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

~~SENSITIVE SECURITY INFORMATION~~

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-146

January 23, 2018

Issue: Failure to Follow Standard Operating Procedures (SOP)

OPINION AND DECISION

On November 7, 2017, management reduced the appellant in pay band and pay rate from her position as a Supervisory Transportation Security Officer (STSO) (SV-1802-G) to the position of Transportation Security Officer (TSO) (SV-1802-E) with the Transportation Security Administration (TSA) based on the Charge: *Failure to Follow Standard Operating Procedures (SOP)*.

The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is GRANTED, in part, and the appellant's reduction in pay band and pay rate is mitigated to a fourteen (14) 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 the Charge, *Failure to Follow SOP*, on one specification. The specification alleged that on August 7, 2017, between the hours of 1300-1500, while supervising the checked baggage screening at the airport, the appellant directed five Officers to conduct (b)(3):49 bag searches on bags that had alarmed the Explosive Detection System (EDS). This violates the Checked Bag SOP which requires (b)(3):49 Search if an EDS viewing station or printout is not available.

Management found the appellant's conduct violated Checked Baggage SOP, Chapter 5, Section 4, Items 1 and 2; Screening Policies SOP Chapter 20, Section 1, Item 1; and Screening Policies SOP Chapter 20, Section 5, Item 2.

The appellant was assigned as the Checked Baggage supervisor on August 7, 2017. Between 1300 and 1430, the airport experienced a heavier than normal baggage throughput. The appellant assumed the position of operating the CT-80 and began to write the nature of the alarms on the bag tags and placed them on the floor of the bag room. The appellant continued to screen bags but directed the TSOs assigned to the bag room to conduct (b)(3):49 searches on the bags looking for the items that she wrote on the bag tag. The TSOs did not have a printout of the image or an EDS viewing station. This was contrary to Checked Baggage SOP Chapter 5 which requires (b)(3):49 Bag Search when an EDS viewing station or printout is not available. The Officers conducting (b)(3):49 bag searches did not review the alarm images on the EDS or in printed form nor did they use On-Screen Alarm Resolution Protocol (OSARP) to assess the alarm images before conducting the (b)(3):49 U.S.C. § bag searches at the appellant's direction. At least 8 to 12 bags were searched this way.

Management provided as evidence: Transportation Security Manager Report of Inquiry, dated August 24, 2017; statement of the appellant, dated August 21, 2017; a Transportation Security Manager's summary of interviews; statements of TSOs, dated August 10, 2017; statements of a TSO dated August 12, 2017; and a Transportation Security Manager's summary of pre-disciplinary discussion, dated September 12, 2017.

On appeal, the appellant stated that she did not dispute the charge and acknowledged her wrongdoing.

Management responded and reiterated that the appellant admitted that she violated the SOP.

With respect to the Charge, the statements provided by other TSOs and the admission of the appellant, is preponderant evidence that the appellant failed to follow the SOP. Therefore, the Charge, *Failure to Follow SOP,* is SUSTAINED.

Having sustained the Charge, the remaining question is whether the reduction in pay band and pay rate is consistent with the TSA Table of Offenses and Penalties (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considered whether the penalty factors

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

On appeal, the appellant argued that management failed to follow the doctrine of progressive discipline and that management did not use the least severe form of action to correct the deficiency. The appellant argued that management should have used the mitigated penalty range. The appellant also argued that management did not properly weigh the mitigating factors in the penalty determination. The appellant argued that the Deciding Official contradicted his statement that he has lost all confidence in her leadership and decision making abilities by continuing to allow her to work as a supervisor for three months prior to her demotion. She also argued that the letters used by management as an aggravating factor were not material to the incident; not signed or dated; defamatory in nature; and solicited after the incident. She argued that these complaints should not have been included in the Decision or relied upon as an aggravating factor. In addition, the appellant stated that the Deciding Official argued that it is critical for an STSO to both know the SOP and to refer to the SOP in cases in which they are not sure. The appellant stated the Deciding Official's determination to use her failure to follow the SOP as an aggravating factor is misapplied as that was the Charge and cannot be both the Charge and an aggravating factor.

Management responded to the appeal and argued that the Deciding Official acknowledged that the appellant had no prior discipline and had an Achieved Excellence rating in 2016. Management went on to argue that the incident revealed several critical problems with the appellant that made retaining her in the STSO position untenable. Management stated that the appellant has been assigned to five different airports since 2009 and when asked why she did not follow the SOP, her response was "coming from differing airports with extremely heavy bag loads, we would OSARP bags and label what was in it and another officer would conduct the bag check during extremely busy hours with little staffing." Management argued that the appellant's statement that she wants to be proactive is not true as she has not reviewed the SOP and ensured that she is following the SOP as it applies to the airport that she is in. In addition, management argued that the appellant's dismissive attitude about the event was cause for alarm by the Deciding Official. Management also argued that the Deciding Official determined that the appellant has created a work environment that actively discouraged her subordinates from raising concerns to her attention. Management stated that when asked about the incident, the TSOs that were working under the appellant in the baggage room indicated that they feared bringing anything to her attention. Management stated that the appellant's conduct toward her subordinates has led to a situation where, while they frequently see her make poor decisions or decisions contrary to SOP, they will not raise them for fear that she will use the "silent treatment" or outward hostility towards them.

Management also argued that the appellant attempted to minimize the significance of the failure to follow the SOP by stating that she only OSARP'd about eight bags. Management argued that there were more bags than the eight cited by the appellant. Management argued that TSA cannot afford to have an STSO who is not going to take the time and effort to read the SOP in the context of her new airport. Management argued that this was an egregious violation of the SOP

and that the agency cannot be expected to place the traveling public at risk by slowly increasing the penalty for each repeated failure to follow critical SOP procedures. Management stated that the appellant has the skills to be a TSO where she can be closely monitored and does not have significant discretion but cannot perform as an STSO.

Under Section M. 1 of the Table, for Failure to Follow Standard Operating Procedures, the recommended penalty range is a 5-day suspension to removal. The Table states that a demotion may always be considered as an option when the applicable range includes removal. Although the Table does state that demotion may always be considered as an option when the applicable penalty range includes removal and demotion may also be considered in appropriate circumstances when the applicable penalty range does not include removal: the facts and circumstances of this case do not rise to this level. The appellant's actions simply do not rise to the level of a demotion.

After considering all the facts and weighing the relevant penalty factors, the Board finds that the appellant's demotion is not within the bounds of reasonableness for the sustained Charge. The Deciding Official did not properly weigh the penalty factors. The Deciding Official improperly weighed the employee's past disciplinary record. The Deciding Official should have simply stated that the appellant had no prior discipline and considered this as a mitigating factor. He erred when he stated "There is no past discipline at [local airport]. A review of your HR file shows only recent data. A request to HQ revealed two charges, Failure to follow instructions, No Final Action in 2013 and Neglect of Duty, No Final Action in 2014. Because there is no final action, I do not consider this aggravating. In your response, you claim no record of discipline over 16 years of service, but I am unable to verify this. I will not consider past activity and make my decision on known history only. [The Proposing Official] listed your history of no documented disciplinary action and your performance rating as mitigating factors." The Deciding Official improperly placed into the record charges that were never sustained. In addition, he did not state that he considered her lack of disciplinary action as mitigating but stated that "because there is no final action, I do not consider this aggravating." Any discussion of misconduct for which the appellant was not charged and sustained does not belong in a discussion concerning the penalty factors and the Deciding Official erred by doing so.

Additionally, the Deciding Official did not give appropriate weight to the appellant's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability. Although the appellant received an "Achieved Excellence" on her 2016 performance appraisal, management considered the fact that she received six complaints from officers as aggravating. The appellant has argued that these statements were brought forth as part of an investigation after the August 8, 2017, incident. There is nothing in the record to show that these complaints were made to management prior to the appellant's misconduct. None of the statements provided are dated, thereby giving credence to the appellant's argument. The Deciding Official also stated that "[T]hese poor relationships with coworkers arguably exacerbated the situation because your subordinates were afraid to say anything given your past negative reactions to them when they raise questions." In addition to the appellant, there were five employees working in the baggage room with her on August 8, 2017. Only one of the five

employees when questioned about the incident stated that they were afraid to question her judgment. Additionally, the appellant is not required to respond to any complaints made against her and it is inappropriate to consider that she failed to respond.

Although the Deciding Official stated that the appellant has potential for rehabilitation, he failed to consider that she was allowed to continue to work in her role as an STSO until her demotion. Management did not provide an explanation of any possible extenuating circumstances or reason why she was allowed to work in her role as an STSO prior to her demotion. Although assigned to the checkpoint rather than baggage, the appellant still had direct responsibility over the SOP and management of employees. The Deciding Official cannot state that the appellant cannot be rehabilitated when management allowed the appellant to work for 3 months as an STSO prior to demoting her. It is also incorrect for management to state that the appellant's dismissive attitude about the event was cause for alarm by the Deciding Official. The appellant acknowledged her wrongdoing and indicated that she wanted to learn from the incident. In addition, management stated that this incident revealed several critical problems with the appellant - one of which appears to be her assignment to five different airports since 2009. It is improper to infer that there is a problem with an employee who has been assigned to five airports in a span of approximately eight years. The appellant has been with the agency since 2002, and has no prior discipline. After analyzing the penalty factors and giving appropriate weight to the factors, the Board found that a 14-day suspension is sufficient to address the appellant's current misconduct. Therefore, the Board mitigates the penalty of demotion to a fourteen (14) day suspension.

Decision. Accordingly, the appeal is GRANTED, in part, and the appellant's demotion and reduction in pay band and pay rate from STSO - to TSO is mitigated to a fourteen (14) day suspension. The appellant will be reinstated as an STSO and will receive back pay from the date of her demotion at the rate of pay for an STSO, subject to TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-147

January 26, 2018

Issue: *Theft, Lack of Candor, Absence Without Leave (AWOL)*

OPINION AND DECISION

On November 6, 2017, management removed the appellant from her position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on three Charges: *Theft, Lack of Candor,* and *Absent Without Leave (AWOL).* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the 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 Charge 1, *Theft*, on one specification. The specification alleged that on June 6, 2017, at approximately 1230 hours, the appellant was in the Terminal A supervisor's office. A Supervisory Transportation Security Officer (STSO) entered the office and placed a customer comment card, containing a complaint against the appellant, at the corner of the desk next to the computer where he was working. At approximately 1239 hours, the STSO left the office and within 40 seconds of him leaving, the appellant left the computer she was working on, went over to where the comment card was, removed it and then exited the supervisor's office with the comment card. The appellant went directly to the checkpoint break room. The passenger comment card was never returned or found.

Management based Charge 2, *Lack of Candor*, on one specification alleging that on June 11, 2017, as part of an official investigation, the appellant was asked about the missing customer comment card. The appellant provided an email stating that she cleans up papers at the end of the shift. On August 22, 2017, the Assistant Federal Security Director of Inspections (AFSD-I) conducted an interview with the appellant and took a statement to clarify her previous statements. In her written statement the appellant admitted that she did pick up the customer comment card, but claimed she did not know what was on it and did not review it. The appellant repeated her claim that she routinely collects all paperwork and cleans the supervisor's office when she leaves at the end of her shift. Review of Closed Circuit Television (CCTV) indicates that the appellant picked up only the comment card from her supervisor's desk, not her own, and no other papers that were lying around the office. The appellant's statement about cleaning up the office was made to give an alternative plausible explanation for her removal of the comment card and was not truthful or complete. The appellant's initial statement that she inadvertently picked up the comment card was untruthful.

Management based Charge 3, *Absent Without Leave (AWOL)*, on one specification alleging that on July 6, 2017, from 0647 to 0733 hours, the appellant was not at the Terminal A checkpoint as assigned. The appellant did not request leave; as a result, she was placed in an AWOL status from 0647 to 0733 hours.

Management found that the appellant violated Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. B. states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred. Section F. (1) of the Handbook to MD 1100.73-5 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 official, OOI or DHS OIG, unless a *Garrity* warning is issued to the affected employee. This includes providing truthful, accurate, and complete information in response to matters of official interest, and providing a written statement, if requested to do so. Employees must follow established TSA and DHS procedures when responding to such requests for information or testimony.

Management also found that the appellant violated Section L. 1. (a) of the Handbook to TSA MD 1100.63-1, *Absence and Leave*, which states that an employee's time may be charged as absence without leave (AWOL) when an employee fails to report for duty without proper approval, has an unauthorized absence from the workplace during the workday, or does not give proper notification for an absence. Employees are expected to report for work on time and fit for duty and are expected to be on duty at all times during their tour of duty except during meal breaks and approved absences.

On June 6, 2017, a passenger complained about the appellant to the STSO and filled out a comment card. The STSO took the comment card into the STSO office and made notes on the card. When the appellant entered the STSO office, the STSO moved the card to the side of his computer. After the STSO left the office, the appellant took the passenger comment card off of her supervisor's desk and removed it from the supervisor's office and did not return it. The comment card reflected negatively on the appellant. During an investigation into the incident, the appellant provided several statements. In an email dated June 11, 2017, regarding the missing comment card, the appellant stated "I don't know what day or where however, when I leave at the end of my shift, I collect all paperwork and clean the office . . ." In a statement dated July 27, 2017, the appellant stated that she did not knowingly throw away a comment card that had anything to do with her. During an interview on August 22, 2017, the appellant stated that she did pick up the comment card but that she thought it was only scrap paper. The appellant stated that she did not review the comment card after picking it up. She also stated that she threw the comment card away.

On July 6, 2017, the appellant left the checkpoint while on duty to move her car. The appellant was gone from the checkpoint for approximately 45 minutes, from 0647 to 0733. In a statement dated July 27, 2017, the appellant stated that she spoke to another LTSO about going to move her car but acknowledged that employees holding the same position title do not have authority over each other and that she did not recall whether she informed the STSO on duty.

The appellant was issued a Notice of Proposed Removal (NOPR) on September 27, 2017. The appellant provided a written reply on October 13, 2017.

Management provided as evidence: email statement from the appellant, dated June 11, 2017; statement from the appellant, dated July 11 and 13, 2017; Summary of Pre-Decisional Discussion, dated July 26, 2017; appellant's response to Pre-Decisional Discussion, dated July 27, 2017; statement from an STSO, dated September 26, 2017; sample TSA Customer Comment Card; statement from an LTSO, dated July 25, 2017; CCTV timelines from a Transportation Security Manager (TSM), dated July 3, and August 5, 2017; CCTV timeline from an STSO, dated July 11, 2017; rotation sheet for July 6, 2017; appellant's timecards; a Supplementary Investigatory Report and Analysis, dated August 24, 2017; Appellant's response to Supplemental Investigatory Report and Analysis, dated August 22, 2017; statement from a Transportation Security Inspector (TSI), dated August 22, 2017; still CCTV photos; Request for Leave or Approved Absence (OPM 71) form for July 6, 2017; and WebTA Certified Time and Attendance Summary for pay period 2017-13.

On appeal, the appellant argued that the Theft and Lack of Candor charges against her should be dismissed for lack of clear and conclusive evidence. She argued that management cannot prove that she knowingly removed the comment card. The appellant argued that the CCTV video and where she was during the entire incident should be considered. She stated that she entered the room after the STSO had "placed the alleged comment card to the left" and that she "never once looked in that direction while in the office." The appellant argued that management only used certain aspects of the incident and not the entire incident to make a case against her. She argued that nowhere in the statements or video was it shown that there was an incident with the individual that filled out the alleged comment card. The appellant stated that while the STSO engaged the passenger, she was at the Walk Through Metal Detector waiting to be relieved and that neither the passenger nor his family looked in her direction. The appellant also argued that

the length of time management took to investigate the incident was excessive and was used as a tool to add the Lack of Candor charge.

With regard to Charge 3, the appellant stated that she did leave the checkpoint to move her car to a location where it was permissible to park from an area that she believed was an authorized parking lot. She stated that she is willing to accept responsibility for that action but feels she is unfairly targeted. She argued that many officers move their cars without being charged and that her car was parked in an area that was previously available but was then taken away without her knowledge until that day. She argued that the AWOL charge was added to increase the penalty.

Management replied and argued that the appellant has a history of misconduct, particularly related to passenger complaints and integrity-related issues and that she was aware that a passenger filed a passenger complaint card. Management argued that the appellant took the comment card from her supervisor's office and then when questioned about the card she was evasive, contradictory, and untruthful.

Management argued that the theft charge arose when the appellant removed the comment card from the supervisor's desk thereby interfering with management's ability to fully investigate and respond to the passenger complaint. Management argued that the appellant deprived the passenger of the opportunity to formally raise grievances and potentially receive a remedy. Management referenced still photos taken from the CCTV footage that were included as evidence which show the appellant watching the passenger make a complaint to her supervisor. Management also referenced the CCTV footage that shows that the STSO entered the supervisor's office and began making notations on the comment card; that the appellant later entered and saw the STSO writing on the comment card and where he placed it; that the appellant was in the office at a desk beside the STSO for over 35 minutes; and that seconds after the STSO left the office, the appellant logged off of her computer, got up and went over to the STSO's desk and retrieved only the comment card. Management noted that the appellant then left the office with a clipboard and the comment card underneath and returned moments later and put the clipboard back on the STSO's desk. Management argued that the appellant tried to shield her actions with her back and using the clipboard because she knew there is CCTV in the office. Management argued that CCTV footage reveals that the appellant left the supervisor's office, went to the break room for only 50 seconds, and emerged with her phone with no papers in her hand. Management argued that the evidence is sufficient to establish intent.

Management further argued that the appellant's alternating and conflicting statements are additional evidence of intent. Management noted that when first questioned she initially claimed she knew nothing about a comment card, but that she may have inadvertently and unknowingly picked up the comment card when clearing up the office, yet in a subsequent interview she admitted that she knew it was a comment card that she picked up but then claimed that she thought it was scrap paper. Management argued that when questioned as part of an official investigation, she provided inconsistent and conflicting statements and provided no explanation for her conflicting and inconsistent statements.

Management argued that the length of time to process the case was not unreasonable. Management stated that the NOPR was issued on September 27, 2017, which was not an inordinate delay after the offenses of June 6, June 11 and July 6, 2017. Management argued that the passage of time does not dull memory when the case is centered on incidents that were

recorded on CCTV. Management argued that the appellant was able to refresh her memory of events when interviewed by the AFSD-I and finally admitted that she knew she took the comment card. Management also noted that the appellant was provided all of the CCTV footage to review in preparing her reply to the NOPR. Management argued that the appellant was not charged with inappropriate conduct related to the passenger and therefore, there is no need for her to remember anything related to the facts of the passenger complaint. Management argued that it is clear from the STSO's statement that the passenger made a negative complaint.

Management also argued that despite the appellant's allegation that she was targeted with regard to the AWOL charge, she provided no evidence to support her claim. Management argued that the record reflects that the appellant was absent from the checkpoint for an extensive period of time but was only charged with 45 minutes. Management further argued that the appellant's disciplinary record shows that she has a history of walking away from her duty station without permission.

With regard to Charge 1, the Board found that the evidence in the record shows intent; the CCTV footage shows that the appellant saw the STSO making notations on the comment card and that the minute the STSO left the office, she went over to the STSO's desk and picked up the card. The appellant's actions were not inadvertent; they were deliberate. The appellant went specifically to the area where the STSO put the comment card and only removed that document. The CCTV footage shows that she removed the comment card and left the office. The appellant admitted that she threw the comment card away and the whereabouts of the comment card is unknown. The Board determined that the appellant's actions were intentional. Therefore, the Charge, *Theft*, is SUSTAINED.

With regard to Charge 2, the CCTV footage and the appellant's statements are preponderant evidence to support the Charge. The appellant alleged that she collected paperwork and cleaned the office at the end of her shift however, the CCTV footage does not show her collecting paperwork or cleaning the office as she claimed. The appellant's statement was an intent to deceive management as there is no evidence to show that she cleaned up the office on the date in question. Her statements about cleaning the office were not truthful. In the August 22, 2017, interview, the appellant admitted that she did know that the paper was a comment card; she also stated that she never throws anything away without looking at it. When asked specifically about the comment card from June 6, 2017, she stated that she didn't know what was on it and she stated that she probably threw it away in the break room. The appellant's statements regarding her actions involving the comment card were purposely deceptive. Therefore, the Charge, *Lack of Candor*, is SUSTAINED.

With regard to Charge 3, the appellant did not dispute the charge and the OPM-71 form and time and attendance documentation in the record are preponderant evidence to support the Charge. Therefore, the Charge, *Absent Without Leave (AWOL)*, is SUSTAINED.

Having sustained the Charges, the question is whether the Deciding Official has shown that the penalty of removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is consistent with TSA policy.

On appeal, the appellant argued that the penalty is extreme and alleged that management aggravated previous unrelated charges to increase the penalty.

Management responded and argued that the penalty is reasonable and that the penalty factors were considered. Management argued that the decision clearly shows that the appellant's work record and length of employment with TSA were considered. Management argued that the appellant provided no clear argument as to why the penalty is unreasonable.

Management stated that this case is an excellent example of progressive discipline and argued that there is no chance the appellant could be rehabilitated due to the "extensive past opportunity to correct behavior and recent serious and related misconduct." Management argued that the penalty is well within the recommendations of the Table and noted that removal is mandatory for theft. Management argued that the facts supports the charges and specifications and that the appellant's disciplinary history supports a progressive discipline removal.

The Deciding Official considered the penalty factors in coming to the conclusion of removal. The Deciding Official considered that the charges of Theft and Lack of Candor are both very serious and stated that they destroyed his confidence that the appellant has the integrity to satisfactorily perform her assigned duties. He considered as aggravating that the appellant was previously suspended for 14 days, on November 17, 2014, for Failure to Follow Instructions, Inattention to Duty, Attendance Fraud and Lack of Candor. The Deciding Official stated that he did not believe demotion is appropriate in this case because he does not believe the appellant should be trusted with any fiduciary responsibilities, including those responsibilities placed on TSOs. The Deciding Official noted that the appellant's previous suspension involved the appellant's claim that she was in the administrative offices working on Kronos reports when she was taking extensive breaks along with the fact that she lied about her activities. He considered that she was warned that further misconduct may result in discipline, up to and including removal and that the current AWOL charge reflects the same lack of accountability for which the appellant had been previously disciplined. The Deciding Official further considered the clarity with which the appellant was put on notice noting that she completed training on MD 1100.73-5 on January 27, 2017.

The Deciding Official considered that he believed the theft of the comment card was intentional noting that the appellant had been counseled numerous times in the past for discourteous conduct and lack of tact. The Deciding Official stated that he believed that the appellant knew an additional passenger complaint against her for unprofessional conduct would have resulted in discipline and that therefore, she intentionally destroyed the comment card in an attempt to conceal evidence of misconduct.

The Deciding Official considered that as an LTSO the appellant is expected to be a role model to her peers and subordinate TSOs and that it is important that both TSA and the public have complete trust and confidence that she will perform her duties with integrity. The Deciding Official considered that the evidence he examined caused him to conclude that the appellant betrayed management's trust in her ability to perform her duties with the honesty, integrity and trustworthiness which are critical to the carrying out of her security functions.

As mitigating factors, the Deciding Official considered the appellant's employment with TSA since November 9, 2008, and her past satisfactory performance but found that the mitigating factors do not outweigh the nature and seriousness of the appellant's misconduct.

The Deciding Official considered the recommended penalties for each offense in the Table as well as the fact that the Table provides that for second and/or successive offenses, the penalty range should generally fall within the aggravated penalty range and/or may often include removal. The Deciding Official found that removal is appropriate based on his assessment of the nature and seriousness of the misconduct and the penalty factors discussed.

Under N.3 of the Table, pertaining to Theft, the recommended penalty range states that "for TSOs: removal is mandatory." Additionally, TSA MD 1100.75-3, Appendix A (1) (3) requires removal for theft. Under E.2 pertaining to Lack of Candor, the recommended penalty is removal. Under A.2 for AWOL less than one day, the recommended penalty is a Letter of Reprimand to 2-day suspension.

The Board found that the Deciding Official weighed both the mitigating and aggravating factors and appropriately determined that the aggravating factors outweigh the mitigating factors. In addition, Appendix A. (1) (3) of TSA MD 1100.75-3 requires removal for Theft. The Board finds that the appellant's removal is in accordance with TSA policy and 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—17-149

January 31, 2018

Issue: *Unauthorized Taking*

OPINION AND DECISION

On January 16, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Unauthorized Taking*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the 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 on three specifications. Specification 1 alleged that on September 5, 2017, the appellant picked up .50 cents (2 quarters) from the floor under the X-ray exit roller at the checkpoint on lane 1. The appellant placed the money on top of the X-ray. Later, the appellant went back to the X-ray and put the money into her uniform pants pocket and left work. Specification 2 alleged that on September 6, 2017, the appellant took .58 cents she found at the checkpoint. The appellant stated it was safe in her locker and returned it after being interviewed about removing the change from the checkpoint. Specification 3 alleged that in the appellant's September 7, 2017, statement, she stated that in the past, she had not taken more than $10.00 of money that did not belong to her.

Management found that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (7) states that TSA employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. 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.

During screening operations, the appellant picked up two quarters from the floor under the X-ray exit roller at the checkpoint and placed them on top of the X-ray. She later went back to the X-ray and put the money into her uniform pants pocket and left work. The appellant was interviewed by the Assistant Federal Security Director- Law Enforcement (AFSD-LE). The appellant provided a statement and admitted to taking money found at the checkpoint on September 5th and September 6th, 2017. Shortly after the interview, the appellant returned and handed the AFSD-LE $1.08 in change. The appellant was issued a Notice of Proposed Removal (NOPR) on November 6, 2017. The NOPR advised the appellant of her right to make an oral and/or written reply. The appellant provided a written response on November 14, 2017.

Management provided as evidence: statement of an LTSO, dated September 13, 2017; Closed Circuit Television Footage (CCTV); statement of the AFSD-LE, dated September 8, 2017; statement of the appellant, dated September 7, 2017; Pre-disciplinary discussions, dated September 12, 2017 and October 2, 2017; and statement of a Transportation Security Manager (TSM), dated September 15, 2017.

On appeal, the appellant argued that management failed to prove the charge by preponderant evidence. The appellant argued that the coin box had been moved prior to the incidents on September 5th and September 6th. The appellant admitted to finding loose change on both dates and failing to place the change into the coin box. The appellant argued that management failed to cite the applicable policy in support of the charge and that she was not placed on notice of what policy she violated. The appellant went on to argue that management has not provided any policy that shows that officers are required to immediately place any loose change into a coin box. The appellant stated that it is also unclear as to what the policy about loose change is at the airport. The appellant argued that because management did not cite to any policy at all, or give any guidance to officers that removal could result from not following any potential currency control policies, the charge should be dismissed.

The appellant also argued that management mischaracterized the CCTV footage and that the characterizations of her actions are wrong. The appellant argued that the CCTV footage shows that she indifferently placed the coins on the x-ray machine and then just as indifferently retrieved the coins; therefore, there is no basis upon which to ascribe a nefarious plot on her part. Additionally, the appellant argued that she has been up front and cooperative from the beginning and management failed to show how she violated any policy. The appellant argued that the coin box was not placed in a consistent location and that management failed to show that its whereabouts were known to anyone on September 5th or 6th. The appellant goes on to state that it

is possible that the coin box was not available to any screeners on September 5th and 6th and there is nothing in the record to suggest what to do when the coin box is not available.

As to specification 3, the appellant categorically denied that she admitted to taking between eight and ten dollars home with her over the course of six years. She stated that the first time that she took loose change home was on September 5th, and that was by accident. The appellant argued that in her statement she does not admit to taking eight to ten dollars home with her. The appellant argued that this was a misunderstanding of the conversation held between her and the AFSD-LE.

As to specification 1, the appellant argued that the fact that she initially placed the loose change on the x-ray does not support the charge as the X-ray is not the coin box. As to specification 2, the appellant argued that she voluntarily informed the AFSD-LE about the change she found and had nothing to hide. The appellant also challenged whether TSA has claim to any of the loose change left at the checkpoint.

Management responded and argued that as to specifications 1 and 2, there is preponderant evidence that the appellant engaged in unauthorized taking of money on September 5th and September 6th. As to specification 3, management argued that the appellant admitted to the AFSD-LE to taking between eight and ten dollars in the past. Management argued that the appellant's admission that she took money home clearly violates the intent of MD 1100.73-5. Management asserted the policy cited states that TSA employees, while on duty, are responsible for behaving in a way that does not cause the agency to question the employee's reliability, judgment or trustworthiness. Management argued that they can no longer trust the appellant to have access to passenger's belongings; knowing that she has appropriated money that does not belong to her.

In addition, management argued that the placement of the cash box is irrelevant as she was charged with unauthorized taking. Management argued that the money did not belong to the appellant. As to the appellant's complaint that management mischaracterized the CCTV footage, management stated whether indifferent or deliberate, the fact remains that she admitted that she took money that did not belong to her. Management asserted that intent is not relevant in an unauthorized taking charge and only relevant in a theft charge. Management asserted that they made no assertion as to her intent but based her removal on her actions and admissions. As to appellant's argument that she did not know the location of the coin box, management contends that the appellant is a seasoned TSO and knew, or should have known, that removing money from the checkpoint for any reason is not authorized. Management pointed out that the appellant acknowledged in her statement that she knew where to put the money.

Management asserted that the AFSD-LE's statement was unbiased, professional and fully supported the charge. Management also asserted that the appellant is not charged with taking change off the X-ray and that the description of the location of the funds on the X-ray was included in the charge simply to describe their location. Management contends that if not for the fact that the appellant was interviewed by the AFSD-LE on September 7, 2017, she would not have returned the funds and that funds taken on September 5, 2017, were not voluntarily surrendered on September 6, 2017, prior to the AFSD-LE interview. In regards to appellant's assertion that management failed to show that the appellant attempted to convert the loose change she found for her personal use, management responded that a reasonable person would

believe that the act of taking funds from the airport to her home would indicate that they were to be used for her personal use.

The appellant responded to management's reply and added that MD 1100.73-5, cited by management, does not relate to the specific alleged misconduct. The appellant argued that the only policies that arguably she violated are the Voluntarily Abandoned Property MD or the Lost and Found Procedures, however, management specifically stated that she did not violate these policies. The appellant argued that management does not identify any policy that clearly identifies her actions as being unauthorized. The appellant also argued that the location of the cash box is relevant. The appellant argued that management made no assertion as to her intent and that she intended to place the money in the box but the box was not in a fixed location. The appellant argued that had the box been placed in a fixed location, she would have placed the money into the box. In addition, the appellant argued that management did not identify to whom the money at issue belonged.

With regard to the appellant's argument that she was not on notice of the policy which she violated, the appellant argued that the Board has held that management's failure to cite policies or show how an appellant was put on notice is grounds for overturning a charge. The appellant acknowledged in her statement and to the AFSD-LE that she knew that what she did was wrong. The appellant referred to OAB 17-086. The facts in that case are different than the current facts. In that case, there was no evidence that the appellant was familiar with the policy which he violated. In the decision letter, management failed to cite the exact policy. The difference is that in the present case, the appellant has admitted that she knew that there was a coin box and that change was to go into said box. The appellant's admissions are clear evidence that she was familiar with the policy that she violated and the specification clearly put her on notice of the violation. In this case, failure to cite the exact policy is not harmful error. In addition, management did cite policy which is relevant to the issue at hand, specifically MD 1100.73-5. The appellant acknowledged reading said policy on February 13, 2017. The appellant's conduct and appearance does have a significant impact on the public's attitude toward TSA. The public's attitude towards TSA would change if the public had seen the appellant placing coins found in the checkpoint into her pocket. The appellant's actions on September 5th and 6th did cause embarrassment to the agency and did cause TSA to question her reliability, judgment and trustworthiness. Although there may be no policy that says that she is required to immediately place loose change into a coin box, the appellant has admitted that she knew that she had to place the coins into the coin box and failed to do so. The appellant did not return the money taken on September 5th and 6th on her own volition, rather she returned the money when questioned by the AFSD-LE. Management is not required to provide notice that the charge may carry the penalty of removal. The charge placed the appellant on notice of the misconduct. In addition, in the pre-disciplinary discussion, it is noted that the possible consequence of the disciplinary action was discussed with the appellant.

In addition, the argument that the coin box had been moved has no merit. The appellant knew that the coins were to be deposited into the coin box. The CCTV footage shows an empty checkpoint with plenty of time for the appellant to locate said box. In addition, the LTSO indicated in her statement that she checked the coin box. Therefore, another employee knew exactly where to find the coin box. The appellant failed to check with anyone else as to the location of the box and failed to look around to determine where the box had been moved to. Instead, the appellant took the money home with her. Therefore, there is no merit to appellant's

argument that it is possible that the coin box was not available to Officers on the dates in question.

The Board took the CCTV footage for what it was- CCTV footage of the incident. Management was not required to prove intent because the appellant was not charged with theft. Therefore, the Board gave no merit to the appellant's assertion that management has painted a nefarious plot. The CCTV footage showed the appellant picking up change at the checkpoint and placing it into her pocket. The Board also gave no weight to the appellant's argument that she has been cooperative. When questioned, the appellant admitted to taking money from the checkpoint on two occasions. The appellant did not come forward voluntarily. Not only did the appellant not immediately place the money into the coin box, she did not return the money for two days. Although intent is not required, the Board agrees with management's assertion that the act of taking the funds from the airport to her home would indicate that they were to be used for her personal use. It is not necessary that management assert who the money belonged to as it is clear that the money did not belong to the appellant and she has admitted to such.

As to specifications 1 and 2, the Board finds that the appellant's admission that she took the money found at the checkpoint, along with the CCTV video, and the statements of the AFSD-LE and LTSO, is preponderant evidence to support the specifications. The placement of the coins on the x-ray in specification 1 has no relevance to the specification but is as management argued - simply context to describe the location. As to specification 3, the Board was not able to ascertain the context in which the appellant's statement was made. The appellant adamantly denies that she has taken money outside of that alleged in specifications 1 and 2. Therefore, management has failed to prove specification 3 by preponderant evidence. Having sustained specifications 1 and 2, the Charge, *Unauthorized Taking,* is SUSTAINED.

Having sustained the Charge, the question is whether the Deciding Official has shown that the penalty of removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is 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 removal is not reasonable and that management did not properly apply the Table of Penalties. The appellant asserted that the offense was not so serious in nature as to warrant removal and that this penalty factor weighs in favor of a mitigated penalty. The appellant also asserted that the decision breezes over the fact that she has no prior disciplinary history. She asserted that no prior discipline and her work history should have been bigger mitigating factors. She also argued that there was no notoriety with the offense and this should be a mitigating factor. The appellant argued that she was not on notice of any policy that establishes the importance of immediately placing lost change into a specified container and that she was not advised of the seriousness with which management would approach this issue. Therefore, this should also have been considered as a mitigating factor. In addition, she asserted that management did not consider her potential for rehabilitation and that there is no reason to doubt that she has great potential. She asserted that her strong potential for rehabilitation should be a mitigating factor. The appellant argued that management failed to follow progressive discipline and the adequacy and effectiveness of alternative actions were not properly considered.

Additionally, the appellant argued that Section N.2 of the Table describes misconduct as "actual or attempted theft, or other unauthorized taking of funds or property owned or controlled by the Government. The Table states "Conversion of seized property to personal use or sale may result in removal for a first offense," but in this case she did not take "seized property." She also argued that she did not intend to take the property for personal use. The appellant argued that the Table makes clear that removal is contemplated for something much more serious than what has happened in this situation. The appellant questioned in what scenario would a Letter of Reprimand or 14-day suspension be appropriate. The appellant argued that by removing her, management has essentially erased all distinction and nuance from Section N.2

Management responded and argued that the penalty factors were considered and weighed appropriately. Management argued that TSOs are in a position of public trust and the appellant's actions have caused management to lose all trust and confidence in the appellant's ability to use good judgment while working unsupervised. Management argued that progressive discipline does not have to be followed in all cases, especially where the misconduct is egregious. Management also argued that the Table provides that second and successive offenses move the misconduct into the aggravated penalty range. Thus, management was able to consider the penalty factors and appropriately apply the aggravated penalty range.

The Deciding Official indicated that he considered a number of factors in assessing the penalty decision. He considered as aggravating that the appellant failed to comply with all established rules, regulations and guidelines and that the appellant's repeated taking of money has caused him to lose all trust and confidence in her ability to use good judgment while working unsupervised. He also considered as aggravating that the appellant's actions call into question her ethics and that ethical behavior is paramount for Officers as they routinely handle passenger's personal property and come into contact with items that were inadvertently left behind. He also considered that the appellant was aware of the agency rules in that her statements indicate that she knew her responsibilities in handling money found on the checkpoint and proper disposition but chose to ignore it. He considered this as aggravating.

As potential mitigating factors, the Deciding Official considered that the appellant has been with TSA since May 2011; her lack of prior discipline; and her otherwise satisfactory performance rating. However, he found that the nature and seriousness of her misconduct far outweighs the mitigating factors.

The Board found that the Deciding Official properly weighed the aggravating and mitigating factors. The Deciding Official did in fact consider that the appellant had no prior discipline and her work history. The Board does not agree with the appellant's assessment that the penalty factor concerning "the nature and seriousness of the offense, and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated" should be considered a mitigating factor. The appellant's duties, position and responsibility require that she abide by all rules and polices. TSA core values involve integrity and conduct. The appellant's actions were serious and as an Officer with TSA, she brought discredit upon the Agency. In addition, although no passengers came forward to claim the money, the offense was known to other TSA Officers and a passenger was seen in the video. This cannot be considered a mitigating factor. The Deciding Official made clear that the

appellant's misconduct negatively affected his confidence in the appellant's ability to perform her duties as a TSO. As an employee of TSA, the appellant is expected to meet high standards of integrity and conduct. The appellant's actions failed to uphold the standard.

Under Section N.2 of the Table, for *Unauthorized Possession*, the recommended penalty range is a 14-day suspension to removal. The aggravated penalty range is removal. Once the coins were abandoned at the checkpoint, they were in fact controlled by the Government. Guidance for the Table states that for second and/or successive offenses, the penalty should generally fall within the "Aggravated Penalty Range" option, and may often include removal. On more than one occasion, the appellant removed money abandoned at the checkpoint. The appellant did not come forward to report that she took this money home until such time as she was interviewed by the AFSD-LE.

The Board finds that removal is within the recommended penalty range and given that honesty and integrity are core values of the Agency, is 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

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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—17-150

January 12, 2018

Issue: *Lack of Candor; Failure to Report an Arrest*

OPINION AND DECISION

On December 6, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two disciplinary charges, *Failure to Report an Arrest* and *Lack of Candor*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence in the record. Management based Charge 1, *Failure to Report an Arrest*, on one specification alleging that on September 28, 2015, the appellant was arrested for Retail Theft. The appellant did not report her arrest to TSA as required by policy.

Management based Charge 2, *Lack of Candor*, on one specification alleging that on June 12, 2017, the appellant provided a written, sworn statement to a Special Agent (SA) with the TSA Office of Inspection (OOI), in which she stated that she had never been arrested in her life, especially not in [the city and state], for Retail Theft in 2015. Court records show that the appellant was arrested on September 28, 2015, and charged with Retail Theft.

Management found that the appellant violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, and Handbook. Section D. (8) states that TSA employees must report all arrests, including summons and citations to appear before a court, to the immediate supervisor or to any manager in the chain of supervision within 24 hours of the arrest or as soon as possible thereafter. Management found that the appellant's actions also violated Section F. (1) of the Handbook to MD 1100.73-5, which states in part that employees must cooperate fully with all TSA and DHS investigations and provide truthful, accurate, and complete information in response to matters of official interest, and provide a written statement, if requested to do so.

During the recurrent vetting process, TSA's Personnel Security Division (PERSEC) conducted a criminal history check on the appellant and found that she was arrested on September 28, 2015. The appellant was interviewed by OOI on June 12, 2017, and wrote that she has never been arrested in her life. The appellant provided a second statement on July 19, 2017, and wrote that the reason she made the statement on June 12, 2017, concerning the arrest, was because her attorney advised her that she was no longer liable for any charges or information regarding the arrest.

The appellant was issued a Notice of Proposed Removal on October 1, 2017. The Notice advised the appellant of her right to make an oral and/or written reply. The appellant gave an oral reply on October 12, 2017, and also submitted a written reply. Management removed the appellant on December 6, 2017.

Management provided as evidence: email from PERSEC, dated April 3, 2017; sworn statement of the appellant, dated June 12, 2017; Background check report on the appellant, dated May 4, 2017; sworn statement from the appellant, dated July 19, 2017; and OLC training records.

On appeal, the appellant requested that she be allowed to retire so that she can receive health benefits. The appellant also stated that management's statement regarding a polygraph is untrue and that she had not been polygraphed.

Management responded and stated that the appellant was correct and she has never taken a polygraph test. Management argued that there is uncontroverted evidence that the appellant failed to report an arrest, was untruthful about having been arrested when asked, and was ultimately convicted for the underlying charge.

With regard to Charge 1, TSA policy requires the report of all arrests, including summons and citations to appear before a court, to the immediate supervisor or to any manager in the chain of supervision within 24 hours of the arrest or as soon as possible. A preponderance of the evidence showed that the appellant was in fact arrested on September 28, 2015, and failed to report the arrest to management. Therefore, the Charge, *Failure to Report an Arrest*, is SUSTAINED.

With regard to Charge 2, the appellant supplied a sworn statement to OOI on June 12, 2017, stating that she has never been arrested in her life. Although the appellant argued that the charge was expunged and she was advised that she was no longer liable for any charges or information regarding the arrest, the appellant holds responsibility for being truthful when interviewed by OOI. The appellant intended to mislead management by stating that she had never been arrested in her life. The appellant had the opportunity to explain the expungement to OOI but chose instead to provide a false statement to OOI. Therefore, the Charge, *Lack of Candor*, is SUSTAINED.

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

In determining the appropriate penalty, the Deciding Official considered both mitigating and aggravating factors. She considered the seriousness of the appellant's misconduct and its relation to her position as a TSO. She stated that the appellant's misconduct negatively impacts her confidence in her ability to perform her duties, and does not conform with the mission of TSA. As a TSO, the appellant is expected to exhibit honesty and integrity. The Deciding Official considered that the appellant was given the opportunity to provide truthful and accurate information, but provided false information and knowingly concealed being arrested. The Deciding Official considered this as particularly aggravating. In addition, the Deciding Official stated that the appellant holds a sensitive position involved in anti-terrorism security and her trustworthiness is of great consideration. She stated that she has lost all trust in the appellant.

As mitigating factors, the Deciding Official considered that the appellant has been with TSA since 2012; has satisfactory performance ratings; and has no history of formal discipline. The Deciding Official determined that the mitigating factors are far outweighed by the aggravating factors.

Under E.2 of the Table, for Lack of Candor, the recommended penalty is removal. Under Section K.1, for Failure to Report Arrest, the recommended penalty is a 3-day suspension to a 5-day suspension and the aggravated penalty is a 6-day suspension to removal. The Guidelines on using the Table provide that "[i]n cases where an employee commits more than one offense, the appropriate penalty should generally be in the 'Aggravated Penalty Range' column corresponding to the most serious offense being charged."

The Board found that management's decision to remove the appellant was supported and was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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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—17-151

January 19, 2018

Issue: *Possession of Illegal Drugs*

OPINION AND DECISION

On November 17, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Possession of Illegal Drugs*. The appellant filed a timely appeal with TSA's Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Possession of Illegal Drugs*, on one specification alleging that on October 15, 2017, while being processed by the Police Department, a bag of edible marijuana was found in the appellant's possession.

Management alleged that the appellant violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, 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 policies and guidance. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively

impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. Section 6.D provides that employees in direct contact with the public bear a heavy responsibility, as their conduct has a significant impact on the public's attitude toward the Federal government and TSA.

Management also alleged that the appellant violated the Handbook to MD 1100.73-5, Section O. (b) which states that employees are prohibited from possessing, distributing or trafficking in controlled and/or illegal substances in violation of federal, state or local law. This prohibition applies to employees both on and off-duty.

On October 25, 2017, a Special Agent (SA) provided management a summary of her review of the Police Report. The police report reflected that the Police Department responded to a call regarding an argument at a Hotel. As the appellant's brother was being arrested for trespassing, the appellant stepped in front of the arresting officers in an attempt to stop the arrest. The report identified that the officers advised the appellant several times to "back off" but the appellant refused to do so, and as a result, was arrested for Obstruction. The appellant was arrested without incident but while being processed, a bag of edible marijuana was found in his possession.

Management met with the appellant for a pre-decisional discussion on October 26, 2017. The appellant was given the opportunity to reply orally and/or in writing. The appellant submitted a written response on October 27, 2017. The appellant stated that the possession of marijuana edibles found in his belongings were the property of a friend who was with him the night of the incident but did not carry any bag or backpack to hold her items. The appellant stated that he stuffed the items into his bag and left the hotel room to catch an Uber to the airport. He stated that both he and his friend were arrested for obstruction. The appellant provided a more detailed statement on October 18, 2017.

Management provided as evidence: Copy of Pre-Decision Discussion, dated October 26, 2017; Summary of Police Report, dated October 25, 2017; appellant's statements, dated October 18 and October 26, 2017; statement of a Supervisory Transportation Security Officer (STSO), dated October 18, 2017; Police Department Temporary Custody Record, dated October 15, 2017; email from the Coordination Center; and email from TSA Broadcast, dated June 2, 2017.

On appeal, the appellant argued that the decision to remove should not be sustained because his contributions outweigh any viable allegations against him and that the action does not improve the efficiency of the service. The appellant stated that he has been with the Agency for over six years, that his most recent performance rating was "Achieved Excellence," and that he has no prior discipline. The appellant argued that the specification is not an accurate reflection of his character and conduct. The appellant acknowledged that he held a bag of edible marijuana for a friend but expected to return it to her when they parted ways. He stated that he did not use the marijuana, and had no intention of using it. The appellant argued that he was not arrested or charged with any drug-related offense or any offense relating to the edible marijuana. The appellant pointed out that edible marijuana is legal in the State in which he was arrested. He argued that this fact sheds light on the context and setting and that this caused him to have an error in judgement. The appellant acknowledged that he is to adhere to all federal laws and policies prohibiting use and possession. The appellant provided an analysis of the penalty factors. Additionally, the appellant argued that Appendix A only requires/permits removal for the use of drugs not the possession of drugs. The

appellant argued that removal is not an absolute and that the Federal Security Director (FSD) could consider the circumstances surrounding the case.

Management argued that the appellant does not dispute that he was in possession of marijuana. Management argued that as recently as June 2, 2017, a TSA Broadcast message was sent to all TSA employees reminding them that they are expected to follow federal law and policies prohibiting use, as well as possession of illegal drugs, including marijuana. The Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A (1) (e) identifies possession of illegal drugs as an offense for which removal is required, as does Section C. 8 of the TSA *Table of Offenses and Penalties*. Thus, management asserted that the appellant knew or should have known that removal was the consequence for possession of marijuana. Management stated that notwithstanding the appellant's good performance on the job, TSA has determined that certain on /off duty conduct for TSOs will not be tolerated. Management also asserted that the penalty factors are not relevant in this case under policy. Management argued that the appellant's removal was appropriate and consistent with TSA policies.

The Board notes that under the Handbook to MD 1100.75-3, penalty factors do not apply to mandatory removals. Thus, management was not required to address the penalty factors. In addition, the appellant incorrectly cited Appendix A to the Handbook to MD 1100.75-3. Appendix A (1) (e) requires removal for cases involving possession of illegal drugs. Thus, the Board gave no merit to the arguments put forth by the appellant.

The Board found that the details included in the summary provided by the SA and the statements provided by the appellant provide substantial evidence to support the Charge. Although marijuana is legal in the State in which the appellant was arrested, he was expected to follow TSA policy. The appellant was in possession of edible marijuana and admitted to such. In addition, the appellant acknowledged that he is to adhere to all federal laws and policies prohibiting use and possession. Management has met the burden of substantial evidence that the appellant possessed the illegal drugs. Therefore, the Charge, *Possession of Illegal Drugs*, is SUSTAINED.

The Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A (1) (e) and Section C.8 of the TSA *Table of Offenses and Penalties,* requires removal for a possession of illegal drugs. The Board has sustained the Charge of *Possession of Illegal Drugs* and removal for the sustained charge is required.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-152

January 26, 2018

Issue: *Off-Duty Misconduct*

OPINION AND DECISION

On November 24, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration based on the Charge: *Off-Duty Misconduct.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board GRANTS the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charge(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*, on one specification. The specification alleged that on August 26, 2017, while off-duty, the appellant was arrested for disorderly conduct.

Management found that the appellant's conduct violated TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, Sections 5.D., 5.D.(2), 5.D.(3), 5.D.(7), 6.A., 6.D., and 6.E. Paragraph 5.D. states that employees are responsible for behaving in a way that does not bring discredit upon the Federal government or TSA. Paragraph 5.D.(2) and 5.D.(3) state that employees must respond promptly to and fully comply with directions and instructions received from their supervisor or other management officials, and must exercise courtesy and tact

(whether on or off-duty) in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation. Paragraph 5.D.(7) states that employees must observe and abide by all laws, rules, and regulations and other authoritative policies and guidance. Paragraph 6.A. provides that TSA employees must comply with all standards and responsibilities established by this directive and that failure to comply with this directive may result in corrective action, including discipline, up to and including an employee's removal. Paragraph 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. 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.

TSA MD 1100.77-1, *OPR Appellate Board*, Section 6.E, Procedural Matters, requires the Board to conduct a complete review of all appealed actions properly before the Board. The Board is required to evaluate the evidence and review the procedural and substantive issues, as appropriate. In addition, the Board is tasked with examining each appealed action for due process issues and procedural compliance with TSA MD 1100.75-3. The Board panel is also tasked with reviewing and considering procedural errors when deliberating the appeal.

The Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section H (1), Adjudication Process/Proposal and Decision, states that the notice of proposed adverse action must include: (d) a statement that the employee has the right to present an oral and/or written reply to the proposal. On appeal, the appellant argued that he requested an oral reply with the Deciding Official and provided a copy of an email sent to the Deciding Official. In response, management simply stated that the appellant did not follow the directions stated in the Proposal letter. The directions were to contact the Deciding Official's assistant at a phone number provided. The Board determined that management made a critical error by failing to provide the appellant with an opportunity to present an oral reply. Although the appellant may have failed to follow the correct procedure to schedule an oral reply; he did in fact send an email to the Deciding Official who failed to respond to him. Accordingly, the Board finds that management failed to follow agency policy.

Decision. The appeal is, therefore, GRANTED. The appellant is ordered reinstated to his position as a Transportation Security Officer. Further, the appellant 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

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—17-153

January 11, 2018

Issue: *Jurisdiction*

OPINION AND DECISION

On or about November 28, 2017, the appellant was removed from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). On or about December 28, 2017, the appellant appealed his removal to the TSA Office of Professional Responsibility Appellate Board (Board). On January 9, 2018, 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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Date: 2018.01.12 08:24:31 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-001

January 31, 2018

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

OPINION AND DECISION

On November 30, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge, *Failure to Follow Standard Operating Procedures (SOP)*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the 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 in the record. Management based the Charge, *Failure to Follow Standard Operating Procedures (SOP)*, on one specification alleging that on July 12, 2017, while working at the airport the appellant failed to follow procedures for clearing an incomplete bag scan on a bag containing golf clubs and instead placed the bag on the belt for cleared bags.

Management found that the appellant's misconduct violated Baggage Screening Standard Operating Procedures (SOP), Chapter 5, Section 1 A. 4. a. which required screening of the bag with protocol outlined in SOP Chapter 1, Section B.

Management also found that the appellant's misconduct violated TSA Management Directive (MD), 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance, and (9) reporting any known or suspected violation of law, rule, regulation, policy or Standard Operating Procedure (SOP) by a person to any manager in the chain of supervision and/or to the Office of Inspection (OOI), whenever such violation may have a nexus to the TSA mission and/or effective operation of the agency, or when it occurs in the workplace. 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. 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.

On June 12, 2017, the appellant was working in the checked baggage area when he retrieved a hard sided golf bag and failed to properly screen the bag before placing it on the clear lane. Another TSO initially took a call from the Central Monitoring Facility (CMF) regarding the hard sided golf bag. The Lead Transportation Security Officer (LTSO) who made the call from the CMF submitted a statement on July 12, 2017, in which he stated that the TSO answered his call and he told the TSO to "pass it along and screen and clear hard sided golf bag." The TSO who took the call submitted a statement on July 12, 2017. In his statement, the TSO stated he received a call from the CMF telling him that there was a hard sided golf bag coming down that needed to be cleared and sent on its way as soon as possible. The TSO stated that after the phone call, he let everyone know that there was a hard sided golf bag coming down that had been in the system for a while that needed to be cleared and sent as soon as they could get to it. The appellant stated that he heard the TSO tell him that the golf bag should be placed on the clear lane as soon as possible. The appellant stated that the message that was conveyed from the TSO was that he should place the bag in the clear lane without inspecting it. Another TSO in the baggage area at the time submitted a statement on July 14, 2017, in which he stated that the TSO who took the call from the CMF "relayed message [sic] from CMF. A hard sided golf bag was coming down. It was a pseudo bag. It had been circling in the systems and needs to be cleared and sent ASAP." The TSO stated that the bag then came down the belt and the appellant got the bag. The LTSO working in the CMF stated that after he made the call he was watching the situation on camera and saw the appellant clear the golf bag. The LSTO stated that he immediately called again and when the appellant answered the phone he asked him why he cleared the golf bag which had an incomplete image. The LTSO stated that the appellant told him he was told to do so - presumably by the TSO. The appellant stated that after realizing the message had been misconstrued, he recovered the bag immediately for inspection.

The appellant was issued a Notice of Proposed Removal (NOPR) on September 11, 2017. The NOPR advised the appellant of his right to make an oral and/or written reply. The appellant provided a written reply on September 21, 2017, and made an oral reply on September 25, 2017.

Management provided as evidence: Summary of Pre-Decision Discussion, dated July 13, 2017; statements of the appellant, dated July 12 and July 13, 2017; statement of a TSO, dated July 12,

2017; statement of a Supervisory Transportation Security Officer (STSO), dated July 15, 2017; statement of a Lead Transportation Security Officer (LTSO), dated July 12, 2017; statement of a TSO, dated July 14, 2017; and Closed Circuit Television (CCTV) footage.

On appeal, the appellant referred to his response to the NOPR. In his response, the appellant argued that the area was extremely noisy and that the noise caused him to misconstrue what he heard from the TSO who took the phone call from the CMF. He argued that his interpretation of what the TSO said was that he should put the bag on the clear lane without checking which was an order from the CMF. The appellant stated that he assumed that the decision came from the CMF and that the order triggered his senses that they were correct and that the bag check did not need to be done. He stated that he looked at the bag on the monitor and made sure there was nothing dangerous in the bag. The appellant admitted that he made a wrong judgment call and stated that when he realized that, he recovered the bag immediately for an inspection and that no harm was done. The appellant apologized for his actions and promised that it would not happen again.

Management responded and argued that the appellant placed a golf bag that had registered in the CMF as an incomplete scan onto a clear belt without screening it, as required by the SOP. Management noted that the appellant does not dispute these facts or that the SOP requires a bag with an incomplete scan to be screened. Management argued that the appellant's excuse that he thought a coworker told him the bag did not need to be screened does not justify his conduct. Management argued that the appellant was a fully trained TSO who admitted to knowing the proper procedure. Management argued that unscreened bags simply may not be placed on passenger aircraft, no matter what the appellant may have thought a colleague stated. Management argued that even if the appellant misheard his coworker and believed he had been told to place the bag on the clear bag, he knew better than to do so.

The Board determined that even though the appellant may have misheard the TSO who took the call from the CMF or received improper instruction, he was aware of the correct procedures and failed to follow them. The Board found that the appellant's statement, the LTSO's statement and the CCTV footage are preponderant evidence that the appellant failed to follow the SOP. Therefore, the Charge, *Failure to Follow Standard Operating Procedures (SOP)*, is SUSTAINED.

Having sustained the Charge, the question is whether the Deciding Official has shown that the penalty of removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is 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 stated that humans are fallible and make mistakes. He stated that he promised to be more careful when on the job, he will make sure to follow the SOP to the fullest and that he has learned from this matter. The appellant cited his nine years of service with TSA and the fact that he acquired many awards relating to performance and completed the TSA Associate Program.

Management responded and argued that screening bags is a core pillar of TSA's mission to protect the nation's transportation system. Management argued that the appellant was well aware of the SOP, but did not follow it. Management argued that his explanation for not following the SOP was simply not acceptable and that his failure to follow the SOP goes against the heart and mission of TSA to create security for the traveling public. Management argued that as a certified TSO, the appellant was entrusted to work professionally, using sound judgment, and in accordance with TSA policy and procedures.

In determining the penalty, the Deciding Official considered the nature and seriousness of the appellant's conduct in relation to his duties. He considered that the appellant did not meet his assigned duties and responsibilities and engaged in a practice that could compromise the integrity of TSA's mission and the safety of the traveling public. He considered that the appellant's lack of proper screening of the bag in question could have had a disastrous impact on the transportation system and that the appellant only screened the bag in compliance with the SOP after receiving a call from the CMF directing him to do so. The Deciding Official stated that the SOP must be applied by all TSOs and is not up to interpretation nor can the SOP be modified by another TSO.

As mitigating factors, the Deciding Official considered the appellant's service with TSA since March 30, 2008, his otherwise satisfactory performance and the Time-Off and Challenge Awards he received. The Deciding Official also considered that the appellant demonstrated remorse during their meeting and stated that he would never engage in this type of behavior again. The Deciding Official found however, that the mitigating factors do not outweigh the nature and seriousness of the appellant's offense.

The Deciding Official considered the appellant's previous disciplinary history with TSA which includes a 10-day suspension for Inattention to Duty on November 4, 2014, and noted that the suspension informed the appellant that future disciplinary action could result in a more severe penalty up to and including removal from Federal service. The Deciding Official also considered the clarity with which the appellant was put on notice of the rules violated noting that the appellant read and reviewed TSA MD 1100.73-5 most recently on May 31, 2017. The Deciding Official stated that while no longer active, he considered that the appellant received a Letter of Reprimand for failing to follow the SOP on September 27, 2012. He also noted that that appellant's file reflects verbal counseling from his supervisor regarding the need to follow procedures on May 19, 2015, and May 20, 2016; regarding the need to follow directions on April 3, 2017; and regarding the appellant's conduct on May 29, 2017. The Deciding Official considered that the appellant was well aware of his responsibilities as a TSA employee and the need to follow all screening procedures. The Deciding Official stated that due to the appellant's failure to comply and his history of failing to follow policies and procedures even after multiple notifications from his supervisor, he found that rehabilitation is not likely and that he has lost confidence in the appellant's ability to comply with TSA policies and procedures.

Under Section M.1 of the Table, which pertains to Failure to Follow Standard Operating Procedures, the recommended penalty is a 5-day suspension to removal and the aggravated penalty is removal. The guidelines of the Table state that examples of aggravating factors include prior disciplinary record and prior warning/advisement not to commit misconduct.

The Board determined that in light of the appellant's previous suspension and the fact that the recommended penalty range for the charge includes removal, management's decision to remove the appellant, although harsh, is within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—18-002

January 24, 2018

Issue: *Jurisdiction (Termination in Trial Period)*

OPINION AND DECISION

On December 8, 2017, TSA management terminated the appellant's employment as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DISMISSES the appeal.

The appellant filed an appeal on January 2, 2018. Based on TSA Management Directive 1100.31, *Trial Periods*, management terminated the appellant during her trial period. The appellant commenced employment as a TSO on January 8, 2017. The preponderance of evidence indicates that the appellant was subject to a two-year trial period pursuant to Section 6.A (2) of the MD, and was still serving in her two-year trial period at the time of her termination. The **Note** to Section 7.B (1) of the MD provides that "[a]n employee who is terminated during his or her basic trial period does not have appeal, grievance, or peer review rights with regard to this termination."

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-141

January 4, 2018

Issue: *Disorderly Conduct; Negligent Performance of Duties*

OPINION AND DECISION

On November 1, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charges: *Disorderly Conduct* and *Negligent Performance of Duties*. 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, *Disorderly Conduct*, on one specification. The specification alleged that on July 6, 2017, the appellant was assigned as a TSO to Checkpoint BC. The appellant's shift was from 1100 to 1930. Between 1315 hours and 1330 hours, the appellant was involved in an incident with a passenger between lanes 3A and 3B. During this time, the appellant engaged the passenger, whose property was being screened by an LTSO, and stated to the passenger in an unprofessional manner on multiple occasions "do you want to go outside?" A reasonable person could interpret the appellant's statement as inviting the person to a physical altercation. The appellant's misconduct occurred in front of the passenger's family, co-workers and other passengers going through screening at the checkpoint.

The Charge, *Negligent Performance of Duties*, was based on one specification. The specification alleged that on July 6, 2017, the appellant was assigned as a TSO to Checkpoint BC. The appellant's shift was from 1100 to 1930. Between 1315 hours and 1330 hours, the appellant was involved in an incident with a passenger between lanes 3A and 3B. At approximately 1321 hours, the appellant left his assigned screening position as the Dynamic Officer at lane 2B and walked to lane 3A without proper authorization and got into an argument with a passenger. The appellant's conduct at the workplace was inappropriate as he abandoned his assigned position.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section 5. holds all employees responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing basic-on-the-job rules. Section 5. D. 3) requires employees to exercise courtesy and tact (whether on or off-duty) in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation. Section 5. D. 7) states that employees are responsible for observing and abiding by all laws, rules, regulations, and other authoritative policies and guidance, written and unwritten. Section 6. states that employees must comply with all standards, responsibilities, and code of conduct established by the directive and shall report any violation(s) of the directive to appropriate management officials. Section 6. B. states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. Section 6.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, judgement or trustworthiness.

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

In addition, management alleged that the appellant's conduct violated TSA MD 2800-12, *Workplace Violence.* Section 5.L(1) provides that TSA employees must conduct themselves in a professional manner consistent with TSA policies.

On July 6, 2017, the appellant was working at the checkpoint. During this time frame, a passenger came through a different lane and had words with a Lead Transportation Officer (LTSO). The appellant came over to the lane and repeatedly said to the passenger "do you want to go outside." The appellant's actions occurred at a busy checkpoint and in front of passengers.

The passenger and his wife were interviewed over the telephone by the Assistant Federal Security Director (AFSD-LE) and both confirmed that the appellant approached him in an aggressive and unprofessional manner yelling words to the effect of "is that a threat? Is that threat? You want to fix this? We can fix this outside!" The passenger stated that he believed that the TSO wanted to have a physical altercation and took it as a threat of violence.

Two Lead Transportation Security Officers both indicated in their statements that they heard the appellant say to the passenger "let's go outside" and that they both considered this to be an act of violence or a possible physical altercation. A Transportation Security Manager (TSM) approached the appellant to ask why he interfered with a passenger when an LTSO was handling the situation to which the appellant stated that the passenger had insulted him and he responded back.

The appellant provided multiple statements in which he acknowledged asking the passenger "if he wanted to go outside." The appellant stated that he his intention in "asking him to go outside" was to try to get the passenger to cool off.

The appellant was issued a Notice of Proposed Removal (NOPR) on August 31, 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 provided a written response to the NOPR on September 29, 2017.

Management included as evidence: emails from the AFSD-LE, dated July 20 and 21, 2017; statement of a Program Specialist, dated July 21, 2017, statements of an LTSO, dated July 11, 2017; statements of an LTSO, dated July 11, 2017; statement of the TSM undated; statement of an STSO, dated July 12, 2017; the appellant's statements, dated July 11 and 12, 2017; Copy of ID and boarding pass from the passenger; Closed Circuit Television (CCTV) Footage; CCTV timeline, dated August 2, 2017; and copy of report of inquiry, undated.

On appeal, the appellant argued that he acted in a proper and orderly conduct within the parameters of his training. The appellant argued that the Deputy Assistant Federal Security Director-Screening was not present when the incident occurred and therefore, could not know his intentions. He also argued that the statements provided by the other TSA employees do not mention that he made an invitation to fight. The appellant argued that the phrase "do you want to go outside" has many connotations and that the Deciding Official did not know what was in his mind or what his intentions were. He also argued that the evidence establishes that the appellant was late for his flight, was aggressive, used foul language and was rude and disrespectful and that he simply intervened in order to calm the situation.

In addition, the appellant argued that the DAFSD-S called the passengers even without a complaint being filed. He also alleged that it was improper to ask fellow TSA employees what they thought about the phrase "do you want to go outside?" The appellant argued that it is common practice for TSA employees, just as it is common practice by pilots and flight attendants to ask disorderly and disrespectful passengers to go outside of the plane. The appellant alleged that he submitted four statements and that the agency lost or misplaced one of the statements and that the misplaced statement established that he did not invite the passenger to fight but told the passenger that if he did not calm down, he would be asked to leave the security monitoring area.

As to Charge 2, the appellant argued that a dynamic officer is authorized to assist in any lane in which he is needed and that he was needed by a co-worker in dealing with an unruly passenger.

Management responded and argued that the appellant's arguments are simply his recounted version of the reply to the Notice of Proposed Removal and were addressed by the Decision letter. As to the missing statement, management stated that they have no record of, nor did they receive any additional statements other than what was provided during the informal administrative inquiry. As to the appellant's argument concerning being a Dynamic Officer, management responded that his involvement in the incident was not within the duties of a Dynamic Officer and was also addressed in the Decision letter.

The appellant responded and attached a copy of the email that he alleged shows that he sent four statements, not three statements. The appellant denied the general manner in which the allegations were answered by management.

The appellant argued that the actions of the DAFSD-S were inappropriate and that the DAFSD-S could not have known what he was thinking. The Board notes that the DAFSD-S was neither the Proposing or Deciding Official in this action. His actions were appropriate in regards to an investigation of an incident that occurred at the airport. In addition, the email provided by the appellant does not show that there were four statements provided by the appellant.

With regard to Charge 1, the evidence shows that multiple people, including the appellant's co-workers and the passenger's wife, heard the appellant ask the passenger if he wanted to go "outside" and contrary to the appellant's assertion, asking someone if they want to go "outside" when used in the situation described is not a means of calming someone. The appellant's body language seen in the CCTV footage of his interaction with the passenger further supports the statements. The Board determined that the appellant acted improperly. The evidence in the record is preponderant evidence to support the Charge. Therefore, the Charge, *Disorderly Conduct*, is SUSTAINED.

With regard to Charge 2, the appellant was assigned to the Dynamic Officer position. There is no evidence in the record to show that he was supposed to stay in a fixed position or that he abandoned any duty at the time he got involved in the situation with the passenger. The appellant's conduct with the passenger, as addressed in Charge 1, was inappropriate but there is no evidence to show that he was negligent in his duties as a Dynamic Officer. Therefore, Charge 2, *Negligent Performance of Duties*, is NOT SUSTAINED.

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

On appeal, the appellant argued that management is sending the wrong message to its employees and the public in general by removing him. He argued that removing him would hinder the safety of his co-workers and affect their confidence because they will be cautious to act, fearing

that they would lose their employment, and permit passengers to "do and say anything," which he alleged would affect the security of the airport in the long run. The appellant argued that his actions, in helping a distressed coworker was not only proper, but was necessary under the circumstances. The appellant also argued that management did not allow him to resign which hinders his chances to find other employment.

The Deciding Official considered the nature and seriousness of the appellant's offense and its impact to the agency. He considered the charges to be extremely serious. The Deciding Official considered that while on or off duty TSOs are expected to behave in a professional manner and that the appellant's conduct was egregious, as he implied a threat to a passenger at the checkpoint and left his position to escalate the situation without authorization. The Deciding Official considered that the appellant's conduct reflects poor judgement, was unprofessional in the workplace and made management question the trust placed in him as a Federal employee. The Deciding Official found the appellant's conduct to be highly inappropriate.

The Deciding Official considered that the appellant's offense is counter to the mission of TSA. He noted that in order to serve as a TSO, the appellant must serve in a manner conducive to the successful accomplishment of the TSA mission and that adherence to the TSA mission and MD 1100.73-5 is a fundamental expectation of all TSOs. The Deciding Official considered that as a Federal Officer, the appellant is considered an essential employee. He stated that he lost all trust and confidence that the appellant will conduct himself professionally at all times and that he will follow TSA policy and procedure.

The Deciding Official considered the clarity with which the appellant was on notice of the rules that were violated noting that the appellant's Online Learning Center (OLC) records show that the appellant completed MD 1100.73-5 on January 28, 2016 and December 12, 2016. He also considered corrective actions issued to the appellant, noting that the appellant received a Letter of Counseling (LOC) for lack of tact and courtesy on May 31, 2011 and an LOC for attendance on January 17, 2011. The Deciding Official considered the appellant's prior disciplinary record which includes a Letter of Reprimand for attendance, dated May 25, 2017; a 14-day Suspension, dated February 8, 2008; and a 30-day suspension, dated July 18, 2012. The Deciding Official stated that he considered the aggravated penalty range for the offenses under the Table of Penalties because the appellant had prior discipline and violated or was charged with multiple offenses.

The Deciding Official considered the consistency of the penalty and found that it is commensurate with others who have committed similar offenses. He also considered the effect upon the appellant's supervisor's trust that he will not be able to exercise appropriate judgement when performing his duties and found that management has lost all trust and confidence that the appellant will follow agency policy as it relates to personal conduct.

The Deciding Official considered the notoriety of the offense and its impact on the reputation of the agency noting that as a Federal employee in direct contact with the public the appellant bears a heavy responsibility as his conduct has a significant impact on the public's attitude toward the Federal government and TSA. The Deciding Official considered that there is particular notoriety with this incident as it occurred in front of co-workers, passengers, and other Federal agencies and had to be reported to the Workplace Violence Program at TSA Headquarters.

As mitigating factors, the Deciding Official considered the appellant's performance record and that he has been employed by TSA since 2002. The Deciding Official found however, that the appellant's conduct was extremely serious and unacceptable and that the nature and seriousness of the misconduct far outweighs the mitigating factors and warrants removal. The Deciding Official also considered the effectiveness of alternative sanctions to deter such conduct in the future and determined that because of the seriousness of the offense and the fact that it occurred in front of other passengers and co-workers, he determined that no alternative sanctions would be adequate and effective in deterring future misconduct.

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

TSA employees, while on or off-duty, are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness. TSA employees are also expected to exercise courtesy and tact (whether on or off-duty) in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation. The appellant was aware of those requirements and clearly failed to abide by them. The appellant, in his position as a TSO, has direct contact with the traveling public and is expected to perform his duties in a professional and business-like manner throughout the workday and in this instance, the appellant failed to do so. The appellant's behavior was egregious; he inserted himself into a situation that he did not need to be involved in and confronted a passenger using language with a threatening connotation. The behavior took place at an active checkpoint in the view of the public, passengers, and co-workers. 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; the appellant's actions reflected poorly on TSA. Additionally, the appellant did not take responsibility for his actions.

Removal is within the aggravated penalty range and recommended range for the Charge. The Board finds that due to the egregious nature of the appellant's misconduct, management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-143

January 11, 2018

Issue: *Off-Duty Misconduct; Failure to a Report a Citation*

OPINION AND DECISION

On October 13, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two Charges: *Off-Duty Misconduct* and *Failure to Report a Citation*. The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Off-Duty Misconduct* on one specification alleging that on June 14, 2017, the appellant pled guilty to a felony charge of Lewd and Lascivious Conduct for an incident that occurred on August 2, 2016. Specifically, the charge stemmed from an allegation that the appellant exposed himself to a female at a local convenience store.

Management based Charge 2, *Failure to Report a Citation*, on one specification alleging that on September 26, 2016, the appellant was issued a citation to appear in court for a charge of Lewd and Lascivious Conduct, a Felony, for an incident that took place on August 2, 2016. The

appellant failed to report this citation to his immediate supervisor or other management official within 24 hours, as required by policy.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance; (8) reporting all personal arrests, including summons and citations to appear before a court, to the immediate supervisor or to any manager in the chain of supervisor within 24 hours of the arrest or as soon as possible thereafter. Section 6. D. states that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employees' reliability, judgement, or trustworthiness. Management also noted that MD 1100.75-3, *Addressing Unacceptable Performance and Conduct,* Handbook, Appendix A, (2) lists TSA Offenses for which removal is permitted for the first offense; Section (e) states "any felony conviction regardless of nexus to employment."

On August 2, 2016, the appellant spoke to a woman outside of a convenience store. The appellant gave the woman his name and number and, after a brief conversation, walked back to his car. As the female walked towards the appellant's car, she observed him masturbating. On September 26, 2016, the appellant was issued a citation to appear in court for a charge of Lewd and Lascivious Conduct, which is a felony. On June 14, 2017, the appellant entered into a plea agreement to which he pled guilty to Lewd and Lascivious Conduct. The plea agreement was signed by the Judge on July 7, 2017.

Management provided the following evidence to support the Charge: Summary of Pre-Decisional Discussion, dated July 18, 2017; Notice of Plea Agreement, dated July 7, 2017; Current Case Docket Information from Criminal Court Division; Probable Cause Affidavit of the Police Officer; and an article from a local newspaper, dated June, 16, 2017.

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

With regard to Charge 1, the appellant plead guilty to the Lewd and Lascivious Conduct charge. The Board found that the evidence in the record, including the appellant's plea agreement, is preponderant evidence to prove the Charge. Therefore, the Charge, *Off-Duty Misconduct*, is SUSTAINED.

With regard to Charge 2, the appellant did not dispute the Charge and the dates of the appellant's arrest, the newspaper article and the Pre-Decisional Discussion show that the appellant did not report the citation to his immediate supervisor or other management within 24 hours, as required by policy. Therefore, the Charge, *Failure to Report a Citation*, 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 the penalty was reasonable. He argued that management improperly assessed the nature and seriousness of his conduct as it pertains to the public's perception of TSA and the federal government. The appellant stated that management considered that the off-duty misconduct occurred in a public place and that he was wearing his TSO uniform at the time of the incident but argued that he was not wearing his uniform and that there is no evidence other than the woman's statement to suggest otherwise. The appellant argued that given the "conflicting statements," management cannot prove he was wearing his uniform by a preponderance of evidence and therefore, improperly considered the nature and seriousness of his offense as it relates to the perception of the agency and federal government.

The appellant argued that management did not give adequate weight to his length of service or performance record, noting that he has been employed by TSA since 2007, and has received awards and other recognition for his "more than satisfactory" performance. Additionally, the appellant argued that management improperly asserted the clarity by which he was on notice of the polices governing off-duty misconduct. The appellant argued that neither the Letter of Reprimand nor the suspension he received were due to off-duty misconduct or failing to report a citation. He argued that even assuming *arguendo* that all prior discipline is sufficient to provide some measure of notice against future misconduct, that notice is so broad and vague it cannot be considered a strong aggravating factor. The appellant argued that management gave too much weight to the extent that he was on notice about his off-duty misconduct.

The appellant also argued that management overstated the notoriety of the offense. The appellant stated that management emphasized that the off-duty conduct occurred in a public place and was reported in an article in a local newspaper. He argued that the article does not identify him as a TSA employee, but rather as a security guard at the airport. The appellant argued that management should not have placed much weight on an article that does not mention TSA and thus, did not harm the reputation of the agency.

Management responded and argued that the appellant's length of service was taken into consideration when determining the penalty as well as the seriousness of his misconduct. Management argued that taking into consideration the appellant's disciplinary history which includes a 7-day suspension; the fact that he pled guilty to a crime that is a felony and sexual in nature; and the fact that the incident was reported in a news article far outweighs mitigating factors such as length of service and a satisfactory performance record.

Management also reiterated that TSA MD 1100.75-3 states that TSA may remove an officer for any felony conviction, regardless of nexus to his or her TSA employment. Specifically, the Handbook to MD 1100.75-3, Appendix A. (2) which lists TSO Offenses for which removal is permitted for the first offense, includes (e) "any felony conviction regardless of nexus to employment."

Management argued that given the fact that the appellant was masturbating in front of a female, in an open public area, removing him from service was the only appropriate action to render in order to maintain the best interest of the agency.

The Deciding Official considered both mitigating and aggravating factors. He considered the nature and seriousness of the offense in relation to the appellant's conduct as a TSO and noted that as a TSA Officer, the appellant has daily interaction with the public and is held to a high standard established by TSA's Code of Conduct. The Deciding Official considered that the appellant's conduct has a direct impact on the public's perception of TSA and the federal government, while on or off-duty. He also considered that the appellant's off-duty misconduct took place at a local convenience store while wearing part of his TSA uniform.

The Deciding Official considered the notoriety of the appellant's offense and its impact upon the reputation of the agency. He noted that the appellant's conduct occurred in public and that an article from a local newspaper, dated June 16, 2017, identifies the appellant as a security guard at the airport and describes the appellant as being partially in uniform. The Deciding Official considered that management expects all of their employees to conduct themselves with integrity and professionalism and that the appellant's off-duty misconduct goes to the heart of his responsibilities as an officer and a federal employee.

The Deciding Official noted that a review of the appellant's prior disciplinary history shows that he was well aware of management's expectations and TSA policies and procedures. He considered that on March 5, 2014, the appellant was issued a 7-day suspension for failure to follow policy. He also stated that while not considered as discipline, he considered the fact that the appellant received a Letter of Reprimand for failure to follow procedures on November 12, 2014. The Deciding Official considered that these actions put the appellant on notice that any further misconduct would result in further disciplinary action, up to and including removal from federal service. The Deciding Official also considered that the appellant acknowledged having received and read TSA MD 1100.73-5 on November 20, 2016, which explained his responsibilities to conduct himself in a professional manner and to observe and abide by all laws, rules, regulations, policies and guidance.

As mitigating factors, the Deciding Official considered the appellant's tenure with TSA and his satisfactory performance. He found however, that the mitigating factors do not outweigh the seriousness of the appellant's misconduct.

The Deciding Official considered that the appellant's actions failed to adhere to TSA's Code of Conduct and high standards. He found that the appellant's off-duty misconduct undermined the agency's confidence in his professionalism, trustworthiness, and ability to continue serving in his position.

Under Section G. 24 of the Table, the recommended penalty range for off-duty misconduct is a 31-day suspension to removal and the aggravated range is removal. Under Section K.1 for failure to timely report arrest, the recommended range is a 3-day to 5-day suspension and the aggravated range is a 6-day suspension to removal. The Deciding Official considered the nature and seriousness of the appellant's misconduct and found that removal is the appropriate penalty. He considered that in the appellant's role as a TSA Officer, the appellant occupies a position of public trust. The appellant is expected to uphold TSA's Code of Conduct (whether on or off-

duty) as an officer in the presence of fellow co-workers, supervisors and the public. The Deciding Official considered that any inappropriate conduct compromises management's confidence in the appellant as all TSA 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 even in the fact of provocation.

The Board found that the Deciding Official properly assessed and weighed the penalty factors. The appellant's misconduct was egregious and whether or not he was in uniform or identified specifically as a TSA employee in the newspaper article is irrelevant. The appellant pled guilty to a felony. The Handbook to TSA MD 1100.75-3, Appendix A, Section (2) lists TSO offenses for which removal is permitted for the first offense and includes (e) any felony conviction regardless of nexus to employment.

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:

DONNA M RACHUBA

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Donna Rachuba
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

~~SENSITIVE SECURITY INFORMATION~~

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-144

January 17, 2018

Issue: Failure to Follow Standard Operating Procedures

OPINION AND DECISION

On November 9, 2017, management removed the appellant from her position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on the Charge: *Failure to Follow Standard Operating Procedures.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board GRANTS the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Failure to Follow Standard Operating Procedures (SOP)*, on one specification alleging that on June 29, 2017, at approximately 5:00 p.m., the appellant was working at the North Checkpoint at the airport when she allowed a passenger wearing a coat to be screened by the Advanced Imaging Technology (AIT) in violation of the SOP.

Management alleged that the appellant's misconduct violated the Checkpoint Screening Standard Operating Procedures, Chapter 2, Advanced Imaging Technology (AIT), 1. Advisements and Divestiture, A. Standard Screening, 1.

Management also alleged that the appellant violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (2) responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials; (7) observing and abiding by all laws, rules, regulations and other authoritative polices and guidance, written and unwritten; (9) reporting any known or suspected violation of law, rule, regulation, policy, or Standard Operating Procedure (SOP) by a person to any manager in the chain of supervision and/or to the Office of Inspection (OOI), whenever such violation may have a nexus to the TSA mission and/or effective operation of the agency, or when it occurs in the workplace. Section 6. A. states that TSA employees shall comply with all standards and responsibilities established by this directive and shall report any violation(s) of this directive to appropriate management officials. Failure to comply with this directive and/or failure to report violations of this directive may result in appropriate corrective action, including discipline up to and including removal. Section 6. B. states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. Section 6. D. states that employee 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.

On June 29, 2017, the appellant was working at the checkpoint. The appellant spoke to a Transportation Security Officer (TSO) working near the Walk Through Metal Detector (WTMD); the TSO told her that a female passenger did not want to remove her coat. The appellant directed the passenger wearing the coat to be screened by the AIT while wearing her coat.

In a statement, dated July 3, 2017, the TSO stated that she informed a passenger wearing a coat (described by the TSO as "knee length, pink, with many zippers") that she would have to remove her coat and put it through the x-ray. The TSO stated that the passenger said that she did not want to remove it and showed the TSO that she was wearing a "short sleeve top" under her coat. The TSO stated that when the passenger refused to remove the coat, she called for a Supervisory Transportation Security Officer (STSO). The TSO stated that the STSO told the passenger that she could go to a private room for a pat down and that her coat would be put through the x-ray. The TSO stated that the passenger agreed. The TSO stated that after the STSO walked away, the appellant approached her and asked her what was going on. The TSO stated that she explained to the appellant that the passenger did not want to remove her coat and that she had called the STSO who spoke to the passenger and that the passenger agreed that she would go to a private screening room to receive a pat down and that her coat would go through the x-ray. The TSO stated that the appellant asked the passenger if she could raise her arms to go through the AIT

and that the passenger nodded affirmatively. The TSO stated that the appellant then said, "You don't have to remove your coat, just go on thru."

The STSO submitted a statement on July 4, 2017, in which she stated that the TSO called for assistance and she responded. The STSO stated that when she arrived at the WTMD, the TSO told her that the passenger did not want to remove her coat. The STSO stated that she told the passenger that they could offer a private screening which would include a pat down and that her coat would have to go through the x-ray. The STSO stated that the passenger stated that she would like that. The STSO stated that she confirmed the procedure with the TSO and that as she walked away, she saw the appellant walking up to the TSO.

In a statement, dated July 8, 2017, the appellant stated that the TSO told her that the STSO told her to have the passenger remove her coat but that the passenger did not want to remove her coat. The appellant stated, "I understood this to mean [the TSO] needed guidance with the screening. I evaluated the situation and noted that the jacket the woman was wearing was not only super tight but was not in any way bulky. Based on that, as well as the fact that I was aware that [the STSO] was doing numbers and busy, I asked the woman if she could raise her arms and screened her in the AIT, in the same manner I would if a woman was wearing a tank top with a form fitting flannel shirts [sic] over it." The appellant stated that she followed through with the screening by checking the AIT screen and completing a pat down on the alarmed areas on the side where the material was hanging open away from the passenger's body and arms. She stated that she completed the screening herself to ensure all was well. The appellant stated that she is clear about bulky clothing and how to screen it but that in this case she "in no way found this to be a bulky item." The appellant stated that she completed the screening based on the fact that the TSO was presenting her with a situation and that as an LTSO, she needed to provide guidance. The appellant stated that she screened the passenger per the SOP. The appellant acknowledged that she told the TSO that she would let the STSO know how she screened the passenger but that she did not follow up with the STSO. The appellant stated that she did not follow up with the STSO because "we were super busy and I forgot."

A pre-decisional discussion was held with the appellant on July 8, 2017. When asked about the passenger in question, the appellant stated that she did not consider the passenger's coat as bulky clothing since it appeared to be tight fitting. She stated that when she spoke to the TSO she understood it to mean that the TSO needed guidance from her so she evaluated the situation and noted that the jacket was "super tight and in no way bulky" so she processed her through the AIT.

The appellant was issued a Notice of Proposed Removal (NOPR) on August 28, 2017, which advised her of her right to make an oral and/or written reply. The appellant gave both an oral and written reply on September 5, 2017.

Management provided as evidence: Pre-Decisional Discussion Summary, dated July 8, 2017; statement from the appellant, dated July 8, 2017; statement of a TSO, dated July 4, 2017; statement of an STSO, dated July 4, 2017; statement of a TSO, dated July 4, 2017; statement of a TSO, dated July 4, 2017; statement of a TSO, dated July 3, 2017; statement of a TSO, dated July 6, 2017; and Closed Circuit Television (CCTV) footage.

On appeal, the appellant argued that her conduct was not in violation of the SOP. The appellant argued that removal of clothing is referenced in the SOP in several screening scenarios, but not when using the AIT. She argued that Chapter 2.1 (a), (b), (c) is specific in nature but does not include the word clothing.

Management responded and argued that the SOP requires employees to advise passengers to remove any item that would cause an alarm, not just those in the non-exclusive list of items in Chapter 2, Section A. 1. (a), (b), and (c). Management argued that the SOP requires TSOs to advise divestiture of "items that may cause AIT alarms and require additional screening." Management argued that if the SOP meant to instruct TSOs to advise passengers to only remove jewelry, wallets, belts, or footwear, the SOP would instead read something more to the effect of: "the following items should be removed: jewelry, wallets, belts and footwear could cause an alarm." Management argued that instead, the SOPs language more generally states that items which could cause an alarm and require additional screening should be removed. Management noted that the coat the passenger was wearing did cause an alarm and argued that the appellant's failure to advise the passenger to remove the coat violated the SOP.

The Board reviewed the relevant sections of the SOP and determined that the SOP does not state that coats must be removed before entering the AIT. The appellant was charged with violating the SOP by allowing a passenger to wear a coat into the AIT. The Section of the SOP cited by management requires officers to advise passengers to divest any items which could cause the AIT to alarm before entering the AIT; the SOP gives officers the discretion to determine whether or not a passenger needs to remove an item of clothing. The STSO made a different judgment call than the appellant regarding the passenger's coat however, the appellant was charged with failing to follow the SOP and her actions do not constitute failure to follow the SOP. Although the appellant may have disobeyed an order from the STSO, she was not charged with Failure to Follow Directions. Therefore, the Charge, *Failure to Follow Standard Operating Procedures*, is NOT SUSTAINED.

Decision. Accordingly, the appeal is GRANTED. The appellant is ordered reinstated to her position as a Lead Transportation Security Officer. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—17-145

January 9, 2018

Issue: *Jurisdiction (Untimely)*

OPINION AND DECISION

The appellant petitions for review of the respondent's decision to indefinitely suspend 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 November 23, 2016, management indefinitely suspended the appellant. The appellant's indefinite suspension was based on her being charged on November 14, 2016, with Family Violence, an offense for which imprisonment may be imposed. The charge against the appellant was dismissed on September 13, 2017. On November 12, 2017, the appellant was returned to duty. On or about December 4, 2017, the appellant filed an appeal with 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 the basis for continuing an indefinite suspension may be appealed to the Board at any time during the action and no later than 30 days after its termination. Section C. (2) goes on to state that the basis for the decision imposing an indefinite suspension may not be appealed after 30 days from its effective date. The appellant's appeal does not involve the basis for continuing the indefinite suspension but rather deals with back pay during the time period she was on an indefinite suspension. In addition, the appellant did not file her appeal within 30 days after its effective date. Therefore, the basis for the decision may not be appealed. The Handbook to TSA Management Directive 1100.77-1, also states that appeals must be filed no later than 30 days

after the action is effected and failure to file within 30 days, without a demonstration of good cause, will result in dismissal of the appeal as untimely.

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

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

FOR THE BOARD:

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