# 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—17-124

November 16, 2017

***Issue:*** *Misconduct of a Sexual Nature*

## OPINION AND DECISION

On September 19, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the charge: *Misconduct of a Sexual Nature*. The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Misconduct of a Sexual Nature*, on four specifications. Specification 1 alleged that on February 28, 2016, while assigned to an airport baggage room, the appellant touched an airport employee's breast. Specification 2 alleged that on February 28, 2016, while assigned to an airport baggage room, the appellant showed an airport employee a picture of two girls kissing and asked her "how do 2 girls get pleasure and how does 2 guys get pleasure?" Specification 3 alleged that on February 28, 2016, while assigned to an airport baggage room, the appellant reiterated a sexual encounter to an airport employee that included the appellant and four other males receiving "head" from a woman the appellant met at a party. Specification 4 alleged that on February 28, 2016, while assigned to an airport baggage room, the appellant stated to an

airport employee that one of his former female co-workers sat next to him in the break room and grabbed his "dick."

Management alleged that the appellant's conduct violated TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct,* Handbook, Section K: (2) which states that misconduct of a sexual nature may not rise to the legal definition of sexual harassment, but is nonetheless inappropriate for the workplace and will not be tolerated and (3) all employees have a responsibility to behave in a proper manner and to take appropriate action to eliminate sexual harassment or other misconduct of a sexual nature in the workplace. Management also 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; 5.D (3) for exercising courtesy and tact (whether on or off duty) in dealing with fellow workers and supervisors, and to create a productive and hospitable model work environment; and 5. D (7) for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance.

Additionally, management alleged that the appellant's conduct violated the Handbook to TSA MD 1100.73-3, *Prevention and Elimination of Sexual Harassment in the Workplace*, Section C., which describes behaviors that are examples of misconduct of a sexual nature which include: sexual jokes, suggestive verbal communications or innuendos; nonverbal conduct such as distribution or display of materials of a sexual nature and suggestive body language; unwelcome and deliberate touching such as patting, stroking, rubbing, biting, pinching, grabbing, bumping, back/neck rubs, and unsolicited clothing adjustments.

On February 29, 2016, an airport employee met with her supervisor to report inappropriate conduct by the appellant that took place in an airport baggage room when she worked with him on February 28, 2016. The airport employee also provided a written statement detailing the inappropriate conduct and comments of a sexual nature made by the appellant when she and the appellant were assigned to the baggage room. The airport supervisor immediately contacted her General Manager and a Transportation Security Manager (TSM) about the incident. The TSM then met with the airport employee, the airport supervisor and a Supervisory Transportation Security Officer (STSO) on February 29, 2016, to discuss the incident and after the meeting, the TSM contacted a Deputy Federal Security Director (DFSD) to make notification of an alleged claim of sexual harassment. The TSM also met with the appellant and two other officers, a Lead Transportation Security Officer (LTSO) and a TSO, who were assigned to the baggage room on February 28, 2016.

The appellant was placed in a non-screening status in February 2016, after the allegations were made.

On April 20, 2017, the appellant was interviewed by the Office of Inspection (OOI) Special Agents (SA) regarding the complaint received from the airport employee. As part of their investigation, the OOI Special Agents also interviewed the airport employee, the airport employee's supervisor; another airport employee who was present in the baggage room on February 28, 2016; the TSM, and an LTSO who was working in the airport baggage room on February 28, 2016. OOI completed their Report of Investigation (ROI) on June 2, 2017.

The appellant was issued a Notice of Proposed Removal (NOPR) on July 6, 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 gave an oral reply denying any misconduct.

Management included as evidence: the Report of Investigation, dated June 2, 2017.

On appeal, the appellant denied the allegations and argued that management did not produce unrefuted evidence of the specifications. He argued that specifically, management was unable to provide visual or audio evidence and instead relied on contradictory witness statements from an OOI investigation. The appellant noted that the OOI report states that two TSA employees assigned to the baggage room on February 28, 2016, did not see any inappropriate behavior from him. He argued that the findings in the report rest on the airport employee's allegations and the statement of one witness, who claims to have observed the appellant's actions, but did not report it. The appellant argued that with conflicting statements, his denial, and no outside evidence, management failed to prove the charge by a preponderance of evidence.

Management replied and argued that one of the witnesses stated that he visually witnessed the appellant speaking to the airport employee in the rear of the baggage room on February 28, 2016, and that the statement raises serious questions about the truthfulness of the appellant's June 2, 2017, statement to an OOI Special Agent in which he said he did not know the airport employee. Management also argued that another airport employee reported that she witnessed the appellant removing a picture of two women kissing from a passenger's luggage and that she observed the appellant touching the airport employee's breast. Management also argued that in addition to the two contemporaneous witnesses, the airline employee promptly reported the misconduct to her supervisor who in turn reported it to TSA management.

With respect to the Charge and specifications, the Board noted that when the OOI Agents interviewed the appellant, he told the Agents several times that he had never heard of the airline employee. The Agents stated that the appellant "would not answer the specific questions or look at [the Special Agent] when questioned." They also reported that the appellant "exhibited shaking hands and nervousness and that each time the appellant was asked a specific question about the allegations, the appellant continually responded that he "was married to an Indian woman." The Board found that the evidence in the record clearly contradicts that the appellant did not know the airport employee. When the LTSO was interviewed by the OOI Agents, he stated that he witnessed the appellant speaking with the female airport employee in the back of the room throughout the course of his shift. Additionally, a written statement submitted by the airport employee's coworker stated that she saw the appellant "showing a kissing picture to [the airport employee]" and that later she saw the appellant touch the airport employee's breast and hug the airport employee. The Board found no contradictory or conflicting statements in the record submitted by witnesses regarding what took place in the baggage room on February 28, 2016. The fact that the airport employee immediately reported the incident to her supervisor and provided a highly detailed statement lends to her credibility. Further, the fact that the appellant failed to answer any specific questions regarding the allegations and claimed he did not know the airline employee undermines the appellant's credibility. The Board determined that the statements in the record are preponderant evidence to support all four specifications. Therefore, the Charge, *Misconduct of a Sexual Nature*, is SUSTAINED.

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

On appeal, the appellant argued that an analysis of the mitigating factors demonstrate that the proposed penalty of removal is unreasonable. He noted that B.6 of the Table is cited for *Misconduct of a Sexual Nature* and the recommended penalty range is a 3-day to 14-day suspension. The appellant argued that management claims his misconduct warrants the harshest aggravated penalty but that their conclusion rests on an incorrect balancing of the penalty factors. The appellant argued that given his performance the last 15 years in a non-supervisory position and his continued ability to perform satisfactorily, an analysis of the mitigating factors demonstrates that the penalty is unreasonable and should be mitigated. The appellant also argued that his removal does not promote the efficiency of the service. He argued that he has been a suitable employee with the necessary credentials, experience and education to enhance TSA's mission and that removing him from federal service would deprive the airport of a valuable and well-respected employee. He argued that allowing him to retain his employment not only saves TSA the exorbitant cost of finding and training a replacement TSO, but also preserves the time and money that TSA and the federal government has invested throughout the years on building his experience and expertise.

Management responded and argued that only one penalty factor, the appellant's length of service, falls in his favor and that the remaining penalty factors do not support the appellant and he either did not address them in his appeal or he misapplied them to this particular incident. Management argued that given the severity of the inappropriate behavior involving a partner in the aviation security community, even with the mitigating factors, removal was reasonable.

The Deciding Official considered the nature and seriousness of the appellant's misconduct and its relationship to his duties as a TSO. He considered that all Federal positions require an individual who displays qualities of honesty, reliability, integrity, trustworthiness, and good judgment. The Deciding Official considered that strict adherence to established rules, regulations, and procedures, the ability and willingness to conform to authority in a mature and responsible manner, and the ability to uphold the public trust and confidence in the Federal Government are also essential. He considered that when an employee conducts himself in an unprofessional manner, it can damage the integrity of the agency and create a negative impression both within and outside the agency.

The Deciding Official considered that he found the appellant's conduct to be extremely serious and very concerning as it goes against TSA's mission and expectations. He considered that management must have the utmost confidence in the appellant's ability to conduct himself in a manner that does not diminish TSA's reputation. The Deciding Official considered that the appellant's conduct at work directly impacts the proper and effective accomplishment of his official duties and responsibilities and that the appellant's unprofessional conduct of a sexual nature is a serious offense. The Deciding Official considered that the charge and specifications caused him to question the appellant's reliability, judgment, and trustworthiness and that management must be confident in the appellant's ability to conduct himself in a manner that does not discredit himself, management or TSA whether he is on or off-duty. The Deciding Official

considered not only the appellant's unprofessional behavior and poor decision making but also his lack of understanding of the impact of his behavior. He considered that due to the appellant's actions he has lost all confidence and trust in the appellant.

The Deciding Official also considered the notoriety of the incident and that the appellant's actions involved an airport employee. He considered that as a TSA employee interacting with airport employees, stakeholders, and passengers, the appellant represents not only himself but the airport management team and TSA as a whole, and that his actions should be above reproach at all times and reflective of the TSA mission. The Deciding Official considered that the appellant's demonstrated behavior, as described in the action, has had a negative effect on the efficiency of security screening and operations at the airport and that therefore, had impacted the agency's mission to provide world class security to the traveling public. The Deciding Official considered that TSA depends upon the public's confidence that it can ensure the safety and security of the traveling public and that employee's 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 Deciding Official considered that the appellant's conduct, which involved an airport employee, is totally unacceptable and is inconsistent with TSA's values and mission.

The Deciding Official stated that although he did not consider the actions as discipline, he did consider that the appellant received a Letter of Counseling on February 16, 2013, and Letters of Guidance and Direction on December 1, 2012 and November 27, 2012, and that those actions were prior notice of management's expectations to follow all laws, rules, regulations and other authoritative policies and guidance. The Deciding Official also considered that the appellant acknowledged having read and received TSA MD 1100.73-5 on April 7, 2017.

As mitigating factors, the Deciding Official considered that the appellant has been employed with TSA since 2002 and has had otherwise satisfactory performance ratings. He did not find however, that the mitigating factors were enough to outweigh the seriousness of the appellant's misconduct.

Under Section B.6 of the Table, the recommended penalty range for *Misconduct of a Sexual Nature*, is a 3-day to 14-day suspension and the aggravated range is a 15-day suspension to removal. The Deciding Official stated that he found that the appellant has no potential for rehabilitation and that he has no confidence that lesser discipline would get the appellant's attention and correct his behavior. The Deciding Official stated that anything less would allow the appellant another opportunity to engage in the same type of misconduct and therefore, would place TSA's mission at risk.

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. The appellant's actions, involving an airport employee, were serious and highly inappropriate in the workplace. In particular, the fact that the appellant touched another person on the breast cannot be tolerated. The Board finds that management appropriately considered the penalty factors. The appellant's conduct is sufficiently serious and egregious to warrant removal. The Board finds that management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
*Appellant,*

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—17-125

November 20, 2017

***Issue:*** *Disorderly Conduct*

## OPINION AND DECISION

On September 13, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge: *Disorderly Conduct.* The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the 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, *Disorderly Conduct*, on two specifications. Specification 1 alleged that on July 11, 2017, at approximately 5:50 p.m., while assigned to Terminal B checkpoint, the appellant threatened violence against a Supervisory Transportation Security Officer (STSO), while on duty. After the STSO requested that the appellant conduct a groin anomaly pat-down on a passenger who alarmed on the Advanced Imaging Technology (AIT) machine, the appellant resisted but eventually completed the pat-down. The appellant then walked away from the AIT but returned to confront the STSO about why he was directed to conduct the pat-down. After the STSO gave the explanation, the appellant stated something to the effect of, "This is bullshit." When directed by the STSO to the supervisor's podium to write a statement about the comment

he had just made, the appellant began pacing back and forth, unbuttoned his shirt, clinched his fists and said something to the effect of, "I am going to knock you the fuck out, I am not playing, I should punch you in your fucking face now." Additionally, when the appellant was sent to Terminal C checkpoint to complete his witness statement, the appellant verbally stated to the Transportation Security Manager (TSM) words to the effect of, "I wanted to punch him in his fucking face," referring to the STSO. The appellant's conduct was witnessed in clear view of passengers and fellow TSA employees.

Specification 2 alleged that on July 11, 2017, at approximately 6:10 p.m., while assigned to the Terminal C checkpoint, the appellant went into the private screening room to write a statement regarding an incident that took place earlier in the day on Terminal B checkpoint. While in the private screening room, the appellant slammed the door and began yelling. The STSO went into the private screening room to see if he was alright and to request that he be quiet because passengers could hear him. When the STSO addressed the appellant about his behavior, he stated something to the effect of, "Get out and leave me the fuck alone." The appellant's conduct and comments were within ear shot of passengers and fellow TSA employees.

Management alleged that the appellant's conduct violated the TSA Handbook to Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section L states "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. Employees, supervisors, and managers are responsible for enforcing the highest standards of personal safety and welfare at the workplace."

The appellant was working on C checkpoint and was directed to go to B checkpoint. While at B checkpoint, the STSO stationed at the AIT called the appellant over to conduct a groin-anomaly pat-down. The appellant told the STSO that he did not see the image on the monitor but was told to perform the pat-down anyway and complied. After completing the pat-down, the appellant approached the STSO stationed at the AIT to question him as to why he was called over to do the pat-down. The appellant admitted in his statement that he felt like he lost his cool and was not able to deal with the situation professionally and said some things in anger. The STSO stated that when called over to perform the pat-down, the appellant replied softly, "This is bullshit." After completing the pat-down, the appellant came back to the AIT and asked aggressively why he was called over to do the pat-down. The STSO asked to be tapped out and asked the appellant to speak to him in private. Another STSO was asked to be a witness in the private screening room. The STSO stated that the appellant asked why he was called over to perform the pat-down and the STSO explained to him the reason at which point the appellant cut him off and said he did not want to talk and needed a break. The STSO stated that the appellant was visibly agitated and agreed. The STSO returned to the checkpoint floor. A minute or two later, the appellant was on the podium talking to the other STSO. The STSO on the floor went to the podium and asked the other STSO to have the appellant do a witness statement to which the appellant loudly replied "I'm not doing a witness statement." The appellant then walked off the podium. The STSO then went to the podium to write his statement and the appellant returned to the podium and stated loudly "I want to punch him in his fucking face" and "I'm going to fuck him up." The

STSO stated that out of the corner of his eye he could see the appellant approaching him and come behind him and said "why the fuck would you do that." The STSO stated that he then jumped to his feet due to the threat but the appellant then stepped off the podium. The STSO then called the Police Department. The appellant returned to the podium and was escorted off by the other STSO. The other STSO accompanied the appellant until they met up with the TSM and Police Department to whom the appellant stated "I wanted to punch him in his fucking face so bad. I did not do it, that is what I wanted to do." The appellant was sent to C terminal and went in to the private screening room. A third STSO stated that the appellant slammed the door and began to yell. She then went into the private screening room and asked him if he was all right and asked him to quiet down because there were passengers and other people around. The appellant told her to "get out and leave me the fuck alone."

The appellant was issued a Notice of Proposed Removal (NOPR) on September 1, 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 submitted a written response on September 5, 2017.

Management included as evidence: Incident Report, dated July 11, 2017; Notice of Indefinite Suspension, dated July 18, 2017; Police Department Complaint/Incident report; statement of the appellant, dated August 9, 2017; statement of an STSO, dated August 1, 2017; statement of an STSO, dated July 28, 2017; statement of a TSO, dated July 28, 2017; statement of a TSO, dated August 1, 2017, statement of a TSO, dated August 1, 2017; statement of an STSO, dated August 2, 2017; statement of a Transportation Security Manager, dated August 2, 2017 and Closed Circuit Television Footage (CCTV).

On appeal, the appellant argued that he did not threaten physical violence against a supervisor. He stated that all of the witness statements reflect that he had a desire but not an intent to hit the supervisor. The appellant questioned the credibility of the STSO who was at the podium with him and walked him to meet the TSM and police. He stated that the police report shows that he was sent home and did not get an opportunity to speak with the police. He also alleged that her recollection of events was different than the STSO who was the focus of his frustration. The appellant denied having his fists clenched and denied approaching the STSO quickly and stated that the CCTV footage shows this. The appellant again admitted that his conduct in expressing a desire to punch the STSO and swear at him is inappropriate behavior but argued that these actions fall short of a threat of physical violence. Additionally, the appellant argued that the Board previously found that the appellant's actions were not substantial evidence that he posed a threat to life or safety.

Management replied and stated that the witness statements are not inconsistent. Management stated that both the TSM and the STSO stated that in front of the police officer, the appellant said that he "wanted to punch him in his fucking face." Management argued that the appellant's claim that the witness statements only show his desire to inflict harm is a clear admission that he threatened physical violence. Management argued that they did utilize the CCTV footage and that it does show the appellant's threatening behavior.

As to the appellant's argument that the Board found that his statement and actions were not substantial evidence, management stated that the appellant is referring to the Board's decision on Indefinite Suspension and that his statement is inaccurate. The Board notes that on July 18, 2017, management indefinitely suspended the appellant. On September 20, 2017, a decision was

issued by the Board granting the appellant's appeal. The Board found that management failed to support the Charge with substantial evidence because neither the STSO's statement, nor statements of anyone else involved in the incident described, other than the appellant, were provided to support the Charge. Contrary to the appellant's assertion, the Board found a lack of evidence prevented management from proving the Charge by substantial evidence. Therefore, the Board gave no merit to the appellant's argument concerning the Indefinite Suspension.

With respect to the Charge, the appellant argued that the CCTV would disprove that his fists were clinched and it does in fact do so. However, that statement is the only sentence in the specification not proven by management. The CCTV does in fact show the threatening stance and behavior of the appellant. The essence of the specification is that the appellant's behavior was disorderly. The statements provided by the three STSOs and the TSM confirm the appellant's behavior. The statements of the STSOs are not contradictory and the fact that he was not formally interviewed by the police, does not mean that he did not state to the police, "[I] wanted to punch him in his fucking face." This comment in front of the police was noted by both the TSM and the STSO. In addition, the appellant admitted to his behavior although couching it as inappropriate because he only had the desire not the intent to strike the STSO. The appellant is not charged with assault but charged with Disorderly Conduct. The statements of the STSOs and TSM are preponderant evidence to prove both specifications 1 and 2. Therefore, the Charge, *Disorderly Conduct*, is SUSTAINED.

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

On appeal, the appellant argued that the penalty should be mitigated because management failed to prove that removal is reasonable. The appellant argued that the only mitigating factors that management considered were his ten years of service and the quality of his performance. He argued that they failed to consider the mitigating circumstances surrounding the incident and the adequacy and effectiveness of alternative sanctions. The appellant argued that one day out of his 10-year career, he "snapped" and that this was an isolated incident that was catalyzed by the circumstances surrounding the event. He also argued that management failed to recognize that the last and only discipline that he received was a Letter of Reprimand (LOR) and that progressing from the least severe to the most severe form of discipline is an extraordinary leap. The appellant argued that in light of the Board's previous ruling that his statement was not substantial evidence of a threat to safety; this was an extraordinary leap. The appellant argued that management did not provide an explanation as to why a lesser penalty would be insufficient to deter future conduct. As to the Table, the appellant argued that B.6 covers offenses that range from relatively mild to incredibly serious and that is why the recommended range, five days to removal, is so wide. The appellant argued that his swearing and expressing a desire should all fall on the lower end of the spectrum.

Management replied and argued that the appellant's response itself is cause to show his inability to interact with co-workers and the traveling public. Management argued that his lashing out only one day of a ten-year career is incorrect. The appellant received an LOR on March 8, 2016, for Failure to Follow Screening Procedures and Failure to Exercise Courtesy and Tact for an

incident involving performance of a groin anomaly pat-down. In that incident, management claimed that the appellant became irate with a co-worker after initially refusing to perform the groin anomaly pat-down, as required. Management also argued that there were two incidents on July 11, 2017, which involved two different officers. Management argued that the conduct on July 11, 2017, was not an isolated incident and that management has a requirement to ensure the safety of all employees. Additionally, management argued that "for second and/or successive offenses, the penalty should generally fall within the 'Aggravated Penalty Range.'" Removal is within the aggravated penalty range for Disorderly Conduct. Management argued that the appellant has had three (3) incidents within the last (2) years where he became irate with his supervision. Management also argued that the appellant has made no indication that this is a one-time incident and that he will perform all required job functions without issue or that his aggressive and threatening action will not happen again. Management asserted that they must ensure the safety of all of their employees which includes the prevention of workplace violence.

The Deciding Official considered the nature and seriousness of the appellant's misconduct and the relationship to his duties. The Deciding Official considered that the appellant is required at all times to behave professionally and in a manner that does not adversely reflect on TSA or negatively impact its ability to discharge its mission. The Deciding Official stated that TSA is committed to providing a safe work environment at TSA facilities and operations for all employees and enforcing the highest standards of personal safety and welfare at the workplace is consistent with TSA policy. The Deciding Official stated that workplace violence is unacceptable and will not be tolerated. He stated that as a result of the misconduct, he has lost all trust in the appellant's ability to act in a reasonable manner while on duty.

In addition, the Deciding Official noted that the appellant received an LOR on March 8, 2016, for Failure to Follow Screening Procedures and Failure to Exercise Courtesy and Tact. The Deciding Official found that the LOR cautioned the appellant that any additional acts of misconduct could result in more severe discipline, up to and including removal. The Deciding Official also found that the appellant was on clear notice that his conduct as described was not acceptable as the appellant received and read MD 1100.73-5 on March 4, 2017.

As mitigating factors, the Deciding Official considered the appellant's service with TSA since 2007, and satisfactory performance ratings but found that these mitigating factors were significantly outweighed by the nature and seriousness of his misconduct. The Deciding Official stated that he did not find any alternative remedy or that a lesser penalty would sufficiently deter future misconduct. The Deciding Official found that the safety of TSA employees must come first and determined that the removal promotes the efficiency of the Federal service.

Under Section B.6 of the Table, pertaining to threatening, intimidating, violent, reckless or disorderly act, language, gestures or conduct, the recommended penalty range is a 5-day suspension to removal. The aggravated range is removal. Management cited the table which states that for second and/or successive offenses, the penalty should generally fall within the aggravated range.

The appellant has argued that B.6 is a broad category which encompasses many offenses. Although this may be correct, it does not prevent management from determining that removal is the appropriate remedy. The appellant's conduct on the date in question happened in front of passengers and other TSA employees. Management does have the responsibility to protect all of

its employees and did so by removing the appellant. The appellant's actions were shown to be threatening. No merit is given to his argument that it was his desire not his intent as the evidence clearly shows that he did in fact threaten physical violence against an STSO. The Board finds that the appellant's actions on the day in question were so egregious that management could in fact use the aggravated range; recognizing that removal is within the recommended and aggravated penalty range.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Lead Transportation Security Officer
*Appellant,*

V.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—17-126

November 22, 2017

***Issue:*** *Failure to Maintain Certification*

**OPINION AND DECISION**

On September 21, 2017, management removed the appellant from her position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Certification.* 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 by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, management bears the burden of establishing that it followed proper TSA protocol by providing proper testing, remediation and retesting, if applicable, for the appellant, with a fair opportunity to demonstrate proficiency.

Management supported the Charge with one specification. The specification alleged that on April 25, 2017, the appellant failed her first attempt to meet the standard for technical proficiency on the On-Screen Alarm Resolution Protocol (OSARP) Annual Assessment (OAA). The appellant was given the opportunity to improve her performance and provided with remediation. On April 26, 2017, the appellant failed to meet the standard for technical proficiency on the OAA for a second time. Again, the appellant was given the opportunity to improve her performance and provided with remediation. On May 8, 2017, the appellant failed to meet the standard for technical proficiency on the OAA for the third time. Again, she was given the opportunity to improve her performance and provided with a fourth attempt at remediation. On June 5, 2017, the appellant failed to meet the standard for technical proficiency on the OAA for the fourth time. Consequently,

she has not met the requirements for technical proficiency as a Transportation Security Officer (TSO) which is required to maintain her certification as an LTSO.

The OSARP/OAA (Annual Assessment) is part of a larger annual proficiency review that TSA administers to all employees who occupy TSO positions. TSA administers the annual proficiency review pursuant to the legal requirements imposed on it by the Aviation and Transportation Security Act (ATSA). ATSA specifically requires that every TSO undergo an annual proficiency review, and that any individual employed as a TSO "may not continue to be employed in that capacity unless the evaluations establish that the individual…demonstrates the current knowledge and skills necessary to effectively perform screening functions." 49 U.S.C. § 44935(f) (5).

The TSA FY 2017 APR User's Guidance sets forth the requirements TSOs must meet to remain certified for employment as a TSO. Section 1.2. of the Guidance provides: To maintain the standards of the annual proficiency review (screening certification) and employment with TSA, employees in the following positions must successfully complete annual recertification requirements on all applicable assessments . . . Transportation Security Officer (TSO); Lead TSO (LTSO); Supervisory TSO (STSO); Master TSO (MTSO) and Expert TSO (ETSO) – Security Training Instructors (STI); and Master TSO (MSTO) and Expert TSO (ETSO) – Behavior Detection Officers (BDO), Lead BDO (LBDO), Supervisory BDO (SBDO) and all TSOs certified in Behavior Detection. Section 4.1.B. provides that employees must successfully complete the required APR assessments related to their official position of record and job function once annually as a condition of employment with TSA. Section 6.2.F. provides that any employee who fails any single scored PSE assessment three times or any other APR assessment four times are subject to removal from TSA. Appendix A, Section (1) (a) of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal of a TSO who fails to maintain certification requirements.

The appellant took the first assessment on April 25, 2017, and failed. The appellant was then tested again on April 26, 2017, and failed. The appellant was tested again on May 8, 2017, and failed her third attempt. After remediation, the appellant was tested again on June 5, 2017, and failed. The appellant was issued a Notice of Proposed Removal (NOPR) on June 12, 2017. The NOPR advised the appellant of her right to make an oral and/or written reply within seven (7) calendar days of her receipt of the proposal. The appellant met with the Deciding Official and gave an oral reply on August 8, 2017. In response to the appellant's oral reply, management obtained documents as part of an investigation into points raised by the appellant. Management provided the documents to the appellant on September 15, 2017, and the appellant provided a response on September 20, 2017. On September 21, 2017, the appellant received the Removal Decision.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgment-OAA forms, dated April 25, 2017, April 26, 2017 and May 14, 2017; APR Supplemental Remediation Record and Acknowledgment – Supplemental form, dated May 1, 2017; EDS/OSARP OJT Checklist, dated June 3, 2017; and a statement from an MSTI, dated June 7, 2017.

On appeal, the appellant argued that corrections were made to her OJT packet after her 4th and final attempt. The appellant alleged that management back tracked to correct the error by introducing an officer/management statement which was also not signed. The appellant also argued that the OJT

checklist shows hours recorded by the OJT monitor on his Regular Days Off (RDOs) on May 16, 2017, and May 23, 2017, and that management failed to provide the names of the other OJT monitors for those dates. The appellant alleges that she was provided insufficient remediation. The appellant argued that all new hires receive 23 hours of OSARP OJT, and that she only received 17.5 hours of remediation. The appellant argued that if the 2017 APR guidance has no requirement for the amount of hours then the APR is vague, ambiguous and not clear and transparent. Additionally, she argued that the OJT checklist is designed for documenting OJT hours as well as OJT monitors, and that this was not done.

Management responded and argued that they investigated the appellant's claim that she did not receive OJT training on May 16 and 23, and addressed this in their decision letter. Management argued that although her OJT monitor was not at work on those days, she had received OSARP OJT training on both days on a CTX 5500 machine in her terminal. Management stated that after providing the appellant with the documentary evidence to prove this, she admitted receiving OJT remediation on both days, although contesting the amount of time attributed to each day. Management argued that in her second reply she alleged that she did not receive the 23 hours of OJT remediation prior to taking her OAA test for the fourth time, much like she argued in her appeal. Management disputed the appellant's argument that she must be provided 23 hours arguing that the APR guidance for remediation prior to a fourth OAA test attempt does not delineate a specified number of hours for the supervised OSARP screening duties. Management argued that all remediation adhered to the guidance found in the 2017 APR, and that prior to taking the fourth test, all requirements were met, thoroughly documented and acknowledged by the appellant herself.

The appellant replied to management and put forth the same arguments in her appeal. Additionally, she argued that she only signed the New Hire Training OSARP OJT checklist after she was forced to immediately cease OSARP OJT remediation and in following the directive put out by the Transportation Security Manager (TSM).

The Board found that in response to the appellant's argument that her OJT monitor was not present on May 16 and 23, 2017, management obtained a statement from her OJT monitor, and provided the appellant with this statement and time to respond to it. Management has not erred in obtaining this statement in response to the appellant's concerns. Management provided documentation to the appellant to show that she did in fact receive training on May 16 and May 23, 2017. There is no requirement that the statement be signed. In regards to the appellant's argument that she did not receive 23 hours of remediation, the Board found that the 2017 APR guidance sets strict guidelines for employees who require a fourth attempt and that there are additional remediation activities required. An employee must be tested no sooner than 10 working days and no later than 15 working days from the date of the third failure. The 2017 APR guidance, sections 6.2.I (e)(1) and 6.2.I (e)(2) set out the remediation steps that must be conducted prior to the fourth and final attempt. It does not state that the remediation training must equal 23 hours. Therefore, there is no merit to the appellant's argument that management failed to properly remediate her. The appellant signed all documents indicating that she received remediation in accordance with the 2017 APR.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the OAA on April 25, 2017, April 26, 2017, May 8, 2017, and June 5, 2017. The Board also found that on April 25, 2017, prior to her first OAA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-OAA form acknowledging that she accepted and participated in self-study, that she received remediation in accordance with the

APR program and policy requirements and that she was ready to take the OAA reassessment. On April 26, 2017, and May 8, 2017, prior to her second OAA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment form acknowledging that she chose to participate in self-study, that she received remediation in accordance with the APR program and policy requirements, and that she was ready to take the OAA reassessment. Prior to the appellant's third reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-OAA 4th Attempt form acknowledging that she chose to participate in self-study, that she received remediation in accordance with the APR program and policy requirements, and that she was ready to take the OAA reassessment. The remediation forms clearly show that the appellant was provided meaningful feedback and that management complied with Section 6.2 of the APR Guidance. The Board finds that the appellant was properly assessed and remediated in accordance with the 2017 APR User's Guidance. The evidence also shows that the appellant was tested in a timely manner consistent with the 2017 APR. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is failure to maintain required certification and certification is a condition of continued employment as a TSO.

Pursuant to the 2017 APR User's Guidance, each employee who conducts screening functions must complete and pass all recertification requirements on all applicable APR assessments in order to meet the basic conditions of employment with TSA. Consequently, the Board finds that the appellant's non-disciplinary removal based on her failure to maintain her certification was appropriate and consistent with TSA policy.

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

FOR THE BOARD:

DEBRA S ENGEL

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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—17-130

November 29, 2017

***Issue:*** *Unavailability for Duty*

## OPINION AND DECISION

On September 25, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Unavailability for Duty*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, the Board must determine whether the Charge, *Unavailability for Duty,* is proven by a preponderance of the evidence.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Unavailability for Duty,* on one specification which alleged that the appellant has been unavailable to perform the duties of her position as a TSO since on or about December 30, 2013, to present due to a work-related injury. The appellant has been in a Leave Without Pay (LWOP) status since February 14, 2014.

On or about December 30, 2013, the appellant filed an Office of Workers' Compensation Programs (OWCP) claim for an on-the-job injury. That claim was approved by the Department of Labor (DOL), OWCP, on April 14, 2014. On May 19, 2017, a Letter of Intent and Duty Status was delivered to the appellant, which notified the appellant that her continued unavailability may result in administrative action including removal. The letter advised the

appellant of the opportunity to submit medical documentation indicating that she was able to return to full duty. On June 5, 2017, the appellant submitted medical documentation requesting a limited duty assignment.

Management supported the Charge with: a letter from the appellant's health care provider, dated May 25, 2017; a letter from the Human Resource Specialist, dated June 21, 2017; Letter of Intent and Duty Status, dated May 19, 2017; and an SF-50, reflecting the appellant's Leave without Pay status.

The appellant received a Notice of Proposed Removal on June 27, 2017. The appellant met with the Deciding Official on July 20, 2017. The appellant was given until August to obtain updated medical information returning her to full duty status. On August 1, 2017, the appellant provided updated medical information which indicated that she was experiencing "buckling and giving way of the left knee and that a new MRI is needed." The letter also indicated that she would not be able to return to full duty until November 2018. On August 7, 2017, the appellant once again met with the Deciding Official and stated that her doctor's note should have read return to full duty on November 1, 2017. The Deciding Official stated that he provided her the opportunity to provide him with updated medical documentation to return to full duty but as of September 25, 2017, he had not received any new documentation indicating that she can perform her full duties.

On appeal, the appellant argued that she had in fact emailed updated medical information and received no response from management. The appellant provided a copy of the updated medical information, dated August 11, 2017. The medical note indicated that the appellant could return to work light duty and set a tentative full duty return date of November 1, 2017.

Management responded and argued that the August 11, 2017, letter repeated the same opinion stated in the August 1, 2017 letter. Management argued that the significance of both letters is that the same orthopedic surgeon merely cleared the appellant to return to an eight hour shift in mid-August 2017, only if she could receive numerous restrictions. These same restrictions were initially proposed in the May 25, 2017 letter. Management argued that throughout all of the medical documentation there has never been a definitive statement by the orthopedic surgeon of a realistic return to full duty other than to give a tentative date of November 1, 2017. Management noted that the appellant was given every opportunity to show that she could return to full duty but unfortunately her medical condition did not allow for such a result.

The Board finds that management's decision to remove the appellant from the TSO position is supported by a preponderance of the evidence; it is clear from the SF50 that the appellant has been and remains unavailable for duty. Additionally, the appellant did not dispute or deny that she has been unavailable for duty. The August 11, 2017 letter provided by the appellant once again provides restrictions on her return to duty and gave a tentative date of return. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary Charge*: Unavailability for Duty.*

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
*Appellant,*

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—17-132

November 30, 2017

***Issue:*** *Unsatisfactory Performance*

## OPINION AND DECISION

On October 4, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration based on the Charge: *Unsatisfactory Performance.* 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 substantial evidence, which is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. It is a lower standard than preponderance of the evidence.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Unsatisfactory Performance*, on one specification. The specification alleged that the appellant's performance during FY 17 rating period in the Core Competency: Critical Thinking, has been determined to be unacceptable. The appellant failed to successfully complete the required activities and/or the level of minimum performance outlined in the Performance Improvement Plan (PIP).

As background, the appellant signed her Transportation Officer Performance System (TOPS) Performance Plan for FY 17 on October 5, 2016. She was provided a mid-year review on

August 7, 2017, and informed that her critical thinking TOPS ratings was a 1. On August 16, 2017, the appellant was placed on a PIP for 60 days due to her unacceptable performance. On September 7, 2017, the appellant's PIP was cut short due to numerous examples of poor performance that she displayed over only a 23-day period. Management determined that the appellant's performance would not reach an acceptable level by the end of the 60-day period. The appellant was issued a Notice of Proposed Removal (NOPR) on September 11, 2017. The NOPR cited nine examples of poor performance, the majority of which occurred within the first day and/or week that the PIP was issued. The appellant was issued a Notice of Decision on October 4, 2017, removing her for unacceptable performance.

On appeal, the appellant argued that the early termination of the PIP violated the Collective Bargaining Agreement (CBA) and that management did not prove by substantial evidence that she would not be able to improve her performance by the conclusion of the improvement period. Article 1(L)(7)(d) of the CBA states that PIPs issued to bargaining unit employees will contain "a statement that the bargaining unit employee will be given a minimum of sixty (60) calendar days to demonstrate improvement in performance." The appellant argued that the CBA does not contain any language or any circumstances that would permit management to terminate a PIP within the required 60-day minimum period. The appellant acknowledged that the PIP cited that an error that could result in death, injury or a breach of security could lead to removal. The appellant argued that while these may amount to actionable circumstances after the conclusion of the 60-day period; any attempt to rely on this language to terminate a PIP before the conclusion of the minimum number of days is contrary to the CBA and must not be permitted. The appellant went on to argue that even if the Board believes that this deviation from the CBA is permissible, none of the circumstances cited above arose in her case. Additionally, the appellant argued that management failed to discuss how it determined that 23 days was sufficient time to ascertain her performance. She stated that during those 23 days, she was not provided with on-the-job feedback of corrections in keeping with the purpose of the PIP. The appellant also argued that more than half of the examples cited by management occurred the day of or after the PIP was issued and that it is unreasonable to expect an employee to display an instant perfection of their duties upon the issuance of PIP. The appellant argued that some of the examples cited were not poor performance. The appellant argued that management seems to have characterized the timeline of the events of week two in such a way that they appear to show regression, when in fact, they demonstrate that she recognized her errors and improved them during the meeting. No further examples of poor performance were reported following week two of the PIP, even though it was not terminated until September 7, 2017.

Management replied and argued that had they allowed the PIP to continue and the employee would have had zero performance errors for the last 37 days of the PIP, she still would have failed the PIP. Management argued that the last 37 days of the PIP would have only served to prolong an unavoidable conclusion - that the appellant was unfit to continue in her security position. Management argued that the appellant engaged in two critical errors during the PIP that could have resulted in security breaches, as well as another three instances of failure to follow SOP. Therefore, due to the extreme security vulnerability, the PIP was ended early. In addition, management argued that the reasons for ending the appellant's PIP early were not arbitrary and were explained in the PIP close out letter. Additionally, management notes that contrary to the appellant's assertion, her mentor and on-the-job training (OJT) monitors provided

a great deal of feedback both verbally and by advising their supervisor of any shortcomings they noticed in writing. Management argued that three meetings were held with the appellant within the 23 days to assure that she was instructed properly on the expectations and requirements and her progress, or lack thereof, was reviewed and discussed.

The Board found that after notifying the appellant of her poor performance in the Core Competency 2: Critical Thinking, management placed the appellant on a PIP on August 16, 2017. The PIP indicated that the improvement period began on August 16, 2017, and would continue for 60 days, ending on October 16, 2017 (unless there are unforeseen circumstances). The PIP states, "In addition, if you have a single error of performance that could result in death, injury, or a breach of security, you must be aware that the PIP may end, and administrative action may be initiated." On September 7, 2017, the appellant was notified that management was closing out her PIP. Management stated "I have evaluated your performance on the specified critical element and I find that you have not improved your performance to meet the 'Achieved Expectations' level, nor have you demonstrated that you will you [sic] within the 60-day period. Therefore, I have decided to terminate your PIP immediately." Article 1(L)(7)(d) of the CBA states that PIPs issued to bargaining unit employees will contain "a statement that the bargaining unit employee will be given a minimum of sixty (60) calendar days to demonstrate improvement in performance." A 60-day requirement is in place to insure that employees have a meaningful opportunity to improve. The appellant is correct that a 60-day PIP is required. However, language agreed to by both parties in the PIP states that "...if you have a single error of performance that could result in death, injury, or a breach of security, you must be aware that the PIP may end, and administrative action may be initiated." Therefore, a PIP can in fact be terminated prior to the 60-day period if any of the actions cited above occurred.

Management did not end the appellant's PIP because of a single error of performance that could result in a breach of security. Rather, management ended the appellant after 23 days stating that "I have evaluated your performance on the specified critical element and I find that you have not improved your performance to meet the 'Achieved Expectations' level, nor have you demonstrated that you will you [sic] within the 60-day period." The appellant's PIP was not terminated because of incidents involving potential security breaches. There is no mention in the close-out letter of potential security breaches. The Deciding Official also failed to mention that the appellant's PIP was cut short due to a violation of the PIP. Rather, he stated that the PIP was cut short due to the numerous examples of poor performance the appellant displayed over a 23-day period. The majority of the appellant's deficiencies cited occurred within the first week of the PIP. Management erred by concluding that even if she had zero performance errors for the last 37 days of the PIP, she still would have failed. This was speculation on the part of management. Management failed to provide the appellant a meaningful opportunity to improve her performance. Therefore, the Charge, *Unsatisfactory Performance*, is NOT SUSTAINED.

Decision. The appeal is, therefore, GRANTED. The appellant is ordered reinstated to her position as a Transportation Security Officer. Further, the appellant will receive back pay from the date of her 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—17-129

November 29, 2017

***Issue:*** *Failure to Follow SOP*

## OPINION AND DECISION

On September 5, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration 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 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.

Management supported the Charge with one specification. The specification alleged that on May 5, 2017, the appellant was on duty as a TSO working the x-ray position at the airport. At approximately 1358 hours, while he was performing x-ray screening of a passenger's carry-on luggage, he failed to follow the SOP. Specifically, he "annotated" a bag (that is identified and specified a location of the threat) identifying a potential prohibited item. The appellant failed to "pull" the annotated bag for additional screening as required for the x-ray operators; and he did not confer and concur with the Lead Transportation Security Officer, regarding the annotated bag for search as required for x-ray operators. Thus, he failed to follow Checkpoint Standard Operating Procedure, Chapter 11, section 2.C. The appellant's failure to follow SOP resulted in

a passenger retrieving a bag with a prohibited item inside (a corkscrew with a knife) and proceeded into the sterile area.

The Deciding Official found the Charge supported by a preponderance of the evidence and sustained the Charge. However, he then went on to state "[I] find the statement 'You did not confer and concur with the [LTSO], regarding the annotated bag for search' to be descriptive of your actions as it relates to the security incident and demonstrative of your unwillingness to demonstrate care in the performance of your duties, as 'confer and concur' is a best practice established at [name of the airport) to minimize the risk of security incidents, and not necessarily a failure to follow Standard Operating Procedures. As such, I am considering it removed from the specification and am not considering it in my decision."

The Board found that by removing a portion of the specification, the Deciding Official modified the specification. The appellant was not provided the opportunity to respond to the new specification and thus, he was deprived of his due process rights. The Board finds that not providing the appellant the opportunity to respond was a harmful error. Therefore, the Board did not uphold management's decision to remove the appellant.

Decision. Accordingly, the appeal is GRANTED. The appellant is ordered reinstated to his position as a Transportation Security Officer, and returned to duty subject to meeting TSA employment standards. Further, the appellant will receive back pay from the effective 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--17-108

November 22, 2017

***Issue**: Jurisdiction*

**DECISION ON RECONSIDERATION**

On August 3, 2017, the appellant was removed from Federal Service during his Trial Period. On September 2, 2017, the appellant's representative filed an appeal before the Office of Professional Responsibility Appellate Board (Board). The Board dismissed the appeal on October 3, 2017. TSA Management Directive 1100.31-2, *Trail Periods*, states that an employee who is terminated during his or her basic trail period does not have appeal, grievance, or peer review rights with regard to termination. The Board noted that "[T]he preponderance of evidence indicates that the appellant was subject to a two-year trial period pursuant to Section 6.A (2) of the MD, and was still serving in his two-year trial period at the time of his termination. The appellant provided no proof that the qualified for a veteran's preference and the evidence shows that he did not serve more than 180 consecutive days. On November 7, 2017, the appellant's representative filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.*

The Handbook to TSA Management Directive 1100.77-1, *OPR Appellate Board*, Section I, states "A Request for Reconsideration must be filed with the Board within 14 days of receipt of the Decisions. Accordingly, the request for reconsideration is DENIED.

FOR THE BOARD:

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Supervisory Transportation Security Officer
*Appellant,*

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—17-109

November 16, 2017

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

**DECISION ON RECONSIDERATION**

On October 16, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding management's decision to demote the appellant to a Lead Transportation Security Officer. On October 17, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On October 25, 2017, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—17-111

November 7, 2017

***Issue:*** *Lack of Candor; Inappropriate Conduct*

## OPINION AND DECISION

On August 31, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the charges: *Lack of Candor and Inappropriate Conduct*. The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Lack of Candor*, on one specification. The specification alleged that during an official TSA Administrative Inquiry on June 14, 2017, while under oath, the appellant told the Inquiry Officer that he gave TSA employees neck and back massages, which contradicts the appellant's written statement dated June 22, 2017, wherein he claimed that he has never given a TSA employee a back massage.

Management based the Charge, *Inappropriate Conduct*, on three specifications. Specification 1 alleged that on or around August 2016, the appellant placed his hand on a Lead Transportation Security Officer's (LTSO) shoulder and upper back. The appellant's actions made the LTSO

feel uncomfortable as she had previously asked him not to touch her. Specification 2 alleged that on or around February 2017, the appellant placed his hand on the LTSO's shoulder and upper back. The appellant's actions made the LTSO cringe and feel uncomfortable as she had previously asked him not to touch her. Specification 3 alleged that on March 20, 2017, the appellant placed his hand or attempted to place his hand on the LTSO's shoulder and upper back. The appellant's actions made the LTSO feel uncomfortable as she previously asked him not to touch her.

Management alleged that the appellant's conduct violated TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct,* Handbook, Section F: Providing statements and/or Testimony, which requires employees to cooperate fully with all TSA and DHS investigations and inquiries. This includes the requirement to provide truthful, accurate, and complete information in response to questions. In addition, management alleged that the appellant's conduct violated TSA Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5.D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal government or TSA, and 5.D (3) for exercising courtesy and tact (whether on or off duty) in dealing with fellow workers and supervisors, and to create a productive and hospitable model work environment. Section 6.A. provides that TSA employees must comply with all standards, responsibilities, and code of conduct.

Sometime in August 2016, February 2017, and on March 20, 2017, the appellant inappropriately touched an LTSO. An Administrative inquiry was conducted into the allegations. During the inquiry, the appellant told the inquiry officer that he had given TSA employees back massages. The appellant then provided a written statement in which he said that he has never given any TSA Officers, male or female, a back massage. He went on to state that he has assisted some other Officers of both genders to relieve their pain with hand, neck or shoulders, as he knew techniques that were proven to relieve such symptoms.

The LTSO provided a sworn statement in which she indicated that in July 2016, after the new shift bid, the appellant came up behind her and placed his hand on her left shoulder and upper back and asked how she was doing. She stated that she visibly cringed from his touch to which he asked if everything was ok. The LTSO stated that in order to avoid a confrontation, she told him that her back hurt and to please not touch her. She stated that he told her that he was skilled at giving back massages and had done so for other female co-workers in the past. The LTSO said no and to please not touch her. Approximately one month later, the appellant touched her again without her permission. She stated that he placed his hand on her shoulder and upper back and felt uncomfortable confronting him about it, so said nothing. She stated that after that she went out of her way to always have either a piece of equipment or another person between the appellant and herself.

Sometime in February 2017, the appellant was in baggage discussing the AM shift events with the Supervisory Transportation Security Officer (STSO). The LTSO stated that the appellant was clocking out and instead of leaving came up behind her again and placed his hand on her left shoulder and upper back; stating have a great day. She stated that she visibly cringed and that the STSO saw her reaction. The STSO provided a statement and indicated that on February 21, 2017, he saw the appellant reach to pat the LTSO on the back and at the same time, he saw her arch and roll her back. He stated that the look on the LTSO's face was a look of a person that did not welcome this gesture.

The LTSO stated that on March 20, 2017, the appellant placed his hand on her left shoulder and upper back area and that she stated firmly to please not touch her again. She stated that the appellant apologized and walked away.

The appellant provided a statement and said that he has had three incidents with the LTSO. On the first incident, which occurred years ago, he said that the LTSO spun around and stated in an aggressive way, "Don't ever walk up behind me." He said that he was four feet away from her and reported the incident to his STSO. He stated that the second incident occurred about two years ago when he was reading some work literature and noticed the LTSO backing up into him and he reached out and contacted her shoulder so that she would not step on him. He indicated that he put his hand up in defense as not to have contact with her and his hand touched her shoulder as she backed up. He stated that she turned around and said, "Don't ever touch me!" and he responded that she was backing up towards him. The appellant stated that the last incident was much like the second and that the LTSO was in his personal space and he put his arm up, elbow bent, and open hand as he contacted the top of her shoulder for less than a second. He said that this happened approximately April 2017. He stated that the LTSO said "I've told you not to touch me." The appellant stated that the LTSO seemed to intentionally create a situation that required his defense and then redirected blame on him for the brief contact. He also stated that he had forgotten that two years earlier she had told him not to touch her.

The appellant was issued a Notice of Proposed Removal (NOPR) on August 3, 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 responded in writing on August 25, 2017.

Management included as evidence: a memorandum from a Transportation Security Manager (TSM); No contact order, dated May 24, 2017; and an Informal Administrative Inquiry Report, dated June 22, 2017.

On appeal, the appellant stated his due process rights were violated because the Assistant Federal Security Director (AFSD), who was the Deciding Official, and a Senior Transportation Security Manager (STSM) were named parties in an ongoing Equal Employment Opportunity (EEO) complaint, and that this requires rescission of the removal. The appellant stated that the AFSD in a telephone call to the STSM stated that he has a conflict and must recuse himself. The AFSD addressed this complaint in the Decision notice. He stated that he recommended to the STSM that she recuse herself to ensure that there would be no perception of retribution. He further stated "I have no conflict of interest in this case nor have I stated I have one. I was interviewed as a witness by the A/I Official during her investigation and required to provide a witness statement." The Board gave no merit to the appellant's argument regarding due process violations. There is no evidence that the STSM was involved in the decision making process nor any evidence to show that the AFSD had a conflict of interest and could not serve as the Deciding Official. Under TSA MD 1100.77-1, *Office of Professional Responsibility Appellate Board*, the Board is not authorized to review and decide allegations of discrimination and harassment based on retaliation.

The appellant also argued that management improperly used a Letter of Reprimand issued on September 2, 2004, for unprofessional conduct, in deciding the likelihood that he committed the alleged misconduct. The appellant was able to show that the 2004 LOR was removed in October

2005, following a request by the AFSD. The appellant further claimed that the Notice of Proposed Removal did not attach the 2004 LOR nor his grievance to the LOR. Management responded in their reply and argued that the LOR was not used as evidence of character or propensity, but to determine whether the violation was repeated, the same, or similar to any conduct matters. Management's claim that the appellant should still have a copy of his 2004 LOR is disingenuous. Although the LOR can be used to establish that the appellant was placed on notice, management's failure to provide the appellant with the LOR prevents management from using the LOR for purposes of proving the charge was a repeated violation or similar to any conduct matters. In order to use the LOR against the appellant, management was required to provide a copy of the LOR. Management clearly considered the LOR in making their determination as to Charge 1, *Lack of Candor.* Use of the LOR without providing it to the appellant is a violation of policy. Therefore, the LOR issued to the appellant will not be considered by the Board in relation to any charges before the Board.

On appeal, as to Charge 1, the appellant argued that management focused on his rescission of one term to judge his statements as unethically inconsistent and thus failed to correctly evaluate the consistent message that he conveyed. That message was that he was willing to help his colleagues with pain relief when they brought it to his attention and he was not offering to massage female colleagues in a manner that conveyed sexual interest. The appellant stated that he uses "Myotherapy" and there is a difference between a generic term like massage and myotherapy techniques. As to Charge 2, the appellant argued that management relied upon completely erroneous descriptions of the incidents in question. The appellant argued that the only witness to one of the incidents did not see the appellant actually touch the LTSO. The appellant attached a statement from what appeared to be a former TSA employee. This statement described the LTSO snapping at him, thus the appellant alleged corroborated the LTSO's inappropriate reaction to inadvertent touching. The appellant stated that after learning that the LTSO had a strong aversion to any kind of touch, he would put his hands up, palms outward, in an "I'm acting innocently" gesture that is common in society. He argued that this accounts for why his hands would be raised at the LTSO's shoulder area whenever they were in close quarters and as to why the LTSO was likely to make extreme facial expressions when in close quarters with colleagues.

Management replied and argued that the appellant is attempting to convince the Board that Charge 1 is based on the omission of the word "massage." Management argued that the appellant's sworn testimony was inconsistent with his subsequent written statement and that this was a conscious and deliberate attempt to dodge responsibility for engaging in aberrant behavior on duty. Management argued that whether it is considered or called massage, or trigger point manipulation, it still achieves or satisfies the appellant's personal need to touch someone. Management argued that taken at face value, the appellant denied ever giving a coworker a massage at work and that this is a misrepresentation that would run afoul of being candid. Management asserted that the appellant told the LTSO that he was really skilled at giving back massages and had done so for other female coworkers in the past. Additionally, management argued that the issue is whether he has ever given other employees neck and back massages, or trigger point therapy, thereby broadening the field of inquiry. Management also argued that the appellant had good reason to be careful answering the questions because he was complicit and was hyper-focused on avoiding the use of the term massage, because he associated it with sex, and more likely than not, that would make the case against him.

With respect to Charge 1, the Board finds management's conclusion that the issue is whether the appellant has ever given other employees neck and back massages so that they could broaden the field of inquiry to be incorrect. At any time, management had the right to conduct further fact finding and broaden the scope of their inquiry. The issue before the Board is whether the appellant lacked candor when his statement failed to state the word "massage." Although the oral testimony provided may be contradictory to the appellant's written statement; this is not enough to sustain a charge of Lack of Candor. The appellant did not deny touching other employees; he simply did not use the word "massage." The appellant states that he has "assisted some other Officers of both genders to relieve their pain with hand, neck or shoulders…" The Board cannot find a nefarious intent behind the omission of the word "massage" since the appellant freely admits to touching other employees. Therefore, the Charge, *Lack of Candor*, is NOT SUSTAINED.

With respect to Charge 2, the statements provided by the LTSO provided detailed information concerning each incident. Contrary to the appellant's assertion, the STSO stated that the appellant attempted to pat the LTSO on the back. The STSO stated "I did see [the appellant] reach out to pat the [the LTSO] on the back at the same time I saw [the LTSO] arch and roll her back, I am not sure that he touched her, he might have or might not have but at the same time he was reaching to pat her she ached [sic] and rolled her back in the opposition direction and at the angle I was at I could not really tell if he touched her or not but he did motion like he was going to pat her on the back." This statement corroborates the statement of the LTSO and provides credibility to all of her statements. The appellant admitted in his statement that he "had forgotten about two years earlier she had told me not to touch her." The Board finds no merit to the appellant's assertion that he put his hands up in defense and touched her as she was backing up. The Board also finds no merit to the appellant's argument that another employee was "snapped at" by the LTSO. Therefore, all specifications are SUSTAINED and Charge 2, *Inappropriate Conduct*, is SUSTAINED.

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

On appeal, the appellant argued his removal was not reasonable. The appellant alleged that management failed to adequately consider the mitigating factors and surrounding circumstances that compel a mitigated penalty. The appellant discussed the penalty factors which he felt mitigated the removal. In addition, the appellant argued that management failed to abide by its policy of progressive discipline and that his removal does not promote the efficiency of the service.

Management responded and stated that both the Proposing and Deciding Officials took into consideration TSA's Table of Penalties and the discussion was outlined in their analysis in their respective letters to the appellant. Management stated that the determination of removal was appropriate and was not an abuse of the decision authority's discretion in deciding the penalty. Management also argued that the efficiency of the service was served by the appellant's removal from the work environment as it has fostered a more hospitable working environment.

The Deciding Official considered the seriousness of the appellant's misconduct and its relationship to his position; the effect of the appellant's conduct on management's confidence in his ability to perform his assigned duties; whether the appellant's conduct was notorious; the appellant's work and disciplinary history; the Table of Offenses and Penalties; and any mitigating circumstances.

The Deciding Official considered the appellant's prior disciplinary conduct as aggravating. On October 14, 2016, the appellant received an eleven (11) day suspension for Inappropriate Conduct for referring to an STSM as a "bitch." On November 15, 2012, the appellant was issued a five (5) day suspension for Inappropriate Conduct, Failure to Exercise Courtesy and Tact, and Failure to Follow TSA Policy for handing out his business card to a passenger after completing a bag search, telling a female TSO to mind her business then mouthing "shut up" and having his personal cell phone displayed on his hip. On July 29, 2009, the appellant received a three (3) day suspension for misconduct when while on duty he showed an STSO a picture of an overweight naked man on his cell phone. The Deciding Official also considered the appellant's corrective actions: an Interest Based Conversation (IBC) for attendance on April 20, 2016 and an LOR in 2004 for Unprofessional Conduct. Although the 2004 LOR could not be used to prove prior similar misconduct for purposes of the charges, it can in fact be considered solely for the purpose that it placed the appellant on notice that future misconduct may result in discipline up to and including removal from federal service.

As mitigating factors, the Deciding Official considered the appellant's satisfactory job performance, and that he has been employed with TSA since 2002. The Deciding Official stated that the seriousness of the appellant's misconduct outweighs any mitigating factors. The Deciding Official also noted that he would have removed the appellant solely for the Charge, *Inappropriate Conduct*.

Under Section B.5 of the Table, the recommended penalty range for Inappropriate Conduct, is an LOR to a 5-day suspension and the aggravated penalty range is a 6-day suspension to 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. The appellant acknowledged being told not to touch the LTSO two years ago but failed to heed her request. His actions were inappropriate in the workplace. Given the appellant's previous disciplinary history, management clearly followed progressive discipline and considered the penalty factors in making the determination to remove the appellant from Federal service. The Board finds that management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—17-113

November 21, 2017

***Issue:*** *Medical Disqualification*

## OPINION AND DECISION

On August 16, 2017, management removed the appellant from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on one non-disciplinary Charge, *Not Medically Qualified for the STSO Position.* The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Not Medically Qualified for the STSO Position,* on one specification. The specification alleged that by the Office of Chief Medical Officer (OCMO) letter, dated July 11, 2017, the Medical Review Officer (MRO), reviewed the appellant's medical information and determined that he did not meet the medical guideline requirements for the STSO position.

In a letter dated July 11, 2017, the MRO described the relevant facts of the appellant's serious health condition, in part, he noted that the appellant was being treated for vertigo. The MRO noted that on May 8, 2017, the appellant's medical care provider indicated on form WH-380-E that the appellant was having "dizzy spells, with sense of imbalance, trouble concentration, poor memory, [and] trouble with critical thinking." The MRO also noted that additional information about the appellant's condition, symptoms, and treatment was not provided, despite the OCMO's

request. The MRO stated that in accordance with the *Medical and Psychological Guidelines for Transportation Security Officers (January 22, 2016)* (TSO Medical Guidelines), the documentation provided for the appellant's fitness for duty review does not allow the OCMO to determine that the appellant's condition meets the TSO Medical Guidelines.

On July 14, 2017, the appellant was issued a Notice of Proposed Removal (NOPR). The NOPR advised the appellant of his right to make an oral and/or written reply. On July 19, 2017, the appellant requested an extension to respond to the NOPR. The extension was granted and the appellant submitted a written reply on July 28, 2017. In his reply, the appellant stated that he had an MRI (magnetic resonance imaging) scheduled for August 3, 2017. The appellant did not provide the completed Fitness for Duty Questionnaire or any other medical documentation to warrant a reconsideration by the OCMO decision by the date of the Decision letter.

The Board considered all of the evidence presented including: the OCMO Fitness for Duty Determination letter, dated July 11, 2017; and the *Medical and Psychological Guidelines for Transportation Security Officers*, dated January 22, 2016.

In accordance with TSA Human Capital Management (HCM) Policy 339-2, *Job Search Program for Medically Disqualified Transportation Security Officers Eligible for Reassignment*, dated August 29, 2014, the appellant was issued an options letter explaining that he may be eligible for a reassignment. The appellant did not return the options letter and thereby forfeited his options through the job search program.

On appeal, the appellant argued that the allegations are "completely inaccurate and obfuscate the truth." He argued that he did not refuse to cooperate with the medical inquiry by not providing the medical documentation in a timely fashion; rather he has made and is continuing to make diligent efforts to obtain the necessary documentation. The appellant argued that he provided the Agency with three separate Family and Medical Leave Act (FMLA) certifications relating to his serious health condition and that he is complying with the Veterans Affairs (VA) Clinic's instructions with regard to his treatment. The appellant argued that it was the VA Clinic that determined it could not complete the Agency's requested paperwork until he saw a neurologist and had an MRI. He stated that he saw a neurologist on June 26, 2017, and was awaiting an MRI. He argued that as he stated in his extension request, he is at the mercy of the VA clinic. The appellant cited the definition of the word "refuse" and argued that his words and conduct show diligence and good-faith efforts to comply, not an unwillingness or refusal to cooperate.

The appellant also argued that management engaged in procedural harmful error when it based its decision on charges/evidence that was not included in the NOPR or otherwise provided to him prior to him submitting his written reply; by not proving the charges by a preponderance of the evidence and not considering his factual and legal arguments in defense of his actions; and by determining the existence of a sufficient connection or "nexus" between the charge and the efficiency of the service. He argued that management violated his due process rights because the Agency relied upon inadmissible evidence, i.e. unsworn, unsigned statements containing double and triple hearsay and lacking any indicia of reliability such as date, verification, or corroboration. The appellant also argued that management engaged in prohibited personnel practices in removing him claiming that his removal constitutes discrimination and/or reprisal and that he was improperly

terminated from his position after almost 15 years of service with TSA and approximately 23 years of employment by the Federal government between civil and military service.

Management responded and argued that the appellant was not charged with failing to cooperate with the medical inquiry. Management argued that the statement in the specification regarding his failure to provide requested medical documentation came straight from the July 11, 2017, letter from the MRO. Management argued that the appellant was given ample time to respond to the NOPR and to provide medical documentation, noting that an extension was granted until July 28, 2017. Management also noted that the appellant asked the Deciding Official to delay his decision on the NOPR until he had the results of his MRI which he had stated was scheduled to occur on August 3, 2017, but that August 3, 2017, came and went with no contact from the appellant. Management argued that on August 9, 2017, a Human Resources Specialist (HRS) emailed the appellant's representative regarding the results of the MRI and received no response. Management noted that the Deciding Official waited until August 16, 2017, to make his decision, and that at the time, the appellant had neither submitted any additional medical documentation nor contacted the Deciding Official to request additional time. Management argued that therefore, the decision was based on the available evidence which established that the OCMO had determined that the appellant was not medically qualified for the STSO position.

With regard to the appellant's claims that management engaged in procedural harmful errors, management argued that the appellant did not specify what charges/evidence were/was not included in the NOPR. Management stated that they are unaware of any such charges/evidence. Management argued that the appellant's removal is based solely on the charge that the appellant was not medically qualified for the STSO position. Management argued that they provided the appellant with all of the evidence the Deciding Official relied upon in sustaining the charge. Further, with regard to the appellant's claim that management relied upon inadmissible evidence, management argued that the appellant did not specify what evidence management relied upon that was inadmissible. Management argued that the OCMO letter relied upon was dated and signed by the MRO and that nothing about it made it inadmissible.

Management argued that the letter from the OCMO indicating that the MRO had determined that the appellant is not medically qualified for the STSO position is preponderant evidence to establish the Charge, *Not Medically Qualified for the STSO Position.* Management also argued that the appellant provided no medical documentation refuting the MRO's determination.

With regard to the efficiency of the service, management argued that the appellant is not medically qualified for the STSO position and that as set forth in the decision, TSA established medical guidelines for employees in the TSO job series pursuant to the Aviation and Transportation Security Act (ATSA). Management stated that to be in compliance, TSA must ensure that the personnel entrusted with carrying out security procedures and duties meet TSA's medical and physical standards. The appellant is medically unable to perform the duties of his position; that establishes a nexus to the efficiency of the service.

The appellant responded to management's reply and argued that his removal interfered with his rights under FMLA and the Americans with Disabilities Act (ADA). He argued that he was granted leave under FMLA through August 30, 2017, with a retroactive date of June 23, 2017, and

thus he was on FMLA leave at the time the Agency removed him effective August 17, 2017. The appellant stated that he raised his medical issues through the FMLA request and that his removal is based upon a fitness for duty determination which expressly acknowledges that he may be eligible for reasonable accommodation.

The appellant argued that the fitness for duty determination does not find him unfit for duty but rather alleges that his "refusal to cooperate with a medical inquiry by not providing requested medical documentation in a timely fashion" does not allow the Agency to determine that he meets the conditions of the TSO Medical Guidelines. He argued that the letter states that he is "temporarily not medically qualified" or "not medically qualified for full and unrestricted duty" and that he "may be eligible for light duty" and/or "reasonable accommodation," among other things. He argued that he did not refuse to cooperate but rather was diligent in his efforts to obtain the necessary documentation. The appellant argued that in addition to providing the Agency with FMLA documentation certifying his serious health condition, he complied with the VA Clinic's instructions with regard to his treatment. He argued that it was the VA Clinic that determined it could not complete the Agency's requested paperwork until he saw a neurologist and had an MRI.

The appellant's argument regarding his FMLA status is immaterial; the MRO reviewed and considered the appellant's Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) (WH-380-E), dated May 8, 2017, when making his determination. The appellant was sent a Request for Medical Documentation and Fitness for Duty Questionnaire on May 30, 2017, and failed to provide the requested documentation. After receiving the NOPR, the appellant stated that he had an MRI scheduled for August 3, 2017. The appellant did not provide updated medical documentation after August 3, 2017, and the Deciding Official waited until August 16, 2017, to issue a Decision. The Board found that the appellant was given every opportunity to provide the requested medical documentation, yet failed to do so. The MRO's determination was made based on the documentation that was available and management's decision is based on the MRO's Determination. In the Fitness for Duty Determination, dated July 11, 2017, the MRO determined that "in accordance with the *Medical and Psychological Guidelines for Transportation Security Officer (January 22, 2016)* (TSO Medical Guidelines), the documentation provided for this fitness for duty review does not allow the Office of the Chief Medical Officer to determine that [the appellant's] condition meets the TSO Medical Guidelines due to refusal to cooperate with a medical inquiry by not providing requested medical documentation in a timely fashion. Therefore, [the appellant] is not medically qualified to perform the full and unrestricted duties of an STSO as required by the Aviation and Transportation Security Act." The Board found that preponderant evidence supports management's conclusion that the appellant does not meet the medical guidelines and is disqualified from the STSO position, according to the applicable TSA medical guidelines.

Therefore, the Board upholds management's decision to remove the appellant based on the non-disciplinary charge of *Not Medically Qualified for the STSO Position.*

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Lead Transportation Security Officer
*Appellant,*

V.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—17-118

November 6, 2017

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

**OPINION AND DECISION**

On August 22, 2017, management removed the appellant from his position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on two Charges, *Failure to Follow Standard Operating Procedures (SOP)* and *Inattention to Duty*. 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 Charge 1, *Failure to Follow Standard Operating Procedures (SOP)*, on two specifications. Specification 1 alleged that on April 29, 2017, while stationed to operate the Advanced Imaging Technology (AIT) on Lane 4-5, for the period covering approximately 0515 to 0528, the appellant failed to provide eight passengers with advisements on the requirement of a pat down due to an alarm needing to be resolved. Further, the appellant failed to conduct proper pat down procedures in accordance with the SOP.

Specification 2 alleged that on March 15, 2017, while stationed to manage the operations in Pre✓™ Ticket Document Checker (TDC), the appellant failed to rotate a Transportation Security Officer (TSO) to a new position every 30 minutes, leaving him stationed at TDC for approximately two hours from 0931 to 1130.

Management based Charge 2, *Inattention to Duty*, on one specification alleging that on January 25, 2017, while working as the x-ray operator on Lane 11, Closed Circuit Television (CCTV) from the period covering approximately 1048 to 1101 showed the appellant engaged in conversations with four fellow TSOs while bags were being run through the x-ray machine diverting his attention from being fully engaged in the screening of passenger luggage.

With regard to Charge 1, specification 1 management found that the appellant violated Screening Checkpoint SOP, Revision 12, release date January 26, 2017, Chapter 2, Section 3, AIT Alarm Resolutions A. (1), (2), and (3) and Chapter 4 Pat Down, Physical Contact, Sections A, B, C. With regard to specification 2, management found that the appellant violated Screening Policies SOP, Version 1, Chapter 2, Part 3, Chapter 20, Section 2, Implementing Staffing Requirements.

With regard to Charge 2, management found that the appellant's actions violated Screening Checkpoint SOP, Revision 12, Change 1, Chapter 11: X-ray Screening 2: Conduct Screening, Section A: Control of the X-Ray Conveyor Belt, 3.b.

Management also found that the appellant's actions violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5. D., which states that 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: (2) responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials; and (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance.

On April 29, 2017, the appellant was stationed at the AIT. Management alleged that CCTV footage shows that between 0515 and 0528, the appellant failed to provide eight passengers with advisements on the procedures for pat downs required to resolve alarms. Management also alleged that the appellant did not properly conduct pat downs. The appellant submitted a written statement on May 17, 2017, after being shown the CCTV footage by management. The appellant stated, "I witnessed my errors and know better; property or person was cleared, but not per SOP procedures."

On March 15, 2017, the appellant was responsible for managing position rotations at the checkpoint. CCTV footage shows that a TSO was stationed at the TDC for approximately two hours. In a statement dated March 17, 2017, the appellant stated that he inadvertently missed one officer who was checking tickets. The appellant stated, "We were so busy trying to expedite the passengers through, I missed his rotation. It didn't help the fact he didn't say anything about being in the same spot too long."

On January 25, 2017, the appellant began his rotation as the x-ray operator at 1048 hours. CCTV footage shows that between 1050 and 1101 hours, the appellant engaged in conversation with three TSOs and worked on the lane rotation sheet while operating the x-ray. The appellant submitted a written statement on January 29, 2017, in which he stated that he was running the x-ray when the camera viewed him instructing officers. The appellant stated that the belt was in motion at the time of the incident in question; adding, "In my defense, there was nothing coming out of the x-ray." The appellant stated that he understood there was to be no talking while in the x-ray position, but

that several officers tried to engage him in conversation. He stated that no one was distracting him when the bags entered and exited the x-ray tunnel.

The appellant was issued a Notice of Proposed Removal (NOPR) on July 13, 2017. The NOPR advised the appellant of his right to make an oral and/or written reply within seven (7) calendar days of his receipt of the proposal. On July 26, 2017, the appellant met with the Deciding Official and provided an oral and written reply.

Management provided as evidence: Airport Personnel Conduct Memorandum, dated April 3, 2017; Airport Personnel Conduct Memorandum, dated May 10, 2017; Airport Personnel Conduct Memorandum, dated June 23, 2017; statement of the appellant, dated March 17, 2017; statement of the appellant, dated May 17, 2017; and CCTV video from January 25, March 15, and April 29, 2017.

On appeal, the appellant argued that management did not prove the charges by preponderant evidence. With regard to Charge 1, specification 1, the appellant denied that he failed to provide advisements. He stated that when stationed at the AIT machine, he provided all passengers with the same advisements when appropriate. The appellant stated that due to the repetitive nature and volume of passengers that pass through the machine, he rhythmically recites the necessary advisements to passengers when alarms need to be resolved and that because the procedure is so routine, he does not believe he could have missed any advisements. The appellant argued that the CCTV footage does not reflect a failure to provide advisements as the footage does not contain any audio that would enable the viewer to determine the nature of his interactions with the passengers as they exited the AIT machine. He argued that the CCTV also does not show the monitor that alerts the TSOs of any alarm areas and therefore, does not provide evidence that he failed to satisfactorily revolve any alarms. The appellant stated that all alarms were satisfactorily resolved. The appellant also argued that the chapter of the SOP which describes the pat down procedures he is charged with violating, does not mandate that pat downs must be conducted with two hands. The appellant did accept responsibility for the allegations that the pat down was improper and stated that he will use two hands going forward.

With regard to specification 2, the appellant argued that one of his duties as an LTSO required him to direct TSOs to their posts. He argued that his written statement is consistent with the statements provided by the TSOs involved; that they approached him to ask for instructions where they were to be positioned. The appellant stated that he gave them directions, as his duties required, but did not divert his attention from the x-ray machine. The appellant also argued that he directed a TSO to complete the rotation in order to prevent the need for other TSOs to engage him to receive their assignments. He argued that the video shows that the TSO completed the chart as directed and that the appellant stopped the belt many times while the TSOs were at his station. The appellant argued that the video does not demonstrate that his attention was diverted from the screens while the belt was in motion. He stated that there are two monitors above the x-ray machine that display images of the items being x-rayed and argued that the two screens were not clear in the CCTV footage. He argued that the CCTV video may give the appearance that he was looking away when in fact he was looking at a screen that is pointed in the same direction as the camera.

Management responded and argued that the appellant admitted in his written and oral statements to not following the SOP; not providing the required advisements to passengers having to undergo pat downs; failing to rotate an officer after 30 minutes; and holding conversations while operating the

x-ray machine. Management also argued that the CCTV video showed the appellant having conversations while operating the x-ray as well as failing to rotate an officer from his position after 30 minutes, noting that an officer remained stationed as a Ticket Document Checker for approximately two hours. Management acknowledged that the video does not provide sound but argued that the actions and behaviors of the appellant do not show that any advisements were provided to the passengers requiring pat downs. Management argued that the appellant's statements, both oral and written, along with the videos support the charges.

With regard to Charge 1, specification 1, the appellant admitted that he did not perform the pat downs correctly and the CCTV video confirms that. Contrary to management's assertion, the appellant did not admit to not providing the required advisements and denied that he failed to give proper advisements. As the appellant argued, there is no audio on the CCTV footage, however, the Board noted that his interactions with the passengers were not lengthy enough to allow for the appellant to communicate all that is necessary to give a proper advisement per the SOP. The Board determined the appellant's statement and the CCTV footage are preponderant evidence that the appellant failed to follow the SOP. Therefore, specification 1 is SUSTAINED.

With regard to specification 2, the appellant acknowledged that the position rotation was his responsibility and admitted that he failed to rotate an officer from the TDC position after 30 minutes. Therefore, specification 2 is SUSTAINED.

Having sustained specifications 1 and 2, Charge 1, *Failure to Follow Standard Operating Procedures (SOP)*, is SUSTAINED.

With regard to Charge 2, the Board found that the CCTV shows that while the appellant was at the x-ray, several TSOs approached him and engaged him in conversation. At one point, the appellant is shown working on a piece of paper, looking up, pointing and writing. It is clear from the CCTV footage that the appellant was responsible for both managing the position rotation schedule and operating the x-ray in a busy checkpoint environment and there is preponderant evidence that he was, at times, inattentive to his duties as the x-ray operator. Therefore, the Charge, *Inattention to Duty*, is SUSTAINED.

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

On appeal, the appellant argued that removal is an unreasonable penalty for the conduct alleged. He argued that management failed to conduct a *Douglas* factor analysis. With regard to Charge 1, the appellant argued that he disputed any failure to provide passenger advisements and that it was not proven by management so it should not be a factor in a penalty determination. He also argued that although he has taken responsibility for conducting some pat downs with one hand, he is confident that the pat down was effective and that the alarm was cleared. He argued that he did not intend to violate the SOP and corrected the behavior as soon as he became aware of it and that accordingly, management wrongfully assigned severe, aggravating weight to specification 1. With regard to specification 2, the appellant stated that he was extremely busy with a large volume of passengers and requested help from his supervisor. He argued that during this time he was also responsible for

rotating TSOs, bag checks, and other supervisory duties which caused him to inadvertently leave the TSO out of the rotation. The appellant argued that the TSO did not make any effort to report to other officers or him that he had not been rotated. He argued that because he took responsibility for his error and emphasized that it was not intentional, Charge 1, specification 2 is not serious enough to rise to the level of removal.

With regard to Charge 2, the appellant noted that management waited six months to issue the Personnel Conduct Memorandum referencing Charge 2 and allowed him to continue to perform his duties normally. He argued that this demonstrates that management did not believe this was severe enough to warrant disciplinary action, and that it was included in the Decision to compound the charges in order to justify removal. The appellant argued that because the CCTV footage and his statement reflect that he was attentive and engaged while the belt was in motion, and that his only interaction with other TSOs while stationed at the x-ray machine was to assign their rotations in accordance with his duties as LTSO, the nature and seriousness of the offense should be considered mitigating.

The appellant argued that management failed to consider any mitigating factors when assessing the penalty. He stated that he has been an employee of TSA for 12 years, has maintained a satisfactory performance record, and served on the Safety Action Team from 2006-2012. The appellant alleged that management has issued "at least seven Letters of Reprimand" in 2017 for failures to follow SOP that actually resulted in security breaches, some of which included past disciplinary history and argued that his conduct was less serious and did not result in any security breaches.

The appellant also argued that his conduct did not impact the agency's reputation, stating that the passengers who were the subjects of any single-handed pat downs likely believed they received proper pat downs and that passengers are not aware of the length of time a TSO has operated in one position during a shift. He argued that a conversation between the x-ray operator and TSOs inquiring about their assigned posts, if overheard by passengers, is not likely to affect public confidence in TSA as all parties involved were simply trying to perform their duties. The appellant argued that this is supported by the fact that there were no complaints from passengers or members of the public that reflect that any passengers even noticed. He argued that he showed immediate remorse and a strong desire to improve his performance after he was alerted by management. He stated that he has shown dedication in his 12 years of service to the Agency, and has already demonstrated his potential for rehabilitation by altering his behavior immediately upon learning of the alleged errors.

The appellant also argued that management did not follow progressive discipline and failed to abide by TSA's policies for determining reasonableness of the penalty. Additionally, he argued that removal does no promote the efficiency of the service.

Management responded and argued that the penalty was reasonable and appropriate. Management noted that the appellant's prior discipline includes a 10-day suspension for failure to follow SOP and failure to follow procedures and a 1-day suspension for failure to follow SOP. Management argued that the prior suspensions demonstrate management's attempt to correct and address the appellant's behavior, yet there were no changes. Management stated that in accordance with the Table, for second and/or successive offenses, the penalty should generally fall within the aggravated penalty range which may often include removal. Management argued that the appellant has repeated offenses for the same misconduct, making removal reasonable and appropriate.

Management argued that the appellant's appeal provided no new, mitigating, or persuasive evidence which would support a penalty less than termination. Management stated that the Deciding Official carefully considered the relevant penalty determination factors and determined that removal from Federal service was the required action in accordance with TSA policies and procedures.

In determining the penalty, the Deciding Official considered the severity and seriousness of the offense along with maintaining the principle of progressive discipline. The Deciding Official considered that the appellant has been disciplined two times in the last four years, noting that he received a 10-day suspension for failure to follow SOP and failure to follow procedures on November 25, 2016, and a 1-day suspension for failure to follow SOP on June 9, 2015. The Deciding Official considered that the appellant's behavior, demonstrated by his failure to follow the SOP and other agency procedures in 2015 and 2016, is similar to the behavior he demonstrated in the charges outlined in the current matter. He noted that the appellant's past lack of attention and focus is particularly concerning in that they could potentially allow unauthorized items and individuals into the sterile area of the airport. The Deciding Official noted that the appellant's suspension in November 2016, included the appellant's use of his personal cell phone while working on a checkpoint lane and stated that it is indicative of the appellant's willingness to allow himself to become distracted from performing his primary duties of security screening. The Deciding Official considered that the appellant demonstrated similar behavior in January 2017 when, while assigned to the x-ray operator position, he engaged in conversations with other officers that were not directly related to the screening of items in the x-ray. The Deciding Official considered that the appellant has repeatedly failed to follow procedures and has repeatedly failed to properly prioritize his personal behavior while assigned to screening functions on active checkpoint lanes. The Deciding Official found that based on the current charges against the appellant, it is apparent there has been no change in his behavior.

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. Under H.5, which pertains to Inattention to Duty, the recommended penalty range is a Letter of Reprimand (LOR) to 10-day suspension and the aggravated penalty an 11-day suspension to removal. The guidelines of the Table state that examples of aggravating factors include prior disciplinary record; prior warning/advisement not to commit misconduct; and notoriety and impact on reputation of agency. The guidelines also state that for second and/or successive offenses, the penalty should generally fall within the "Aggravated Penalty Range" column, and may often include removal and that in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the "Aggravated Penalty Range" column corresponding to the most serious offense being charged.

The Board agrees that the Deciding Official provided a very brief penalty factor analysis but noted that the Proposing Official addressed further penalty factors in his analysis. The Board found that management did follow progressive discipline, noting that the appellant has had two previous suspensions for similar misconduct since 2015. In light of the appellant's previous suspensions and the fact that the aggravated penalty range for each charge includes removal, management's decision to remove the appellant 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**
**OFFICE OF PROFESSIONAL RESPONSIBILITY**
**APPELLATE BOARD**

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—17-120

November 1, 2017

***Issue:*** *Indefinite Suspension*

## OPINION AND DECISION

On September 25, 2017, management indefinitely suspended the appellant from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on one Charge, *Revocation of Security Clearance*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

> (d) An employee's security clearance has been suspended, denied, or revoked, and a security clearance is a condition of employment or is otherwise required for the employee's position.

Management based the Charge on one specification which alleged that on August 21, 2017, the Chief Security Officer, Personnel Security Section revoked the appellant's Security Clearance and access to classified information. The appellant was advised of the basis for this action by letter dated August 21, 2017. The Notice of Determination to Revoke Access specified that the decision to revoke his access was based upon an evaluation of information concerning his Alcohol Consumption and Criminal Conduct.

The issue before the Board is whether the appellant's placement on indefinite suspension on September 25, 2017, was appropriate under TSA policy. Maintenance of a security clearance is a condition of the appellant's employment. On August 21, 2017, a Notice of Determination to

Revoke Access to Classified Information (NOD) was sent to the appellant. The NOD provided the appellant with 30 days in which to reply to the Chief Security Officer (CSO), Office of Security Services and Assessments, requesting a review of the determination.

Management issued the appellant a Notice of Proposed Indefinite Suspension dated August 29, 2017. The appellant met with management on September 5, 2017, and provided a written response on September 1, 2017.

The Board considered the evidence and arguments submitted by both parties. Management supported the charge with the Job Analysis Tool for Supervisory Transportation Security Officer, 1802-G Band; a Memorandum to the Federal Security Director from the Chief, Personnel Security Section, Services and Assessment Division, dated August 21, 2017; and Notice of Determination to Revoke Access to Classified Information to the appellant from the Chief, Personnel Security Section, Security Services and Assessments Division, dated August 21, 2017.

In his appeal, the appellant stated that he notified management right after the driving violation and received an eight (8) day suspension and was surprised that nine (9) months after the fact, he received a letter from Personnel Security (PerSec). The appellant stated that his prior driving violations were more than 25 years ago and that he has appealed this revocation to PerSec. Additionally, the appellant argued that he has been with TSA for almost 15 years of service and that his work performance, attendance, participation, reviews and loyalty to TSA have always been excellent.

Management responded and argued that the Deciding Official properly considered all the evidence, applicable policies and penalty factors before making his decision to place the appellant on Indefinite Suspension. Management argued that the appellant is required to maintain a security clearance and that the determination that he is no longer qualified to hold a security clearance is solely within PerSec's authority.

Management cited TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section I. (1) (d) which states in part that an employee may be placed on indefinite suspension when an employee's security clearance has been suspended, denied, or revoked, and a security clearance is a condition of employment or otherwise required for the position.

As to the Charge, management must prove that the appellant's security clearance has been suspended, denied, or revoked, and that a security clearance is a condition of employment or is otherwise required for the employee's position. Management has shown by memorandum dated August 21, 2017, that the Federal Security Director (FSD) was notified by the Chief of the Personnel Security Section, Security Services and Assessments Division, that the Personnel Security Section made the determination to revoke the appellant's access to classified information granted on September 9, 2011. The memorandum advised that the determination to revoke access to classified information is based on potentially disqualifying information concerning the appellant's alcohol consumption, and criminal conduct. Therefore, the Charge and its associated specification are SUSTAINED.

The Board finds that the evidence indicates that the appellant's access to classified information has been revoked and that access to classified information is required for the appellant's position as an STSO. The Board finds that management's decision to place the appellant on an indefinite

suspension was appropriate and consistent with TSA policy and promotes the efficiency of the service.

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

FOR THE BOARD:

DEBRA S ENGEL

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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—17-121

November 14, 2017

***Issue:*** *Illegal Drug Possession*

## OPINION AND DECISION

On September 6, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Illegal Drug Possession*. 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, *Illegal Drug Possession*, on one specification alleging that on September 4, 2017, at approximately 0224 hours, the appellant was arrested by a local Police Officer and charged with misdemeanor possession of marijuana, in violation of State Statute.

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.

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 September 5, 2017, airport management received a report from the local Police Department indicating that at approximately 0224 hours on September 4, 2017, a Police Officer conducted a traffic stop after observing the appellant starting to travel south bound on north bound lanes of an Interstate Highway, his front bumper scraping the sidewalk and his passenger side front tire going up onto the sidewalk. During the traffic stop, field sobriety tests indicated the appellant was impaired by alcohol. The Police Officer noticed an odor of marijuana coming from the appellant's vehicle and a search of the center console of the appellant's vehicle resulted in the discovery of a bottle of liquor and a small clear plastic bag containing approximately 1.5 grams of marijuana. The appellant was arrested and charged with Driving While Intoxicated (DWI), Open Container Violation, and Simple Possession Schedule IV (possession of marijuana).

Management met with the appellant for a pre-decisional discussion on September 6, 2017. The appellant was given the opportunity to reply orally and/or in writing. The appellant submitted a written response.

Management provided as evidence: Police Department Incident/Investigation Report and a written statement from the appellant, dated September 6, 2017.

On appeal, the appellant argued that management failed to provide him with the pre-decisional discussion required by policy; specifically, that management never discussed the incident or allegation and advised him of the possible consequences prior to deciding the action. The appellant argued that when he arrived to what he believed would be a pre-decisional discussion, the Assistant Federal Security Director (AFSD) met with him and his representative and informed them that they could provide a written statement. The appellant stated that he left to type a statement in a nearby computer room and that once he submitted it to the AFSD, she simply took the statement and left him and his representative waiting once more outside her office. The appellant alleged that no discussion took place and that the next time the AFSD saw him was when she handed him the Notice of Removal. He argued that management's actions were insufficient because they did not discuss the incident or allegation with him and instead only referenced the potential consequences of the pending criminal charges. The appellant argued that by not discussing the incident or allegation and by not informing him of the specific charge and employment consequences that he faced, management violated his right to a pre-decisional discussion and interfered with his right to effectively respond to any allegation made against him.

The appellant also argued that management failed to prove by substantial evidence that he possessed the marijuana found in his car. He argued that while the arresting officer may have believed there was probable cause to charge him with possession of the marijuana, Merit Systems Protection Board (MSPB) case law states that it takes more than the mere fact of an arrest to establish probable cause. The appellant argued that he did not have actual possession of the small bag of marijuana because the bag was in the center console of the vehicle, not on his person, and

that therefore, management cannot show actual possession and must prove that he had constructive possession of the marijuana. The appellant referenced several cases that he alleged were relevant to his current case.

The appellant stated that despite admitting to drinking some alcohol, he "adamantly and immediately" denied having or using marijuana and requested to be drug tested. He stated that he again requested to be drug tested when he gave his statement to the AFSD on September 6, 2017. The appellant argued that the fact that he does not use marijuana and was eager to prove it makes it significantly less likely that he would choose to possess marijuana.

Management replied and noted that the appellant did not dispute that he was driving on the night in question, that the car belonged to him, or that after the Officer discovered marijuana in the center console of the car. Management also noted that while the appellant argued that somebody else must have put the marijuana in the center console without his knowledge, it was the appellant – not a passenger – who was charged with possession.

With regard to the cases the appellant cited to support his assertion that he had neither actual or constructive possession of a controlled substance, management argued that the cases are not the same as his case. Management argued that the undisputed facts of the case include that the appellant owned the car in which the drugs were located; that the car was within the appellant's control at the time the drugs were discovered in it; and that the smell of marijuana in the appellant's car was strong enough that a police officer standing outside of the car could smell it even though a "very strong odor" of alcohol was present. Additionally, the appellant was in the car at the time the officer detected the smell of marijuana and never disputed the odor was present; the smell of marijuana was strong enough that the officer articulated probable cause to search the vehicle; the drugs were in the center console directly beside and within inches of the appellant inside the small storage compartment under his armrest; the appellant's open liquor bottle was stored in the center console along with the drugs; the appellant admitted to drinking liquor and was also charged with DWI and having an open container; and only the appellant was charged with possession.

Management argued that while it is possible that another individual put the marijuana in the center console without the appellant's knowledge – that mere possibility does not negate the Charge. Management argued that there is substantial evidence that the appellant possessed the marijuana being stored in the same small compartment as the open bottle of liquor. Management further argued that it cannot be concluded that the evidence is anything less than substantial considering that the appellant failed the field sobriety test and admitted that he drank liquor prior to driving the wrong way on the highway and onto a sidewalk before being pulled over. Management highlighted the fact that the smell of marijuana emanating from the appellant's car at the time he was in it and controlling it was quite obviously strong enough to the Officer standing outside of the car that the Officer used it as a basis to search the vehicle. Management also argued that the appellant's repeated offers to take a drug test are not dispositive because he is not charged with use of illegal drugs, he is charged with possession.

With regard to the appellant's argument that management failed to properly conduct a pre-decisional discussion, management argued that the meeting with the appellant and his representative on September 6, 2017, was conducted as required by policy. Management argued that all of the charges were read to the appellant directly from the arrest report and that the appellant was informed that some administrative action may be taken as a result of the alleged misconduct.

Management stated that the appellant was provided with a copy of the arrest report during the meeting and that he had ample opportunity to ask questions and provide information. Management noted that the appellant's representative appeared surprised about the existence of the drug charge and that the representative was granted time to confer with the appellant and provide a written response. Management stated that a room, a computer and ample opportunity was provided for the appellant to confer and draft a written statement for management's consideration. Management argued that given the details set forth in his statement, the appellant clearly understood the misconduct alleged.

Management further argued that the appellant knew or should have known that his removal was a potential consequence of illegal drug possession as employees are required to review TSA MD 1100.73-5 annually. Management noted that the appellant most recently reviewed the MD on July 27, 2017.

The appellant replied to management's response and maintained the arguments he made in his appeal.

The Board gave no merit to the appellant's argument that management failed to conduct a proper pre-decisional discussion. It is clear that management held a pre-decisional discussion with the appellant and his representative on September 6, 2017, and that the appellant was given an opportunity to provide a written statement. The appellant's written statement, dated September 6, 2017, is in the record and addresses the details of the Charge.

The Board found that the details included in the Incident/Investigation Report from the local Police Department provide substantial evidence to support the Charge. The Police Officer smelled marijuana from outside the appellant's car which gave the Officer probable cause to search the car where he found marijuana in the center console next to the appellant. The marijuana was found in the car that is owned by the appellant and was being driven by the appellant at the time of the traffic stop. The Board gave no merit to the appellant's argument regarding constructive possession. The cases cited by the appellant are in fact different than the fact pattern established by the police report. It is clear that the appellant was in constructive possession of the marijuana found in the center console of his vehicle. Management has met the burden of substantial evidence that the appellant possessed the illegal drugs. Therefore, the Charge, *Illegal Drug Possession*, 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 *Illegal Drug Possession* 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—17-122

November 8, 2017

***Issue:*** *Failure of Random Breath Alcohol Test*

## OPINION AND DECISION

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

ANALYSIS AND FINDINGS

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

The issue before the Board is whether the appellant was properly removed from his TSO position for testing positive for alcohol. Management based the Charge, *Failure of Random Breath Alcohol Test*, on one specification alleging that on August 28, 2017, the appellant was subjected to a random drug and alcohol test pursuant to the TSA Drug and Alcohol Free Workplace Program. The initial result of the blood alcohol test (BAT) reading was 0.027. The confirmation BAT reading was 0.021. A confirmation test result of 0.020 or above requires that an employee be immediately removed from performing security or safety sensitive work.

A pre-decisional meeting was held with the appellant on August 28, 2017. The appellant responded in writing.

Management submitted as evidence: statement of the appellant, dated August 28, 2017; and U.S. Department of Transportation (DOT) Transportation Security Administration Federal Employee Testing Breath Alcohol Testing Form, dated August 28, 2017; and Intoximeter Test Status receipts, dated August 28, 2017.

On appeal, the appellant argued that the decision should be rescinded because the agency obtained an inaccurate reading of his blood alcohol level by not properly performing the breath alcohol test. He stated that he suffers from occasional coughing spells due to a minor, but chronic, health issue resulting, in part, from his battle with lung cancer several years ago. As a result of his condition, he does take cough medicines such as Nyquil and Dayquil, and uses cough drops to soothe his throat. The appellant stated he had a Ricola Lemon Mint cough drop in his mouth at the time of the first reading. He stated that after the initial test, the BAT technician had him remove the mentholated cough drop and wait eighteen minutes and twenty-seven seconds before performing a confirmation test. The appellant argued that the cough drop in his mouth can cause a reading that does not reliably confirm his current blood alcohol level. The appellant argued that research has shown that a mentholated cough drop could cause an even greater risk of a false reading and that this, in combination with the natural alcohol produced by the body, can artificially raise the level of breath alcohol detected in a BAT. The appellant argued that the presence of the medicines, combined with the cough drop, should cause sufficient doubt upon the accuracy of the test readings that were within 0.001 of the agency limit.

The appellant also argued that his removal does not promote the efficiency of the service. The appellant stated that he has worked for TSA for over four years and has always maintained a satisfactory performance level. The appellant provided statements from his supervisors attesting to the fact that he is valuable employee and an asset to the agency.

Management responded and argued that the decision to remove the appellant should be upheld. Management noted that in the written response, the appellant stated "I have not been well for several weeks, aside from having allergies and constant coughing, I have been taking different medicines for the allergies plus codine (sic) and Dayquil for my cough."

U. S. Department of Transportation Order 3910.1D sets out the guidelines for drug and alcohol testing. The Breath Alcohol Technician must meet stringent requirements in order to be qualified to test employees. The process set out in the Order requires the Breath Alcohol Technician to ask the employee if he/she has consumed any food or drink (other than water) or smoked in the past 15 minutes. If the employee has, then a 15-minute wait will be observed and the Breath Alcohol Technician will direct the employee not to eat, drink (other than water), smoke, belch or put any substance in their mouth during the waiting period. If a confirmation test is required, the donor should remain at the testing site within view of the BAT during the 15-minute wait for the confirmation test. There is no evidence that this process was not followed. There is no mention in the appellant's written statement of the Breath Alcohol Technician requiring him to remove the mint prior to the confirmation test. In addition, the results of the confirmation test show that, as expected, the readings have gone down. As the appellant noted, this was eighteen (18) minutes after the first reading, not fifteen (15) minutes, as required by the Order. Therefore, the Board gave no merit to the appellant's arguments regarding the Ricola Lemon Mint. Although the confirmation

test was only 0.001 from the limit set by TSA, it was still above the limit and policy requires removal.

The Board considered all of the evidence and arguments submitted by the appellant. The record shows that on August 28, 2017, the appellant was selected for a random alcohol test. The first breath alcohol test administered to the appellant registered a positive influence with a reading of 0.027. The second breath alcohol test administered to the appellant registered a positive influence with a reading of 0.021. TSA MD 1100.33-1, *TSO Daily Fitness for Duty*, states, "Impairment due to the presence of alcohol occurs when a TSO has a blood alcohol concentration level of 0.020 or higher." The evidence in the record is substantial evidence that the appellant tested positive for alcohol on August 28, 2017. The Board finds that the evidence supports that the appellant tested positive for alcohol while on duty on August 28, 2017, and that the breath alcohol test was conducted in accordance with policy. Therefore, the Board SUSTAINS the Charge, *Failure of Random Breath Alcohol Test*

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

The Board has sustained the Charge, *Failure of Random Breath Alcohol Test,* and removal for the sustained charge is required.

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

FOR THE BOARD:

DEBRA S ENGEL

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DN: c=US, o=U.S. Government, ou=Department of Homeland Security, ou=TSA, ou=People, cn=DEBRA S ENGEL, 0.9.2342.19200300.100.1.1=0876087875.TSA
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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—17-123

November 28, 2017

***Issue: Neglect of Duty; Failure to Follow Instructions; Disruptive Conduct; Unexcused Absence***

## OPINION AND DECISION

On September 6, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on four Charges: *Neglect of Duty*; *Failure to Follow Instructions*; *Disruptive Conduct*; and *Unexcused Absence*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based Charge 1, *Neglect of Duty*, on two specifications. Specification 1 alleged that on May 12, 2017, at about 4:09 p.m. while assigned to TSO duties at the Advanced Image Technology (AIT) scanner located at the checkpoint, the appellant walked away from her position without authorization and walked over to the x-ray machine. Specification 2 alleged that on May 12, 2017, at about 4:10 p.m. while assigned to TSO duties at the AIT scanner located at the checkpoint, the appellant walked away from her position without authorization and walked over to the exit lane.

Management based Charge 2, *Failure to Follow Instructions*, on one specification alleging that on May 12, 2017, after leaving her assigned AIT position without authorization, a Supervisory

Transportation Security Officer (STSO) properly directed the appellant to return to her assigned AIT position multiple times and the appellant refused to do so.

Management based Charge 3, *Disruptive Conduct*, on four specifications. Specification 1 alleged that on May 12, 2017, while assigned to duties at the AIT scanner located at the checkpoint, the appellant vacated her position and walked over to a TSO who was assigned to the x-ray machine. Despite the TSO's requests not to touch her or hug her, the appellant approached the TSO and hugged her. Specification 2 alleged that on May 12, 2017, while assigned to duties at the AIT scanner located at the checkpoint, an STSO approached the appellant to provide counseling on her disregard to his directions. The appellant raised her voice, pointed her finger and told the STSO she wasn't his child or words to that effect. Specification 3 alleged that on May 12, 2017, while the appellant was assigned to duties at the checkpoint, a Transportation Security Manager (TSM) arrived at the checkpoint and addressed the appellant; the appellant continued to be loud and disruptive after he instructed her to calm down. Specification 4 alleged that on May 21, 2017, at about 6:16 p.m. while performing Dynamic Officer duties at the checkpoint, the appellant called for an STSO after she had a verbal exchange with a female passenger during a bag check. Upon the STSO's arrival, the appellant stated the passenger was being rude, raised her voice in front of the passenger and demanded that the STSO complete the required bag check.

Management based Charge 4, *Unexcused Absence*, on one specification alleging that on May 21, 2017, while performing Dynamic Officer duties at the checkpoint, the appellant requested a break; a Lead Transportation Security Officer (LTSO) authorized it. The appellant departed but failed to return to the checkpoint for 52 minutes, resulting in an unauthorized absence from her duty station.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing basic on-the-job rules: (2) responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials; (3) exercising courtesy and tact (whether on or off-duty) in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation. Supporting and assisting in creating a productive and hospitable model work environment. Section 6. B. states that employees' conduct at work affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. Section 6. D. states that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred.

Management also alleged that the appellant's conduct violated the Handbook to TSA MD 1100.73-5. Section BB. (1) states that employees are expected to schedule and use leave in accordance with established procedures. Whenever possible, employees must obtain prior

approval for all absences including leave without pay (LWOP). Employees are required to contact their supervisor as far in advance of their scheduled tour of duty as possible, or by the time established in call-in procedures for their organization, to request and explain the need for unscheduled leave. Exceptions to this requirement include when the employee is incapacitated or when there are other exigent circumstances. In such instances, the employee, a family member or other individual should, as soon as is reasonably practical, notify the employee's supervisor of the unplanned leave. Repeated unscheduled absences may negatively reflect on the employee's dependability and reliability, and may adversely affect TSA's mission. Unapproved absences will be charged as absent without leave (AWOL). AWOL may form the basis for administrative action, including discipline, up to and including removal from TSA. Section BB (2) states that tardiness includes delays in reporting to work at the employee's scheduled starting time, returning late from lunch or scheduled break periods, or returning late to the employee's work site after leaving the workstation on official business or leave. Unexplained and/or unauthorized tardiness shall be charged as AWOL.

Management also cited the TSA Collective Bargaining Agreement (CBA). Article 3, Section F, 1. states that a minimum 30-minute unpaid meal break shall be scheduled for any bargaining unit employee who works a daily tour of duty of at least eight hours. Bargaining unit employees may not skip a meal break in order to reduce the work scheduled or to extend the workday to receive additional compensation. In addition, bargaining unit employees are not authorized to take meal breaks at the start or end of the shift. Article 3, Section F., 6. states that bargaining unit employees shall have one 15-minute paid rest break for every four hours of scheduled duty. The Federal Security Director or Deputy Federal Security Director has the discretion to approve an additional 15-minute paid rest break. The Federal Security Director or Deputy Federal Security Director has the discretion to reduce, postpone or in rare instances eliminate rest breaks. CBA Article 3, Section D. 1. a) states that a bargaining unit employee's time may be charged as absence without leave (AWOL) when a bargaining unit employee fails to report for duty without approval, has an authorized absence from the workplace during the workday, or does not give proper notification for an absence.

On May 12, 2017, the appellant was assigned to the AIT at the checkpoint. The appellant left her position at the AIT and approached a TSO working at the x-ray and hugged her. An STSO directed the appellant to return to her assigned position at the AIT machine. The appellant responded to the STSO, telling him not to treat her like a child or words to that effect and did not immediately return to her position at the AIT. The appellant walked to the exit lane and summoned her husband, a TSO working the exit lane position, during the verbal altercation with the STSO. A TSM was called to the checkpoint to address the situation with the appellant, the STSO, and the appellant's husband in the presence of a second STSO.

On May 21, 2017, the appellant was performing Dynamic Officer duties at the checkpoint. She called for an STSO to assist after she had a verbal exchange with a passenger during a bag check. When the STSO arrived the appellant told him that the passenger was being rude. The appellant refused to continue the bag check; she walked away from the area leaving the STSO to complete the bag check. The appellant then requested a break, which was authorized by an LTSO, but failed to return to the checkpoint for 52 minutes.

The appellant received a Notice of Proposed Removal on August 18, 2017, and the appellant provided a written response on August 24, 2017.

Management provided as evidence: Report of Investigation by an Assistant Federal Security Director – Law Enforcement, dated June 28, 2017; statement of an STSO, dated May 21, 2017; statement of an LTSO, dated May 21, 2017; statement of the appellant, dated May 25, 2017; statement of a TSM, dated June 11, 2017; and Closed Circuit Television (CCTV) footage from May 12, 2017 and May 21, 2017.

On appeal, the appellant argued that management did not prove the charges by preponderant evidence.

With regard to Charge 1, specification 1, the appellant argued that an LTSO was stationed at the AIT with her and therefore, the machine was never without supervision. She argued that she stepped away from her post for "mere moments" before returning. She argued that management failed to prove by a preponderance of the evidence that she neglected her duty when she stepped to the x-ray machine to interact with the TSO.

With regard to Charge 1, specification 2, the appellant argued that she did not leave the AIT area when she enlisted her husband to provide her with moral support. She stated that she merely called him over and that her husband could see her talking to the STSO through the glass separating the exit lane from the AIT.

With regard to Charge 2, the appellant stated that when the STSO asked her to return to her position at the AIT, she complied with him, stopping only briefly to ask him not to treat her like a child.

With regard to Charge 3, specification 1, the appellant argued that she and the TSO were simply joking around. She argued that their behavior was playful, not disruptive and that the only disruptive individual in the situation was the STSO who invaded her personal space as she walked back to her station.

With regard to Charge 3, specification 2, the appellant argued that she was insulted by the STSO's "condescending tone" and that she spoke up accordingly. She stated that she pointed out that the STSO was treating her like a child and that he escalated the situation by responding that she was a child when she was in the building or words to that effect.

With regard to Charge 3, specification 3, the appellant stated that she signaled for her husband for aid, but argued that it was the only conspicuous behavior she exhibited during the exchange with the STSO. She argued that she did not escalate the situation when the STSO spoke to her disrespectfully; she merely repeated her request that he not treat her like a child.

With regard to Charge 3, specification 4, the appellant argued that when the female passenger "blatantly disregarded her instructions," she understandably reprimanded the woman in a professional manner befitting a TSO. She argued that she called for a supervisor to assist her and had to repeat her request for a supervisor several times before an STSO came over to her. The appellant stated that she informed the STSO that she could not complete the bag check because she was so upset about the incident.

With regard to Charge 4, the appellant argued that an LTSO stated that he gave her permission to excuse herself for a break after the incident with the female passenger. She argued that the LTSO did not specify any time limit for the break and that she took the time she needed to maintain professionalism in the face of degrading treatment.

Management responded and argued that the Charges were proven by a preponderance of the evidence.

With regard to Charge 1, specification 1, management argued that the appellant does not deny that she was stationed at the AIT or that she walked away from it without authorization to do so. Management argued that the appellant's statements, the LTSO's statement, the TSO's statements, the STSO's statements, and the CCTV are preponderant evidence to support the specification. Management noted that while the appellant argued that the LTSO was stationed at the AIT along with her and that therefore, the fact that she walked away does not constitute neglect of duty but argued that while that may go to mitigation, it does not negate the fact that she engaged in the conduct as charged.

With regard to Charge 1, specification 2, management noted that the appellant wrote in her statement dated June 26, 2017, that she walked over to the exit to talk to her husband. Management referenced images from the Administrative Inquiry showing the appellant at the exit lane, statements from two STSOs, and the CCTV as preponderant evidence. Management also noted the TSO's statement, dated May 12, 2017, in which she stated, "at that point [the appellant] walked off and we all scrambled to start a rotation to cover [the appellant and the appellant's husbands'] positions."

With regard to Charge 2, management argued that the evidence clearly illustrates that the STSO repeatedly instructed the appellant to return to her assigned position and that she repeatedly refused to do so and instead engaged in an argument with him. Management specifically referenced the statement of the LTSO who said in his June 7, 2017, statement that the STSO "appeared and he was asking [the appellant] to return to her position repeatedly and she did not do so at the time so [the STSO] started to get really serious with [the appellant] and she finally returned back to her position but words were still being thrown around . . ." Management also noted that the TSO wrote in her statement that she told the STSO to tell the appellant not to come any closer and that the STSO told the appellant to go back to her position. The TSO stated that the appellant told the STSO that she would go when she felt like it. Management noted that the TSO also stated that she asked the appellant to return to her position before the STSO instructed the appellant to return yet again.

With regard to Charge 3, management argued that at no point does the appellant deny that she left her assigned position and walked up to the TSO and hugged her. Management noted that instead, the appellant argued that her behavior was not disruptive, because a witness, other than the TSO, described the behavior as "joking around." Management argued that in actuality, the TSO repeatedly told the appellant not to hug her and actually held up her hand. Management stated that instead of focusing on security duties, the TSO and STSO were forced to focus on the disruption from unwanted physical attention from the appellant. Management also argued that the appellant does not deny arguing with the STSO; noting that she only attempts to justify her conduct by indicating that she was upset with the tone the STSO was using. Management argued that given the STSO's repeated unsuccessful attempts to restore order at the checkpoint and to

convince the appellant to return to her security duties, he was understandably frustrated. Management argued that the appellant compounded the problem by disregarding her supervisor's repeated instructions instead choosing to argue with him on an active checkpoint. Management argued that the appellant's own statement, dated June 26, 2017, details a lengthy exchange between her and the STSO. With regard to the incident with the passenger, management argued that the appellant does not deny having a verbal altercation with the passenger or that she failed to complete the bag check.

With regard to Charge 4, management argued that the appellant does not deny being gone in excess of the 15-minute break as charged. Management argued that the CBA is very clear on the recognized 15-minute break limit absent specific extension. Management argued that nobody in a leadership position granted an extension to the 15-minute break limit and that the appellant made no effort to request an extension or notify anyone in management that she would not be returning to complete her shift.

The appellant replied and argued that the CCTV footage demonstrates that the May 12, 2017, incident was less serious than management has portrayed it to be; arguing that the video shows that the interaction between her and the STSO was quite brief, lasting only a minute or two and that she did not engage in any aggressive behavior during that time. She also argued that it is evident that she complied with the STSO's order to return to her work area at the end of the conversation. She also argued that it is particularly significant that the other STSO remained seated at the table in front of the supervisor's office and continued writing through the conversation between her, her husband, the TSM, and the STSO. She argued that a proper perspective of the May 12, 2017, incident was provided by the statement of the TSO who noted that the STSO approached her aggressively, although the TSO added that he did not believe that the STSO intended to harm her. She noted that the TSO also stated that things calmed down after the TSM became involved. She argued that it is clear that the May 12, 2017, incident did not involve significant aggressive or disruptive behavior on her part and does not merit discharge.

With regard to Charge 1, specification 1, the appellant admitted that she left her position at the AIT and walked over to the x-ray. The CCTV and the statement of the LTSO working at the AIT and the TSO working at the x-ray also support the specification. The fact that the LTSO was also assigned to the AIT is irrelevant; the appellant was not given permission to leave her assigned position. Specification 1 is SUSTAINED.

With regard to Charge 1, specification 2, the evidence in the record clearly supports that the appellant left her position at the AIT and walked to the exit lane. The appellant wrote in her statement, dated June 26, 2017, that she "walked over to the exit to talk to [her husband]." The TSO positioned at the x-ray at the time, also wrote in her statement, dated June 7, 2017, "[the appellant] went to the exit to tell [the appellant's husband]. She went to the exit to tell [the appellant's husband] what happened." The TSO at the exit lane, the appellant's husband, wrote in his statement, dated June 8, 2017, ". . . [the appellant] came out to the exit lane to tell me that she needed me . . ." Additionally, the images provided by management show the appellant at the exit lane. It is clear that the appellant left her assigned position at the AIT. Therefore, specification 2 is SUSTAINED.

Having sustained the specifications, Charge 1, *Neglect of Duty*, is SUSTAINED.

With regard to Charge 2, although the appellant claims she complied with the STSO's instructions, the evidence in the record supports that she did not immediately return to her position. In a statement dated June 7, 2017, the LTSO who was working at the AIT along with the appellant on May 12, 2017, stated, "[the STSO] appeared and he was asking [the appellant] to return to her position repeatedly and she did not do so at the time, so [the STSO] got really serious with her and she finally returned back to her position but words were still being thrown around between the to [sic]." The TSO positioned at the x-ray at the time of the incident submitted a statement on June 7, 2017, in which she stated, "[the STSO] told her to go back to her position. She said that she would go when she felt like it. I told her to go back again, she said she would when she felt like it. Once again [the STSO] told [the appellant] to go back to her position. She finally went . . ." The appellant failed to follow the instructions of the STSO by not immediately returning to her position as instructed; she was told multiple times to return to her position before she did so. Therefore, Charge 2, *Failure to Follow Instructions*, is SUSTAINED.

With regard to Charge 3, specification 1, the appellant admitted that she hugged the TSO at the x-ray. In the TSO's statement, dated June 7, 2017, she stated, "While [the appellant] and I were going back and forth she decided to come closer to give me a hug. I told her to 'go away' because I didn't want to be touched. She kept coming anyway. I told the [the STSO] to tell her not to come any closer." The incident took place while both the appellant and TSO were on duty on an active checkpoint and the appellant was away from her assigned position. Therefore, specification 1 is SUSTAINED.

With regard to Charge 3, specification 2, statements in the record support that the appellant engaged in a verbal altercation with the STSO when he instructed her to return to her assigned position. The LTSO at the AIT, the TSO at the x-ray, the STSO seated at the entrance of the STSO's office at the checkpoint and the STSO involved in the incident described the verbal exchange in their statements. Additionally, the appellant's husband, a TSO, wrote in his statement, dated June 8, 2017, "while being positioned on the exit lane I witnessed my wife, [the appellant], and [the STSO] having an altercation." The Board reviewed the CCTV footage and did not see the STSO's fists clenched as alleged by the appellant however, the appellant's body language clearly portrayed defiance. The incident took place while the appellant was on duty on an active checkpoint and the statements of the officers present at the checkpoint, along with the CCTV footage, are preponderant evidence that the appellant's conduct was disruptive to security operations. Therefore, specification 2 is SUSTAINED.

With regard to Charge 3, specification 3, the TSM submitted a statement, dated June 8, 2017, in which he stated, ". . . [the appellant] and [the STSO] follow me inside the office and both start to talk over each other and [the appellant] kept telling [the STSO] don't talk to her like a little child and left the STSO's office and yelling and pacing that someone need to tap out her husband." The STSO seated at the entrance of the STSO's officer at the checkpoint submitted a statement dated May 12, 2017. In her statement, the STSO stated, "[the appellant] was repeating how [the STSO] 'rolled up on her' and 'disrespected her' and [the TSM] was trying to get everyone to quiet down and cool off, saying 'Let's go to the Manager's office' because by now this situation had drawn the attention of everyone on the checkpoint, including passengers. [The appellant and the appellant's husband] were not interested in quieting down, and the volume continued to rise despite [the TSM's] attempt to move this activity away from the checkpoint." The statements in

the record are preponderant evidence that the appellant's behavior was disruptive. Specification 3 is SUSTAINED.

With regard to Charge 3, specification 4, the STSO who responded to the appellant's request for assistance provided a statement on May 21, 2016, the date of the incident. In his statement, the STSO stated that when he walked over to the bag search location, both the appellant and the passenger were talking over each other trying to tell their side of the story. The STSO stated that he told the appellant and the passenger to lower their voices and calm down. The STSO stated that the appellant told him the passenger was being rude and talking about her and that at the same time, the passenger was saying that the appellant told her in an abrupt way that she could not touch her property or talk to her. The STSO stated that the appellant told him that she was not going to screen the bag and that the passenger was not going to talk rudely to her while she was screening. The STSO stated that he told the appellant that she could not choose which bags and passengers to screen and that at that point, the appellant said she was turning the bag over to him and left the area. The STSO stated that the passenger then "explained how rude [the appellant] was." He stated that he screened the passenger's bag and that she thanked him and told him that something needed to be done with the appellant's attitude. The CCTV video footage supports the STSO's statement. It is clear that the appellant did not complete the bag search; she patted the STSO on the back and left the area leaving the STSO to complete the bag search. The CCTV footage also shows that the appellant turned her back to the passenger while the passenger appeared calm waiting for the issue to be resolved. Although the appellant claimed that the passenger used inappropriate language toward her, TSOs are required to remain calm and professional and complete their duties even under provocation. The appellant failed to do so which caused a disruption to security operations at the checkpoint. Therefore, specification 4 is SUSTAINED.

Having sustained the specifications, Charge 3, *Disruptive Conduct*, is SUSTAINED.

With regard to Charge 4, it is clear from the evidence that the appellant requested a break and that an LTSO authorized the appellant to take a break. The appellant does not dispute that she did not return to the checkpoint for 52 minutes. The Board determined that 52 minutes exceeds the time period authorized for a standard break or a lunch period under policy and therefore, the Charge, *Unauthorized Absence*, is SUSTAINED.

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

On appeal, the appellant argued that management failed to properly weigh the penalty factors. She argued that it is notable that while management charged her with four separate charges with eight specifications, all of the charges are based on two incidents of brief duration. The appellant argued that it appears that management is attempting to make the interactions appear more serious by including several charges for a single incident.

The appellant also argued that her past work record is "impeccable" stating that she has never dropped below a performance rating of "4" and has never gotten a performance evaluation below "exceeds expectations." She argued that she goes above and beyond and that her hard work has paid off, noting that she has earned multiple awards over the course of her eight years as a TSO.

Additionally, the appellant argued that her mother's battles with kidney failure and lupus have, in the past year, occupied her thoughts and time and that as a caretaker for her mother, she is under a great deal of stress and more preoccupied than usual. She argued that these abnormally taxing concerns are a mitigating factor in her case.

Management responded and argued that the Deciding Official properly considered and weighed the aggravating and mitigating factors reiterating the penalty analysis as explained in the Decision letter.

Management argued that the Table establishes that an employee may be charged with several offenses none of which alone would result in removal, but when combined may support such a penalty and that in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the Aggravated Penalty Range column corresponding to the most serious offense being charged. Management stated that with exception of Charge 4, the Deciding Official found that all of the other charges fall within the aggravated range on their own, given the repeated and serious nature of the appellant's misconduct. Management stated that considering all of the charged misconduct together, the appellant's misconduct is so severe and so frequently repeated that – coupled with the aggravating factors discussed in the Decision letter – the appellant's removal is the only appropriate option. Management argued that the aggravating factors, to include the serious and repeated nature of the appellant's actions, far outweigh the mitigation of her time in service and performance. Management also argued that the appellant's disciplinary history illustrates on-going issues involving similar misconduct. Management argued that it is clear that lesser actions have not caused the appellant to correct her behavior.

Management stated that the information the appellant offered in her appeal related to her mother's illnesses and her need to assist her mother is an unfortunate circumstance that is given mitigation but argued that it does not overcome the fact that the aggravating factors far outweigh the overall mitigation or that removal is appropriate.

The Deciding Official considered a number of factors including the nature and seriousness of the offense and its relation to the appellant's duties, position, and responsibilities. The Deciding Official found that the appellant's actions were severe and directly related to the appellant's position of trust. The Deciding Official noted that the appellant is a dual-certified officer and is well aware of her security responsibilities. He considered that her neglect of duty, failure to follow instructions, disruptive conduct, and unexcused absence not only affected her security role at the checkpoint but also disrupted and distracted her peers and defied her supervisors which resulted in disorder at the security checkpoint. The Deciding Official found that the appellant's actions undermined the vital security mission.

The Deciding Official considered that the appellant's behavior and misconduct is very serious and that during the incidents and in the appellant's own statements, she showed no regard for the important screening responsibilities required for her TSO position. He considered that the

appellant was disruptive to her fellow employees and that her actions defied and undermined two STSOs. He considered that the appellant made her own irresponsible decisions without regard to how others would have to step up and cover for her egregious behavior. The Deciding Official also noted that when asked by the fact-finding official if she would do anything differently, the appellant indicated that she would not; that she could do everything the same, not changing how she interacted with her peers, defied her supervisors' directions, or how she acted in view and earshot of passengers. The Deciding Official also noted that the appellant told the fact-finding official that she would not have confidence in passengers being screened properly if she had witnessed the incidents even though she was the source of creating disorder on the checkpoint.

The Deciding Official considered the appellant's job level and type of employment and found that by failing to conduct herself in a professional manner, she set a bad example which increased the security risk for the airport. He considered that the appellant is in a position of public trust and that her actions were in view and earshot of the public. He considered that the appellant's actions were egregious and damaging to the reputation of the agency.

The Deciding Official considered that the appellant repeated her disruptive conduct on two different dates and that she also previously received disciplinary actions. He considered that on April 22, 2017, she received a Letter of Reprimand (LOR) for discourteous conduct and that on April 30, 2013, she was issued a 5-day suspension for attendance issues. He also considered that the appellant had a 3-day suspension on May 30, 2011 for failure to follow instructions when she entered into a loud argument with a co-worker in the break room that escalated into her spilling the co-worker's lunch in her lap. The Deciding Official considered that with these actions, the appellant was warned that additional misconduct on her part may lead to more severe discipline, up to and including removal. He considered that the appellant did not take any of the prior warnings seriously since she continued to act in a disruptive manner and violate policy.

The Deciding Official considered the clarity with which the appellant was on notice of the requirements of her positon as a TSO and noted that on June 19, 2016, she was issued a Letter of Counseling (LOC) for failing to follow an STSO's instructions, specifically, not working where she was assigned. He also noted that on April 24, 2011, she was issued an LOC for failure to follow call-in procedures. The Deciding Official considered that with each action the appellant was duly notified of the requirements and expectations of MD 1100.73-5. Additionally, the Deciding Official noted that the appellant completed her Online Learning Center (OLC) training and confirmed her understanding of MD 1100.73-5 as recently as November 11, 2016. The Deciding Official found it aggravating that the appellant was clearly aware of the necessity to conduct herself appropriately and the potential consequences of not doing so, yet she still engaged in this behavior.

The Deciding Official considered the appellant's past work record, including length of service and performance on the job. As mitigating factors, he considered that she has been employed by TSA since January 2009 and received a performance rating of exceeds expectations in 2016. He found however, that the mitigating factors do not outweigh the nature and seriousness of the appellant's misconduct.

Section H.6 of the Table, pertaining to Neglect of Duty, has a recommended penalty range of a 14-day suspension to removal and an aggravated penalty of removal. For Section D.2, pertaining to Failure to Follow Instructions, the recommended penalty is a Letter of Reprimand to a 10-day

suspension and the aggravated penalty is an 11-day suspension to removal. For Section B.6, pertaining to Disruptive Conduct, the recommended penalty is a 5-day suspension to removal and an aggravated penalty of removal. For Section A.1 pertaining to Unexcused Absence, the recommended penalty is a Letter of Reprimand and the aggravated penalty is a 1-day to 5-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. The Board agrees that the appellant's conduct was egregious; the appellant displayed defiant and inappropriate behavior on an active checkpoint in the presence of passengers and coworkers. Management had the right to consider an aggravated penalty due to the multiple charges against her, as well as her disciplinary history. The Board finds that the appellant's removal is in accordance with TSA policy and within the bounds of reasonableness. The penalty decision is SUSTAINED.

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

FOR THE BOARD:

DEBRA S ENGEL

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government, ou=Department of Homeland Security, ou=TSA, ou=People, cn=DEBRA S ENGEL, 0.9.2342.19200300.100.1.1=0876087875.TSA
Date: 2017.11.28 16:16:34 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598