# 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—16-214

January 27, 2017

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

## OPINION AND DECISION

On October 14, 2016, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Conduct Unbecoming of a Transportation Security Officer*. 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, *Conduct Unbecoming of a Transportation Security Officer*, on six specifications. All specifications dealt with derogatory posts made by the appellant to his Facebook page.

Specification 1 alleged that the appellant made a post on his Facebook page on or about May 19, 2016, wherein he disparaged his job and used profanity and a racially offensive term as he described how he came in late every day, was bored, and did not care if passengers missed their flights. Specification 2 alleged that the appellant made a post to his Facebook page on or about September 21, 2016, wherein he used a racially offensive term and made disparaging remarks

about his coworkers. Specification 3 alleged that the appellant made a post to his Facebook page on or about September 21, 2016, wherein he used racially offensive language and disparaging comments related to race, specifically African-Americans. Specification 4 alleged that the appellant made a post to his Facebook page on or about September 23, 2016, wherein the appellant used profanity and made disparaging comments about coworkers, mentioning TSA by name. Specification 5 alleged that the appellant made a post to his Facebook page on or about September 23, 2016, wherein he used profanity and stated that if there was a real active shooter he is entitled to use coworkers as human shields. Specification 6 alleged that on or about September 23, 2016, the appellant made a post to his Facebook page using profanity and disparaging language regarding his job, his coworkers and TSA.

Management alleged that the appellant violated the Handbook to TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section D. (4) (c) (Note) states that an employee's off-duty access/use of the internet must not adversely reflect on TSA or negatively impact its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness. This prohibition is applicable while off duty and/or while using non-government supplied resources if an employee's off-duty internet access/use is identified with, or contains references to TSA in a manner that may reasonably imply a connection between TSA and the internet access/use.

Management also noted in the Decision letter that the appellant violated Section 6. E. of MD 1100.73-5, which 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.

On September 23, 2016, management received an email from a Supervisory Transportation Security Officer (STSO) forwarding screenshots of a number of Facebook posts made by the appellant. The STSO reported that the TSO who reported the messages was very upset and felt that the appellant's Facebook posts may be creating a hostile work environment.

On or about September 30, 2016, the appellant was issued a Notice of Proposed Removal (NOPR) from the Deputy Assistant Federal Security Director (DAFSD). The NOPR advised the appellant of his right to make an oral and/or written reply. The appellant submitted a written reply dated October 7, 2016.

Management included as evidence: copies of Facebook posts from May 19, 2016; September 21, 2016; and September 23, 2016; and email correspondence from an STSO.

On appeal, the appellant addressed each of the specifications. Regarding specification 1, the appellant noted that the Deciding Official stated that his public Facebook postings were evidence of discriminatory animus towards African Americans. The appellant argued that specification 1 does not fit that description nor does it fit Section B. 1 of the TSA Table of Offenses and Penalties that was cited by the Proposing Official. The appellant argued that specification 1 should be rescinded for lack of merit to the actual Charge and for management citing the wrong Section of the Table. He stated that the Deciding Official agreed that Section B. 1 did not apply to specifications 1 and 2 and instead used Section B. 5 of the Table for specifications 1 and 2.

The appellant argued that it is unfair and not transparent for management to implement a new citation after he responded to the NOPR.

With regard to specification 2, the appellant argued that he never mentioned that he was a "security officer" or that he worked for TSA in the post. He argued that therefore, the specification should be rescinded in whole, for lack of merit related to the actual charge. The appellant also argued that his post was not dated, even though management cited September 21, 2016, as the date. The appellant reiterated his argument that the Deciding Official agreed that Section B.1 of the Table did not apply to specifications 1 and 2 and instead used Section B. 5 of the Table, and that it is unfair and not transparent for management to implement a new citation after he responded.

With regard to specification 3, the appellant stated that the post was in direct relation to the incident that occurred in Charlotte, North Carolina and that there was no indication of TSA or the position he held within TSA. He also noted that the post was not dated even though management cited September 21, 2016, as the date.

With regard to specifications 4, 5, and 6, the appellant argued that the posts were not dated, yet management cited September 23, 2016, as the date.

The appellant stated that he is regretful and sincerely sorrowful for his statements on social media and that he takes them back even though there is no physical way that he could do so.

Management did not reply to the appeal.

With regard to specification 1, the screenshot of the appellant's Facebook post in the record is preponderant evidence to support the specification. The appellant's argument that he never mentioned that he was a security officer is irrelevant as TSA 1100.73-5, 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 . . . cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. The appellant referred to his job and mentioned "aviation security." In conjunction with the string of other posts, one would associate the appellant as being identified as working for TSA. Therefore, specification 1 is SUSTAINED.

The appellant argued on appeal, with regard to specifications 2 through 6, that the Facebook posts were not dated. The Board found that the appellant's argument regarding the dates of the posts is irrelevant as the posts were clearly posted to Facebook. The violations alleged in specifications 2 through 6 related to the content and language used in the Facebook posts, not the dates.

With regard to specification 2, the screenshot of the appellant's Facebook post in the record is preponderant evidence to support the specification. As with specification 1, the appellant's argument that he never mentioned that he was a security officer is irrelevant as TSA 1100.73-5, 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 . . . cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. The appellant's Facebook post contained derogatory language about people the appellant "work w/"

[sic] and "worked with." In addition, the appellant's other posts would associate the appellant as being identified as working for TSA. Therefore, specification 2 is SUSTAINED.

With regard to specification 3, the screenshot of the appellant's Facebook post in the record is preponderant evidence to support the specification. The appellant argued that his post was related to an incident that happened in Charlotte, North Carolina, however, as the Deciding Official pointed out in the Decision letter, the violation alleged in the specification was not in reference to the incident, but in reference to the derogatory language the appellant used to describe African-Americans. Therefore, specification 3 is SUSTAINED.

With regard to specification 4, the screenshot of the appellant's Facebook post in the record is preponderant evidence to support the specification. The specification was in reference to the derogatory language the appellant used to describe his coworkers and his specific reference to TSA. Therefore, specification 4 is SUSTAINED.

With regard to specification 5, the screenshot of the appellant's Facebook post in the record is preponderant evidence to support the specification. The specification was in reference to the hostile language the appellant used regarding his coworkers. Therefore, specification 5 is SUSTAINED.

With regard to specification 6, the screenshot of the appellant's Facebook post in the record is preponderant evidence to support the specification. The specification was in reference to the derogatory content of the appellant's Facebook post describing his job and coworkers. Therefore, specification 6 is SUSTAINED.

Having sustained all specifications, the Charge, *Conduct Unbecoming of a Transportation Security Officer,* 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 addressed the penalty factors. He argued that during the course of events that occurred in Charlotte, North Carolina, on or about September 20, 2016, regarding a police officer involved shooting and the protests that followed, he, like many others was caught up in the moment of the matter and inadvertently posted his frustrations on his Facebook social media site. He stated that he sincerely regrets his postings, his frustrations at the unrest in Charlotte, and the poor image police officers were receiving as a result of the media coverage. He stated that he used poor judgment when he decided to rant in response to another individual's primary post. The appellant argued that there was no malicious intent. He admitted that the post could have offended some and that opinions and statements made in haste often possess unintended consequences.

The appellant argued that he was not a supervisory or management official and that many supervisors within TSA were frequently posting their frustrations on Facebook, which led many non-supervisory officers to believe it was okay to express their opinions on Facebook.

The appellant argued that he had no prior discipline and that he was an exemplary employee, save for his lapse in judgment while he was off-duty. He argued that he performs his job well and gets along with coworkers, management and stakeholders.

The appellant argued that while it is clear that he made a significant mistake while he was off-duty by making remarks that were clearly outside of his typical character on or off-duty; that it did not and does not affect his ability to perform at a satisfactory level as an employee of TSA. He stated that he realizes the impact his words may have had on others who read his posts on Facebook, and that for that, he is sincerely regretful and remorseful. The appellant argued however, that there is no factual indication that the posts, as sorrowful as he remains, affected his ability to screen the traveling public or work with his coworkers.

The appellant argued that it is known that there was at least one other individual involved in Facebook postings at the airport, in which employees were offended, and that the employee did not receive a similar outcome. The appellant stated that it cannot be overstated how sincerely sorry he is for his reckless outbursts on his personal Facebook site, in which coworkers were offended, but argued against management's contention that the reputation of the agency was harmed. The appellant argued that there was no media coverage; that not every employee at the airport viewed his post; and that not all of his Facebook friends are employees of TSA. He argued that while he realizes that his posts were not positively viewed by some; in many cases his posts were misconstrued and not the true intent of his message. The appellant argued that there is no specific prohibition on social media posts made outside of work. He argued that he was not aware of any rule or mandate that regulated his ability to "speak" freely on his personal Facebook site.

The appellant argued that while management stated that his potential for rehabilitation is non-existent due to a statement he made in one of his posts about not worrying about losing his job because it is not important or a priority to him; his statement is not reflective of his true character although he understands that it can be taken as his lack of care for his job. The appellant stated that he cares deeply about his job and the mission of TSA in ensuring safe and secure travel for travelers.

The appellant argued that he, like any other employee of TSA, was expressing his opinion, at the time of his postings, regarding a very sensitive and delicate situation that arose from an incident in Charlotte. He argued that many TSA employees on Facebook were expressing opinions and that some exchanges were very wordy, yet they were all entitled to express such opinions. He argued that he did not initiate every post within the specifications, that instead, he was responding to other posts from other individuals. The appellant argued that he immediately deactivated his Facebook account due to his remorse and sincere effort to right his admitted wrongs. He stated that he personally spoke to some of his coworkers and apologized and that he learned so much from the incident, including the necessary requirement to keep his opinions to himself. He argued that he is extremely capable of rehabilitation and that a lesser penalty would undoubtedly impress upon him the need to refrain from such comments.

The appellant argued that progressive discipline is the lowest form of action required to impress upon the employee the seriousness of the misconduct. He argued that he believes management used the aggravated range based on the belief that he cannot be rehabilitated. He argued that

criteria alone, which is subjective, is not sufficient enough to warrant such a harsh penalty for a first time disciplinary/adverse action. The appellant argued that a penalty in the recommended penalty range is more appropriate considering it is his first offense of any kind. The appellant argued that he is not racist nor does he condone racism in any form. He stated that he takes full responsibility for his posts and has ceased making out-of-character posts. The appellant stated that he acknowledges that he should be punished for his actions, but argued that given the aforementioned circumstances and mitigating factors, a reasonable and fair penalty would be within the recommended penalty range of the Table.

The Deciding Official considered the seriousness of the appellant's misconduct and its relationship to the appellant's position. He considered that as a TSO, the appellant is in direct contact with the public and interacts every day with passengers and coworkers of various backgrounds, including African-Americans. The Deciding Official considered that as a TSO, the appellant bears a heavy responsibility because his conduct and appearance have a significant impact on the public's attitude toward the Federal government and TSA. The Deciding Official stated that for that reason, TSA's Code of Conduct requires TSA employees, whether on or off-duty 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 Deciding Official considered that the appellant made public comments that show he had no regard or respect for the traveling public that the agency serves, the mission of the agency, or his coworkers. The Deciding Official considered that in his reply, the appellant stated that he was "caught up in the moment" of events taking place in Charlotte, North Carolina, at the time he made the Facebook posts but found that while the appellant is free to speak publicly about those events, he may not do so in a way that is disruptive to the operations of TSA. The Deciding Official considered that in the appellant's posts, he referred to African-Americans using derogatory terms and that the post was in a string of posts that identified him as a TSA employee. The Deciding Official considered that by associating TSA with his racial epithets, the appellant undermined public confidence in the agency's ability to treat all members of the public in a fair and professional manner. He considered that the appellant's public Facebook posts are evidence of a discriminatory animus toward African-Americans and of his indifference to aviation security and the welfare of passengers. The Deciding Official noted that the fact that the appellant is not a supervisor does not diminish the seriousness of his conduct, because his duties include the exercise of government authority that must be carried out in a non-discriminatory manner towards all members of the public. The Deciding Official considered that because the appellant made it clear in his posts that he worked for TSA as a security officer, he associated his discriminatory animus and disdain for the flying public with TSA and its screening operations which undermines public confidence in the commitment of TSA and its workforce to effectively carry out its mission.

As mitigating factors, the Deciding Official considered the appellant's satisfactory job performance, lack of discipline, and over two years of service. He noted that the appellant stated in his reply to the NOPR that he got along with coworkers, management and stakeholders. The Deciding Official also considered that the appellant expressed regret for making the Facebook posts and stated that he deactivated his Facebook account as a means to remedy his action. The Deciding Official determined however, that based on the appellant's Facebook posts, he read the appellant's statement to exclude African-American coworkers and passengers from those with

whom the appellant got along. The Deciding Official considered that it was a disruption to the workplace caused by the appellant's Facebook posts that set the disciplinary action in motion because the appellant made his posts available to coworkers. The Deciding Official considered that the appellant's racially derogatory statements and his claim that he might use his coworkers as human shields in an active shooter incident disrupted his working relationship at the airport. The Deciding Official stated that he gave little weight to the appellant's claim that he got along with fellow coworkers and found that returning the appellant to the workforce would cause additional disruption to the operation.

The Deciding Official considered that although the appellant claimed that he was unaware of any rule that regulated his ability to make statements on social media while off duty, he considered that the appellant was on clear notice of his obligation to carry out his duties in a professional manner and avoid discredit to TSA. He noted that the appellant received a Letter of Counseling (LOC) on April 4, 2015, advising him that he violated the Code of Conduct when he made a comment comparing passengers to mental health patients. The Deciding Official noted that the LOC stated, in part, "Please keep in mind that we are an agency that places a heavy emphasis on customer service and these types of incidents have the potential to cause embarrassment to the agency." The Deciding Official considered the LOC to be clear notice that the appellant was advised not to make public comments denigrating passengers. The Deciding Official stated that he found it hard to believe that, having been given a warning, the appellant thought it was permissible to make the public post on Facebook showing disregard for being late to work and passengers missing their flights stating that it was not his problem. The Deciding Official reiterated that the appellant's comments were posted on a social media page that was assessable to TSA employees and non-TSA employees. He noted that the appellant argued that there was no media coverage of his posts but argued that in this media coverage was not necessary to make the appellant's comments notorious because he made his comments public.

Finally, the Deciding Official considered the appellant's potential for rehabilitation. He noted that the appellant stated that he learned from his mistakes and about the need to keep his opinions to himself. He noted that the appellant stated that he is not a racist nor does he condone racism in any form. The Deciding Official stated however that he found the appellant's claims difficult to believe in light of the appellant's hateful references to African-Americans. The Deciding Official also noted that in the appellant's reply to the NOPR, he stated that the Proposing Official chose to propose removal because she is African-American. He noted that the appellant claimed that the Proposing Official's choice of penalty was "vindictive" and "issued in bad faith." The Deciding Official stated that he found the appellant's allegations are evidence that the appellant continues to harbor a racial bias towards African-Americans that he does not hesitate to express. The Deciding Official also considered that the appellant provided no explanation for his statements showing contempt for passengers, coworkers, or aviation security in general. The Deciding Official stated that he agreed with the Proposing Official that the appellant's potential for rehabilitation is negligible, and determined that returning the appellant to screening operations would be disruptive.

The Deciding Official acknowledged that the Proposing Official made a penalty determination based on Section B. 1 of the Table and that in the appellant's reply he argued that Section B. 1 does not apply to specifications 1 and 2, because they do not involve degrading remarks about African-Americans. The Deciding Official agreed and found that Section B. 5, which applies to

offensive statements about coworkers and the public, is appropriate in determining the penalty for the appellant's conduct described in specifications 1 and 2.

Under B.1 of the Table, for Conduct Unbecoming, relating to using offensive, demeaning, or degrading remarks, comments, statements, or taking actions based on another's race, color, religion, national origin, sex, age, disability, sexual orientation, or parental status, the recommended penalty is a 5-day to14-day suspension and the aggravated penalty range is a 15-day suspension to removal. Under Section B. 5, for Conduct Unbecoming relating to using abusive, offensive, disrespectful, inflammatory, or similarly inappropriate language, gestures, or conduct to or about other employees or members of the public, the recommended penalty range is a Letter of Reprimand (LOR) to 5-day suspension and the aggravated range is a 6-day suspension to removal.

The appellant was not harmed by management citing both Sections B. 1 and B. 5 of the Table. The Board concurred with the penalty determination made by the Deciding Official and has determined that management had the right to go to the aggravated penalty range given the multiple specifications and the level of egregiousness of the Charge. The Board finds that management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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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—16-224

January 23, 2017

***Issue:*** *Threatening Conduct; Failure to Follow Directions; Lack of Candor; Failure to Report*

**OPINION AND DECISION**

On October 20, 2016, management removed the appellant from his position as a Lead Transportation Security Officer (LTSO), with the Transportation Security Administration (TSA) based on four charges: *Threatening Conduct*; *Failure to Follow Directions*; *Lack of Candor*; and *Failure to Report*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is GRANTED, in part, and the appellant's removal is MITIGATED to a five (5) calendar day suspension.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Threatening Conduct*, on one specification. The specification alleged that on or about August 3, 2016, while assigned as the Officer in Charge (OIC) in the Lobby, a public area, the appellant engaged in threatening conduct towards a Skycap Porter. Specifically, on that date, after a Skycap Porter advised him that he could load the bags on the CT-80 belt, the appellant got in an argument with the Porter during which he stated words to the effect of "Fuck you" to the Porter, called the Porter "lazy" and indicated words to the effect that he was going to take the Porter outside and beat him up. The appellant's conduct was observed by an Airlines Agent,

who heard him yelling and swearing and another Airlines Agent, who had to intervene to diffuse the situation and try to calm the appellant down.

Charge 2, *Failure to Follow Directions*, was based on one specification. The specification alleged that on or about August 3, 2015, the appellant failed to follow the directions of the Transportation Security Manager. Specifically, on that date, the TSM ordered him, or words to that effect, to have no further contact with the airline employees who had made a complaint concerning his conduct towards a Porter on that day. Thereafter, on August 3, 2016, the appellant was observed talking to the airline employees in violation of this direction. The airline employees expressed discomfort with the appellant approaching them to discuss the complaint.

Charge 3, *Lack of Candor*, was based on one specification. The specification alleged that on or about August 9, 2016, the appellant was less than candid with the Deputy Assistant Federal Security Director (DAFSD), when questioned concerning an altercation that he had with a Porter. Specifically, on that date, when the DAFSD asked if the appellant had stated words to the effect that he was going to take the porter outside to beat him up, the appellant was less than candid by shrugging his shoulders, shaking his head in the negative, and stating, "No, I didn't say that," when the appellant knew in fact that he had indicated words to that effect.

Charge 4, *Failure to Report*, was based on one specification. The specification alleged that on or about August 3, 2016, the appellant failed to report to management a known or suspected violation of TSA Management Directive when it occurred. Specifically, on that date, the appellant failed to report an altercation which occurred between him and the Porter, while he was performing screening duties in a public area and viewed by stakeholders. The appellant only reported the incident after the airlines made a complaint against him and he was questioned regarding the incident.

Management found the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct* and *Handbook.* Section 5.D.,[1] requires all TSA employees to behave in a way that does not bring discredit upon the Federal Government or TSA. Section 5.D. (3) requires employees to exercise courtesy and tact (whether on or off-duty) in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation; support and assist in creating a productive and hospitable model work environment. Section 5.D. (7) requires all employees to observe and abide by all laws, rules, regulations and other authoritative policies and guidance. Section 5.D. (9) requires employees to report any known or suspected violation of law, rule, regulation, policy, or Standard Operating Procure (SOP) by a person to any manager in the chain of supervision and/or to the Office of Inspection (OOI), whenever such violation may have a nexus to the TSA mission and/or effective operation of the agency, or when it occurs in the workplace. Management also alleged that the appellant violated Section 6. Section 6. B requires all employees to 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

[1] Management alleged a violation of Section 5.D. of the MD. The Board has cited the correct references to the MD above.

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 was in violation of Section F (1) of the Handbook, which requires all employees to provide truthful, accurate, and complete information in response to matters of official interest.

The appellant was stationed in the Lobby of the airport conducting baggage screening operations. The evidence shows that a Porter attempted to press the scan button on the TSA CT-80 unit. The appellant advised the Porter not to press the button. The Porter told the appellant that he always pushes the button and the appellant replied, "not while I'm here." The Porter walked away after giving the appellant a dirty look. A few moments later, the Porter came back to the CT-80 with a few bags and told the appellant to "load his own bags" to which the appellant told the Porter that was his job. At that point, both the Porter and the appellant were cursing at each other. The Porter accused the appellant of threatening to take him outside. The appellant acknowledged cursing at the appellant but alleged that the Porter cursed at him first. The appellant also acknowledged stating "Hey, don't make me smack you on the head." The appellant was placed on an indefinite suspension on August 9, 2016. The appellant was given a Notice of Proposed Removal on August 24, 2016. The written notice advised the appellant of his right to make an oral and/or written reply. The appellant requested and was granted a seven (7) day extension and provided a written response on September 7, 2016. On September 20, 2016, the appellant was issued a "Notice of Additional Materials Relied Upon." The appellant was provided an additional seven days to respond to the new information and provided an additional response on September 27, 2016. The appellant was removed on October 20, 2016.

Management provided as evidence: a statement from a Skycap Porter, dated August 3, 2016; a statement from an Airlines Agent, dated August 3, 2016; a statement from a TSO, dated August 3, 2016; a statement from the appellant, dated August 3, 2016; an undated addendum to the appellant's August 3, 2016 statement; a statement from a TSM, dated August 5, 2016; a second statement from the Skycap Porter, dated August 6, 2016; a statement from an Airlines Agent, dated August 3, 2016; a statement from a Supervisory Transportation Security Officer (STSO), dated August 9, 2016; a statement from the DAFSD, dated August 9, 2016; a summary of the pre-decisional discussion with the appellant, dated August 8, 2016; a second statement from the appellant, dated August 8, 2016; a no contact order to the appellant from a TSM, dated August 7, 2016; Interoffice Memorandum from TSA, dated August 18, 2016; photographs of the appellant's work area; and a second statement from the DAFSD, dated September 9, 2016;

The Skycap Porter provided two statements. In his first statement, dated August 3, 2016, he stated that the appellant cursed at him and said the "F__ word" many times and called him out for a fight. He indicated that many heard the appellant say that but in particular the Airlines Agent who was calming the appellant down. The Porter stated that he was looking at the machine but did not touch the machine when the appellant said "Don't touch the machine." The Porter said that he responded back that he did not touch the machine. The Porter acknowledged that he told the appellant that he can put the bags on the belt when the appellant said that is the Porter's job and not his job. The Porter said that he explained that he was helping TSA and that the appellant began saying the F word to him and calling him out for a fight. The Porter said that he had many "witnesses." On August 6, 2016, the Porter provided another statement and said that the appellant cursed at him 7 times and called him out for a fight. The Porter said that the airline management staff was trying to calm the appellant down but the appellant did not bother

to listen to them. When asked what the appellant said when called him out for a fight, the Porter said "He said right now, let's go to the street and have a fight."

An Airlines Agent gave a statement on August 3, 2016, and said she was at the counter and heard someone yelling and swearing and looked over and saw that it was the appellant swearing at the Porter. She also stated that she heard the appellant say that he will take him outside. The Porter came to the Airline Agent and said that the appellant was swearing at him and was going to beat him up. She also stated that another airline staff member spoke to both and said calm down. In addition, she stated that she heard the appellant say "don't touch the machine."

The TSO who was stationed at the CT-80 with the appellant provided a statement on August 3, 2016. She stated that she overheard the Porter arguing with the appellant and that the Porter was about to push the scan button on the CT-80 when the appellant advised him not to touch the machine. She said that the appellant told him only TSA was allowed to handle the machine to which the Porter replied that he always pushes the button. The appellant then replied "Not while I'm here." She stated that the Porter gave the appellant a very angry look and walked away and when he came back he told the appellant that he can load his own bags. At that time, the appellant told the Porter that is his job. The TSO stated that she walked away while more words were exchanged and did not hear anything further.

The appellant provided his first statement on August 3, 2016. His statement corroborated the statement of the TSO in that the appellant told the Porter that he cannot touch the button to the CT-80 machine and that the Porter then gave him a dirty look. The statement of the TSO also corroborated the statement of the appellant that a few minutes later, the Porter brought over more bags and told the appellant to load the bags himself to which the appellant told him that was his job. The appellant then stated that the Porter cursed at him and he cursed back at the Porter and asked him what was his problem. The appellant wrote an addendum to the August 3, 2016, statement and said that with proper staffing, he would have stayed at his post and would not have had an issue with the Porter. The appellant provided a second statement on August 8, 2016, and reiterated what he said in his first statement but added that he said to the Porter "Hey, don't make me smack you on the head." The appellant explained that this was not meant to be a physical threat but with the intention of insulting the Porter based on his cultural upbringing as a Samoan. The appellant said that when the Porter said that he was threatening him, he told the Porter "I'm not threatening you, It's because you're acting very childish." The appellant stated that he then saw the appellant go up to each of the airline agents and tell them that he was being threatened. In the appellant's response to the NOPR, he stated that the Porter challenged him to a fight by saying "Let's go outside." The appellant stated that he responded back by stating "Hey, let's go outside so I can smack you on the head." The appellant stated that this was not a threat

A TSM provided a statement on August 5, 2016, and stated that he spoke to an Airlines Agent on the phone and she stated that she did not hear the appellant swearing at the Porter because she was on the other end of the counter but did hear raised voices. She stated that the other employees stated that they did hear the appellant swearing. The TSM stated that she heard the appellant state that he was going to beat up the Porter. She said that the Porter came over and said that the appellant is threatening to beat him up. The TSM stated that the Airline Agent said that the appellant stated that the Porter is lazy and that he was going to take him outside and beat him up. She indicated to the TSM that the appellant's voice was raised but he wasn't yelling.

The Airline Agent that is mentioned in the call above with the TSM, provided a statement on August 3, 2016. In that statement she said that the Porter called out loudly to her that the TSA agent was going to beat him up, so she turned to look at the TSA agent and asked him what the problem was. The Airline Agent said that from her understanding the appellant thought that the Porter was not doing his bag handling and touching the machine. She also said that the appellant was telling the Porter that he will "take him outside" but she did not know what that meant.

An STSO provided a statement on August 9, 2016, and stated that when he left the lobby area, the majority of the bags had been processed and that he left the appellant and a TSO to process whatever remaining bags there were for the airlines. He stated that he would not have left the area if he felt that the two officers were overwhelmed with unscreened bags.

A DAFSD provided two statements. The first statement, dated August 9, 2016, stated that during her meeting with the appellant to serve him his Notice of Indefinite Suspension, she specifically asked him if he stated he was going to take the Porter outside to beat him up and that the appellant shrugged his shoulders, shook his head in the negative and stated "No, I didn't say that." The DAFSD provided a second statement, dated September 9, 2016. This statement was provided to the appellant on September 20, 2016, and the appellant was provided an additional seven days to respond to the NOPR as a result of the new evidence. The DAFSD stated she met with the appellant on August 9, 2016, to issue him his indefinite suspension. The DAFSD reiterated the comments made in her statement provided on August 9, 2016, and added that the appellant stated that he did not know that the meeting was for discipline and wanted a union representative. The DAFSD responded that if the appellant can call someone up within the next few minutes that is fine, but the appellant replied that he did not know who was here. The appellant requested to walk around to see who he could find and the DAFSD told him that he would need to be escorted. She indicated that the appellant signed the document and prepared to leave so she took this to mean that he did not want to go and find a representative.

A TSM provided a statement on August 18, 2016, and said that on August 3, 2016, he was approached by an Airlines Agent who asked if he was a supervisor for TSA. The Airline Agent then conveyed that there had been an incident involving one of the porters and a TSA officer and that both parties were swearing at each other. The Airline Agent when asked to identify the TSA officer involved, pointed out the appellant. The TSM stated that he approached the appellant and advised him that there had been a complaint about his unprofessional conduct. He stated that a visibly upset appellant acknowledged that there had been an exchange. He stated that the appellant began venting that the Porter had been touching the equipment after being told not to do so. When he asked the appellant if he yelled at the Porter, the appellant answered yes. The TSM then told the appellant that he was to have no further contact with the airline and was to provide a written statement. The TSM observed that the Porter had been reassigned; the ticket counter was actively processing passengers; and the appellant appeared upset but in control. The TSM stated that upon his return to the lobby, he observed the appellant speaking to the two Airline Agents. The TSM called the appellant over and reiterated his original direction that he was not to have any contact with the agents and that another TSM would be by shortly to collect his statement and speak to the airline personnel about the complaint. The TSM then apologized to the airline personnel, who had expressed their discomfort with the appellant attempting to talk to them about the complaint.

On appeal, the appellant argued that the removal was arbitrary, capricious, unwarranted by the evidence, based upon a flawed investigation, and retaliatory in nature. In his appeal, the appellant alleged EEO violations. The Board is not authorized to review and decide allegations of discrimination and harassment based on race, color, religion, sex, national origin, age, disability, sexual orientation, protected genetic information, parental status, and retaliation.

The appellant also argued that he was short staffed on the day of the incident and that if he had adequate staffing, he would have been able to stay at the CT-80 and avoided any contact with the Porter. The appellant argued that the Porter instigated the alleged incident; the Porter's statements are inconsistent with the statement of the other TSO; and as a result the Porter lacks credibility.

As to Charge 1, the appellant argued that the Porter threatened him after he prevented him from engaging in unpermitted actions which could have jeopardized the integrity of the security screening process during an under-staffed period. The appellant argued that management ignored the statement of the TSO present with him whose statement corroborates the statements that he provided. The appellant argued that the Porter challenged him by saying "Let's go outside." The appellant then acknowledged that he said to the appellant "Hey, let's go outside so I can smack you on the head." He stated that he then disengaged with the Porter and walked away and did not deem this to be a threat. The appellant argued that the Porter did not view this as a threat and that the appellant ended the communication by walking away from the Porter. The appellant further stated that his statement was a culturally appropriate response to immature behavior. He stated that he is Samoan and that in the Samoan culture his statement was a culturally accepted way of rebuking inappropriate childish behavior. The appellant argued that management suggests that his conduct was observed by an Airlines Agent, however, this is false in that the agent's statement said "The porter came to us saying that the TSA [sic] swearing at me and gonna beat me up." He stated that she also admitted in her own statement that she did not know what started the argument nor saw anything else. The appellant provided a diagram that showed that the Airline Agent discussed above was physically located at the last counter, and that it would have been impossible for her to have observed and heard what transpired. The appellant also argued that management's suggestion that the other Airlines Agent had to intervene to diffuse the situation with him was incorrect as it was only with the Porter. The appellant pointed out that the agent indicated to the TSM that she did not hear the appellant specifically swearing at the Porter because she was on the other end of the counter. The appellant stated that the agent was talking to passengers and on the other side of the counter which was 16-18 feet away from the CT-80 when the first exchanges took place. The appellant stressed that he did not threaten the Porter and provided a chart summarizing the false accusations contained in Charge 1. The appellant argued that neither of the airline agents were in a position to hear the Porter's claim that he was going to take him outside and beat him up because one was 45-48 feet away and the other was 63 to 66 feet away and that they are merely repeating what the Porter told them.

As to Charge 2, the appellant denied that he failed to follow directions. The appellant argued that when the TSM notified him of the Porter's complaint, he did not tell him at that time that he could not have any contact with the airline agents. The appellant understood that the complaint involved a Porter but it was his understanding that the porters are contract workers and not airline employees. The appellant argued that he did not speak to any porters about the incident after speaking with the TSM. The appellant acknowledged that he spoke to two airlines agents

to ask whether they knew about the Porter's complaint. He said that it was at that time that the TSM came over and instructed him to avoid any contact with airline agents and he immediately followed his directions. The appellant argued that his communications with the airline agents occurred prior to the TSM providing directions to him.

In regards to Charge 3, the appellant argued that it is nonsensical to assert that he should be required to admit to a statement that was never made. The appellant argued that the specification assumes facts and events that did not occur and that he never said that he was going to take the Porter "outside and beat him up." He stated that the only person that uttered those words was the Porter in attempt to get the attention of other persons to garner sympathy and reframe the narrative. The appellant argued that none of the third party witness statements indicate that he said those words but merely repeated what the Porter told them. The appellant alleged that the interrogation by the DAFSD was inherently biased and did not seek to determine what actually transpired. The appellant further alleged that this interrogation was the first time that he heard that the Porter accused him of saying that he was going to "beat him up." The appellant argued that he was truthful and candid during the interrogation.

As to Charge 4, the appellant argued that no altercation occurred. He argued that he was instructed to prepare a statement on August 3, 2016, but was prevented from doing so because he did not know his accuser or the specifics of the alleged "altercation." The appellant argued that he returned to work on August 7, 2016, and was asked to write another statement on August 8, 2016, but he still did not know the identity of his accuser or the specifics of the alleged altercation that formed the basis for the complaint.

In response to the appeal, management provided a procedural and factual background. Management argued that there were four witnesses to the appellant's misconduct and summarized their statements. Management also argued that the appellant made several admissions which changed as the appellant became aware of the extent of the evidence against him. Management argued that in the August 3, 2016, oral admission to the TSM, the appellant admitted to yelling at the Porter and misrepresented that the Porter had touched the machine. In the August 3, 2016, statement, the appellant admitted to swearing at the Porter and walked away from the Porter making no mention of his threat to beat the Porter up. In the appellant's August 8, 2016, statement, he admitted to swearing at the Porter and telling the Porter "Hey, don't make me smack you on the head" but made no mention of wanting to go outside or take the Porter outside to beat him up. In the appellant's request for reconsideration of his indefinite suspension, the appellant submitted a statement on August 11, 2016, and stated that he had a loud voice, admitted to using profanity in response to the profanities directed to him and stated that the Porter called him out for a fight first by saying "let's go outside" to which the appellant answered "O.K." The appellant then said "hey, let's go outside so I can smack you on the head." The appellant's September 7, 2016, response to the proposed removal, stated that he said to the Porter "hey let's go outside so I can smack you on the head" and admitted to using profanity. Management alleged that the Union submitted a different response and denied that the appellant threatened the Porter.

Management asserted that the Charges and specifications were proven by a preponderance of evidence. As to Charge 1, management argued that the statements support the Charge and the appellant made several admissions in the case relevant to the Charge. As to Charge 2, the appellant argued that the appellant's response was not credible because it is normal protocol and

practice for a manager to advise an officer to not make contact with witnesses/reporting party in this situation immediately upon learning of the incident. Management also argued that the TSM recalled the events in detail and the Deciding Official knows the TSM to be of excellent character and has no reason to be biased. Management argued that they found the appellant's statements to be self-serving, inconsistent and fluid as he became aware of the content of the other witness statements. As to Charge 3, management argued that the DAFSD provided two statements to support the Charge and that the Deciding Official found the appellant's assertion to be not credible for the following reasons: the DAFSD is of excellent character and is fair and unbiased; the DAFSD's statements have been consistent and consistent with other evidence; and the appellant's prior inconsistent statements. As to Charge 4, management argued that all employees are required to report any known of suspected violation of policy by a person to any manager when it occurs in the workplace.

Management denied the appellant's assertions that this action was taken due to discriminatory EEO matters and denied that the appellant's due process rights were violated. Management also asserted that they considered the statement of the other TSO and that the appellant was aware that an Airline Agent reported his activity. Management argued that contrary to the appellant's assertions, the Porter clearly viewed the appellant's actions as threatening and disagreed with the appellant's assertion that his actions were justified noting that employees are required to exercise courtesy and tact even in the face of provocation.

The appellant responded to management's reply and argued that he only had three brief exchanges with the Porter. The appellant stated the Airline Agent's statement is incorrect in that she did not tell him to calm down since he was not even where she was located and thus, her statement is not credible. In addition, the appellant argued that the second Airline Agent's statement was also not credible as she had no personal knowledge of his exchange with the Porter and was trying to recall what the Porter told her. He also alleged that this Agent could not have heard him as she was twice the distance away with her back toward him; the CT-80 impaired her view during the first two exchanges; and that the last exchange she was 63'to 66' feet away. The appellant also argued that the first agent was 45' to 48' feet away and it would have been impossible to hear any exchange. The appellant also argued that although management recognized the statement of the other TSO, they did not realize that it corroborates his statement that the Porter was insubordinate, was the one who was angry and was the aggressor. The appellant argued that his statements were fragmented and incomplete since he did not know what he was alleged to have done nor the identify of his accuser. Finally, the appellant submitted a character reference from his Pastor.

With respect to Charge 1, although the Porter's behavior on August 3, 2016, was the catalyst for the unfolding events, the appellant was required under TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, to exercise courtesy and tact in dealing with fellow workers, supervisors, contact personnel, and the traveling public, even in the face of provocation. The appellant failed to meet the standards set out in the MD. The essence of the specification was that the appellant was engaged in threatening conduct by cursing at and threatening the Porter. Even if the Porter was the first one to use profanity, the appellant was obligated to refrain from engaging in the same behavior, but failed to do so. In addition, the Board found no merit to the appellant's argument that his statement "Hey, don't make me smack you on the head" was not meant to be a physical threat but was stated with the intent of insulting the Porter based on the appellant's cultural upbringing as a Samoan. The statement made by the appellant could

have been interpreted by the Porter to be threatening. Although there were conflicting statements from the witnesses, the appellant has admitted to swearing at and making a statement that could be construed as threatening towards the Porter. Therefore, Charge 1, *Threatening Conduct*, is SUSTAINED.

With respect to Charge 2, the appellant argued that the directions to not speak to the airline agents came after the TSM pulled him away from speaking with them; not before. Management argued that more weight should be given to the TSM's statement since it is normal protocol and practice for a manager to advise an officer to not make contact with witnesses/reporting party in this situation immediately upon learning of the incident. There is no evidence in the record of this protocol and thus, it does not provide more weight to the statement of the TSM. In addition, the TSM's statement indicated that he instructed the appellant to not have any further contact with the airline but did not provide instructions to have no contact with the Porter. The TSM stated that upon his return to the lobby, he saw the appellant speaking to the reporting agent and an unknown female, who was later identified as the second Airline Agent. The TSM, aside from the reporting agent, did not know which airline agents were involved and which were not and admitted that the ticket counter was actively processing passengers. The statement of the TSM shows that the appellant was still working the CT-80 machine. In that position, he may have been required to speak to airline agents and without direct knowledge of who he could or could not speak to, it is incongruous to believe that he was given a blanket statement not to have any further contact with the airlines. Additionally, the TSM stated that the two agents expressed their discomfort with the appellant when he attempted to speak to them about the complaint. Neither agent expressed these sentiments in the statements provided to management. For the reasons stated above, the Board does not believe that the appellant was given a direct order to not speak to the airlines. Therefore, Charge 2, *Failure to Follow Directions*, is NOT SUSTAINED.

With regard to Charge 3, the appellant was charged with being less than candid when he told the DAFSD that he did not say that he was going to take the porter outside to beat him up. Management argued to the credibility of the statements by the DAFSD. The credibility of the DAFSD is not at issue. The statement of one of the Airline Agent's indicated that she heard the appellant state that "he will take him outside." The second Airline Agent stated that the Porter called to her that the TSA agent was going to "beat him up." She stated that the TSA agent was telling the Porter that he will "take him outside." She did not say whether she heard these exact words but then stated that she does not know what this means. The statement of the TSM, which summarized his call with the second agent, indicated that the second agent said that she heard the appellant state that he was going to beat the Porter up. The appellant admitted that he said "Hey, don't make me smack you on the head." The appellant later clarified this statement and said that the Porter first stated "Let's go outside" to which the appellant responded "Hey, let's go outside so I can smack you on the head." The appellant was asked by the DAFSD whether he stated that he was going to take the Porter outside to beat him up. The appellant has never stated that "he was going to take the Porter outside to beat him up." The statements provided by the Porter did not state that the appellant was going to take him outside to beat him up. In the first statement, the Porter stated that the appellant called him out for a fight. In the second statement, the Porter stated that the appellant called him out for a fight and said "Let's go to the Street and have a fight." There is no proof that the appellant said the words that management has accused him of being less than candid with them about. The Board agrees with the appellant that it is nonsensical to assert that he should be required to admit to a statement that he never made. Therefore, the Charge, *Lack of Candor*, is NOT SUSTAINED.

With regard to Charge 4, the Board is not swayed by the argument put forth by the appellant that there was no altercation. Although TSA MD. 1100.73-5 requires employees to report known or suspected violations of law, rule, regulation, policy, or SOP, there is no time constraint set out in the policy. Certain policies set out time frames in which violations must be reported but the general catch-all stated in MD 1100.73-5 does not. What weights most heavily is the fact that one of the Airline Agents reported the incident to management mere minutes after it occurred thus depriving the appellant of the opportunity to self-report. Whether the appellant would or would not have reported is not the issue. The fact is that the incident was reported to management within minutes relieving the appellant of his responsibility to report said incident. Therefore, the Charge, *Failure to Report*, is NOT SUSTAINED.

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

The penalty factors were addressed by the Deciding Official. The Deciding Official considered that as an LTSO, the appellant's conduct was unprofessional and threatening in that he escalated a verbal conflict with an external stakeholder, while on duty, and in full view of the traveling public and other stakeholders. The Deciding Official also asserted that he considered that the appellant attempted to hide his misconduct by not reporting the incident to management and not being candid when questioned on the incident. The Deciding Official determined that the appellant was the Officer In Charge and represented TSA as the leader of his workgroup on the day in question. The Deciding Official considered that the appellant was served a Letter of Reprimand on February 21, 2016, for Failure to Follow SOP. The Deciding Official considered that the incident has negatively impacted his supervisor's confidence in the appellant's ability to perform his assigned LTSO duties professionally and honestly. In addition, the Deciding Official considered that the incident occurred in full view of the traveling public. As aggravating, the Deciding Official determined that due to the severity of the incident, he has no confidence in the appellant's ability to perform his duties professionally. The Deciding Official considered lesser penalties but deemed them insufficient to address the appellant's behavior. As mitigating, the Deciding Official considered the appellant's length of service, since March 4, 2007, and his performance.

Under Section B.5 of the Table, for Inappropriate Conduct, the recommended penalty range is a Letter of Reprimand (LOR) to a five (5) day suspension. The aggravated penalty range is a six (6) day suspension to removal. The Deciding Official used the aggravated range because of guidance in the Table, which states "[I]n 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." Only one of the four charges was sustained. In light of the fact that the Deciding Official only went to the aggravated range because of the multiple offenses, the Board determined that the correct penalty range is the recommended range. The appellant's previous discipline, an LOR, in 2016, was for dissimilar conduct. In addition, it is clear that the Deciding Official considered the charges that were not sustained in making his determination of the penalty by arguing that the

appellant attempted to hide his misconduct by not reporting the incident to management and not being candid when questioned on the incident.

After considering all the facts and weighing the relevant penalty factors, the Board finds that the appellant's removal is not within the bounds of reasonableness for the sustained Charge. The Board agrees that the appellant's misconduct is serious; however, TSA policy promotes the use of progressive discipline as a means of motivating an employee to correct misconduct. The Board found that the mitigating factors in this case, including the fact that the appellant has been employed with TSA for almost ten years and has one LOR for unrelated misconduct, grant significant weight in favor of the employee. Additionally, the Board considered the part that the Porter played in the unfolding events which resulted in the appellant being charged with Threatening Conduct. Given that this was the appellant's first offense for this type of incident, the Board determined that a penalty at the high end of the recommended penalty range is appropriate. Therefore, the Board mitigates the penalty of removal to a five (5) day suspension.

Decision. Accordingly, the appeal is GRANTED, in part, and the penalty is MITIGATED to a five (5) calendar day suspension. The appellant will be reinstated as an LTSO, subject to meeting current TSA employment conditions. Further, the appellant will receive back pay from the date of his removal, excluding the period of suspension, in accordance with TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

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=08760 87875.TSA
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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

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

V.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—16-226

January 17, 2017

***Issue:*** *Failure to Follow Instructions*

**OPINION AND DECISION**

On October 28, 2016, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge, *Failure to Follow Instructions*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence in the record. Management based the Charge, *Failure to Follow Instructions*, on four specifications. Specification 1 alleged that on or about August 28, 2016, at approximately 0415 hours, the appellant reported to duty at the checkpoint without his radio earpiece. A Supervisory Transportation Security Officer (STSO) provided the appellant with a new earpiece and instructed the appellant to wear it while on duty. On two separate occasions between approximately 0500 hours and 0700 hours, at the checkpoint, another STSO observed the appellant without his radio earpiece in violation of the instructions the first STSO had already given the appellant earlier that morning. The STSO spoke to the appellant and instructed the appellant to wear the earpiece.

Specification 2 alleged that on or about August 28, 2016, at approximately 0812 hours, a Transportation Security Manager (TSM) observed the appellant performing exit monitor duties at

the checkpoint without wearing his radio earpiece. The TSM reminded the appellant that two STSOs had already instructed him to wear the earpiece that morning, and the TSM instructed him again to wear it. The appellant failed to follow the previous instructions given to him that morning by two STSOs.

Specification 3 alleged that on or about August 28, 2016, at approximately 0932 hours, a TSM observed the appellant performing Travel Document Check (TDC) for the standard lanes, without wearing his radio earpiece. The TSM instructed the appellant again to wear the earpiece. The appellant had been previously instructed, that morning, by two STSOs and the TSM to wear his earpiece on duty. The appellant failed to follow instructions.

Specification 4 alleged that on or about August 30, 2016, at approximately 0738 hours, a TSM observed the appellant performing TDC duties without wearing his radio earpiece. The appellant had previously been instructed on August 28, 2016, by two STSOs and the TSM to wear his earpiece while on duty. The appellant failed to follow instructions.

Management found the appellant in violation of 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. Section 5. D. (2) states that TSA employees are responsible for responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials. Section 5. D. (7) states that TSA employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. A. states that TSA employees must comply with all standards, responsibilities, and code of conduct established by the directive and shall report any violation(s) of the directive to appropriate management officials. Section 6. B. states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. 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 noted that Section 6. A. states that failure to comply with the directive and/or failure to report violations of the directive may result in appropriate corrective, disciplinary, or adverse action, up to and including removal.

On August 28, 2016, the appellant reported to work without his radio earpiece. An STSO submitted a statement, dated September 18, 2016, in which she stated that on August 28, 2016, she observed the appellant enter the checkpoint without his headset after the morning briefing. The STSO stated that she reminded the appellant to wear his headset and that the appellant told her that he left it in his car. The STSO stated that she provided the appellant with a new headset from the supply cabinet and instructed him to wear the headset provided.

Another STSO submitted a statement, dated September 1, 2016. In his statement, the STSO stated that the appellant arrived at the checkpoint a few minutes prior to the start of his shift time of 0415 hours on August 28, 2016, without his earpiece set. The STSO stated that when asked, the appellant said that he left it at home. The STSO stated that another STSO provided him a new earpiece and told him to wear it. The STSO stated that while walking to his position at approximately 0426

hours, the appellant is shown on Closed Circuit Television (CCTV) taking the earpiece set out of the plastic bag and beginning to attach it to his shirt collar. The STSO stated that after the appellant attached it to his shirt, he let the plug hang down his back and did not attach it to the radio microphone. The STSO stated that when the appellant was called on the radio, he was nonresponsive. The STSO also stated that on two separate occasions during that early morning, he had to tell the appellant to put his earpiece in his ear. The STSO stated that at approximately 0730 hours, a TSM informed him that he had to tell the appellant to wear his earpiece. The STSO stated that he told the TSM that he had mentioned the earpiece to the appellant twice earlier in the morning. The STSO stated that the appellant was seen at the TDC with the earpiece hanging outside of his ear and the wire hanging down his back.

A third STSO submitted a statement, dated September 1, 2016. In his statement, the STSO stated that on August 28, 2016, at approximately 0500 hours, the male STSO, who submitted the statement referenced above, instructed the appellant to wear his earpiece on several different occasions. The STSO stated that approximately 0730 he observed the appellant at the TDC not wearing his earpiece. The STSO stated that a TSM came over to the checkpoint to give an update and that during the conversation with the TSM, he and the other STSO noticed again that the appellant was not wearing his earpiece. The STSO stated "I informed [the TSM] that [the appellant] was instructed to wear his ear piece but won't."

A TSM submitted a Memorandum for Record, dated September 28, 2016. In the memorandum the TSM stated that at 0800 hours he spoke to another TSM and that the TSM advised him that two STSOs seemed frustrated that the appellant had failed to answer a couple of calls over the radio and appeared to not be wearing his radio earpiece properly despite being directed to do so twice by one of the STSOs. The TSM stated that at approximately 0812 hours he approached the appellant who was preforming exit monitor duties and observed him without his earpiece in place. The TSM stated that he asked the appellant why he was not wearing the earpiece and that the appellant stated that it was a nuisance. The TSM stated that he told the appellant that while it may be a nuisance, it was necessary and required. The TSM stated that he told the appellant that while at the checkpoint, he must wear his radio earpiece. He also stated that at 0932 hours, he observed the appellant performing TDC duties without his radio earpiece in place. The TSM stated that he approached the appellant and reminded him that in the last hour he had just instructed him to wear his earpiece while on duty and asked him why he was not wearing it. The TSM stated that the appellant told him that he had been on break and forgot to put his earpiece in place when he returned to the floor. He stated that he told the appellant to make sure that he was wearing his earpiece while on duty. The TSM noted that when reviewing the CCTV, he saw that the appellant's earpiece was not connected to his radio and that the earpiece connection was dangling down the center of his back. The TSM stated that throughout the day the radio connection could be seen dangling down the center of the appellant's back.

In his memorandum, the TSM also stated that on August 30, 2016, at approximately 0738 hours he observed the appellant performing TDC duties without his radio earpiece properly in place. The TSM stated that the appellant's earpiece wire was draped over his ear and his earpiece was dangling alongside of his ear, in between his ear and his cheek. The TSM stated that he asked the appellant why he was not wearing his earpiece properly and that the appellant replied "It's close enough, I can hear." The TSM stated that he met with the appellant, along with an STSO, to address the fact that the appellant was not wearing his earpiece despite having been told repeatedly to do so. The TSM stated that the appellant stated that he did not understand why he had to have the earpiece

stuffed inside his ear. He stated that he told the appellant that the expectation was to use all TSA equipment properly, as it was intended to be used, including the radio earpiece. The TSM stated that he asked the appellant if he had any information to present that he should know or consider before making a decision as to what action to take and that the appellant replied that he had nothing to add and that it already sounded like the TSM had made up his mind.

The appellant was issued a Notice of Proposed Removal (NOPR) on September 29, 2016. 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. The appellant requested and was granted an extension to reply. The appellant submitted a written reply and gave an oral reply on October 13, 2016.

Management provided as evidence: a statement from a TSM, dated August 31, 2016; a statement from an STSO, dated September 18, 2016; a statement from an STSO, dated September 1, 2016; a statement from another STSO, dated September 1, 2016; a Memorandum for Record from a TSM, dated September 28, 2016; and CCTV video.

On appeal, the appellant argued that management failed to provide evidence that is credible and reliable, and therefore failed to prove the Charge by a preponderance of the evidence. The appellant argued that on August 19, 2016, he visited an Urgent Care and was diagnosed with otitis externa, commonly known as swimmers ear, and that avoidance of precipitating factors, such as wearing an earpiece, are common practice. The appellant argued that it was in line with the doctor's order, which states to keep the ear canal clear, refrain from swimming, and refrain from putting anything in the ear.

With regard to specification 1, the appellant noted that in the Decision, management stated that one of the STSOs observed him not wearing his earpiece two additional times after the first STSO observed that he did not have his earpiece when he reported to work. He argued that in the second STSO's statement, written four days after the incident, the STSO referred to times on the CCTV footage, and that therefore, it is unclear if the STSO witnessed the entirety of the events in person or had subsequently viewed parts of the event via CCTV footage. He argued that management provided a statement in support of their claim by the STSO, however, his statement is not based on his own personal knowledge but from being shown the CCTV footage. The appellant argued that the statement clearly shows that the STSO was asked to give a statement on an event that he had no personal knowledge of the actual details.

With regard to specifications 2, 3, and 4, the appellant argued that management failed to provide the precise details to provide the statement of facts. He noted that Specification 2 states in part "I observed you," "I reminded you;" specification 3 states in part "I observed you," "I instructed you;" and specification 4 states in part, "I observed you." The appellant argued that the language was used in both the Decision and the NOPR even though the author of the NOPR was a TSM and the author of the Decision was an Assistant Federal Security Director (AFSD). He argued that management provided the same claims in specifications 2-4 but failed to identify who made the claims. He noted that management told its story from the perspective of the individual but that throughout the Decision and the NOPR, management alluded that the individual could be either the TSM or the AFSD. He argued that it is not possible for both men to give the same exact story because the story uses singular language instead of plural.

Additionally, the appellant argued that the NOPR was never signed by the proposing official. He noted that under TSA MD 1100.75-3, Handbook, Appendix B, the proposing official for a removal must be a TSM or higher. The appellant argued that without the signature, it is impossible to know who the proposing official actually was. The appellant argued that without a signature, management failed to show that the proper procedure was taken to remove him and that it subsequently taints the entire removal process to the point that the removal should be dismissed.

Management responded and argued that on August 28, 2016, when he reported to work without his radio earpiece and was provided a new one and instructed to wear it while on duty by two STSOs at different times, he did not tell either STSO why he was not wearing or could not wear the radio earpiece. Management also argued that on the same date, at 0812 hours, a TSM observed him without his earpiece and that when the TSM asked the appellant why he was not wearing it, the appellant stated that the earpiece "was a nuisance." Management argued that the appellant did not provide the TSM or make any mention of any medical reason why he was not wearing or could not wear an earpiece. Management reiterated that a little over an hour later, at approximately 0932 hours, the TSM observed the appellant not wearing his earpiece again and once again instructed him to wear the earpiece while working. Management argued that the appellant did not provide any medical reason why he was not wearing or could not wear the earpiece. Management stated that two days later, on August 30, 2016, at approximately 0738, the TSM again observed the appellant not wearing his radio earpiece. Management stated that the TSM held a meeting with the appellant with an STSO as a witness to discuss his failure to follow instructions. Management argued that the appellant questioned the requirement to have the earpiece in his ear but did not provide any medical reason why he was not wearing or could not wear the earpiece. Management noted that the Deciding Official met with the appellant and his representative on October 13, 2016, and that for the very first time, the appellant eluded to medical reasons for not wearing the radio earpiece by stating that he did not insert the earpiece into his ear for his "fear of the potential for contracting an ear infection." Management argued that he did not mention he had allegedly visited an Urgent Care facility on August 19, 2016, nor did he provide a copy of the medical statement that he introduced in his appeal.

With regard to the unsigned NOPR, management stated that the TSM proposed the appellant's removal on September 29, 2016, in person, with an STSO as a witness. Management stated that the TSM read and explained the proposal to the appellant. Management stated that the TSM and the appellant signed one copy of the NOPR, which was kept for management's record, but that the TSM forgot to sign the copy issued to the appellant. Management argued that the fact that the appellant's copy of the proposal was mistakenly not signed by the TSM was not a harmful error.

Management argued that the appellant's argument that management failed to provide evidence that is credible and reliable is nonsensical. Management argued that the STSO's statement is clear; that he stated that he told the TSM that the appellant was not responding to radio calls and that he had to instruct the appellant twice that morning to wear the earpiece. Management argued that the fact that the STSO also made reference to certain parts of the CCTV video does not negate the fact that he instructed the appellant to wear his earpiece twice that morning. Management also argued that the appellant never denied that he was instructed to wear the earpiece twice by the STSO.

Management argued that the Decision letter clearly states in the first paragraph that the action is based on the specifications from the NOPR. Management stated that the Deciding Official copied the Charge and specifications from the NOPR and did not modify them to change the "I" to "TSM"

because he specifically stated that he was using the specifications from the NOPR. Management further argued that it is quite clear who made the claims against the appellant because the TSM met with the appellant on September 29, 2016, to issue the NOPR and explain the charges and specifications and the response process. Additionally, management argued that during the meeting on October 13, 2016, the appellant did not mention any doubts or question as to who had made the claims against him.

Management argued that the evidence shows, and that the appellant does not contest, that he was instructed several times on August 28, 2016, by two STSOs and a TSM to wear his radio earpiece and that he did not comply with the instructions. He was additionally observed not wearing his earpiece while on duty on August 30, 2016. Management argued that the preponderance of the evidence clearly shows that the appellant failed to follow instructions.

The Board found no merit to the arguments put forth by the appellant. Although the Proposing Official failed to sign the NOPR; this was not a harmful error. The statements by the STSOs are clear and the Board agrees with management that the reference to CCTV does not negate the fact that he instructed the appellant to wear his earpiece. In addition, management's failure to correct the specifications from the NOPR to the Removal letter, although sloppy, are also not a harmful error as the appellant was on proper notice as to who was making the allegations against him.

With regard to specification 1, the Board found that the statements from two STSOs, who saw the appellant without his earpiece and instructed him to wear his earpiece, are preponderant evidence to support the specification. Specification 1 is SUSTAINED.

With regard to specification 2, the Board found that the statement from the TSM and the CCTV footage of the interaction between the appellant and the TSM is preponderant evidence to support the specification. Specification 2 is SUSTAINED.

With regard to specification 3, the Board found that the statement from the TSM and the CCTV footage of the interaction between the appellant and the TSM is preponderant evidence to support the specification. Specification 3 is SUSTAINED.

With regard to specification 4, the Board found that that the statement of the TSM is preponderant evidence to support the specification. Specification 4 is SUSTAINED.

Having sustained the specifications, the Charge, *Failure to Follow Instructions*, is SUSTAINED.

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

On appeal, the appellant argued that management failed to follow progressive discipline because his removal is excessive. He argued that management did not use the least severe form of punishment that could correct the problem and failed to properly consider the charge against him. The appellant stated that he has some unrelated disciplinary and performance actions; but argued that he has been employed with TSA for over ten years and that his overall performance record is satisfactory. The

appellant argued that his removal is based on a misunderstanding and miscommunication and does not indicate an attempt to willfully fail to follow instructions. He argued that a more appropriate penalty would be a Letter of Counseling (LOC). The appellant argued that management chose the most severe punishment for a first time offense for this particular charge and thus management failed to follow the principles of progressive discipline.

The appellant also argued that management did not properly weigh the penalty factors. He argued that management incorrectly overstated the seriousness of the offense. The appellant noted that management charged him with failure to follow instructions by failing to wear his radio earpiece on six occasions, outlined in four specifications. He also noted that five of the six occasions occurred on the same day. The appellant argued that management failed to give credence to his assertion that he was worried about contracting an ear infection by wearing the earpiece and the accompanying medical evidence that he provided. The appellant argued that it is significant that the dates on which he is accused of not wearing an earpiece are within a two-week period for which his physician had advised him to refrain from putting anything in his ear.

The appellant argued that he faced unusual tensions alleging that he was intentionally persecuted by management on a daily basis while working his scheduled shifts and that it appears that management punished him with the most severe punishment for failing to wear his earpiece when other employees were not punished at all for the offense. He referenced two other individuals and argued that management did not apply the punishment consistently to other employees who were similarly situated to him.

Further, the appellant argued that management placed undue reliance on his previous disciplinary record for unrelated offenses. He conceded that he received two suspensions for attendance-related issues in 2012 but argued that he has not had any issues since then which demonstrates that he can be rehabilitated.

Finally, the appellant argued that his removal does not promote the efficiency of the service. He argued that he has the necessary credentials, experience and education to enhance TSA's mission, and that he has always promoted a culture founded on values of integrity, innovation, and team spirit.

Management responded and argued that the appellant's claims that management failed to follow progressive discipline and that the penalty is not reasonable are not valid. Management argued that the appellant had a significant disciplinary history including a 1-day suspension in March 2012 for Absence without Leave (AWOL), Tardiness, Failure to Follow Leave Procedures and Failure to Follow Instructions; a 2-day suspension in December 2012, for AWOL and Tardiness; a 7-day suspension in May 2015 for Refusal to Follow Instructions; and a 7-day suspension in March 2016 for a first alcohol related offense, Driving Under the Influence (DUI). Management noted that although the Charge at issue with the current action is not the same as all of the other charges in the past, they demonstrate the appellant's inclination for not following procedures and instructions and noted that the past disciplinary actions did not correct his behavior.

Management argued that there was no misunderstanding or miscommunication in this offense; the appellant was instructed by two supervisors and a manager to wear the earpiece five different times in a three-day period and he chose to ignore the instructions.

Management also argued that the NOPR and Decision clearly show that management carefully considered all applicable factors before making the decision to remove the appellant. Management also argued that the Deciding Official did not incorrectly overstate the seriousness of the offense. Management argued that the appellant's apathetic attitude towards his superiors is a serious breach of conduct which disrupts management's ability to conduct the mission. Management argued that employees cannot decide what instructions they will follow as management relies on them to follow every instruction.

Management argued that the appellant's claim regarding his fear of an ear infection is disingenuous and that his claims that he was intentionally persecuted by management are baseless and have nothing to do with his action. Management argued that the appellant's serious misconduct adversely impacted management's ability to accomplish the mission. Management argued that the appellant deliberately and repeatedly ignored instructions from two STSOs and a TSM. Management argued that the radio earpieces are used for very important security purposes and that individuals cannot decide on their own to disregard them. Management argued that they have lost trust that the appellant could or would perform his duties in accordance with instructions and policies.

The appellant replied to management's reply and argued that management failed to rebut the strong evidence he presented in his appeal of several instances where officers failed to wear their earpieces and were not disciplined. He argued that the evidence demonstrates that management in practice did not discipline employees for failure to wear the earpiece and that it was improper for management to single him out for discipline.

The Deciding Official considered the breadth and scope of the appellant's misconduct and found that it was extremely serious. The Deciding Official stated that the appellant's apathetic attitude toward his supervisors' and manager's instructions is a very serious breach of conduct which serves to disrupt management's ability to maintain good order and discipline in the workplace. The Deciding Official stated that to fulfill mission requirements and maintain efficiency of the Federal Service, the agency and management rely upon the expectation that employees will follow legitimate instructions. He stated that as a TSO, the appellant is tasked with the critical duty of protecting the nation's public and transportation systems by identifying and preventing explosives, weapons, incendiaries and other prohibited items from being transported aboard commercial aircraft. The Deciding Official considered that with such a critical role in the nation's security, the TSA and its stakeholders cannot afford to gamble on whether or not the appellant will respond to orders or whether he will pick and choose which orders to follow. The Deciding Official found that the appellant's misconduct demonstrates terrible judgement and damages management's trust in him to do what is necessary when needed, especially if he finds it inconvenient.

The Deciding Official stated that he found it aggravating that the appellant chose to set aside his obligation to follow instructions without explanation or dialogue with management, other than to first say he was not wearing the earpiece because it was a nuisance and then to later claim that he was afraid of getting an ear infection. The Deciding Official stated that the appellant's uninspiring posture is troubling and unconvincing.

The Deciding Official considered the appellant's prior disciplinary record including a 1-day suspension in March 2012 for 2 specifications of Absence without Leave (AWOL), 21 specifications of Tardiness, and 1 specification of Failure to Follow Instructions; a 2-day suspension

in December 2012 for 5 specifications of AWOL and 15 specifications of Tardiness; a 7-day suspension in May 2015 for Refusal to Follow Instructions; and a 7-day suspension in March 2016 for a first alcohol related offense, Driving Under the Influence (DUI). The Deciding Official noted that while not all of the appellant's prior discipline is exactly the same as his current misconduct, they are common in that they involve a pattern of failure to uphold the standards of conduct expected of all TSA employees. The Deciding Official stated that as some of the appellant's disciplinary history involved following procedures or instructions; he found that the appellant is well aware of the importance and requirements to follow instructions at work. The Deciding Official considered that as a tenured TSA employee, the appellant clearly knew what is expected of him and yet he elected to ignore his responsibilities. The Deciding Official also noted that in each of the disciplinary cases mentioned above, the appellant was advised that additional misconduct could result in more severe disciplinary action, up to and including removal.

The Deciding Official also considered the effect the appellant's misconduct had on the appellant's ability to perform at a satisfactory level and its effect on his supervisor's confidence in his ability to perform those duties. The Deciding Official considered that the appellant's repetitive failure to follow instructions and apparent defiant attitude breeds an atmosphere of distrust and demonstrates terrible judgment. The Deciding Official found that the appellant cannot be trusted or relied upon to follow rules, procedures or instructions, especially if the appellant determined them to be inconvenient or a nuisance. The Deciding Official stated that he had lost all confidence in the appellant's ability and willingness to consistently demonstrate professional behavior and comply with workplace rules.

The Deciding Official stated that he also gave significant consideration to the degree of notice the appellant had been provided advising him that his conduct was unacceptable, that it would not be tolerated and that if repeated, may result in disciplinary action up to and including removal. The Deciding Official considered that in this instance the appellant was told approximately five times over a three-day period to wear his earpiece while on duty, yet he repeatedly failed to comply. Additionally, the Deciding Official considered that records indicate that during his tenure with TSA, the appellant acknowledged reading and understanding TSA MD 1100.73-5, *Employees Responsibilities and Code of Conduct*, or its predecessors, approximately once annually and that according to the training records, the appellant competed an acknowledgment on February 18, 2016. The Deciding Official considered that as a well-seasoned TSO, the appellant was well aware of his responsibility to follow policies, procedures and instructions in a professional manner.

As mitigating factors, the Deciding Official stated that he gave significant consideration to the appellant's past work record, including length of service, performance on the job and ability to get along with fellow officers. The Deciding Official stated that he considered that the appellant has been employed as a TSO for more than ten years; that his technical performance ratings have consistently been at the Achieves Standards or higher level; and that he generally gets along well with fellow officers. The Deciding Official noted that he weighed those factors carefully as ten years of service is significant and meaningful but found that it is outweighed by the seriousness and repetitive nature of the appellant's misconduct.

The Deciding Official considered the appellant's potential for rehabilitation and found that the appellant's actions were substandard and an affront to his fellow TSOs. The Deciding Official stated that the appellant showed horrible judgment and a lack of integrity. The Deciding Official stated that the appellant's seemingly deliberate failure to follow instructions is so serious that he lost

all confidence in the appellant's willingness and ability to perform his duties to standard and in a professional manner and found that there is no reason to believe the appellant can be rehabilitated.

Section D.2 of the Table, which pertains to Failure to Follow Instructions, provides for a recommended penalty range of a Letter of Reprimand (LOR) to a 10-day suspension. The aggravated penalty range is an 11-day suspension to removal. The Deciding Official noted that he considered the aggravated penalty range due to the appellant's past disciplinary history and prior warnings not to commit misconduct.

The Board found that the appellant's failure to follow the instructions of management was serious. Significant security reasons, critical to the mission of the agency, require officers to wear an earpiece. The appellant failed to inform management, prior to his appeal, of a medical reason for his failure to wear an earpiece but chose instead to consistently fail to follow the instructions to wear an earpiece. The Board found that given the appellant's repeated blatant and deliberate failure to follow instructions, 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

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: 2017.01.17 16:30:57 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

V.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—16-227

January 18, 2017

***Issue:*** *Failure to Follow Standard Operating Procedures*

**OPINION AND DECISION**

On November 8, 2016, management suspended the appellant for twenty (20) calendar days from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge, *Failure to Follow Standard Operating Procedures (SOP)*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence in the record. Management based the Charge, *Failure to Follow Standard Operating Procedures (SOP)*, on one specification. The specification alleged that on August 10, 2016, the appellant was performing X-ray screening duties at the checkpoint. At approximately 0855 hours, a passenger submitted their property for X-ray screening. The appellant properly recognized and annotated oversized liquids inside of the passenger's bag. The appellant pulled two bags unto the manual diverter roller (MDR); however, she failed to ensure that the property matched the image. As a result, the passenger was allowed to enter the sterile area with the oversized liquids and its contents unscreened.

Management found that the appellant violated TSA Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5.D. (7), which states that employees must observe and abide by all laws, rules, regulations and other authoritative policies and guidance. Management

also found that the appellant violated the Screening Checkpoint SOP Revision 11, Change 2, Chapter 12, Section 2. C, *Positive Control of Items Requiring Resolution.*

On August 10, 2016, at approximately 0855 hours, the appellant was operating the X-ray. During that time, she annotated a bag for search due to oversized liquids. The appellant removed the bag from the X-ray and placed it on the MDR. The appellant removed the wrong bag and as such, the liquids were allowed to enter the sterile area. The passenger and bag were located in the sterile area, rescreened, and the liquids were surrendered.

The appellant submitted a written statement, dated August 10, 2016. In her statement, the appellant stated that at approximately 08:45 a.m., while working X-ray on the pre-check lane, she called a bag check on some liquids. The appellant stated that she pulled two bags out of the machine that resembled the bag and that neither of those bags had liquids in them.

A Pre-Decisional Discussion was held with the appellant on August 12, 2016. During the discussion, the appellant told a Supervisory Transportation Security Officer (STSO) that she pulled two bags from the X-ray, placed one back, and sent the other to the MDR. The appellant stated that the wrong bag was pulled. She stated that the search was for oversized liquids and that when the bag was located it was a bottle of lotion. The appellant stated that she was alone on the X-ray, not distracted with a conversation, and pulled the wrong bag. The appellant stated that they were short on staffing and that it took some time for the dynamic officer (DO) to respond for the bag check. She stated that while she did pull the wrong bag, better staffing could lead to a quicker response and make it easier to locate the correct bag as it probably would still be in the checkpoint.

The appellant was issued a Notice of proposed twenty (20) day suspension on October 4, 2016. The Notice advised the appellant of her right to make an oral and/or written reply within seven calendar days of her receipt of the proposal. The appellant requested an extension on October 8, 2016, and management granted an extension until October 18, 2016. The appellant did not provide a response.

Management provided as evidence: Summary of a Pre-Decisional Discussion, dated August 12, 2016; a statement from the appellant, dated August 10, 2016; a statement from a TSO, dated October 1, 2016; an Incident Report, dated August 10, 2016; and three photographs.

The appellant did not dispute the charge in her appeal.

The Board found that the appellant admitted in the pre-decisional meeting that she pulled the wrong bag. The statement of the appellant, the statement of the TSO, and the summary of the pre-decisional meeting are preponderant evidence that the appellant failed to follow standard operating procedures. Therefore, the Charge, *Failure to Follow Standard Operating Procedures (SOP)*, is SUSTAINED.

Having sustained the Charge, the question is whether the Deciding Official has shown that the penalty of a 20-day suspension 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 20-day Suspension Decision letter given to her is in direct violation of TSA MD 1100.73-3[1], which states that notice of proposed adverse or disciplinary action should, in general, be issued within 30 days of the completion of the fact-finding inquiry. The appellant argued that the Decision letter was not issued until November 8, 2016, which was approximately 24 days after it should have been issued per the MD. The appellant also argued that management violated TSA penalty determination policy by not being consistent with the penalties imposed for failure to follow standard operating procedures. She argued that she gave a timely acknowledgement of her wrongdoing and took full responsibility for her actions. The appellant argued that management should be held accountable for not only consistently missing deadlines outlined in the MD but also for "constant overreach and abuses of power and positions." The appellant stated that she is an outstanding employee who received a performance rating of exceeded expectations for 2015 and who has been an asset who has worked for the agency for 12 years. The appellant argued that her commendations along with the MD and Table of Penalties violations she alleged management committed should all be mitigating factors in getting the action mitigated or dismissed.

In response, management noted that the appellant claimed that the Decision letter is in direct violation of MD 1100.73-3 which is *Prevention and Elimination of Sexual Harassment*. Management stated that they believe the appellant intended to reference MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*. Management noted that the appellant claimed that the Proposal Notice was issued 24 days past the "deadline" set forth in the policy. Management noted that the appellant referenced the Handbook to MD 1100.75-3, Section H. (1) which states the notice of proposed adverse action should, in general, be issued within 30 days of completion of the fact-finding inquiry. Management noted that in this case, the appellant's failure to follow policy occurred on August 10, 2016; the pre-decisional discussion occurred on August 12, 2016; and the Notice was issued on October 4, 2016.

Management argued that it does not interpret the provision of the policy as strictly as the appellant and argued that the very words of that section state the proposal "should" and "in general" be issued within 30 days of the fact-finding, not "must" be issued. Management argued that there is clearly some flexibility within reason and that they disagree that a three-week interval beyond the 30-day mark before issuing the proposal letter could be viewed as unreasonable. With respect to the issuance of the Decision, management noted that the appellant requested and was granted an additional seven days to reply to the proposal and that even with the extension granted, the appellant failed to respond. Management further argued that during the pre-decisional meeting the appellant did not dispute, nor did she in the appeal, the factual basis for the charged misconduct and accordingly she was not disadvantaged in any way in defending herself to the proposed action.

Management argued that while for a first offense and no prior disciplinary history, a mitigated penalty under Section M.1 would typically be appropriate; the appellant has a significant progressive disciplinary history which the Deciding Official found to be an aggravating factor. Management also argued that notwithstanding the appellant's multiple suspensions, the Deciding Official considered the nature of the current offense and that it was not intentional, but was negligent. Management argued that the Deciding Official noted mitigating factors, including the

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[1] The appellant used an incorrect MD number; the appellant referenced MD 1100.73-3 which is *Prevention and Elimination of Sexual Harassment in the Workplace* when citing portions of MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*.

acceptance of responsibility and length of service, but that he could have chosen the aggravated penalty range for a successive offense for failing to follow SOP.

In making a penalty determination, the Deciding Official considered the nature and seriousness of the appellant's misconduct and its effect on his confidence in the appellant's ability to perform her duties. He noted that when employees fail to follow SOP, it adversely affects the ability to provide efficient and effective security at the airport. The Deciding Official considered that in her position as a TSO, the appellant is responsible for screening persons and their property to ensure the security of passengers, the airport and the public. The Deciding Official stated that it is critical that management be able to trust that the appellant will perform her duties in accordance with established procedures, and that she will be fully focused on the performance of her duties.

The Deciding Official considered the effect of the offense upon the appellant's ability to perform at a satisfactory level. He stated as a TSO, the appellant is expected to meet high standards of conduct, performance and judgment. The Deciding Official considered that the appellant's failure to follow SOP reflects a failure to meet the standards expected of a TSO. The Deciding Official also considered the impact upon the reputation of the agency and stated that when officers fail to execute their duties according to the SOP, it puts the flying public at risk and negatively reflects on the agency. The Deciding Official considered that the incident disrupted the operations and passengers and property had to be brought back to the checkpoint to be re-screened in accordance with SOP. The Deciding Official found that the appellant's actions undermined the trust and confidence of the traveling public in TSA.

The Deciding Official considered the appellant's prior disciplinary record noting that she received a 14-day suspension on July 30, 2015, for inappropriate conduct and failure to exercise courtesy and tact in performance of duties; a 5-day suspension on September 26, 2014, for failing to exercise courtesy and tact; and a 3-day suspension on June 26, 2008, for failure to follow SOP.

The Deciding Official also considered the clarity with which the appellant had been warned about the conduct in question. He considered that as a TSA employee, the appellant had been notified of the policy governing employee responsibilities to perform procedures in accordance with SOP and that she had been fully trained and regularly tested on the requirements of the SOP. The Deciding Official also noted that the appellant read MD 1100.73-5 on November 30, 2015, via the Online Learning Center (OLC). Further the Deciding Official considered that with the appellant's prior disciplinary actions, she was warned that future misconduct could lead to additional and more severe action, up to and including removal from TSA and that she therefore knew, or should have known, that her conduct was in violation of TSA policies and could lead to more severe disciplinary action.

As mitigating factors, the Deciding Official considered that the appellant has been with the agency since September 12, 2004, and that she received a performance rating of "exceeded expectations" for 2015. He also considered that the appellant's misconduct was unintentional but found that the mitigating factors do not outweigh the aggravating factors.

Section M.1 of the Table, which pertains to failure to follow standard operating procedures, provides for a recommended penalty range of a five (5) day suspension to removal.

The Board agrees with management that there is flexibility in the guidance in the Handbook to MD 1100.75-3 with regard to the timeframe of the issuance of a proposed action and found no violation of policy by management. The Board determined that the appellant had one instance of prior discipline for similar misconduct, a 3-day suspension in 2008 for Failure to Follow SOP, which supports progressive discipline. The Board found that while a 20-day suspension is unduly harsh for an unintentional performance error, management's decision was within the bounds of reasonableness based on the recommended range in the Table of Penalties.

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—16-228

January 26, 2017

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

## OPINION AND DECISION

On November 8, 2016, management removed the appellant from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) for Violation of his Last Chance Agreement (LCA). An LCA was entered into on July 8, 2016, and signed by the appellant and management. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management charged the appellant with a violation of his LCA that was signed by the parties on July 8, 2016. A copy of the signed agreement was included with the record and showed that the appellant signed said agreement. The document stated that the agreement was signed as an alternative to removal. The appellant was proposed for removal on June 13, 2016, for *Failure to Follow Instructions and Failure to Honor Financial Obligation,* and notified of the decision to remove on July 8, 2016[1]. It is the removal of July 8, 2016, that was held in abeyance.

[1] The Last Change Agreement incorrectly stated the Decision to Remove as dated June 27, 2016.

The LCA provides that the appellant's removal would be held in abeyance for a period of one (1) year from the date of receipt of the agreement. The agreement goes on to provide that in exchange for TSA's agreement to place the removal action in abeyance, the appellant agreed to adhere to all the terms of the Agreement for a period of one (1) year from the date of the Agreement (July 8, 2016). As part of the agreement, the appellant agreed to perform his TSA duties with attentiveness, due care and in accordance with all TSA Standard Operating Procedures. In addition, the agreement required the appellant to observe and abide by all law, rules, regulations and other authoritative policies and guidance issued by TSA, including TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, and TSA MD 1100.63-1, *Absence and Leave*. The appellant was also required under the agreement to abide by all lawful directions given by managers and supervisors.

The key section of the Agreement, Section 4, states that the appellant understands and voluntarily agrees that if he fails to comply with any term or obligation outlined in the agreement, TSA will end the Last Chance/Abeyance Agreement and will by written notice effect the removal action. The issue before the Board is not to assess the merits of the charges that led to the LCA, but rather to determine whether the appellant is in violation of his LCA, thus giving Management the right to reinstate his removal and remove him from federal service.

On November 8, 2016, the appellant was notified of his failure to adhere to the terms of the LCA. Management alleged that the appellant violated the LCA by failing to follow instructions and by being negligent in the performance of his duties. On October 7, 2016, the appellant received an email from the Human Resources Specialist (HR) directing all STSOs to submit their team members 2016 final Transportation Officer Performance System (TOPS) ratings no later than October 24, 2016. The appellant failed to comply with the directions from HR and did not submit the information until October 31, 2016. The October 24, 2016, deadline was further verbally reiterated to the appellant by a Transportation Security Manager (TSM) on October 7, October 14 and October 21, 2016, during the 0730 staff meetings. Additionally, the TSM sent the appellant an email, dated October 27, 2016, and made numerous attempts to work with the appellant in order to finalize his team members TOPS ratings but the appellant failed to respond back to her email and phone calls and texts.

On appeal, the appellant argued that the removal should be overturned because he had complied with the terms of the LCA; he did not commit a material breach of the agreement; and management had acted in bad faith. The appellant argued that performed his duties in the manner agreed and in accordance with TSA operating procedures and abided by all relevant authorities, adhered to directives, and observed directions of peers and supervisors.

The appellant argued that the duties of the STSO are numerous and that he served as the rating official for seven officers total. He stated that on October 7, 2016, a peer supervisor informed him that the office laptop shared by all checkpoint STSOs had crashed and that this laptop held all of his completed TOPS ratings and feedback forms. The appellant indicated that he had no backup copies. He stated that he immediately notified his TSM of the loss of his evaluations and feedback form and that he would need to start from scratch to complete the evaluations. The appellant argued that the nationally established deadline to complete and submit TOPS 2016 performance evaluations to the local POC was October 31, 2016, and that the October 24, 2016, date was in advance of the national deadline. The appellant claimed that he kept his TSM informed throughout the process and that she

informed him that he had until October 31, 2016, to meet with subordinates. The appellant argued that attempting to complete the work at the checkpoint laptop was arduous due to the high demands of the checkpoint and that he often took the TOPS packets home to work on. The appellant stated that he completed the TOPS paperwork for the seven officers assigned to him on the evening of October 22, 2016. He stated that he was to meet with the TSM on October 24th but he was ill and called out sick on that date. He stated that he returned to work on October 25, 2016, but was reassigned by management to another checkpoint for the day and did not hear from the TSM. The appellant stated that the following two days, October 26-27, were his Regular Days Off (RDO).

The appellant stated that he returned to work on Friday, October 28, 2016, and found an email sent from the TSM on October 27, 2016, his RDO. The appellant stated that the appellant never called or visited the checkpoint to which he was assigned. He stated that in her email, she stated that she called his cell phone and left a message. The TSM wrote in her email that she was going to change his RDOs so that he could review the TOPS paperwork and ratings; however, the appellant argued that he did not recognize her phone number and did not receive a voice mail message from her. The appellant stated that he met with the TSM on October 28, 2016, and she reviewed and signed his TOPS packets and made no mention of phone calls or emails or about the untimeliness of the packets. The appellant stated that the next three days were spent meeting with employees and the last TOPS packet was completed and submitted to HR on October 31, 2016.

The appellant argued that management did not take into consideration the fact that the computer had crashed containing all of his TOPS evaluations; his assignments to the checkpoint; the level of due diligence he exercised both on and off duty to timely complete the TOPS evaluations; and the fact that his TSM informed him that he had until October 31, 2016, to submit the TOPS paperwork. In addition, the appellant argued that management did not consider that he completed his part of the evaluation process on October 22, 2016, but that he could not proceed in meeting with subordinate officers until the TSM had reviewed the documents. The appellant also argued that it was the responsibility of the TSM to inform him that management was assessing his compliance to the LCA. The appellant argued that had he been informed that this was being viewed as non-compliance with the LCA, he would have made the necessary notifications, adjustments and met the local due date.

The appellant argued that he did not fail to follow instruction and abided by all direction given by supervisors and managers; thus he did not violate the terms of the LCA. In ending, the appellant argued that he has over ten (10) years of service with TSA and has maintained an "exceeded expectations" rating record and has had no performance issue or record of discipline in his fifteen (15) years of Federal service.

Management replied and argued that the appellant repeatedly informed the TSM that he would complete his TOPS ratings by the deadline specified and had been given instructions to submit the TOPS evaluations no later than October 24, 2016. Management also argued that the appellant attempted to call and text the appellant but he did not reply. On October 27, 2016, the TSM emailed the appellant and stated that she would be in on October 28, 2016, to meet with him and go over the TOPS ratings and he was instructed not to leave work until he had met with the TSM. In addition, management argued that the only issue to be determined is whether there has been a breach or violation of the policy and that they have proven that he did not perform his supervisory duties with due care, nor did he abide by the lawful directions given to him by management. Management argued that the appellant's claim that the TSM extended the deadline until the 31st is

not supported by the evidence. As to the appellant's argument that he was busy with other STSO duties, management argued that the appellant was the only supervisor who did not meet the October 24, 2016, deadline. Management also argued that the appellant's disregard for his responsibilities as a supervisor were serious and that by not providing the required TOPS rating documentation on time, he jeopardized his subordinate's bonuses. Lastly, management argued that the appellant's failure to submit the TOPS rating sheets by the deadline was a violation of the LCA because it showed that he failed to perform his supervisory duties with due care and failed to abide by the directions given to him by management.

The record shows that the appellant failed to follow the directions provided by management and was negligent in the performance of his duties by failing to submit the final TOPS ratings no later than October 24, 2016. This failure is a material breach of the LCA. The Board finds that the appellant voluntarily signed the LCA and that he thereafter, violated its terms.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—16-229

January 25, 2017

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

**OPINION AND DECISION**

On November 12, 2016, management removed the appellant from his position as a 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 with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is GRANTED, in part, and the appellant's removal is mitigated to a fourteen (14) day suspension.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Misconduct of a Sexual Nature*, on 13 specifications. Specification 1 alleged that on February 14, 2016, at approximately 06:01:22 hours, while performing Divestiture Officer (DO) duties from the queue, a female passenger entered the divesting area and bent over with her back to the appellant. Upon seeing this, the appellant stepped back from his position and appeared to stare at her while she was bending over.

Specification 2 alleged that on February 14, 2016, at approximately 06:15:35 hours, a TSO handed the appellant a belt for screening and the appellant made a motion with the belt and said, "I'm going to spank you with this."

Specification 3 alleged that on February 14, 2016, at approximately 06:16:23 hours, while performing DO duties, a female crewmember passed the appellant to enter the divesting area. As she was divesting her property, the appellant began to leave his position by the queue and walk toward her. While she was taking off her coat with her back to the appellant and began to turn around, the appellant positioned himself close behind the crewmember, and as she turned around the appellant was bending over with his head at her chest level staring at her body.

Specification 4 alleged that on February 14, 2016, at approximately 10:37:20 hours, a TSO reported that while walking past a female passenger waiting for her accessible property to clear the X-ray, the appellant touched her backside. CCTV shows the appellant passing the passenger with his right hand spread out toward her buttock area and his head appears to turn and dip toward her as he passed.

Specification 5 alleged that on February 14, 2016, while performing the Walk Through Metal Detector (WTMD) duties, the appellant noticed a female passenger in a white/light colored sweater divesting her property. After the passenger passed through the WTMD wearing her shoes, the appellant returned her to the divesting area to remove her shoes. On the passenger's second pass; as she began to exit, the appellant moved toward and into the passenger's path to exit the WTMD. The passenger raised her right arm between herself and the appellant and as the appellant was leaning toward her, his right hand moved from in front of him down and toward her and within a short distance from her leg, hip and buttock area. As the passenger maneuvered around the appellant, it appeared that the appellant's upper arm and hand touch, or nearly touched the passenger's body.

Specification 6 alleged that on February 14, 2016, at approximately 1115 hours, while performing DO duties, a TSO observed the appellant get really close to a female passenger and touched on her backside.

Specification 7 alleged that at or near early to mid-January 2016, a TSO observed the appellant flirting and being overly friendly with female passengers on multiple occasions. The TSO observed the appellant in close proximity to female passengers and talking to them in hushed tones, causing them to appear uncomfortable.

Specification 8 alleged that in January 2016, while performing duties of the DO, a TSO observed the appellant brush a female passenger's body with his forearm while giving her advisements.

Specification 9 alleged that on January 25, 2016, while performing screening duties and working side-by-side with a TSO, whenever the appellant passed behind the TSO he made contact with her body. The TSO put her elbow out so the appellant would not touch her again.

Specification 10 alleged that during January and February 2016, while on duty at the checkpoint, a TSO observed the appellant rubbing himself up against the backside of two female TSOs, when there was enough room to get by without touching them.

Specification 11 alleged that during February 2016, a TSO observed the appellant getting "extremely close in proximity with female passengers" while they were exiting the Advanced

Image Technology (AIT). On one occasion the appellant blocked a female passenger's exit through a side stanchion causing her to lower her head and wait until the appellant stepped back.

Specification 12 alleged that at or near Mid-Summer 2015, while assigned to the L-3, a TSO observed the appellant obstruct the exit path while female passengers were trying to exit. The TSO also observed that while the appellant was approaching female passengers, at times the appellant would drop his right hand as if trying to touch them. During the same period, the TSO observed the appellant staring at female buttocks.

Specification 13 alleged that at or near June and July 2015, a TSO observed the appellant getting uncomfortably close to female passengers, primarily while performing Checkpoint Plays, but also at the WTMD and as a DO. A TSO stated that the appellant used his position to single out female passengers to chat with them and spend abnormal amounts of time with them for purely prurient interests. The TSO witnessed the appellant place his hand on the small of their backs for no reason related to TSO duties. The TSO specifically recalled the appellant bragging about getting a female passenger's phone number while at the DO position. The TSO recalled other instances where the appellant would stare and gawk at female passengers longer than required for the TSO duty being performed required. Often, while stationed at the WTMD, the appellant would mention that a particular passenger was fine, cute, and hot or had big breasts and a nice ass.

Management found the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA and for observing basic on-the-job rules. Section 5. D. (3) states that TSA employees are responsible for exercising courtesy and tact (whether on or off-duty) in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation and supporting and assisting in creating a productive and hospitable model work environment. Section 5. D. (7) states that TSA employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 5. D. (11) states that TSA employees are responsible for upholding, with integrity, the public trust involved in the position to which assigned, abiding by the 14 general principles of ethical conduct (5 C.F.R. § 2635.101) and avoiding the appearance of using public office for private gain. Section 5. D. (13) states that TSA employees are responsible for seeking advice and guidance as needed through their supervisory chain concerning their responsibilities under this and other policies governing employee conduct. Section 6. B. provides that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred.

Management also found that the appellant's conduct violated TSA's policy on *Prevention and Elimination of Sexual Harassment in the Workplace*, MD 1100.73-3, Section 5. H., which states that TSA employees are responsible for maintaining a work environment free from sexual harassment and ensuring that his or her conduct is not sexually offensive to other employees. The Handbook to MD 1100.73-3 defines sexual harassment as unwanted or unwelcome conduct

that can be verbal or nonverbal and may consist of sexual advances, requests for sexual favors, or physical conduct of a sexual nature that explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. The Handbook further explains that the intent of the alleged harasser is irrelevant; the reasonable effect of the conduct determines whether sexual harassment has occurred. While the conduct may occur outside the workplace, it may have a negative impact on the work environment. If the conduct is unwelcome or unwanted, it may be sexual harassment even if the affected person submits or participates against his or her will. Depending on the particular circumstance surrounding the actions, the conduct may rise to the level of sexual harassment. Management noted that Section C of the Handbook to MD 1100.73-3 provides examples of misconduct of a sexual nature which includes, in relevant part, the following: 1. Verbal Conduct: (a) Sexual jokes, suggestive verbal communication, or innuendoes; (c) degrading or demeaning remarks of a sexual nature; (d) sexual propositions, either overtly or by implication; (e) whistling or calling out to someone in a sexual manner; and (g) repeated requests for participation in situations, such as dates, suggestive of romantic or sexual liaisons and 2) Nonverbal Conduct: (b) suggestive body language such as ogling, staring, leering; (d) unwelcome and deliberate touching; (e) conduct to encourage, invite or suggest physical contact, such as blocking a passageway.

On February 14, 2016, a female TSO reported to management that she had observed the appellant engage in inappropriate conduct while on duty that day, and other days. Based on the allegations made by the TSO, a Transportation Security Manager (TSM) was appointed by the Federal Security Director to be an Administrative Inquiry Officer (IO) on February 22, 2016, and directed to conduct an Informal Administrative Inquiry (AI) into allegations of misconduct and sexual harassment by the appellant against female coworkers and passengers. In the initial phase of the AI, a review of Closed Circuit Television (CCTV) was ordered based on specific allegations reported by the TSO. The CCTV footage submitted as evidence is from February 14, 2016. The IO submitted a written AI summary on April 2, 2016. The IO stated that he did not find that the alleged events of February 14, 2016, could be substantiated by a corroboration of either CCTV or witness statements.

On June 20, 2016, a Transportation Security Manager – Inspection (TSM-I) was tasked to complete a fact-finding regarding possible sexual misconduct by the appellant. The fact-finder submitted a Memorandum, dated July 13, 2016, stating that he received a detailed AI completed by a TSM. The fact-finder stated that the AI investigated the allegations of Misconduct and Sexual Harassment by the appellant brought forward by a female TSO. The fact-finder stated that the AI interviewed 12 employees regarding the allegations and that "witness statements support the allegation of Sexual Misconduct by [the appellant]."

On August 17, 2016, an Acting Federal Security Director (AFSD) then appointed the first IO to obtain additional information on the Informal Administrative Inquiry completed on April 2, 2016. The Memorandum instructed the TSM to obtain additional information from witnesses previously interviewed regarding allegations of sexual harassment against the appellant.

Management provided as evidence: A memorandum from a TSM, dated July 13, 2016; Administrative Inquiry, dated April 2, 2016; a statement from a TSO, dated August 25, 2016; a statement from a TSO, dated August 26, 2016; a statement from a TSO, dated August 25, 2016;

a statement from a TSO, dated August 30, 2016; CCTV video from February 14, 2016; and a CCTV Timeline.

On appeal, the appellant argued that management failed to prove the alleged misconduct by a preponderance of the evidence. The appellant argued that there were three fact-finders during the investigative process. He stated that the first fact-finder found that from the CCTV video, the allegations against him were unfounded. The appellant argued that the fact-finder was subsequently removed from the case. He argued that the second fact-finder found that that video proved inconclusive and that the fact-finder was then removed from the case. He argued that the third fact-finder found that there was misconduct. The appellant stated that between March 4, 2016 and August 30, 2016, multiple witness statements were taken from his coworkers regarding the allegations and that there were many inconsistencies, as well as hearsay. He argued that the main protagonist of the allegations was a female TSO and that her accusations were not corroborated with any evidence. In addition, he alleged that this TSO was allowed to review the CCTV for over an hour before she wrote her statement, and that she was allowed to point out to management specific instances from the video that she believed were instances of his inappropriate behavior. The appellant argued that management should have viewed the video independently to determine if the video corroborates her version of the events.

The appellant also argued that there was a very long lapse of time between the dates of the alleged incidents and the statements and that there was also a long gap in time between some of the initial and secondary statements. He also argued that the statements taken a second time added details not contained in the original statements. He argued that the CCTV footage is not consistent with the allegations made by the Agency. The appellant further argued that the CCTV footage unequivocally shows that he did not commit the actions of which he is accused.

The appellant stated that he signed and entered into an Abeyance Agreement on November 10, 2015, as an alternative to suspension for issues related to his removal action. He stated that on November 7, 2016, the Deputy Assistant Federal Security Director (DAFSD) provided him with a Notice of Decision to Reinstate his 3-Day Suspension for Violation of Abeyance Agreement based upon the TSO's allegations. The appellant stated that on September 12, 2016, a TSM provided him with a Proposed Notice of Removal. He stated that he requested an extension, which was granted, and submitted his response on October 3, 2016. The appellant stated that on November 8, 2016, he was provided with a Notice of Removal by an AFSD.

The appellant also addressed each specification. With regard to specification 1, the appellant argued that the CCTV shows that he looked in the direction of the women at 06:01:31 and then looked away four seconds later at 06:01:35. He argued that there is no way from viewing the video that management could determine what he was actually looking at. The appellant argued that management made an assumption based on their subjective, bias, predetermined belief that he was engaging in misconduct of a sexual nature. He argued that the allegation cannot be proven that he was more likely than not "staring" at the women's backsides. The appellant also argued the TSO who brought allegations against him was able to review the CCTV video prior to writing her witness statements, essentially giving her authority as a fact-finder. The appellant argued that it was unethical and a violation of his due process rights. He argued that any allegations made by the TSO should have been verified by the fact-finder, not by the TSO.

With regard to specification 2, the appellant argued that at no point in the video does it show that he did anything remotely close to what was alleged. The appellant argued that the video shows that he requested a property bin from the TSO, placed the passenger's jacket in the bin and then walked away. He argued that the allegation is completely unfounded.

With regard to specification 3, the appellant argued that he only entered the particular area to retrieve more property bins and as he got close to the crewmember, she had already turned around to face him. The appellant argued that the allegation is simply false, as there was nothing inappropriate done on his part. He argued that management once again made an unfounded allegation that is not supported by the CCTV video.

With regard to specification 4, the appellant argued that the CCTV shows that he walked past the passenger, but that as the passenger does not move or flinch, there is no indication that he actually touched her. He argued that the passenger did not complain or even turn her head in his direction as a reasonable person would do when they are unexpectedly touched from someone behind them. The appellant argued that management went above and beyond to make instances that typically occur as a TSO in a tight-spaced work environment to be of a sexual nature in order to build a case against him. He argued that management's allegations are not corroborated by the CCTV video that management relied upon.

With regard to specification 5, the appellant argued that in management's own words, it is unclear whether he actually touched the passenger as she walked through the WTMD. The appellant argued that at no point in the video does the passenger make any comments or gestures toward him that indicated that she was touched by him. The appellant stated that he acknowledged that he must become more aware of his movements and body positioning, but argued that there was no sign of any actions of a sexual nature.

With regard to specification 6, the appellant argued that the CCTV failed to support management's claim that he touched a passenger's backside based on allegations from the TSO. He argued that the TSO was not even in position to clearly view whether he came into contact with the passenger. He further argued that the passenger did not react as if someone had touched her.

With regard to specifications 7 and 8, the appellant argued that there is no evidence to support the TSO's allegations that he had been flirtatious with passengers and brushed past passengers; he argued that it is merely the TSO's opinion. The appellant argued that no passenger has complained that he made them uncomfortable in any form or fashion. He argued that even if he was being "overly friendly" with passengers, it certainly does not constitute misconduct of a sexual nature. He argued that management searched far and wide to find any and everything they could to add to the charge in order for it to become an aggravated charge. The appellant argued that management cannot prove by preponderant evidence that any of the allegations made by the TSO actually occurred.

With regard to specification 9, the appellant argued there is no evidence to corroborate the TSO's claim that he continued to make contact with her body while they were working together on January 25, 2016. He argued that it seems highly unlikely that the TSO would remember the specific situation eight months after the alleged incident occurred, when she mentioned it in her witness statement. The appellant argued that if the incident actually occurred and the TSO felt

uncomfortable to the degree that she claimed, she would have reported the incident to management much sooner. He argued that management accepted her allegation as a fact even though they cannot prove that more likely than not, the incident actually occurred.

With regard to specification 10, the appellant argued that while a TSO alleged that he rubbed up against the backsides of two female TSOs, the TSO did not provide specific dates and based her belief that the incident actually occurred on what another TSO told her had happened. The appellant argued that neither the TSO nor management has any evidence of it. He argued that the TSO who made the initial allegations against him went around the airport telling coworkers of her allegations.

With regard to specifications 11, 12 and 13, the appellant argued that the allegations made by the TSOs are completely unfounded and that they have no evidence to support them. He argued that each of the TSOs witnessed the alleged instances from a distance and did not know why he may have had to be close to the passengers or block their exit from the screening area. The appellant also argued that management omitted from the NOPR that several of the witness statements stated that they had not personally witnessed him engage in any misconduct of a sexual nature with passengers or coworkers. The appellant referenced the statements of six officers who all stated in their witness statements that they are unaware of incidents in which he acted inappropriately. He argued that two of the witness statements management relied on in the NOPR were conflicting statements in which they also stated that they had not witnessed any misconduct of a sexual nature by him. The appellant argued that management seemed to be on a "witch hunt" and that he was their unlucky target potentially based on a jilted coworker. The appellant further argued that even if the alleged actions took place, they simply do not amount to misconduct of a sexual nature and that he was incorrectly charged. He argued that management did not prove by preponderant evidence that he engaged in misconduct of a sexual nature.

Management responded and argued that the appellant offered no supporting evidence or new argument that was not raised and addressed in the Decision. Management argued that the evidence establishes that the appellant engaged in misconduct of a sexual nature with a TSO and passengers. Management also argued that there is no evidence in the record that the TSO who brought the allegations against the appellant reviewed CCTV footage before she wrote her first statement addressing the events on the date they occurred, February 14, 2016, because the IO was not directed to begin an investigation until February 22, 2016. Management argued that the facts show that the TSO wrote a supplemental statement on February 27, 2016, to clarify references she made in her first statement about misconduct that had occurred in the past and reviewed the CCTV with the AI officer to identify the incidents she alleged occurred. Management argued that the appellant's claims of collusion to fabricate a statement to fit the evidence has no basis in fact.

Management also argued that the appellant's assertion that there were three fact-finders during the investigation and that the CCTV demonstrates that the allegations against the appellant were unfounded are "entirely false." Management argued that the Materials Relied Upon (MRU) include a two-page memo, dated July 13, 2016, titled Fact Finding by a TSM who was appointed to complete a fact-finding on June 20, 2016. Management argued that the TSM's fact-finding incorporated the IO's report; that there was no third fact-finder; and that the IO was never removed from the case. Management also argued that no one determined that the CCTV showed the allegations against the appellant were unfounded; management argued that the IO simply

concluded that the CCTV did not definitively show the physical contact alleged by the TSO on February 14, 2016.

With respect to the Charge, specification 1, the specification alleged that the appellant stepped back and appeared to stare at a passenger while she was bending over. Management supported the Charge with CCTV footage. The Board found that none of the statements in the record addressed what was described in the specification and the CCTV footage provided as evidence was inconclusive. Therefore, specification 1 is NOT SUSTAINED.

With respect to specification 2, management supported the Charge with CCTV footage and the statement of the TSO. The CCTV footage was inconclusive. The TSO who made the allegation stated, "I was on the opposite side of the x-ray machine. A passengers [sic] belt was stuck on the xray [sic] belt so I handed it to [the appellant] to place in a bowl and send it through the xray [sic]. When I handed it to him, he took the belt and made a motion with it and said 'I'm going to spank you with this.' I was so shocked at what he told me, I couldn't even respond . . ." In his statement, the appellant stated that he did not recall any of the incidents that included the incident described in specification 2, and in his appeal he stated that at no point in the video does it show that he did anything remotely close to what was alleged. The Board found that the TSO's detailed statement describing the incident, is preponderant evidence to support the specification. Statements from other officers, collected during the AI, lend credence to a pattern of behavior by the appellant which further supported the plausibility of the incident as described in the TSO's statement. Therefore, specification 2 is SUSTAINED.

With respect to specification 3, the specification alleged that as a crewmember turned around and as she removed her coat, the appellant was bent over with his head at the crewmember's chest level staring at her body. The Board found that none of the statements in the record addressed what was described in the specification and the CCTV evidence was inconclusive. Therefore, specification 3 is NOT SUSTAINED.

With respect to specification 4, the Board determined that the CCTV footage does not support the TSO's statement. The CCTV does not show that the appellant touched a passenger's backside as he walked past her while she was waiting for her accessible property to clear the X-ray, as the TSO described in her statement. In addition, there is no reaction from the passenger that the appellant is accused of touching. The Board found that management failed to prove the specification by a preponderance of the evidence and therefore, specification 4 is NOT SUSTAINED.

With respect to specification 5, management supported the Charge with CCTV footage. The Board determined that the appellant's interaction with a passenger while he was performing WTMD duties, as shown on the CCTV footage, does not rise to the level of misconduct. The specification, as written, does not describe the actions of the appellant. The appellant may have appeared to be blocking the passenger but the passenger simply moved around him. Therefore, specification 5 is NOT SUSTAINED.

With respect to specification 6, management supported the Charge with CCTV and the statement of the TSO. The Board found that the CCTV is inconclusive as it is unclear whether the appellant made physical contact with the passenger, as alleged. The Board noted that the passenger showed no type of reaction as would be expected if someone touched her backside.

The Board also noted that the statement of the TSO regarding the incident referred to the passenger's "rear" while the specification referred to the passenger's "backside." The evidence does not support that the appellant touched a passenger on her backside, as alleged. Therefore, specification 6 is NOT SUSTAINED.

With respect to specification 7, in his statement, a TSO stated that he had "witnessed [the appellant] flirt and become overly friendly with both female passengers and TSO's [sic] on multiple occasions." He also stated that "at times, I have seen female passengers become uncomfortable with his approach as their body language determines that." The Board found that the statement of the TSO gave no specific dates and that the conduct described was too vague and did not rise to the level of sexual misconduct. The statement contains general characterizations of behavior as opposed to specific details making it too difficult for the appellant to be able to respond to the allegation. Therefore, specification 7 is NOT SUSTAINED.

With respect to specification 8, management used as evidence, the statement from the same TSO as referenced in specification 7. In his statement, the TSO stated, "There was one event that I remember a few months ago, where [the appellant] approached this female passenger during his stint as a Divestiture Officer, where he got too close to the passenger and brushed her body with his forearm while telling her the advisements of what exactly to divest." The Board determined that there is no specific date associated with the incident and that the behavior described in the statement does not rise to the level of sexual misconduct. The TSO's statement was very general making it too difficult for the appellant to be able to respond to the allegation. Therefore, specification 8 is NOT SUSTAINED.

With respect to specification 9, the TSO wrote in her statement, dated February 27, 2016, that on January 25, 2016, she was on the end of the lane at the Explosive Trace Detection (ETD) and was working side by side with the appellant as she was assisting a female in a wheelchair and he was assisting a male. The TSO wrote that both she and the appellant were with the respective passengers, going back and forth, and taking samples. The TSO stated, "every time he passed my backside he would push himself onto me. The last time he tried it, I put my elbow out so he wouldn't touch me, but I was so afraid that I could not even speak up for myself." In his appeal, the appellant argued that there is no evidence to corroborate the TSO's claim and that if the incident actually occurred and the TSO felt uncomfortable she would have reported the incident to management much sooner. The Board found that the TSO's detailed statement describing the incident, is preponderant evidence to support the specification. Statements from other officers, collected during the AI, lend credence to a pattern of behavior by the appellant which further supported the plausibility of the incident as described in the TSO's statement. Therefore, specification 9 is SUSTAINED.

With respect to specification 10, the Board noted that the allegation was made by a TSO who stated that he saw the appellant rubbing up against two female TSOs. However, in the statement by one of the TSOs alleged to be involved in the incident, the TSO denied that the incident took place. In her statement, the TSO stated, "It has been brought to my attention [the appellant] has been seen rubbing up from behind me & another TSO. I have never felt uncomfortable around [the appellant], thinking of him as a friend I work with. We are all in close range of everyone when working I have never noticed this behavior intentionally. I have not witnessed [the appellant] do this with another TSO. If this behavior has happened, honestly I would like to

think it was not in a sexual matter [sic] there for [sic] it has never raised a red flag for me. I get bumped & touched all day, I honestly pay no mind while I'm working on the checkpoint with all the craziness." The Board found that management failed to prove the specification by a preponderance of the evidence and therefore, specification 10 is NOT SUSTAINED.

With respect to specification 11, in a statement dated March 5, 2016, a TSO stated that she recalled an incident where she witnessed the appellant become inappropriate with his body language while working on the Advanced Image Technology (AIT)-L3. The TSO stated, "It was about a month ago, while working on the L3, I noticed he would get extremely close in proximity with female passengers. In one instance a passenger exiting the L3 tried getting out through a side stantion [sic] but [the appellant] blocked her with his body. The female passenger immediately became uncomfortable, she lowered her head and didn't know how to get around him until [the appellant] stepped back after a few seconds." The Board found no violation by the appellant in what was described in the specification; noting that when operating the AIT, part of the job is to make sure passengers do not leave the area or go through stanchions until they are cleared. Therefore, specification 11 is NOT SUSTAINED.

With respect to specifications 12 and 13, the Board determined that the allegations in each specification were numerous; were too vague; and too far in the past, as they were well over a year prior to the issuance of the Notice of Proposed Removal. The appellant would have been unable to defend himself against the specifications as written. Additionally, the allegations pre-dated and were included in the Abeyance Agreement issued to the appellant on November 10, 2015. Therefore, specifications 12 and 13 are NOT SUSTAINED.

Having sustained specifications 2 and 9, the Charge, *Misconduct of a Sexual Nature*, is SUSTAINED.

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

On appeal, the appellant argued that the penalty is not reasonable. The appellant stated that he signed and agreed to enter into an Abeyance Agreement as an alternative to suspension on November 10, 2015, and that as to the terms of the agreement, he was not to have any further infractions of any nature. The appellant stated that because of the allegations made by a TSO, management reinstated the 3-day suspension for violation of the Abeyance Agreement on November 7, 2016. The suspension was to be served from November 9 -11, 2016. The appellant stated that he was given his Notice of Removal on November 8, 2016, effective November 12, 2016. The appellant argued that the allegations against him have not been proven and that even if they were, management did not allow adequate time for him to exhibit his corrected behavior after serving the suspension. He argued that management did not comply with progressive discipline.

The appellant also argued that management did not properly weigh the mitigating factors. He argued that he has been a TSA employee for more than five years and has received much recognition and multiple awards for his outstanding work ethic and ability to more than

satisfactorily perform his job duties. The appellant argued that he only had one incident in the past that required discipline and that it was for leave-related issues.

The appellant argued that there were no complaints against him by any passenger for any reason, specifically not in regard to any misconduct of a sexual nature. He argued that therefore, TSA's reputation was not affected negatively, or otherwise. He also argued that prior to the allegations made by the TSO, none of his coworkers had made any complaints either. The appellant argued that if his misconduct was as prevalent and pervasive as the TSO alleged, surely a passenger would have reported it to management or multiple coworkers would have noticed. He argued that management failed to take that into consideration in their determination to remove him. The appellant further argued that he and another TSO had an intimate relationship outside of work and alleged that the TSO who made the allegations against him was envious of their relationship, as she was interested in pursuing a relationship of her own with the other TSO. He stated that the TSO who made the allegations against him had worked with him in the past and knew that he had allegations against him previously for misconduct of a sexual nature. He alleged that the TSO devised a plan to eliminate him from the picture by alleging that he was still engaging in inappropriate behavior. The appellant argued that many of the witness statements taken from fellow employees stated that they had not personally witnessed any misconduct by him. He argued that the TSO went around telling other employees that he was engaging in inappropriate behavior as evidenced by multiple witness statements. The appellant argued that management relied upon the TSO's allegations in determining to remove him even though the CCTV proved inconclusive, as management conceded in the Notice of Proposed Removal.

The appellant also argued that his removal would not promote the efficiency of the service. He argued that removing him would result in the short term loss of a valuable employee. He requested that the action be mitigated to a lesser and more reasonable penalty in consideration of the unintentional nature of the alleged misconduct and other mitigating factors.

Management argued that removal is a reasonable penalty because of the pervasive and serious nature of the misconduct. Management argued that the penalty is reasonable after considering all of the circumstances and applying the mitigating and aggravating factors. Management argued that while progressive discipline is part of TSA's overall approach to discipline, Section B.3 of the Table states that removal is an authorized penalty for the offense of misconduct of a sexual nature. Management also argued that the action taken in response to the appellant's misconduct meets the efficiency of the service standard because it furthers a legitimate government interest. Management argued that in this case, the removal promotes the efficiency of the service because the appellant engaged in conduct that adversely affected the TSA's ability to accomplish its mission. Management argued that the appellant's removal falls squarely within TSA's policy defining the efficiency of the Federal service, in MD 1100.75-3, Handbook, Section A.

The Deciding Official considered that the appellant's violations are serious by their very nature and that because he had repeated incidents of the same policy violation, the misconduct is appropriately considered aggravated. The Deciding Official considered that the record shows that the appellant's misconduct was protracted and severe. He considered that the appellant's offenses involved the appellant's coworkers, stakeholders and the traveling public. The Deciding Official considered the relationship of the appellant's misconduct to his position and duties as a TSO and employee with TSA. He considered that the offenses the appellant committed directly relate to his potion as a TSO, as the appellant is in daily contact with the

public and stakeholders and that his recent conduct reflects negatively on the agency and the Federal government as a whole. The Deciding Official considered that the appellant's behavior caused harm to his coworkers and the traveling public, as well as stakeholder employees. He considered that the appellant's misconduct directly affects the public's opinion of TSA, its reputation and their confidence in the ability to carry out the security mission.

The Deciding Official considered that the appellant's peers repeatedly asked him to change his behavior and explained how harmful and inappropriate his conduct was, yet the appellant dismissed their advice and laughed at their concerns. The Deciding Official considered that the appellant's conduct could and should have been reported as far back as 2014, and again in June or July of 2015, while he was under investigation for similar allegations. The Deciding Official considered that the appellant's behavior created a work environment in which employees and passengers were not treated with dignity and respect, and caused harm to persons affected by his misconduct. He considered that the appellant's peers and a previous investigation placed the appellant on clear notice that his conduct was unacceptable. The Deciding Official found that the appellant's repeated violation of the policy was intentional and directed specifically toward women based on gender.

The Deciding Official considered the appellant's prior disciplinary history consisting of a 3-day suspension (held in abeyance) issued on November 10, 2015, for Inappropriate Conduct. He considered that the facts of the case were similar to the current case. The Deciding Official also considered that the appellant participated in an Interest Based Conversation (IBC) on July 29, 2015, for attendance, and that he received a 3-day suspension on March 29, 2014, for Failure to Follow Leave Procedures. He considered that each disciplinary action placed the appellant on written notice that future misconduct could result in more severe discipline up to and including removal from Federal service. The Deciding Official considered that the most recent suspension, held in abeyance, placed the appellant on clear notice of the policy violated as the allegations investigated involved the same or similar conduct. He noted that evidence uncovered in this case revealed that while the appellant was under investigation and pending discipline for similar allegations, he continued to engage in misconduct of a sexual nature and inappropriate conduct.

The Deciding Official considered that the appellant is an experienced officer on the floor and expected to adhere to all Management Directives. He considered that the appellant's misconduct is very serious in nature because TSA and DHS have a zero tolerance for this type of misconduct. Additionally, the Deciding Official considered that the violations directly relate to the appellant's duties and responsibilities as defined in MD 1100.73-5, which the appellant reviewed in January 2016. He considered that the appellant's misconduct has a direct effect on the proper and effective accomplishment of TSA's mission and that the offense has affected the appellant's ability to perform at a satisfactory level. The Deciding Official also considered that that the appellant's misconduct diminished his manager's confidence in the appellant's ability to follow directions; written and unwritten. The Deciding Official stated that he took into account the appellant's record to date and believes that the appellant's inability and unwillingness to accept any responsibility for his behavior makes rehabilitation unlikely. The Deciding Official also stated that he believes the adequacy and effectiveness of an alternative sanction would not deter or alter the appellant's future behavior and that therefore, removal is reasonable and an appropriate penalty. The Deciding Official considered the appellant's repeated pattern of violating agency policy and the seriousness of his misconduct as aggravating factors that would outweigh any mitigating factors and found that no mitigating factors apply.

Under Section B.3 of the Table, for Misconduct of a Sexual Nature, the recommended penalty range is a 3-day to 14-day suspension. The aggravated penalty range is a 15-day suspension to removal.

After considering all the facts and weighing the relevant penalty factors, the Board finds that removal is not within the bounds of reasonableness for the two sustained specifications of the Charge. The two specifications upheld did not involve conduct with passengers; they were related to the appellant's interactions with a single witness and the incidents occurred in January and February of 2016.

The Board agrees that the appellant's misconduct is serious; however, TSA policy promotes the use of progressive discipline as a means of motivating an employee to correct misconduct. The Board is alarmed by management's decision to hold in abeyance the 3-day suspension for what management argued was similar misconduct. The Deciding Official stated that the facts of the case involving the 3-day suspension were similar to the current case before the Board. Management's failure to suspend the appellant until he had already been proposed for removal removed management's ability to use this suspension for progressive discipline purposes and undermined the Deciding Official's argument for removal. The Board determined that the 3-day Suspension reinstated on November 7, 2016, cannot be considered toward progressive discipline, as the appellant had not yet served the suspension when the Decision to remove the employee was issued on November 8, 2016, with an effective date of November 12, 2016. The only other discipline the appellant received was related to attendance and leave which is dissimilar conduct. The Board determined that while management could consider the aggravated penalty range given the appellant's prior 3-day suspension related to attendance and leave, a fourteen (14) day suspension, at the high end of the recommended range is appropriate penalty based on the specifications upheld in this case and as it relates to the principles of progressive discipline.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

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—16-230

January 12, 2017

***Issue:*** *Failure to Maintain Annual Certification Requirements*

**OPINION AND DECISION**

On November 30, 2016, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Annual Certification Requirements*. 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 August 25, 2016, the appellant was administered the Image Mastery Assessment (IMA) and failed to qualify and demonstrate the level of proficiency required to successfully pass the IMA. On September 9, 2016, the appellant completed the required remediation by a Master Transportation Security Officer- Security Training Instruction (MTSO-STI). On September 9, 2016, the appellant was administered the second IMA and again failed to qualify and demonstrate the level of proficiency required to successfully pass the IMA. On September 17, 2016, the appellant completed the required remediation conducted by an MTSO-STI. On September 22, 2016, the appellant was administered the third IMA and again failed to qualify and demonstrate the level of proficiency required to successfully pass the IMA.

The IMA 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 Fiscal Year (FY) 2016 Annual Proficiency Review (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) and Supervisory BDO (SBDO). 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.E. provides that employees who fail any single scored PSE assessment two times or any other APR assessment three 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 August 25, 2016, and was then tested again on September 9, 2016. The appellant failed the second reassessment on September 22, 2016. The appellant was issued a Notice of Proposed Removal (NOPR) on October 31, 2016. 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. The appellant provided an oral reply on November 10, 2016. On November 30, 2016, the appellant received the Removal Decision.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgment-IMA forms, dated September 9, 2016, and September 17, 2016; and an APR 2016 IMA certification form indicating test failures for August 25, 2016, September 9, 2016, and September 22, 2016.

On appeal, the appellant argued that extenuating circumstances mandate that he be given the opportunity for a re-test, or alternatively, since he is dual certified, that he should be retained, in order to perform the baggage function, since he remains certified in that other job specification. The appellant argued that his tests were performed at irregular and inopportune times, which were not conducive to the successful completion of the certification test. In addition, the appellant argued that there was an anomaly in the administration of the certification tests since the results were the same on each occasion. The appellant argued that management failed to provide the proper amount of remediation and the proper type of one on one training was not provided. Specifically, the appellant argued that he was not provided the requisite sixty minutes of required training on September 17, 2016, and that the confirming documents were altered to reflect the sixty minutes of required training. The appellant argued that the training module period on the right hand side of the APR Remediation form, only reflects fifty-one minutes and the times on the form have

been altered. The appellant also argued that the APR Remediation Form document did not appear to be the one he had actually signed as he did not recall the "scratched" changes made to the document.

The appellant also argued that the agency failed to provide him with "one on one" remediation training and instead provided him with "look and feel" training. The appellant explained that the "look and feel" session merely refers to a timed test session, designed to evaluate the knowledge of the trainee. The appellant argued that a "practice look and feel session" is not an appropriate method for remediation as there is no time to discuss the image.

The appellant argued that under ATSA the Agency is required to examine the history of the employee's performance, in addition to the completion of testing certification requirements. Additionally, the appellant argued that management had other options to retain him short of implementing termination and that the Federal Security Director (FSD) had the discretion to order further training and or remediation.

Management replied and stated that the appellant received one hour and eleven minutes of remediation on September 17, 2016. Management argued that the MTSO-STI explained her September 20, 2016, margin audit entries as simply scrivener's errors but that they did not alter and had no impact on the acknowledgement signed by the appellant on September 17, 2016, or the OLC official Remediation Training record generated by the training computer on September 17, 2016, recording one hour and eleven minutes of remediation. Management argued that the APR Technical Proficiency Assessment Remediation Acknowledgement Form is intended to give TSOs the opportunity to acknowledge by signature and initialing that remediation was received in accordance with the requisite APR program policy on the IMA and confirm that the TSO is ready to proceed to take the IMA assessment.

Management argued that the descriptive field provided at the bottom of the APR Remediation Form, dated September 17, 2016, describes the remediation provided to the appellant and the times of the remediation. In addition, management stated that the appellant was tested on September 22, 2016, at 1400 hours. Management argued that the appellant was provided the correct remediation and that he received more than the required minimum amount of remediation under the 2016 APR Users Guidance.

Additionally, management argued that employees who fail any single ARP assessment three times are subject to removal from TSA and that FSDs are not permitted to convert the employee to single function or to any other function and are not permitted to retain the employee for any reason.

The appellant responded to management's reply and argued that management failed to address two critical issues in their response to the Board. First, that management clearly admitted that the appellant was merely provided with "practice, look and feel remediation," and second, that the appellant was a dual function officer who could have continued to make an effective contribution to the work of the Agency, in the baggage function position.

Management correctly found that FSDs do not have the discretion to convert employees once they have failed the APR assessment. The Board does not find that the APR remediation form was intentionally changed, as it correctly reflected the start and stop times next to the dates and the appellant initialed off on these time frames. Therefore, the appellant was given the proper amount

of remediation. The Board gave no merit to the appellant's argument that this was not the form that he had signed. In addition, it is clear that the appellant, as part of his remediation, was provided "practice look and feel" remediation on September 17, 2016. However, this remediation was not improper and was part of other remediation provided to the appellant. Therefore, the "practice look and feel" remediation did meet the requirements of acceptable remediation under the APR guidance. In addition, the Board found no evidence of the appellant being tested at irregular and inopportune times nor that the appellant's test scores were the same on each occasion.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the IMA on August 25, 2016, September 9, 2016, and September 22, 2016. The Board also found that on September 9, 2016, prior to his first IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form acknowledging that he chose to participate in self-study, that he received remediation in accordance with the APR program and policy requirements, and that he was ready to take the IMA reassessment. On September 17, 2016, prior to his second IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgement-IMA form acknowledging that he chose to participate in self-study, that he received remediation in accordance with the APR program and policy requirements, and that he was ready to take the IMA reassessment. The Board found that the appellant was properly assessed in accordance with the 2016 APR User's Guidance. 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 2016 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 his failure to maintain his 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
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# DEPARTMENT OF HOMELAND SECURITY
## TRANSPORTATION SECURITY ADMINISTRATION
## OFFICE OF PROFESSIONAL RESPONSIBILITY
## APPELLATE BOARD

(b)(6)

Transportation Security Officer,
*Appellant,*

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—16-231

January 27, 2017

***Issue:*** *Jurisdiction*

## OPINION AND DECISION

On or about November 30, 2016, the appellant was removed from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). On or about December 12, 2016, the appellant appealed her removal to the TSA Office of Professional Responsibility Appellate Board (Board). On January 17, 2017, management rescinded the removal action.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

[redacted]
Transportation Security Officer
*Appellant,*

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—16-232

January 19, 2017

***Issue:*** *Illegal Drug Use*

## OPINION AND DECISION

On November 25, 2016, 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 Use*. 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(s), management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Illegal Drug Use*, on one specification alleging that on October 17, 2016, the appellant was on duty and working in the capacity of a TSO assigned to Baggage operations from 0315-1145 hours. At approximately 10:09 am, the appellant was subjected to random drug testing pursuant to the TSA Drug and Alcohol Free Workplace Program (DAFWP). The certified results of the drug test, as indicated on the Medical Review Officer (MRO) initial report, dated November 11, 2016, and Final Report, dated November 14, 2016, show that the appellant tested positive for Cocaine Metabolites. These results were certified by the Medical Review Officer on behalf of TSA and no justified medical reason for this drug use was specified.

A pre-decisional meeting was held with the appellant on November 14, 2016. The appellant was given the opportunity to respond orally and/or in writing and the appellant submitted a written response. The appellant wrote that he was given a drug test on October 17, 2016, and on October 31, 2016, at approximately 8:55 pm, he was left a message to return the MRO's call and he did the next day but did not make contact. The appellant stated that he made several attempts to contact them on November 2 and 4, 2016.

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

On October 17, 2016, the appellant was selected for random drug and alcohol testing. On November 11, 2016, the MRO issued a report which stated "THIS IS A NO CONTACT POSTIVE" indicating that the MRO was unable to make initial contact with the appellant regarding his positive test. The MRO issued a second test result, dated November 14, 2016. Both reports indicated a positive drug test for Cocaine Metabolites. A second pre-decisional meeting was held with the appellant on November 22, 2016. The appellant responded orally and stated that he gave information and the prescription to a TSA employee. He further stated that he does not do drugs; has been with the agency for 14 years; does not know how this happened; and took hydrocodone for his tooth.

Management provided as evidence: Summary of Pre-Decisional with appellant, dated November 22, 2016; Appellant's response, dated November 22, 2016; Appellant's response, dated November 14, 2016; MRO certified re-review Final Report, dated November 14, 2016; MRO certified results, dated November 11, 2016; TSA Drug and Alcohol Test- Employee Instructions/Acknowledgement, dated October 17, 2016; and Federal Drug Testing and Custody and Control Form, dated October 17, 2016

On appeal, the appellant argued that he has been with the agency for 14 years and has been tested every year and never had a positive result. The appellant stated that he does not do illegal drugs. The appellant stated that he was tested on October 17, 2016, and was stunned when he received a call from the MRO on October 31, 2016. He stated that he attempted to return the call the next day but received no response. He stated that on November 2, 2016, someone from TSA called to tell him to call the MRO. He stated that he called again and left a message but no one called him back. The appellant stated that when he was called into the office on November 14, 2016, and told of the No Contact Positive Result, he showed the Deputy Assistant Federal Security Director (DAFSD) his phone to show that he tried to contact the MRO. The appellant stated that he then wrote out a statement and that a TSA employee called the MRO's office and gave the phone to him. The appellant stated that the MRO could not find his files so they hung up and called the MRO back and finally spoke with the MRO and told him what Over the Counter Drugs he was taking and that he was taking hydrocodone for a bad tooth. The appellant stated that he was told to send the prescription label for the medication and he told the MRO that he would do so the next day. The appellant stated that he faxed the prescription label to the MRO on November 15, 2016. The appellant argued that the MRO reviewed the test results at the same time that he was speaking to

him on November 14, 2016, and before he had received the prescription label. The appellant argued that the test was not done correctly; was not done in a timely manner and did not follow DOT protocol. The appellant also argued that the MRO listed on the results is not the MRO that left him a message to call.

Management replied and simply argued that there is no indication that proper protocol was not followed.

The appellant claimed that the MRO made a decision without receiving the prescription label for the hydrocodone that he was taking for a bad tooth. However, hydrocodone is an opioid and is not a Cocaine Metabolite. The MRO re-reviewed the case after speaking to the appellant and confirmed that the appellant's drug test was positive for Cocaine Metabolites. The Board found that the Medical Review Officer's Final Report is preponderant evidence to support the Charge. Therefore, the Charge, *Illegal Drug Use*, is SUSTAINED.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Master Behavior Detection Officer
*Appellant,*

V.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—16-233

January 31, 2017

***Issue:*** *Failure to Maintain a Regular Work Schedule; Absence Without Leave (AWOL)*

**OPINION AND DECISION**

On November 18, 2016, management removed the appellant from his position as a Master Behavior Detection Officer (MBDO) with the Transportation Security Administration (TSA) based on the charges: *Failure to Maintain a Regular Work Schedule* and *Absence Without Leave (AWOL).* 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 based Charge 1, *Failure to Maintain a Regular Work Schedule,* on one specification. The specification alleged that from May 2, 2016, to present, the appellant has been absent more than 93% of his scheduled shifts. On September 16, 2016, the appellant signed a letter warning him about his leave usage and his inability to maintain a regular work schedule. That letter warned the appellant that failure to become available to perform his duties may result in proposed removal. Despite this warning, the appellant has not reported to work.

Management based Charge 2, *Absence Without Leave (AWOL)* on five specifications. Specification 1 alleged that on August 1, 2016, the appellant failed to report for duty. The appellant failed to provide Administratively Acceptable Documentation (AAD) to support his absence and was charged with eight (8) hours of AWOL. Specifications 2-5 alleged that in PP 17, 18, 19 and 20, the

appellant failed to report for duty and did not submit a leave request. The appellant was charged with 80 hours of AWOL for each of the specifications.

The appellant invoked the Family Medical Leave Act (FMLA) on February 5, 2016, and was granted 480 hours of leave. This leave was exhausted on May 1, 2016. An additional 560 hours of LWOP was approved by management between May 2, 2016 and August 20, 2016. During this time frame, the appellant worked a total of 64 hours. On August 1, 2016, and from August 21, 2016 to October 15, 2016, the appellant was charged with a total of 328 hours of AWOL. From May 2, 2016 to October 15, 2016, the appellant missed a total of 888 hours out of 952 hours scheduled to work, or over 93% of his scheduled time.

On September 9, 2016, the appellant received a letter warning him about his leave usage and his inability to maintain a regular work schedule. The appellant signed the acknowledgement of receipt on September 16, 2016, but failed to return to work.

On October 18, 2016, the appellant received a Notice of Proposed Removal (NOPR). The NOPR advised the appellant of his rights to include the right to reply, both orally and in writing. The appellant requested and was granted a seven-day extension to respond to the NOPR. The appellant responded in writing on November 3, 2016.

Management provided as evidence: Warning of Leave Usage letter, dated September 8, 2016; and WebTA Certified T&A Summaries for PPs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

On appeal, the appellant referred the Board to his response to the NOPR, dated November 3, 2016, as well as his response to the decision on the NOPR, dated December 18, 2016. In the appellant's response to the NOPR, dated November 3, 2016, he contested the accuracy of the specification supporting Charge 1. The appellant argued that the "Warning on Leave Usage and Inability to Maintain a Regular Work Schedule," letter, dated September 8, 2016, did not specify the timeframe considered reasonable nor did the notice include an expected return to work date. The appellant argued that the specification is disingenuous as it simply states that the letter warned him that the failure to become available to perform the duties of his position might result in proposed removal and despite the warning, he failed to return to work. He argued that the specification omitted the advisement that availability should occur within a reasonable period of time and the language suggests that he failed to return to work after being provided a notice ordering him to return to duty. The appellant argued that management was fully aware of his request to return to duty on November 3, 2016, prior to sending the Notice of Proposed Removal. The appellant argued that in an email to his supervisor, dated September 1, 2016, in response to his expected return to work date of September 1, 2016, he advised his supervisor that his wife's condition had not improved and that her period of incapacitation was expected to continue through November 1, 2016. He argued that his supervisor acknowledged the email but at no time was he advised that he must report for duty as expected or that returning to work in November was unacceptable. The appellant argued that on September 6, 2016, his supervisor sent him an email regarding submission of an OPM-71 and once again did not advise him that his requested return to work date was unacceptable or outside of a reasonable timeframe, nor was he advised that he was expected to return for duty. In further support of his argument, the appellant stated that on September 16, 2016, he personally delivered the Leave Without Pay checklist that accompanied the Warning letter, dated September 8, 2016. He stated that he provided a written response in which he expressed his intent to return to work and

reiterated his requested return to work date of November 3, 2016. The appellant stated that he did not receive a response so he contacted a management official on October 18, 2016, inquiring about the status of his request and that the management official responded on October 19, 2016, stating that he was not provided with a letter just the signed warning notice letter acknowledgement and the LWOP checklist.

With regard to Charge 2, the appellant contested the application of AWOL and asserted that management violated Article 3, of the Collective Bargaining Unit (CBA) and TSA MD 1100.63-1. The appellant argued that the CBA requires that employees be timely informed in writing of any charges of AWOL; that an absence previously documented as AWOL will be changed if the employee provides administratively acceptable documentation to substantiate an absence previously documented as AWOL; and that upon return to duty employees should submit OPM 71s. He further argued that under the TSA Handbook to MD 1100.63-1, *Absence and Leave*, failure to submit a completed OPM Form 71, along with any required documentation upon return to duty, may result in a charge of AWOL for the absence. The appellant cited Section B.5.c of the Handbook which states that an employee who has exhausted his/her personal leave will be granted LWOP for absence related to illness when the employee has provided administratively acceptable documentation to cover the absence. The policy stated that in those circumstances, the employee cannot be charged absence without leave (AWOL). The policy continues on to state "However, this does not entitle the employee to be approved for LWOP for an indefinite period of time."

As to specification 1, the appellant argued that he has consistently provided medical documentation and has routinely asked management to let him know if additional information was necessary. The appellant argued that management approved LWOP for the period of May 1, 2016 through August 20, 2016, and was fully aware that his wife's condition had not resolved on August 1, 2016. In addition, the appellant argued that he was not provided written notification that he was charged AWOL.

As to specifications 2-5, the appellant argued that the specifications are inaccurate as he did submit requests for leave. He stated that he contacted the communication center to request the leave. He argued that it was his understanding that since his leave was not scheduled and approved in advance that he was following proper leave requesting procedures by calling in to work each day. The appellant argued that management contacted him on August 25, 2016, to determine why he did not call into the communication center but did not contact him to advise him that his leave request could not be approved and that he was expected to return to duty. The appellant argued that the e-mail from his supervisor on August 31, 2016, demonstrates that management was aware of his leave request and had approved his leave through August 31, 2016. The appellant also argued that he was not provided verbal or written notice of the AWOLs.

The appellant reiterated that he appreciated the time off that was provided which allowed him to provide assistance to his wife. He stated that he has been working through an extremely stressful period and making an honest attempt to balance his personal and work life. He stated that he knew that his time off of work was limited and that management could advise him that his absence was no longer sustainable. However, he argued that he relied upon management to advise him when and if that time came and that they failed to give him a return to work date.

Management replied and argued that they made many attempts to try to work with the appellant regarding his leave and granted him 560 hours of LWOP. Management argued that they provided

the appellant more than an adequate amount of time to find a resolution for his circumstances. However, they stated that once the absences became excessive and coupled with the fact that the appellant would not provide a definitive date of return, lack of cooperation and failure to follow procedures; the decision was made to cease approving LWOP. Management argued that the letter sent September 8, 2016, informed the appellant that management would no longer approve future requests for LWOP and future absences may be coded as AWOL. Management argued that the appellant was advised of a Point of Contact that he could call if he had any questions and that he did not call the POC and did not return to work. Management also alleged that the appellant was uncooperative in regards to providing information regarding his absences and was informed by both his supervisor and the Deciding Official that he needed to make plans to return to work. Management argued that they never received any written notice or any other notification from the appellant that he planned on returning to work on November 3, 2016, and that he had provided many dates prior to that one and then would state that he needed more LWOP. Management argued that the appellant was advised in the September 8, 2016, letter that LWOP would no longer be approved because it has gone beyond a reasonable amount of time and he had no personal leave available. Management argued that TSA MD 1100.63-1, Section B. 5, did not apply because the appellant was not sick and had exhausted the 104 hours of Family Friendly sick leave allowed. The same policy reiterates that the employee is not entitled to be approved for LWOP for an indefinite period of time.

In addition, management argued that the appellant had an extensive corrective and disciplinary history involving leave and attendance issues and had been put on notice of the possible consequences of future misconduct. Management also argued that the appellant acknowledged in his appeal that management contacted him via phone on several occasions and acknowledged that he was informed that his failure to follow these procedures would result in AWOL. Management asserted that the appellant was provided all of his due process rights.

The appellant replied to management's reply and argued that what is in dispute is the Charge of AWOL for failure to follow leave requesting procedures and the Charge of failing to maintain a regular work schedule for being ordered to return to duty and failing to return. The appellant argued that management did violate his due process rights by now claiming that the AWOL was charged as a result of: excessive absences, failure to provide a definitive date of return, lack of corporation, and failure to follow procedures due to the fact that he was not given an opportunity to respond to all of the considerations leading to the AWOL charge. The appellant stated that the notice dated September 8, 2016, did not state that "management would no longer approve future requests for LWOP and future absences may be coded as absence without leave (AWOL)" but rather stated "management may no longer approve future requests for LWOP" not that they "would no longer approve."

In regards to management's claim that the appellant was not cooperative in providing information; the appellant argued that this information is false and inconsistent with the information contained in the notice of proposed removal, and another one of management's attempts to portray him as a bad employee. The appellant stated that he consistently asked management to let him know if any additional information was needed which is hardly demonstrative of an uncooperative person. The appellant argued that the August 23, 2016, email from his supervisor is evidence that a definitive date was not established. The appellant reiterated that he hand-delivered his request to return to duty on November 3, 2016, on September 16, 2016. The appellant argued that the emails dated September 1, 2016 and October 18, 2016, are proof of management's awareness of his request to

return to work on November 3, 2016. The appellant argued that the warning notice did not discuss, identify, or refer to the previous verbal warnings or conversations that management is now purporting occurred and that they did not occur. The appellant also asserted that management violated his due process rights by failing to conduct a relevant fact finding into the missing OPM 71s.

TSA's policy on the use of LWOP is clear and is stated under Section K of the Handbook to 1100.63-1. Section K.3 states that all requests for LWOP in excess of 30 consecutive calendar days must be made in advance and each request should define the benefits or the serious needs to the employee and the value to TSA. The policy requires that if the request for over 30 consecutive calendar days of LWOP is approved, an SF-52, Notification of Personnel Action, must be prepared and submitted by the HR specialist/liaison for the appropriate program office for processing. It does appear that the appellant did complete the LWOP-NTE Benefits Checklist and submitted to management on or about September 12, 2016. It does not appear that management strictly enforced the terms of the policy and this failure benefitted the appellant, as he was granted an additional 560 hours of LWOP, in addition to the 480 hours of leave he invoked under FMLA.

Both parties argued fault as to whether or not the appellant was provided with a copy of the Absence and Leave policy. The appellant was provided a copy and the means of distribution is not properly placed before the Board. Additionally, the Board finds that the appellant's arguments as to violation of the CBA are moot in that the appellant was advised by letter dated September 8, 2016, that his absences may be coded as AWOL. Additionally, the appellant's supervisor notified the appellant via email that his absences would be annotated as AWOL if he failed to submit OPM 71s for all absences. The evidence provided by the appellant show that his attempt to submit OPM 71s were sent to an invalid TSA email account. In addition, the NOPR clearly put the appellant on notice of the Charge of AWOL.

The Board found that the preponderance of the evidence establishes that the appellant failed to maintain a regular work schedule. Since May 2, 2016, management has been able to show that the appellant has been absent more than 93% of his scheduled shift. Although the Letter of Intent sent on September 8, 2016, did not set a date of return to duty, it still placed the appellant on notice of his responsibility to return to work. The evidence in the record does not show that the appellant made arrangements between the date of the Intent Letter, dated September 8, 2016, and an email sent to management on October 18, 2016. This email came the day before the NOPR was issued. Although the appellant claims to have provided a date of November 3, 2016, to management to return to duty, he failed to follow through on this request until the day before his NOPR was issued. The appellant indicated that the medical documentation he submitted with his email, dated September 1, 2016, indicated that his wife's period of incapacitation was expected to continue through November 1, 2016, however, his email did not request that he return to duty in November. Therefore, Charge 1, *Failure to Maintain a Regular Work Schedule*, is SUSTAINED.

With regard to Charge 2, specification 1, the Board found that there was no request from management to the appellant requesting administratively acceptable documentation. Additionally, management failed to explain why all other days in this same Pay Period were coded LWOP but this date was charged AWOL. Management has failed to prove the specification by preponderant evidence. Therefore, specification 1, is NOT SUSTAINED.

Additionally, as to Charge 2, the Board finds that management was in compliance with the TSA Handbook to MD 1100.63-1, as the appellant failed to submit an OPM Form 71 or failed to follow leave requesting procedures which then resulted in a charge of AWOL. Employees are not entitled to be approved for LWOP for an indefinite period. The appellant is in violation of Section L.1 (a) of the Handbook which stated that an employee's time may be charged as absence without leave (AWOL) when an employee fails to report for duty without prior approval, has an unauthorized absence from the workplace during the workday, or does not give proper notification for an absence.

With regard to Charge 2, specification 2, the Board found that the WebTA Certified T&A Summary for PP 17 is preponderant evidence. The appellant argued that he sent the OPM 71 to management for PP 17. The evidence submitted by the appellant shows that the OMP 71 was submitted to an incorrect email address and never received by management. Therefore, specification 2 is SUSTAINED.

With regard to Charge 2, specification 3, the Board found the WebTA Certified T&A Summary for PP 18 is preponderant evidence. The appellant argued that he sent the OPM 71 to management for PP 18. The evidence submitted by the appellant shows that the OPM -71 was submitted to an incorrect email address and never received by management. Therefore, specification 3 is SUSTAINED.

With regard to Charge 2, specification 4, the Board found the WebTA Certified T&A Summary for PP19 is preponderant evidence. The appellant argued that he sent the OPM 71 to management for PP19. The evidence submitted by the appellant shows that the OPM 71 was submitted to an incorrect email address and never received by management. Therefore, specification 4 is SUSTAINED.

With regard to Charge 2, specification 5, the Board found the WebTA Certified T&A Summary for PP20 is preponderant evidence. The appellant argued that he sent the OPM 71 to management for PP20. The evidence submitted by the appellant shows that the OPM 71 was submitted to an incorrect email address and never received by management. Therefore, specification 5, is SUSTAINED.

Having sustained specifications 2, 3, 4 and 5, the Charge, *Absence Without Leave*, (AWOL), is SUSTAINED.

Having sustained the Charges, the remaining question is whether the appellant's removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonable 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.

The Deciding Official considered a number of factors, including the nature and seriousness of the appellant's misconduct in relation to his duties. The Deciding Official determined that as a BDO, the appellant is instilled with a great deal of trust to perform his job duties. The Deciding Official considered that the appellant was familiar with TSA's absence and leave policies, as indicated by the appellant's prior discipline. On July 28, 2013, the appellant was issued a three (3) suspension for failure to follow TSA policy; on January 2, 2015, the appellant was issued a three (3) day

suspension for tardiness; and on March 19, 2016, the appellant was issued a seven (7) day suspension for AWOL.

The Deciding Official also considered the appellant's corrective actions. The appellant received Letters of Counseling regarding his attendance on August 7, 2013 and August 14, 2014. The appellant was also placed on a sick leave restriction on December 13, 2013. The Deciding Official considered that these actions clearly put the appellant on clear notice that future offenses could result in more severe discipline.

The Deciding Official considered that the appellant's potential for rehabilitation is very poor and that despite repeated discipline and clear notice of management's expectations, his attendance issues have continued. The Deciding Official considered that the appellant has not reported to work for several months, negatively impacting the TSA operation and noted that management has lost confidence in his dedication and commitment to TSA.

As mitigating, the Deciding Official considered that the appellant has been with TSA since August 8, 2004, and that he has an otherwise satisfactory performance rating. However, he found that the mitigating factors do not outweigh the fact that he has been and continues to be absent from duty and has failed to adhere to management's requests to return to work.

Under Section A.4 of the Table, which pertains to AWOL for a period of more than 5 workdays, the recommended range is a 7-day to 10-day suspension and the aggravated range is an 11-day suspension to removal. Under Section A. 7 of the Table, which pertains to excessive unscheduled absences, the recommended range is a Letter of Reprimand to a 5-day suspension and an aggravated range of a 6- day suspension to removal. The Deciding Official noted that he considered the aggravated penalty range for both charges.

The Deciding Official properly weighed the aggravating and mitigating factors in determining the removal action. The Board finds that management's decision to remove the appellant from his position as an MBDO 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—17-002

January 18, 2017

***Issue:*** *Jurisdiction*

## OPINION AND DECISION

On or about November 29, 2016, the appellant was removed from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA). On or about January 5, 2017, the appellant appealed his removal to the TSA Office of Professional Responsibility Appellate Board (Board). On January 17, 2017, management rescinded the removal action.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
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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—16-195

January 23, 2017

***Issue**: Negligent Performance of Duties*

**DECISION ON RECONSIDERATION**

On November 15, 2016, the Office of Professional Responsibility Appellate Board (Board) issued a decision GRANTING the appellant's appeal, in part, and MITIGATING the appellant's removal to a fifteen (15) calendar day suspension. On November 29, 2016, management filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On December 3, 2016, the appellant filed 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 misinterpreted the facts. Therefore, I concur with the Board's determination that removal is not the appropriate penalty and that a penalty in the aggravated range is appropriate. However, I find that a penalty at the low end of the aggravated range is not sufficient for the sustained specification. I find that a penalty in the middle of the aggravated range is appropriate, and that a thirty (30) calendar day suspension is sufficient for the sustained specification.

Accordingly, the reconsideration request is GRANTED, in part, and the penalty is MITIGATED to a thirty (30) calendar day suspension. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1. Accordingly, there is no further right to appeal.

FOR THE BOARD:

Deborah Kearse

Deborah Kearse
Acting Deputy Assistant Administrator
Office of Professional Responsibility

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
*Management.*

DOCKET NUMBER
OAB—16-210

January 26, 2017

***Issue**: Failure to Follow Proper Screening Procedures*

**DECISION ON RECONSIDERATION**

On December 7, 2016, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On December 22, 2016, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. Management did not respond to the request for reconsideration. 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 Deputy 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—16-211

January 6, 2017

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

**DECISION ON RECONSIDERATION**

On December 5, 2016, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On December 16, 2016, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On December 19, 2016, management filed a response arguing that the request for reconsideration should be denied. After considering the underlying record, the request for reconsideration and the opposition to the request, 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 Deputy 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—16-214

January 9, 2017

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

**AMENDED OPINION AND DECISION ON RECONSIDERATION**

This serves to amend the January 6, 2017, Opinion and Decision granting Management's request for reconsideration. The Office of Professional Responsibility Appellate Board (Board) issued a decision dated December 20, 2016, finding a procedural violation. The Board did not hear the case on the merits. The January 6, 2017, Opinion and Decision granted Management's request for reconsideration but failed to address the remand of the case to the Board for a hearing on the merits.

Management's request for reconsideration is GRANTED, and the case is remanded to the Board for a hearing on the merits.

FOR THE BOARD:

Deborah Kearse

Deborah Kearse
Acting Deputy Assistant Administrator
Office of Professional Responsibility

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598