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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-020

March 19, 2018

Issue: *Off-Duty Misconduct; Making a False Statement to a Public Servant; Failure to Report an Arrest*

OPINION AND DECISION

On December 19, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on three Charges: *Off-Duty Misconduct*, *Making a False Statement to a Public Servant*, and *Failure to Report an Arrest*. The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Off-Duty Misconduct*, on one specification alleging that on October 2, 2017, the appellant assisted in an attempt to break into a vehicle at the airport parking lot. The appellant was arrested for Attempted Car Prowling in the Second Degree.

Management based Charge 2, *Making a False Statement to a Public Servant*, on one specification alleging that on October 2, 2017, when an Airport Police Officer asked the appellant who his companion was in the attempt to break into a vehicle, the appellant gave a

false name to the Officer. The appellant was arrested for Making a False Statement to an Officer.

Management based Charge 3, *Failure to Report an Arrest,* on one specification alleging that on October 2, 2017, the appellant was arrested by the Airport Police Department for Car Prowling, later changed to Attempted Car Prowling in the Second Degree and Making a False Statement to a Public Servant. The appellant failed to report the arrest to an immediate supervisor or anyone in his chain of supervision within 24 hours.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance and (8) reporting all personal arrests, including summons and citations to appear before a court, to the immediate supervisor or to any manager in the chain of supervision within 24 hours of the arrest or as soon as possible thereafter. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employees' reliability, judgement, or trustworthiness.

On October 2, 2017, local police were dispatched to a parking lot behind a parking garage at the airport after a report of people prowling around a car located in the parking lot. It was reported that the individuals appeared to be attempting to enter the vehicle. When a Police Officer arrived on the scene he observed an individual at the driver side door of the vehicle with a crow bar wedged in the seam of the top of the driver side door and was using a coat hanger inserted in the opening in an attempt to unlock the door. The appellant was standing on the passenger side of the car providing the individual with light from a flashlight. The individual admitted to the Police Officer that the car was not his. When the Police Officer spoke to the appellant, he identified the other individual involved by a false name. Both the individual and the appellant were taken into custody. The appellant was charged with Attempted Vehicle Prowling Second Degree and Making a False Statement to a Public Servant.

On October 4, 2017, a Transportation Security Manager (TSM) notified the appellant via telephone that due to the reporting on the event on October 2, 2017, he was not to report to screening duties. On October 5, 2017, the appellant provided a written statement stating that he did not inform his supervisor within 24 hours of being arrested. He stated that he did not know he was supposed to. The appellant stated that had he known he was supposed to inform his supervisor; he would have informed him the moment it was happening. On October 5, 2017, The appellant also received a memorandum informing him that he was not authorized to perform any security screening functions due to an on-going investigation. On October 12, 2017, the appellant received a Notice of Indefinite Suspension based on the Charge: *Criminal Charges for which Imprisonment may be Imposed.*

On November 14, 2017, the appellant agreed to a Motion and Order for Stipulated Order of Continuance and entered into a deferred sentencing agreement with the Municipal Court for 12 months. The appellant agreed that he would not contest the underlying facts of his arrest.

The appellant was issued a Notice of Proposed Removal (NOPR) on December 6, 2017. The appellant did not provide a response or furnish any additional evidence.

Management provided the following evidence to support the Charges: Municipal Court Amended Complaint, dated November 7, 2017; Municipal Court Stipulated Order of Continuance, dated November 14, 2017; Airport Police Department Field Case Report; Municipal Court Citation; statement from Transportation Security Manager (TSM), dated November 2, 2017; statement of the Assistant Federal Security Director – Generalist (AFSD-G), dated November 2, 2017; statement from appellant, dated October 5, 2017; Removal from Screening Duties Memorandum, dated October 5, 2017; and Notice of Indefinite Suspension, dated October 12, 2017.

On appeal, the appellant provided a statement in which he told the story of his arrest and the actions that followed but he did not refute the charges.

With regard to Charge 1, the Municipal Court Amended Complaint and the Police Report are preponderant evidence that the appellant was arrested for attempted vehicle prowling. Therefore, the Charge, *Off-Duty Misconduct*, is SUSTAINED.

With regard to Charge 2, the Municipal Court Amended Complaint and the Police Report are preponderant evidence that the appellant was arrested for giving a false statement to the Police Officer. Therefore, the Charge, *Making a False Statement to a Public Servant*, is SUSTAINED.

With regard to Charge 3, the Municipal Court Citation, the appellant's statement, and the statement of the AFSD-G are preponderant evidence that the appellant failed to report his arrest to his supervisor within 24 hours. Therefore, the Charge, *Failure to Report an Arrest*, is SUSTAINED.

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

On appeal, the appellant stated that he was surprised at the "extreme position of the disciplinary action" because he had not had any disciplinary actions against him in the two and a half years that he worked for TSA and because he regularly tries to go above and beyond by helping trainers and their trainees, trying to help Lead Transportation Security Officers with their duties, and volunteering for collateral duties. He stated that during his Indefinite Suspension he had time to reflect on how his actions not only impacted his life negatively, but have also potentially brought doubt to TSA's reputation. The appellant stated that he is confident that if given a chance, he can prove that not only will he not make a mistake like this again, but will prove that it is worth keeping him around.

The Deciding Official considered the appellant's position as a Transportation Security Officer, the notoriety of the charges and the impact on the Agency's reputation, and how the appellant's misconduct could cause the traveling public and the appellant's peers to question his reliability, judgment and trustworthiness. The Deciding Official also considered management's lack of confidence that the appellant can perform in a security role based on the type of misconduct he engaged in. The Deciding Official stated that attempted to break into a car and being dishonest to the responding police officer is inexcusable conduct, and left him with no trust in the appellant as an employee.

As a mitigating factor, the Deciding Official considered that the appellant has no prior disciplinary history but found that his misconduct outweighs the mitigating factor because the appellant's actions are a violation of the Agency's core value of integrity.

The Deciding Official considered that the appellant has been with TSA since June 28, 2015, but did not consider his short tenure to be mitigating. The Deciding Official also considered that the appellant was on notice of the policies he violated since he last acknowledged receipt of MD 1100.73-5 on October 14, 2016.

Under Section G. 24 of the Table, for Off-Duty Misconduct, the recommended penalty range is a 31-day suspension to removal. Under Section E. 1 for Making a False Statement, the recommended penalty is removal. Under Section K. 1, for Failure to Report an Arrest, the recommended penalty is a 6-day suspension to removal. The Guidelines of the Table states that in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the "Aggravated Penalty Range" column corresponding to the most serious offense being charged.

There is a nexus to the appellant's employment due to his criminal conduct and his public safety position. Management had the right to consider a penalty in the aggravated range given the fact that the appellant committed more than one offense. However, management did not need to consider the aggravated range since the recommended penalty for Making a False Statement is removal.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2018.03.19 13:06:15 -04'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-022

March 19, 2018

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

OPINION AND DECISION

On January 3, 2018, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge, *Failure to Follow Standard Operating Procedures (SOP)*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence in the record. Management based the Charge, *Failure to Follow Standard Operating Procedures (SOP)*, on one specification alleging that on November 15, 2017, at approximately 2223 hours, while assigned as the Dynamic Officer (DO) on lane 3 at the airport security checkpoint, the appellant transported a bin with a passenger's property to an Alternate Viewing Station (AVS) to perform secondary screening. The appellant did not review the x-ray image on the AVS before returning the property to the passenger.

Management found that the appellant's misconduct violated the Screening Checkpoint for Standard Operating Procedures (SOP): Chapter 11 – X-ray Screening: Section 2 – Conduct Screening: 2. D.2.

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– 2.D.4 – Resolve Bounding Boxes; and Enhanced Accessible Property Screening SOP: Chapter 3 – Property Search: Section A.2 – A.4. – Resolve Bounding Boxes.

Management also found that the appellant's misconduct violated TSA Management Directive (MD), 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D.[1] states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance.

On November 15, 2017, the appellant was working in the DO position. He took a tray from the Lane 3 Manual Diverter Roller (MDR) and proceeded to the screening table to resolve an alarm but failed to follow standard operating procedures by visually confirming and concurring the annotated image on the AVS. In a statement, dated November 15, 2017, the appellant stated that he did a bag check on Lane 3 which consisted of a tray with food items, a head pillow and a tablet. The appellant stated that he did the bag check but forgot to pull up and clear the image. The appellant apologized for the incident.

The appellant was issued a Notice of Proposed Removal (NOPR) on December 8, 2017. The NOPR advised the appellant of his right to make an oral and/or written reply within seven days. The appellant did not submit a reply by the required response date.

Management provided as evidence: Summary of Pre-Decisional Discussion, dated November 15, 2017; statements from the appellant, dated November 15, 2017; statement from an LTSO, dated November 16, 2017; and Closed Circuit Television (CCTV) footage.

On appeal, the appellant did not argue that he failed to view and clear the image. The appellant stated that he transported a bin with a passenger's property to an AVS to perform secondary screening. He stated that he removed the items and physically cleared the property. The appellant stated that while he was performing the screening the LTSO instructed him to "finish up and tap out." He stated that he followed his supervisor's orders.

Management responded and argued that the appellant's failure in this case was not merely that he did not clear the x-ray image from the AVS when he finished screening, but that he never looked at the x-ray image to determine what he was looking for during his bag search. Management argued that the appellant's physical search of the bag therefore, did not resolve the suspected threat. Management argued that by returning the bag to the passenger without first having identified the suspected threat item, the appellant caused a breach when the passenger took the bag into the sterile area.

The appellant admitted in both the pre-decisional discussion and in his written statement that he failed to retrieve the image from the AVS and confirm annotated threat areas selected for the bag search. The Board found that the appellant's statement, the pre-decisional discussion summary, the LTSO's statement and the CCTV footage are preponderant evidence that the appellant failed to

[1] Management stated that the appellant's conduct is in violation of MD 1100.73-5, Section 5. A. (7) however, the language cited is from Section 5. D. (7) of the MD.

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follow the SOP. Therefore, the Charge, *Failure to Follow Standard Operating Procedures (SOP)*, is SUSTAINED.

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

On appeal, the appellant argued that removal is unreasonable and that management failed to adequately consider the mitigating factors. The appellant argued that although the AVS image of the property was not cleared after removing it for secondary screening, it was physically screened by removing all of the items and personally inspecting them. The appellant argued that there was no security breach because the property was physically in the possession of the Agency and thoroughly screened. He argued that his actions therefore, did not rise to a level serious enough to warrant removal. The appellant stated that management noted that he has been employed by TSA for over 9 years and maintained satisfactory performance but argued that management improperly found this was only "potentially" mitigating and not sufficient to mitigate the penalty. He argued that management should have attributed significant weight to his lengthy years of service and satisfactory performance. The appellant also argued that management did not apply the proper standard when considering his past discipline. He argued that the two past disciplinary actions should be significantly diminished because one was completely different from the current case and because each incident was over two years old.

The appellant also argued that his rehabilitative potential should have been considered as a mitigating factor. He argued that management failed to consider his sincere expression of remorse and that he immediately took responsibility for his actions upon learning of his mistake. He argued that a Performance Improvement Plan (PIP) or Threat Detection Training Pilot Program (TDTP) is the most appropriate action for performance errors like his.

The appellant noted that Section M. 1 of the Table provides a range of penalties from a 5-day suspension to removal and provides explanatory notes which state, "inadvertent violations may warrant the mitigated penalty range, and deliberate violations may warrant the aggravated penalty range." He argued that the evidence cited by management, including the written statements provided and the CCTV footage, clearly indicate that it was an inadvertent error. The appellant argued that management has not provided evidence to support its claim that he acted willingly; he argued that it shows that he made an unintentional mistake. He argued that his written statement and the statement of the LTSO show that immediately following the receipt of instructions from his supervisor to "finish up," he inadvertently missed the final step in the screening he was performing. The appellant argued that management did not properly consider the penalty factors and that as a result, he did not receive the benefit of the significant mitigating factors applicable and incurred an unreasonably harsh penalty.

The appellant also argued that removal does not promote the efficiency of the service noting that he submitted multiple written statements expressing his desire to work hard to improve. He argued

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that he has served the Agency for nine years and that removal of an employee who has demonstrated such dedication to TSA does not promote the efficiency of the service.

Management responded and argued that the appellant did not explain why management's assessment of his length of service and performance record was insufficient. With regard to the appellant's prior discipline, management argued that while the 10-day suspension was based on a charge of inattention to duty, rather than failure to follow SOP, the underlying misconduct was strikingly similar to the present case. Management stated that the difference is that in the prior case, the appellant was the one sending the bag for secondary screening, and in the present case, he was the one required to perform the secondary screening. Management argued that in each case the appellant's actions lead to a passenger taking a bag into the sterile area with an unresolved alarm.

With regard to the appellant's argument about his potential for rehabilitation, management argued that while expression of remorse is a factor in assessing an employee's rehabilitative potential, it must be considered in relation to the employee's track record. Management argued that the issue comes down to whether management made a reasonable assessment that a TSO who engaged in three instances of misconduct related to screening over the course of approximately two years is likely to engage in the same conduct again. Management argued that the fact that the appellant sees the incident that led to his previous suspension as completely different from the current issue shows that yet another suspension is unlikely to have an impact on his behavior.

With regard to Section M. 1 of the Table, management argued that the Table does state that inadvertent violations may warrant application of the mitigated penalty range but that it is not a requirement. Management noted that guidance accompanying the Table also states that the penalty should fall within the aggravated penalty range for second and/or successive offenses. Management argued that, in short, where there is a succession of similar, inadvertent offenses, application of the recommended or aggravated penalty range is within management's discretion. Management argued that in the present case, the Deciding Official articulated that the appellant's third offense in approximately two years and its implication for his rehabilitative potential supported removal, which was within the recommended penalty range.

In determining the penalty, the Deciding Official considered the nature and seriousness of the appellant's misconduct; his work and disciplinary history; the clarity with which the appellant knew about the policies he violated; the notoriety of the appellant's misconduct; management's confidence in the appellant's ability to perform his duties; his rehabilitative potential; any mitigating factors; and the consistency of the penalty with those imposed on similarly situated employees for the same or similar offenses.

The Deciding Official considered that screening is the appellant's core function as an employee and that the traveling public depends on him to carry out this function in a careful and effective manner. The Deciding Official considered the appellant's statement that he simply forgot to review the AVS image of the property he was screening. The Deciding Official stated that even if this were an explanation for the appellant's actions, it shows gross negligence in his behavior because there is no way to know the nature of a threat item that has been annotated for additional screening without reviewing the x-ray image that led to annotation of the item. The Deciding Official stated that he

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found that the appellant's actions went beyond ordinary carelessness in the situation and created a potential danger to passengers, in addition to disruption of the screening operation. The Deciding Official considered that the disruption led to some notoriety of the appellant's actions, but did not significantly discredit the agency.

As a mitigating factor, the Deciding Official considered the appellant's satisfactory job performance and the fact that he has been employed with TSA for over nine years. He found however, that the mitigating factors do not outweigh the severity of the offense.

As an aggravating factor, the Deciding Official considered that the appellant has prior discipline for similar misconduct, specifically a 5-day suspension on May 27, 2015, for failure to follow proper screening procedures and a 10-day suspension on October 21, 2015, for inattention to duty when as the x-ray operator he failed to notify the officers conducting bag searches that he had permitted a bag to be retrieved by a passenger even though the image of the bag was sent to the AVS, indicating the bag required additional search. The Deciding Official considered that through these actions, the appellant was placed on notice that any future misconduct could result in more severe disciplinary action, up to and including removal from Federal service.

The Deciding Official considered that the appellant's failure to change his behavior in the face of prior disciplinary action has undermined his confidence in the appellant's ability to carry out his screening duties. He stated that based on the seriousness of the appellant's current misconduct and the fact that the incident was the appellant's third SOP violation in approximately two years, he does not believe the appellant has potential for rehabilitation.

The Deciding Official also considered that on September 6, 2017, the appellant acknowledged reading and reviewing TSA MD 1100.73-5.

Under Section M.1 of the Table, which pertains to Failure to Follow Standard Operating Procedures, the recommended penalty is a 5-day suspension to removal and the aggravated penalty is removal. The guidelines of the Table state that examples of aggravating factors include prior disciplinary record and prior warning/advisement not to commit misconduct. The Board found that the Deciding Official properly weighed the penalty factors. The appellant's prior disciplinary actions occurred within two and a half years of the current misconduct.

The Board determined that in light of the appellant's two prior suspensions for similar misconduct and the fact that the recommended penalty range for the charge includes removal, management's decision to remove the appellant is within the bounds of reasonableness.

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

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FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.03.19 14:41:19 -04'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-024

March 25, 2018

Issue: *Medical Disqualification*

OPINION AND DECISION

On January 17, 2018, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one non-disciplinary Charge, *Medically Unqualified for the TSO Position.* The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Medically Unqualified for the TSO Position,* on one specification. The specification alleged that by the Office of Chief Medical Officer (OCMO) letter, dated December 18, 2017, the Medical Review Officer (MRO), reviewed the appellant's medical information and determined that he did not meet the medical guideline requirements for the TSO position.

On October 4, 2017, the MRO issued a Fitness for Duty determination finding the appellant temporarily not medically qualified due to opiate dependence and required that the appellant provide further documentation to prove that he could meet the qualifications.

The MRO described the relevant facts of the appellant's serious health condition, in part, noting that the appellant was treated for opioid dependence, in remission. The MRO noted that on

September 28, 2017, the appellant's medical care provider wrote that the appellant "reports history of opioid use following a MVA in 2010" and "ongoing associated neck and bilateral shoulder pain." On the same date, the appellant's medical provider wrote that the appellant is currently taking the opioid medication buprenorphine, the sedating medication cyclobenzaprine and the benzodiazepine medication alprazolam. Also on the same date, the appellant's medical provider wrote that the appellant "reports history of opioids use following a [motor vehicle accident] in 2010. He reports ongoing associated neck and bilateral shoulder pain. He reports that his medication progressed to 4-7 oxycodone tablets daily. He reports [sic] was obtaining these via Rx off the street. He reports he has been attending counseling sessions with [Narcotics Anonymous]." The appellant's medical provider wrote on October 3, 2017, that the appellant does not need any job limitations, and that he is taking the opioid medication buprenorphine. The appellant's medical provider also wrote that the appellant meets the DSM-5 criteria for early remission, completed a substance use disorder treatment program on May 18, 2016, demonstrates appropriate judgement and attention, does not have any cognitive impairment, and is compliant with recommended treatment.

In documentation submitted for reconsideration review, the appellant's medical provider wrote on October 30, 2017, "this letter is to inform you have been discharge [sic] for one or more of the following reasons: Self Discharge, Inconsistent UDS [Urine Drug Screen]-violation of your pain management agreement with this practice/office., Multiple Medications from other Physicians, Abusive behavior towards staff, Missed scheduled appointments, UDS [Urine Drug Screen] Refusal. All future appointments have been cancelled, and we strongly advise you to contact your primary care physician to help obtain [a] new pain management physician. Upon receipt of your signed medical records release, [the clinic name] will furnish your treating physician with your medical records." The letter checked that the appellant self-discharged. The appellant's medical provider wrote on November 14, 2017, that the appellant "has discontinued taking suboxone for opioid dependency and cyclobenzaprine was only given for 7 days on 9/28/18." On the same date, the appellant's medical provider wrote that "the medications listed in his previous notes were part of his history prior to starting the suboxone treatment." The medical provider wrote on November 21, 2017, that the appellant has reached maximum medical improvement, does not need any job limitations, has discontinued the use of buprenorphine, and is not taking any medications.

In the Fitness for Duty letter dated December 18, 2017, the MRO cited the *Medical and Psychological Guidelines for Transportation Security Officers (December 13, 2017)*, Medications, page 18, which state, "Provide restrictions if taking medications causing sedation, drowsiness, equilibrium disturbance, orthostatic hypotension, vision changes, or behavioral changes. Provide restrictions if taking barbiturates, benzodiazepines, opioids, or dronabinol." The MRO stated that medical records, to include the medical provider's five most recent progress notes, and a release form to allow the MRO to communicate with the medical provider were not provided, despite his request.

The MRO stated that, "the documentation provided for the fitness for duty review does not allow the OCMO to determine that [the appellant's] condition meets the TSO Medical Guidelines due to refusal to cooperate with a medical inquiry by not providing requested medical documentation

in a timely fashion. Therefore, [the appellant] is not medically qualified to perform the full and unrestricted duties of a TSO as required by the Aviation and Transportation Security Act."

On December 21, 2017, the appellant was issued a Notice of Proposed Removal (NOPR). The NOPR advised the appellant of his right to make an oral and/or written reply. The appellant replied via email on January 3, 2018. In his reply, the appellant stated that the OCMO had found him temporarily unfit for duty a few months ago and that he has provided management and the OCMO medical documentation from his former treating physician stating that he was no longer taking or being prescribed the medication used to treat a serious health condition. The appellant stated that he felt he "should be treated as countless others who have gone through the process of proven [sic] that I am no longer taken [sic] the medication in question" and that he should be reinstated to his position.

The Board considered all of the evidence presented including: the OCMO Fitness for Duty Determination letter, dated December 18, 2017; and the *Medical and Psychological Guidelines for Transportation Security Officers*, dated December 13, 2017.

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

On appeal, the appellant argued he did not receive a letter dated December 18, 2017, in which the OCMO requested further information from him. The appellant argued that he was not aware of the request from the OCMO until he emailed management on January 3, 2018, requesting a follow-up of his temporary status. He stated that he received the Notice of Decision removing him from his position on January 17, 2018.

The appellant argued the charge was not proven by preponderant evidence. He noted that the Decision states that he is medically unqualified to perform the full unrestricted duties of a TSO because he did not provide documentation from his physician, in addition to documentation from his physician already provided, that prove that he is no longer taking any opioids and can perform his duties fully and without restriction. The appellant noted that the MRO cited Section 1. 13, "Medications" of the Medical Guidelines and argued that it was the sole provision relied upon by the MRO and management when choosing to remove him. The appellant argued that he cooperated with management to the best of his ability and provided adequate documentation. He argued that he stated many times that he never received a December request for additional information from management. The appellant stated that the documentation he did provide however, included at least 10 documents from his physician in which the physician indicated his professional medical opinion that he was able to perform his duties without limitation, and notably, that he was no longer taking opioids. The appellant argued that it is clear from the documentation from his physician that he is no longer taking opioids and that he may perform his duties without limitation, as required by the Medical Guidelines.

The appellant also argued that his removal does not promote the efficiency of the service because he has been dedicated to his service to TSA. He argued that management has not proposed to remove him for any failure to perform his duties or for any behavior that might implicate his ability to perform or protect the airport. The appellant argued that he is being removed because he did not provide documentation with the same information that was already provided to the OCMO, for a medical issue that was already proven to be resolved. He argued that his treating physician reported to management that his professional opinion was that he was fully capable of performing his job duties. The appellant argued that removing a trained employee who wants to continue to perform his duties cannot promote any legitimate government interest, especially where the charge is completely unsupported by evidence.

Management responded and argued that the appellant was removed after the OCMO requested medical information which the appellant failed to provide. Management stated that the MRO issued a Fitness for Duty determination on October 4, 2017, finding that the appellant was temporarily not medically qualified due to opiate dependence.

Management argued that on December 18, 2017, the MRO found that the appellant failed to provide additional documentation which would allow the OCMO to determine that the appellant's condition meets the TSO Medical Guidelines and that as a result, the MOR found that the appellant is not medically qualified.

Management stated that the Deputy Assistant Federal Security Director (DAFSD) proposed the appellant's removal and that it was mailed via United Parcel Service (UPS) and delivered to the appellant's front door on December 29, 2017. Management argued that the appellant claims that he was unaware of any request for further medical documentation but noted that the appellant sent an email to management on January 3, 2018, stating, "I feel that I should be reinstated to my position." Management argued that Human Resources answered the appellant's January 3, 2018, email on January 4, 2018, and that he did not respond back until January 12, 2018. Management stated that by letter dated January 17, 2018, the appellant was provided notice that he was being removed from TSA. Management argued that it is illogical that a Notice of Proposed Removal, a Job Questionnaire, and an Administrative Leave Letter would be sent to the appellant's home, via UPS, yet he would not know about it until he emailed TSA in January.

Management argued that if a TSO is unwilling to provide medical documentation sufficient enough for the OCMO to determine the TSO is fit for duty, then the OCMO might not be able to make such a determination. Management argued that TSOs always run the risk of removal from TSA for failing to cooperate with the OCMO.

The Board issued an Order on March 20, 2018, ordering management to provide proof that the appellant was requested to submit his physician's five most recent progress notes and a release form allowing the Chief Medical Officer to communicate with the appellant's physician.

Management responded on March 20, 2018, and attached an email from the Office of the Chief Medical Officer to the Human Resources Specialist (HRS), dated November 22, 2017, notifying her that she must notify the appellant to submit his five most recent progress notes and a TSA Form 1134. Management also attached an email from the HRS to the appellant, dated November

24, 2017, in which she asked the appellant to submit his five most recent progress notes from his physician and that he needed to sign the TSA Form 1134 so that the MRO could talk to his physician. Management stated that the email was sent not only to the appellant's TSA account but also to his personal account which he had been using, and receiving mail from, consistently throughout his appeal. Additionally, management attached an email from the HRS to the appellant, dated December 14, 2017, in which she informed the appellant that it was his final reminder that management had not received medical records from him and advised him to have his physician complete the request and return the records to the OCMO as soon as possible. Both emails stated a deadline of December 15, 2017, for receipt of the documents.

The Board determined that the email correspondence between the appellant and management is preponderant evidence that the appellant was notified that he was required to provide additional medical documentation and a TSA Form 1134 to the OCMO. The appellant responded via email on January 3, 2018, using the same email address to which the HRS sent the November and December emails. Therefore, the Board found no merit to the appellant's argument that he did not receive the request for the 5 progress notes and TSA Form 1134.

The December 18, 2017, letter from the OCMO states, "the documentation provided for this fitness for duty review does not allow the Office of the Chief Medical Officer to determine that [the appellant's] condition meets the TSO Medical Guidelines due to refusal to cooperate with a medical inquiry by not providing requested medical documentation in a timely fashion. Therefore, [the appellant] is not medically qualified to perform the full and unrestricted duties of a TSO as required by the Aviation and Transportation Security Act." Therefore, the Board upholds management's decision to remove the appellant based on the non-disciplinary charge of *Medically Unqualified for the TSO Position*.

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2018.03.26 15:57:52 -04'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-026

March 22, 2018

Issue: *Inappropriate Comments*

OPINION AND DECISION

On February 13, 2018, management demoted the appellant from his position of Supervisory Transportation Security Officer (STSO), SV-1802-G, to the position of Transportation Security Officer (TSO), SV-1802-E, with the Transportation Security Administration (TSA) based on the charge: *Inappropriate Comments*. The appellant filed a timely appeal of his demotion to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Inappropriate Comments*, on one specification. The specification alleged that on or about October 8, 2017, while in the TSA break room, the appellant was having a conversation with other TSA employees and used the term "brown skinned bitch" in reference to a Lead Transportation Security Officer (LTSO).

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (7) provides that

employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. 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. provides that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgement or trustworthiness.

Management also alleged that the appellant's conduct violated the Handbook to MD 1100.73-5. Section I states that employees are accountable for the statements they make and the views they express…. For example, defamatory, irresponsible, false or disparaging statements about employees may disrupt the orderly conduct of official business or adversely affect the efficiency of TSA. Section M states: (1) TSA is committed to providing a work environment free from unlawful discrimination and where the contributions of all employees are supported and encouraged without regard to non-merit factors. All conduct must be appropriate and supportive of a model work environment. For instance, engaging in discriminatory conduct, making disparaging remarks, expressing stereotypical views that reflect negatively on a particular group or individual, or displaying and/or distributing offensive materials that ridicule or defame a particular group is prohibited in the workplace and (2) every level of management, including supervisors, is required to provide positive leadership of and support for TSA's and DHS' Equal Employment Opportunity (EEO) policies and programs by ensuring that all agency programs, practices and activities are developed and administered in accordance with pertinent laws and agency policy prohibiting discrimination. Managers and supervisors are responsible for ensuring a hospitable workplace free of discrimination, intimidation, and other offensive behaviors and materials, and may be subject to corrective action for failing to take prompt appropriate action to correct intimidating and/or offensive activity in the workplace.

In addition, management alleged that the appellant violated TSA Management Directive 1100.73-3, *Anti-Harassment Program*, Section 5.G, which states that all TSA employees and contractors are responsible for (1) avoiding behavior that has the effect of creating an intimidating, hostile, offensive, or abusive work environment for other employees, contractors, or the public. Employees who engage in such prohibited behavior may be subject to corrective, disciplinary, or adverse action, up to and including removal. The appellant also violated Section 6.D. and E., which state that to maintain an environment free of harassing behavior, every manager and supervisor must be personally committed to, and held responsible for, professional and appropriate treatment of all TSA personnel and every individual in the workplace. To this end, it is TSA's policy to maintain a workplace free of harassment and regardless of whether the conduct rises to the level of harassment that may be actionable under the law, TSA may consider inappropriate comments and behavior to be misconduct, which will not be tolerated. Although a single utterance or act may not be severe enough to constitute unlawful harassment in violation of the law, such conduct will not be tolerated by TSA.

The evidence shows that on October 8, 2017, the appellant was the STSO on duty. While waiting for a flight to arrive for screening, the appellant and at least four Transportation Security Officers (TSO) were in the TSA break room. While in the break room, the topic of the upcoming schedule was discussed. During the conversation it was discussed that an LTSO was

upset about her new schedule, at which time the appellant referred to the LTSO as a "brown skinned bitch."

On January 16, 2018, the appellant was issued a Notice of Proposed Demotion. An oral reply was held on January 29, 2018, and a written reply was submitted on January 25, 2018. The Deciding Official issued a decision on February 13, 2018, and demoted the appellant from the position of Supervisory Transportation Security Officer to the position of Transportation Security Officer.

Management provided the following evidence to support the Charge: statements of the appellant, dated November 28, 2017; statement of an LTSO, dated November 22, 2017; statement of a TSO, dated November 26, 2017; statement of a TSO, dated November 22, 2017; statement of a TSO, dated November 23, 2017; statement of a TSO, dated November 23, 2017; and a statement of a TSO, dated November 30, 2017.

On appeal, the appellant argued that he never used the phrase "brown skinned bitch." He argued that there were inconsistencies in the witness statements which demonstrate that the employees met on many occasions prior to the investigation to discuss the events and plan their statements to corroborate each other. The appellant argued that the LTSO waited almost a month to make the complaint and had no direct knowledge of the events. The appellant argued that the fact that three officers confirmed with the LTSO what was said shows that they discussed what they would say in their statements so they would match.

In addition, the appellant also argued that one of the TSOs was the instigator behind the attempt to attack him due to receiving a 1 on the 2016 TOPS mid-year. The appellant argued that one of the TSOs after stating that he was minding his own business was able to have a perfect recollection of what occurred two months after the alleged incident. The appellant alleged that the dates do not line up in the some of the statements.

Management did not respond to the appeal.

Three employees provided statements which indicated that the appellant called the LTSO a "brown skinned bitch." There is no evidence of collusion on the part of any employees, nor is there evidence of any inconsistencies in the statements. All of the employees indicated that the incident occurred in October. In addition, the LTSO provided an explanation to the STSO as to why she waited to report the incident. The LTSO reported the incident in a timely manner, within three weeks of the actual incident. The Board found that the statements of the three TSA employees present in the room clearly prove that the appellant referred to an LTSO as a "brown skinned bitch." Therefore, the Charge, *Inappropriate Comments*, is SUSTAINED.

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

On appeal, the appellant argued that the penalty was not reasonable. The appellant agreed that leadership should be held to a higher standard but argued that his 2017 EPMP review shows that he is an excellent supervisor. He also argued that the only mitigating factor that management considered was his being with the agency since 2002 and no mention was made of his nearly spotless career. The appellant stated that he took full responsibility for the Letter of Reprimand (LOR) in 2013 but argued that it cannot be considered as formal discipline as the two years had passed. In regards to the one-day suspension in 2010, he argued that the Charge was incorrect.

The Deciding Official considered both mitigating and aggravating factors. He considered the nature and seriousness of the offense nothing that the comment was derogatory and offensive. He also considered that the appellant is an STSO and is responsible for creating an atmosphere in the workplace that is free of hostility and discriminating. The Deciding Official states that the appellant's action have caused him to question his judgement and trustworthiness, and found that he cannot keep the appellant in a position of authority when he cannot follow policies and procedures.

The Deciding Official considered that the appellant had a history of making inappropriate comments and was put on notice of his responsibility to act appropriately in the workplace. The Board notes that management cannot use the appellant's LOR issued on September 18, 2013, as prior discipline. However, management can use the LOR as a corrective action. In addition, the Deciding Official did note that the appellant was issued a one-day suspension in January 2010 for failing to exercise courtesy and tact.

As mitigating factors, the Deciding Official considered that the appellant has been with the Agency since 2002. The Deciding Official did not give weight to the appellant's satisfactory performance record. The Board does recognize the appellant's satisfactory performance record. However, much like the Deciding Official, the Board finds that the aggravating factors outweigh the mitigating factors.

Under Section B.1 of the Table, the recommended penalty range for inappropriate comments, is an LOR to 4-day suspension and the aggravated range is a 15-day suspension to removal.

The Board agrees with the Deciding Official's conclusions and finds that the Deciding Official correctly analyzed the penalty factors in making the determination to demote. In addition, the Deciding Official followed the guidance provided in the Table. The Table provides that a demotion may always be considered as an option when the applicable penalty range includes removal. It is noted that the appellant's corrective and disciplinary actions dealt with unprofessional conduct. The actions of the appellant were egregious and reflect poorly on TSA. The appellant's actions are not reflective of an STSO.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2018.03.22 21:02:10 -04'00'

Debra S. Engel
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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—18-027

March 30, 2018

Issue: *Submitting Altered Medical Documentation; Absence without Leave (AWOL)*

OPINION AND DECISION

On January 25, 2018, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two charges: *Submitting Altered Medical Documentation; Absence without Leave (AWOL).* 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, *Submitting Altered Medical Documentation*, on one specification. The specification alleged that on Thursday, September 21, 2017, the appellant submitted an OPM 71 requesting sick leave for Monday, September 18, 2017, and Tuesday, September 19, 2017. The appellant also submitted a medical certificate from a Diagnostic Center indicating that his mother was under a physician's care from 9/18 to 9/19, and that he would be able to return to work on 9/20/17. On September 27, 2017, Special Agents from the Office of Inspections (OOI) interviewed a Medical Specialist from the Diagnostic Center and determined the medical certificate had been altered to reflect September 18, 2017-September 19, 2017, when the only authorized date service was provided by the physician was September 19, 2017.

Management based Charge 2, *AWOL*, on one specification. The specification alleged that on Monday, September 18, 2017, the appellant was scheduled for duty from 0400-1230 hours. The appellant notified the Coordination Center and requested sick leave at 0506 hours. The appellant was advised by his manager to provide medical documentation upon his return. The medical certificate submitted was altered to change the date to include September 18, 2017. The appellant was charged AWOL for this date.

Management alleged that the appellant's conduct violated TSA Management Directive (MD), 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5(D)(2)(7), which provides: employees are responsible for behaving in way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (2) responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials, and (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance.

Management also alleged that the appellant violated the Handbook to TSA Management Directive (MD) 1100.63-1, *Absence and Leave*, Section L.1 (a), which provides 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 a workday, or does not give proper notification for an absence. Additionally, management alleged that the employee violated the Handbook to TSA MD 1100.73-5, Section BB (1) which provides that employees are expected to schedule and use earned leave in accordance with established procedures. Whenever possible, employees must obtain prior approval for all absences including leave without pay (LWOP). Employees are required to contact their supervisor as far in advance of their scheduled tour of duty as possible, or by the time established in the call-in procedures for their organization, to request and explain the need for unscheduled leave. Exceptions to this requirement include when the employee is incapacitated or when there are other exigent circumstances. In such instances, the employee, a family member or other individual should, as soon as is reasonably practical, notify the employee's supervisor of the unplanned leave. Repeated unscheduled absences may negatively reflect on the employee's dependability and reliability, and may adversely affect TSA's mission. Unapproved absences will be charged as absent without leave (AWOL). AWOL may form the basis for administrative action, including discipline, up to and including removal from TSA.

On September 18, 2017, the appellant was scheduled for duty from 0400-1230 hours. At 0506, the appellant contacted the Coordination Center and requested sick leave. At 0732 hours, a Transportation Security Manager (TSM) sent the appellant a text stating "this is [name of TSM] on the TSA phone. With your call out today I am requesting a Dr.'s note. Please provide upon your return to work." At 1040 hours, the appellant replied via text, "understood we had to rush mother to the hospital. She has to have surgery tomorrow; I will have note Wednesday." On Thursday, September 21, 2017, the appellant submitted an OPM 71, along with what appeared to be an altered medical certificate requesting sick leave for Monday, September 18, 2017. Management contacted the Office of Inspections (OOI) who met with a Medical Specialist at the office from which the medical certificate was issued. OOI was advised that the only date of care provided by the physician was on 9/19/2017 and the dates currently shown on the doctor's note, 09/18-09/19 were incorrect.

Management provided the following evidence to support the Charge: sick leave restriction, dated January 25, 2017 and September 15, 2015; medical documentation, dated September 19, 2017; OPM 71, dated September 21, 2017; Interoffice memorandum from OOI, dated September 29, 2017; and memorandum of interview or activity, dated September 27, 2017.

The appellant was issued a Notice of Proposed Removal dated November 10, 2017. On November 14, 2017, the appellant provided an email response with two (2) additional medical documents to consider. One of the documents was a letter from another doctor's office stating that he accompanied his mother to the office on 9/18/17 as well as to the appointment for her medical procedure on 9/19/2017 and is able to return to work/school on 9/20/2017. The letter was signed electronically on October 3, 2017, but was dated 9/18/2017. The medical document originally provided by the appellant was shown to the appellant and he was asked if he altered the document and stated "NO." The appellant asserted that he was not on a Letter of Sick Leave Restriction on September 18, 2017. Management acknowledged that the Letter of Sick Leave Restriction, dated January 25, 2017, was not in effect on September 18, 2017.

On appeal, the appellant asserted that on September 18, 2017, as he was headed into work, he received a call from his sister at 0350 stating that their mother had to be rushed to the hospital, so he called operations at 0506 to call out sick. He stated that he found out that the information given to him was not accurate. He asserted that his mother told his sister that her procedure was on the 18th and his sister took it as his mom had to be rushed to the hospital. He stated that once he arrived at the hospital, his mother was informed that she had her dates mixed up, and that her procedure was on the 19th of September, not the 18th. He stated that he called his screening manager at 0732 and informed him that he had to rush his mother to the hospital and would bring documentation upon his return. He stated that on September 19th, after his mother's procedure, the receptionist wrote him a doctor's note and that his mother informed the receptionist as to what happened on the mix-up of the dates for the procedure prior to writing the note.

The appellant argued that he was not told why he was being investigated and that he was not advised of his right to a union representative prior to the commencement of questioning. He also argued that he was not given any type of form to sign. The appellant argued that his rights were violated. The appellant asserted that the second medical form was submitted because of the charges brought against him. He stated that the second medical excuse was not from the same place that the procedure was done but that they were for the same thing. He argued that the Doctor's office was notified as the mix-up and that one note is from the doctor's office and the other is from the office where the procedure was to take place.

Management responded and asserted that upon his return from his absences, the appellant submitted a doctor's note from the Diagnostic Center dated 9/19/17, indicating that his mother was seen by the doctor on 9/18 and 9/19 and could return to work on 9/20/18. Management noted that the 9/18 date on the note was changed from 9/19 and it appeared that the original draft only indicated that the appellant was under the doctor's care from 9/19 to 9/19. Management argued that the medical documentation provided as part of the appeal only raised more questions and that there was not another note provided from the Diagnostic Center, the office that provided the original note.

Management also argued that the appellant's Weingarten rights were not violated and that the meeting the appellant referenced was with his mangers and not an investigatory interview. In

addition, management argued that under MD 1100.63-4, *Personal Representation During Examination or Investigation*, a representative must be requested.

Management correctly asserted that under TSA policy, employees must request representation during an interview. There is also no evidence that the appellant's Weingarten rights were violated. In addition, medical documentation that was not previously submitted to the Deciding Official will not be considered by the Board.

As to Charge 1, the Board found no merit to the appellant's arguments. The note from the Diagnostic Center was clearly altered. The date of 9/19 was changed to 9/18. In addition, OOI interviewed a Medical Specialist with the Diagnostic Center who stated that the note was altered. Therefore, 1, *Submitting Altered Medical Documentation*, is SUSTAINED.

As to Charge 2, the Board finds the evidence in the record shows that the appellant submitted an altered medical documentation to support his absence on September 18, 2017. Therefore, Charge 2, *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 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 he has been with TSA for 15 years and would not put his livelihood in jeopardy.

The Deciding Official considered both mitigating and aggravating factors. He considered as mitigating that the appellant has been with TSA since 2002. However, he stated that the mitigating factor does not outweigh the seriousness of the appellant's misconduct, particularly his lack of integrity and untrustworthiness. The Deciding Official stated that he must be able to trust and depend upon all officers to report for duty, be honest and truthful to ensure that TSA effectively accomplishes its mission. The Deciding Official stated that the appellant breached this trust when he submitted an altered medical note and consequently, no longer has confidence that he can effectively perform the duties of a TSO and cannot be rehabilitated.

The Deciding Official also considered the appellant's past disciplinary history as aggravating. The Appellant was issued a two-day suspension on February 9, 2017, for AWOLs and issued a Letter of Reprimand In-Lieu of Suspension for three-days for attendance issues.

Under Section E.1 of the Table, the recommended penalty for *Submission of Falsified Documents* is removal. The Deciding Official concluded that management has lost confidence in the appellant's integrity and trustworthiness and that the nature and seriousness of the Charges outweigh the mitigating factors and determined removal to be the appropriate penalty. The Board agrees with the Deciding Official's conclusions.

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

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

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.03.30 11:36:57 -04'00'

Debra S. Engel
Chair
OPR Appellate Board

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

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-029

March 29, 2018

Issue: *Unavailability for Duty*

OPINION AND DECISION

On February 20, 2018, management removed the appellant from her position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Unavailability for Duty.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Unavailability for Duty,* on one specification which alleged that the appellant has been unavailable to perform the duties of her position as an LTSO since or about March 31, 2009, to present due to a work-related injury. The appellant has been in a Leave Without Pay (LWOP) status since March 31, 2009.

On August 29, 2006, the appellant filed an Office of Workers' Compensation Programs (OWCP) claim regarding an on-the-job injury. That claim was approved by the Department of Labor (DOL), OWCP, on September 28, 2006. On August 31, 2017, a Letter of Intent and Duty Status was delivered to the appellant, which notified the appellant that her continued unavailability may result in administrative action including removal. The letter advised the appellant of the

opportunity to submit medical documentation indicating that she was able to return to full duty. The appellant did not respond to the letter.

On December 27, 2017, a Notice of Proposed Removal (NOPR) was delivered to the appellant by United Parcel Service (UPS). The NOPR advised the appellant of her right to reply and furnish any evidence within seven calendar days of the receipt of the NOPR. The appellant replied to the NOPR on January 2, 2018. The appellant submitted copes of medical reports performed by a Doctor of Osteopathic Medicine (DO) and an assessment letter. The appellant argued that the District Medical Advisor Review conflicts with the DOs recommendation. She also stated that the DOL cancelled physical therapy that she was prescribed for her neck. The appellant responded again on February 7, 2018, arguing that the DO recommends a procedure along with physical therapy that should allow her to return to full duty, yet she has been denied medical treatment.

Management supported the Charge with: Notification of Personnel Action form (SF-50), reflecting the appellant's Leave without Pay status and Letter of Intent/Duty Status, dated August 31, 2017.

On appeal, the appellant argued that she provided management with the response of the DO which states "We recommend a left shoulder manipulation with general anesthesia followed by PT to help regain and maintain her motion. We feel with a manipulation and PT she should be able to return to her full job. Without manipulation and PT there is a chance she may not be able to return." The appellant requested that the decision be rescinded and that she be allowed to be treated for her work-related injury and reinstated to her position.

Management responded and stated that they took into consideration all information submitted by the appellant. Management argued that the medical assessment that the appellant cited does not provide even a vague timeframe for the appellant to become available to perform the duties of her position.

The Board finds that management's decision to remove the appellant from the LTSO position is supported by a preponderance of the evidence; it is clear from the SF50 and the Letter of Intent/Duty Status that the appellant has been and remains unavailable for duty. The documentation provided by the appellant does not state a date for return to duty but rather that "she should be able to return to her full job." The appellant has been in a LWOP status since March 31, 2009. The documentation provided does not show that she will be able to return to work in a full duty status. In addition, management was correct in their assessment regarding treatment. Any requests for explanations regarding treatment should be addressed to the DOL-OWCP. TSA does not have input or control over medical treatment under OWCP. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary Charge*: Unavailability for Duty.*

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)
Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—18-003

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 8, 2018

***Issue**: Inappropriate Conduct*

DECISION ON RECONSIDERATION

On February 9, 2018, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On February 23, 2018, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On March 1, 2018, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

ROBERT L MILLER

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Robert Miller
Acting Director
Office of Professional Responsibility

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

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

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-012

March 2, 2018

Issue: *Misrepresentation*

OPINION AND DECISION

On December 18, 2018, management removed the appellant from his position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration based on one Charge: *Misrepresentation.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board GRANTS the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Misrepresentation*, on one specification alleging that according to the airport's Insider Threat Mitigation Team (ITMT) data log, ninety-nine (99) individuals were screened on July 28, 2017, however, the appellant entered into the Performance Measurement Information System (PMIS) that one hundred and ninety-nine (199) individuals were screened. A review of Closed Circuit Television (CCTV) revealed that in actuality only forty (40) individuals were screened on July 28, 2017. As a result, management reviewed CCTV footage of three (3) additional dates which also showed that the appellant entered inaccurate numbers into PMIS. When questioned by the Office of Inspection (OOI) investigators about why the appellant entered inaccurate numbers, the appellant claimed that he was "trained by [the name of

the Supervisory Transportation Security Officer (STSO)] to estimate numbers by increasing numbers to keep them out of the red and into the green." The appellant also claimed, "[name of the STSO] said that if the numbers are in the Red that means that officers weren't doing enough." The appellant later stated to OOI investigators that he "never turned in [sic] a report that had numbers in the Red." The appellant admitted that he misrepresented information submitted to TSA Headquarters when he knowingly entered false data into the PMIS Data Entry.

Management stated that the appellant's conduct violates TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5.D. (11) requires employees to uphold, with integrity, the public trust involved in their position. The Handbook to MD 1100.73-5, Section F.(1) requires employees to cooperate fully with all TSA investigations, which includes providing truthful, accurate and complete information.

Management received a complaint that officers from the ITMT were not following procedures and reviewed CCTV footage. The CCTV footage revealed a significant discrepancy between the number of individuals actually screened versus the quantities reported in the airport's data logs and PMIS. On August 24, 2017, OOI opened a case into allegations that members of the ITMT were entering false data into PMIS.

On appeal, the appellant argued that management failed to prove the Charge, *Misrepresentation*, by preponderant evidence. The appellant argued that Misrepresentation, as a charge, has specific elements that must be proven before the charge can be sustained. One of those elements is "for his own private material gain." The appellant argued that management must prove (1) that the appellant intended to defraud, deceive or mislead the agency; and (2) did so for his own private material gain. The appellant argued that management has no proof that he personally benefited by entering inflated numbers into the spreadsheet. The appellant argued that he received no benefit by inflating the data; received no bonuses for "green" results; and would suffer no discipline, counseling, or any other detrimental action for inputting numbers which result in a "yellow" or "red" result. In addition, the appellant pointed to the fact that his STSO stated that he would not benefit in any way by inflating his entries into the PMIS. Therefore, the second element is not met, and the charge cannot be sustained.

Management responded and argued that the appellant's appeal was untimely. In response to the appellant's argument, management stated that the appellant knowingly inflated the numbers and entered in data that he knew was false, and admitted to such. The intent behind inflating the numbers was to give the appearance that the ITMT officers were screening a much larger amount of individuals than they really were. Management argued that the appellant's response in the appeal to question 16.a., in which he stated "I was told by management that Officers are not screening enough individuals," indicates his intent for inflating the numbers which was to secure his position on the ITMT by falsely indicating a high volume of individuals being screened.

The appellant responded to management's response and argued that the appeal was timely, being submitted on January 10, 2018. The appellant argued that his supplemental appeal was filed on January 22, 2018, as the appellant found no tracking information and thus, relied on five days for delivery pursuant to TSA MDs. The appellant argued that his appeal was not submitted in bad faith but submitted with the reasonable belief that tracking information was unavailable. In

addition, the appellant responded to management's arguments concerning gain and argued that none of the admissions made by the appellant address whether he materially benefited by inflating the numbers. The appellant argued that it is undeniable from the record that he received no material benefit from inflating the numbers, and management has failed to provide even a scintilla of evidence to the contrary.

The Board deemed the appeal submitted by the appellant to be timely. The appeal form was signed by the appellant on January 10, 2018, and not received until January 18, 2018. The appellant filed the appeal within 30 days and has provided good cause as to why the remainder of the appeal was not received until January 22, 2018. Management has not been prejudiced by the acceptance of the appeal and has been provided an opportunity to respond to the appeal.

Although the appellant's conduct may have supported the Charge, *Submission of Inaccurate Information*, he was not charged with Submission of Inaccurate Information but charged with *Misrepresentation*. The Charge, *Misrepresentation,* must include proof of private gain and the record is completely devoid of any evidence that the employee intended to defraud, deceive or mislead the agency for his own private material gain. The appellant's admission to submitting inaccurate information is insufficient to support the Charge, *Misrepresentation*. The record contains a statement from an STSO to OOI which shows that there was no personal gain. The STSO told OOI that "there are no quotas attached to the ITMT program, so there would be no pressure to inflate entries into the PMIS. [The STSO] further advised that [the appellant] would not benefit in any way by inflating his entries into the PMIS." The appellant's misconduct, as charged, was not proven by a preponderance of the evidence. For the reasons stated above, the Charge, *Misrepresentation,* is NOT SUSTAINED.

Decision. Accordingly, the appeal is GRANTED. The appellant is ordered reinstated to his position as a Lead Transportation Security Officer. Further, the appellant will receive back pay from the date of his removal at the rate of pay for an LTSO, subject to TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-012

March 28, 2018

***Issue**: Misrepresentation*

DECISION ON RECONSIDERATION

On March 2, 2018, the Office of Professional Responsibility Appellate Board (Board) issued a decision granting the appellant's appeal and ordering the appellant reinstated to his position of Lead Transportation Security Officer (LTSO) with the Transportation Security Administration. On March 16, 2018, management filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On March 23, 2018, the appellant submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

ROBERT L MILLER

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Robert Miller
Acting Director
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-023

March 19, 2018

Issue: *Unavailability for Duty*

OPINION AND DECISION

On January 17, 2018, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Unavailability for Full Duty*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Unavailability for Full Duty*, on one specification which alleged that the appellant has been unavailable to perform the full range of duties for her position since August 19, 2016, and has been in a Leave Without Pay (LWOP) status since that time.

On November 25, 2013, the appellant filed an Office of Workers' Compensation Programs (OWCP) claim regarding an on-the-job injury. That claim was approved by the Department of Labor (DOL), OWCP, on January 7, 2014. On April 5, 2017, an Extended Leave of Absence Due to On-the-Job Injury letter, dated April 4, 2017, was delivered to the appellant, which notified the appellant that her continued unavailability may result in administrative action including removal. The letter advised the appellant of the opportunity to submit medical

documentation indicating that she was able to return to full duty. The appellant did not respond to the letter.

On December 1, 2017, a Notice of Proposed Removal (NOPR) was delivered to the appellant by United Parcel Service (UPS). The NOPR advised the appellant of her right to reply and furnish any evidence within seven calendar days of the receipt of the NOPR. The NOPR also advised the appellant that her request for Reasonable Accommodation had been concluded and there were no vacant positions within TSA in which to place her. The NOPR further advised the appellant that, in lieu of medical documentation, TSA was prepared to send the appellant to a medical examination at no cost to her to determine whether she was physically able to perform the duties of a TSO. On December 5, 2017, the appellant sent an email to the Human Resources Specialist (HRS) and other management officials requesting to be scheduled for a Fitness for Duty (FFD) exam. On December 21, 2017, a NOPR Addendum was delivered to the appellant via UPS. The Addendum stated that the FFD information in the original NOPR was incorrect and that because the appellant's condition is based on an OWCP claim, she is not eligible for a FFD exam. The NOPR Addendum further advised the appellant that if she were able to return to duty and perform the full range of duties as a TSO, she was to provide the HRS with medical documentation by January 3, 2018. The appellant was given an additional seven days to reply orally and/or in writing and furnish any evidence in support of her reply. The appellant did not reply orally or in writing and failed to provide medical documentation.

Management supported the Charge with: Notification of Personnel Action forms (SF-50s), reflecting the appellant's Leave without Pay status and Extended Leave of Absence Due to On-the-Job Injury letter, dated April 4, 2017.

On appeal, the appellant failed to state or provide a specific reason for her appeal.

Management responded and stated that the appellant was removed due to her continued unavailability for full duty. Management stated that the appellant has a permanent work restriction of not being able to lift more than 25 pounds with her right hand due to an on-the-job injury suffered on November 24, 2013. Management stated that the appellant has completed Vocational Rehabilitation through DOL however, no position was found for her. Management stated that the appellant requested a reasonable accommodation however, she received notice from the TSA Reasonable Accommodation Program Office on September 19, 2017, stating that the agency wide search did not find a vacant position that she could be placed in as an accommodation. Management stated that the appellant's removal is supported by the available medical documentation and the Department of Labor's Office of Workers' Compensation and TSA Headquarters' Workers' Compensation Office.

The Board finds that management's decision to remove the appellant from the TSO position is supported by a preponderance of the evidence; it is clear from the SF50s and the Extended Leave of Absence Due to On-the-Job Injury letter that the appellant has been and remains unavailable for duty. The appellant failed to provide any documentation to show that she will be able to return to work in a full duty status. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary Charge*: Unavailability for Full Duty*.

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

FOR THE BOARD:

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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—18-013

March 1, 2018

Issue: Lack of Candor; Inappropriate Conduct; Failure to Report Arrest in a Timely Manner; Failure to Follow Direction

OPINION AND DECISION

On December 22, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charges: *Lack of Candor, Inappropriate Conduct, Failure to Report Arrest in a Timely Manner, and Failure to Follow Direction.* 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, *Lack of Candor,* on two specifications. Specification 1 alleged that the appellant was arrested on November 4, 2017, and failed to make notification of her arrest. The appellant provided a written statement to TSA management regarding her arrest. In her written statement, the appellant stated in part, "This was /is my first time in my life being arrested, so in that situation I didn't know what I was supposed to do or who to contact." This statement was less than candid as management alleged that the appellant had prior arrests. Specification 2 alleged that the appellant was arrested on November 4, 2017. During her arrest she told the

Police Officer that she has never been in trouble in her life and has never been arrested in her life. Management alleged that these statements were less than candid as she had prior arrests.

Charge 2, *Inappropriate Conduct*, was based on nine specifications. The first 3 specifications dealt with the appellant's behavior when she was pulled over for running a red light. Specification 1 alleged that the appellant was arrested on November 4, 2017, while she was on her way to work and in uniform. During the arrest, the appellant was argumentative, confrontational, and displayed inappropriate conduct when she raised her voice to the Police Officer and yelled that she just wanted to go to work and do her job, or words to that effect. Specification 2 alleged that the appellant was arrested on November 4, 2017, while she was on her way to work and in uniform. During the arrest, the appellant displayed inappropriate conduct when she became argumentative with the Police Officer when he asked if she had a weapon. Instead of directly answering the Police Officer's question the first time she was asked, she repeatedly asked the Police Officer why would she have a weapon on her. Specification 3 alleged that the appellant was arrested on November 4, 2017, while she was on her way to work and in uniform. When the Police Officer was talking to her during the arrest, she displayed inappropriate conduct when she raised her voice loudly saying it's not like I'm raping people, it's not like I'm killing people…I'm not trying to rob a bank, or words to that effect.

Specifications 4-9 dealt with the appellant's behavior at the jail and in front of the Magistrate. Specification 4 alleged that the appellant was arrested on November 4, 2017, while she was on her way to work and in uniform. During the booking process, she displayed inappropriate conduct when she had to be physically placed in her cell after she refused to enter it. Additionally, the appellant was alleged to be screaming and uncooperative during the booking process. Specification 5 alleged that the appellant was arrested on November 4, 2017, while she was on her way to work and in uniform. During the process, the appellant displayed inappropriate conduct when she stated that she was a proud, black female and called the Officer a fat, white bitch, or words to that effect. Specification 6 alleged that the appellant was arrested on November 4, 2017, while she was on her way to work and in uniform. The appellant displayed inappropriate conduct when she refused to be fingerprinted. When she realized that she could be released if she cooperated with the process, the appellant allegedly kicked and beat on the door demanding to be fingerprinted. Additionally, the appellant would only allow a black detention officer to fingerprint her. Specification 7 alleged that the appellant was arrested on November 4, 2017, while she was on her way to work and in uniform. The appellant displayed inappropriate conduct when during her bond hearing, she screamed at the magistrate saying, "fuck you." Specification 8 alleged that the appellant was arrested on November 4, 2017, while on her way to work and in uniform. During the process, she displayed inappropriate conduct when she said fuck this, treat me like a criminal and I'm going to act like one; leave these fucking handcuffs on, or words to that effect. Specification 9 alleged that the appellant was arrested on November 4, 2017, while on her way to work and in uniform. During the process, she displayed inappropriate conduct when she told officers that she would just go back to drugs and that she was going to join ISIS.

Charge 3, *Failed to Report Arrest in a Timely Manner*, was based on two specifications. Specification 1 alleged that the appellant was arrested on November 4, 2017. TSA employees are required to report personal arrests to management within 24 hours of the arrest. The appellant failed to report her arrest within 24 hours as required and did not do so until she was confronted by a Transportation Security Manager (TSM) on November 9, 2017. Specification 2

alleged that the appellant was arrested on July 5, 2013. TSA employees are required to report personal arrests to management within 24 hours of the arrest. The appellant failed to report her arrest within 24 hours, as required. The appellant's arrest did not become known until the Assistant Federal Security Director for Law Enforcement (AFSD-LE) investigated the arrest of November 4, 2017.

Charge 4, *Failure to Follow Direction*, was based on one specification which alleged that the appellant was arrested on November 4, 2017. The AFSD-LE called the appellant and left a message on her voicemail advising her of who he was and gave direction for the appellant to return his call leaving his contact phone number. The appellant failed to return his call, as directed.

Management found the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. 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. Further, Section 6.E states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgement or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred.

Section 5.D.(1) states that employees are responsible for reporting to work on time and ready, willing and able to perform the duties of their position. Paragraph 5.D.(2) requires employees to respond promptly to and fully comply with directions and instructions received from their supervisor or other management officials. Paragraph 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. Supporting and assisting in creating a productive and hospitable model work environment. Paragraph 5.D.(7) requires employees to observe and abide by all laws, rules, regulations and other authoritative policies and guidance. Paragraph 5.D.(8) requires employees to report all personal arrests, including summons and citations to appear before a court, to the immediate supervisor or to any manager in the chain of supervision within 24 hours of the arrest or as soon as possible thereafter.

While on her way to work and in uniform, the appellant was pulled over by a Police Officer on November 4, 2017, for running a red light. The appellant was placed under arrest for Driving While License Revoked and for an Expired Vehicle Registration. In the Notice of Proposed Removal, the Proposing Official wrote that the Police Officer received an "Approach with Caution" message when he ran the appellant's information through a database, which was related to a previous criminal charge. The appellant does not have a criminal record but her sister does have a criminal record. The appellant's twin sister spells her name with an "a" not an "e." The appellant recorded her traffic stop. The appellant was taken to the detention center and booked. The Proposing Official stated that during the appellant's arrest and booking process, she was unprofessional, uncooperative, displayed racial prejudice, was violent, refused to cooperate and used profanity, all while in her TSA uniform. On November 7, 2017, the AFSD-LE called and left a message for the appellant to call him but she failed to return the call. When the appellant returned to work on November 9, 2017, she was confronted by her TSM about the arrest and admitted that she had been arrested.

Management provided as evidence: Inmate summary for appellant, dated November 4, 2017; Department of Motor Vehicle Driver's license status for appellant; Summary of Inquiry by the AFSD-LE, dated December 7, 2017; statement from a TSM, dated December 7, 2017; handwritten statement of appellant, undated; typed statement of appellant, undated; statement of a TSM, undated; Officer/Internal Incident Report reporting arrest of appellant's sister, dated June 27, 2013; and audio recording of arrest submitted by appellant.

On appeal, the appellant detailed her arrest on November, 4, 2017, for running a red light, driving while license revoked, and expired vehicle registration. The appellant explained that the Officer approached her car with an "approach with caution" message after running her information through the database. The appellant alleged that the "approach with caution" was in error because of her identical twin sister's prior arrests. The appellant also stated that her identical twin sister spells her name with an "a" not an "e." The appellant stated that she recorded the traffic stop with her brother/brother-in-law's phone and provided this to management. The appellant argued that she was not trying to be argumentative but was concerned and confused about her arrest since she has never been arrested prior to November 4, 2017. The appellant admitted that during the booking process she did display emotions and confusion over her arrest and the continual reference to her prior arrests. The appellant argued that the prior arrest information provided by the AFSD-LE was incorrect and the statements made to the AFSD-LE were incorrect. She indicated that the summary of the Inquiry by the AFSD-LE shows a different social security number and different spelling of her name. Additionally, the appellant argued that the statement that she displayed racial prejudice is false, preposterous, and a defamation of her character. The appellant stated that she was being treated like a habitual criminal.

On appeal, the appellant argued that the arrest referred to in Charge 1, *Lack of Candor*, was not her arrest but her twin sister's arrest. The appellant provided paperwork to support this claim. As to Charge 2, *Inappropriate Conduct*, specification 1, the appellant argued that her voice was raised due to heavy highway traffic. The appellant argued that she felt that she was respectful as could be based on the situation that she was in. She indicated that her actions could have been more responsive but that her emotions took over. As to specification 2, the appellant argued that she was not read her Miranda Rights and had no idea why she was being taken to jail. She indicated that she was fearful, nervous, scared and confused especially being put into handcuffs for the first time. She also argued that she told the officer that she had no weapons on her. As to specification 3, the appellant argued again that she did not yell at the Officer and that the statements made were factual statements. She requested that the distress in her voice be taken into consideration as she was fearful, nervous, scared and confused. As to specification 4, the appellant argued that she was handcuffed during the entire booking process and did not speak to the arresting Officer. She stated that upon entering the Detention Center she was searched by a female Officer and did not scream or be uncooperative. She stated that she was never told that she was being placed in a cell so could not have refused the order. The appellant stated that the Magistrate made the statement that she had a long criminal record and would need to pay a bond of $2,000 to which she responded that she has never been arrested before and was confused about the bond amount. She stated that the Magistrate then told her that she has a criminal record and a history of not showing up to court. She stated that she replied that she was still confused about the $2,000 bond to which the Magistrate replied that based on her criminal record, she could be locked up for 3 months. She stated that after that the detention Officers

surrounded her and she was taken to a holding cell. The appellant stated that the Detention Officer slammed her into the holding cell window and when asked why, the Officer responded that she was being disrespectful. The appellant argued that she never refused to enter the holding cell.

As to specification 5, the appellant stated that she never stated that she was a "proud, black female" but did admit to calling the Detention Officer a "fat bitch," claiming that this was in response to the Detention Officer calling her a "bitch." As to specification 6, the appellant admitted that she refused to be fingerprinted. The appellant argued that she wanted to have free movement of her hands. The appellant denied that she expressed that she only requested a "black detention officer" fingerprint her. As to specification 7, the appellant said that she never screamed "fuck you" to the Magistrate. The appellant argued that video was taken of the bond hearing. The appellant argued that in the AFSD-LE report, the Magistrate indicated that she had an "attitude" but did not hear her curse at him. As to specification 8, the appellant admitted that she made the statement but indicated that it was in response to the Detention Officer not removing her handcuffs. The appellant explained that her emotions were intense during the arrest. As to specification 9, the appellant stated that the statements are inaccurate and taken out of context. The appellant said that she did not make the statement that she was going "back" to drugs and did not state that she was going to join "ISIS."

As to Charge 3, specification 1, *Failure to Report Arrest in a Timely Manner*, the appellant admitted that she failed to report the arrest within 24 hours but did notify the supervisor on duty on November 9th and filled out an OPM-71 (Request for Leave or Approved Absence). As to specification 2, the appellant stated that the information is not correct, as she has never been arrested prior to the event in November 2017. She stated that the arrest listed by management involves her twin sister.

As to Charge 4, *Failure to Follow Direction*, the appellant argued that her phone was inactive and that the directions left on voicemail were never received.

As part of the reply to the appeal, management withdrew Charge 1, *Lack of Candor*, and Charge 3, *Failure to Report Arrest in a Timely Manner*, specification 2, alleging that the AFSD-LE cannot with certainty determine that it was the appellant who was arrested on July 5, 2013. However, management contends that a preponderance of the evidence of record supports the remaining Charges and specifications. Management rebutted the arguments provided by the appellant finding the statements of the AFSD-LE and the Officers to be credible.

As to Charge 1, *Lack of Candor*, management has withdrawn the charge and the preponderance of evidence does not support the Charge. Therefore, Charge 1, *Lack of Candor*, is NOT SUSTAINED.

With regard to Charge 2, *Inappropriate Conduct*, management supported the Charge with a Summary of the Inquiry conducted by the AFSD-LE. This summary was all that was relied upon by management. The AFSD-LE did not provide statements to support his inquiry but provided a summary of his discussions with the various Officers as his sole source of evidence. The inquiry also included assumed "factual" information from which conclusions were drawn based upon them. Appellant's response disputed these assumed "facts" and provided convincing evidence that the assumed "facts" were incorrect and unsupported by the evidence of record. Accordingly,

the conclusions based upon the incorrect "facts" were also incorrect. Additionally, the AFSD-LE, throughout the inquiry, included personal opinions, in part, based upon the erroneous "facts", that were incorrect and inappropriately clouded the inquiry. Furthermore, neither the Proposing Official nor Deciding Official discussed the evidence but simply concluded that the evidence in the record is preponderant evidence to support the Charges. Therefore, and most importantly, without corroborating evidence, the summary of the AFSD-LE's conversations with witnesses, in light of the evidence of record, does not rise to a preponderance of evidence.

As to Charge 2, specifications 1-3, the audio evidence supplied by the appellant clearly shows the confusion in her voice. There was a great deal of traffic which gives credence to her argument that her voice was simply raised in order to be heard above the traffic. In addition, the audio tape does not prove that she was yelling at the Officer. Without an independent statement from the Police Officer, the Board found that the Inquiry supporting the specifications was not supported by preponderant evidence. Therefore, specifications 1-3 are NOT SUSTAINED.

As to Charge 2, specification 4, the appellant has provided a statement that contradicts what was reported to the AFSD-LE. Without an independent statement from the Detention Officer or Police Officer, the Board found that the Inquiry supporting the specification was not supported by preponderant evidence. Therefore, specification 4 is NOT SUSTAINED.

As to Charge 2, specification 5, the appellant has admitted that she called the Detention Officer a "fat bitch." Management was able to prove the essence of the specification with the admission of the appellant. Therefore, specification 5 is SUSTAINED.

As to Charge 2, specification 6, the appellant has admitted that she did not cooperate in the fingerprinting process. Management was able to prove the essence of the specification with the admission of the appellant. Therefore, specification 6 is SUSTAINED.

As to Charge 2, specification 7, the Magistrate indicated that he did not hear the appellant say "Fuck You." Without an independent statement from the Detention Officer who reported this information to the AFSD-LE, the Board found that the Inquiry supporting the specification was not supported by preponderant evidence. Therefore, specification 7 is NOT SUSTAINED.

As to Charge 2, specification 8, although the appellant has admitted to the statement, the circumstances surrounding the statement must be taken into consideration. The appellant's emotions were reflected in these statements after being detained and arrested for mistakenly being thought to be her sister. Additionally, unlike specification 7, the statement was not directed at any one individual. Therefore, specification 8 is NOT SUSTAINED.

As to Charge 2, specification 9, the appellant has denied making the statement contained in the specification. Without an independent statement from the Detention Officer who reported this information to the AFSD-LE, the Board found that the Inquiry was not supported by preponderant evidence. Therefore, specification 9 is NOT SUSTAINED.

Having sustained specifications 5 and 6, the Charge, *Inappropriate Conduct*, is SUSTAINED.

As to Charge 3, specification 1, the appellant admitted that she did not report her arrest within 24 hours, as required. The statement of the TSM, along with the inmate summary, indicating that

she was booked on November 4, 2017, is preponderant evidence to prove the specification. Therefore, specification 1 is SUSTAINED. As part of the reply to the appeal, management withdrew specification 2. Therefore, specification 2 is NOT SUSTAINED. Having sustained one of the specifications, Charge 3, *Failure to Report Arrest in a Timely Manner*, is SUSTAINED.

As to Charge 4, *Failure to Follow Direction*, the evidence in the record is a statement from the AFSD-LE in which he indicated that he called the appellant, identified who he was, and gave direction for her to call him and provided the phone number. In an undated statement from the appellant, she stated that she did not contact the AFSD-LE because she did not know who that was and that she was supposed to contact him. However, in the appeal the appellant stated that she did not contact the AFSD-LE because the voicemail was not received on her active cellular device. The appellant argued that her phone was inactive because her cellular phone sustained damage. This is contradictory to the previous statement provided by the appellant. Therefore, in light of the contradictory information provided by the appellant, the Board finds the statement of the AFSD-LE to be credible and preponderant evidence to prove the Charge. Therefore, the Charge, *Failure to Follow Direction,* is SUSTAINED.

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

The appellant argued that the removal should be mitigated given the emotional distress that she was exhibiting and because this was her first time being placed in this position. The appellant also argued that this was her first time being arrested and she did not know that she was supposed to report the arrest within 24 hours. The appellant stated that the punishment is too harsh. She stated that she has been with TSA since March of 2013 and that she has stopped numerous prohibited items and on/over four occasions has tested negative for drugs. The appellant stated that she has excellent customer service skills and has excelled in testing yearly and monthly. She stated that she was awarded employee of the week in the month of October and that her performance score was 4.7. She stated that she has always been candid in her communications with management. The appellant argued that there were no aggravated factors to warrant a removal.

Management responded and argued that they chose to remove the appellant from her position by considering the evidence in the record, weighing the aggravating and mitigating factors, and consulting the TSA Table of Offenses and Penalties. Management contends that removal was the only appropriate response and justified due to the egregious nature and notoriety of the appellant's misconduct during her arrest and subsequent booking, her blatant disregard for TSA policies and procedures and the potential for the appellant's misconduct to negatively impact the reputation of the Agency. Management argued that the Table provides that for second and/or successive offenses, the penalty should generally fall within the "Aggravated Range." Management argued that the Deciding Official carefully considered the mitigating and aggravating penalty factors but found that the mitigating factors do not outweigh the severity and egregious nature of the appellant's misconduct. Management recognized that there were mitigating factors but held to the fact that removal was the only correct action in response.

Management considered that the appellant has not shown any remorse for her egregious misconduct. Management noted that in each case, each remaining Charge has removal as an option in the aggravated penalty range.

The Deciding Official considered the penalty factors. The Deciding Official considered as aggravating that the appellant knowingly gave false information to the arresting officer and to TSA. This information is incorrect. As aggravating, the Deciding Official also considered that this was the appellant's third arrest and failed to make notification of the appellant's arrest in 2013. This information is incorrect. The Deciding Official goes on to state that the appellant's providing false information begs the question whether she will be truthful in other areas such as in the performance of her screening duties. In addition, he states that her lack of candor has the potential to create a security vulnerability that management is unwilling to accept. These statements cannot be considered since the Charge, *Lack of Candor*, was voluntarily dismissed by management.

The Deciding Official also considered the notoriety of the appellant's misconduct and its impact to the reputation of the agency and that the appellant failed to conduct herself in a professional manner in the face of provocation and that her failure to do so has the potential to negatively impact TSA and reflect negatively on the Agency. The Deciding Official also considered as aggravating the statements of the appellant where she discussed going back to drugs and joining ISIS. This aggravating factor will not be considered as those specifications were not sustained.

The Deciding Official also questioned the appellant's judgement, ability and willingness to follow TSA policies and procedures and instructions given by management. The Deciding Official found the appellant's arrest and misconduct during the process to be an embarrassment to the agency. In addition, the Deciding Official considered as aggravating the appellant's racial attitudes toward the detention officer. There is no evidence in the record to support this statement and this will not be considered as an aggravating factor.

The Deciding Official considered the appellant's prior disciplinary history and found that she was issued a Letter of Reprimand, dated October 23, 2015, for failure to follow procedures and AWOL. This action may no longer be considered as a disciplinary action because it was issued over two years ago. It may be considered only as a corrective action, which placed the appellant on notice that she is required to follow agency policy. The Deciding Official stated that he did not consider this action for progressive discipline purposes.

The Deciding Official determined that the appellant has no potential for rehabilitation. This was based on the fact that the appellant had not accepted responsibility for her egregious misconduct and was less than candid on more than one occasion. The Board notes that the Lack of Candor Charge was dismissed by management and thus, non-sustained by the Board.

As mitigating, the Deciding Official considered that the appellant has been employed by TSA since March 10, 2013, and has acceptable performance evaluations.

The Deciding Official turned to the Table for the penalty. Section B.5 of the Table, for inappropriate conduct, carries a recommended penalty of a Letter of Reprimand (LOR) to a 5-day suspension and an aggravated penalty of a 6-day suspension to removal. Section K. 1 of the Table, for failure to report an arrest, the recommended penalty range is a 3-day suspension to a

5-day suspension and the aggravated penalty range is a 6-day suspension to removal. Section D.2 of the Table, for failure to follow direction, the recommended penalty range is an LOR to a 10-day suspension and the aggravated penalty range is an 11-day suspension to removal.

After considering all of the facts and weighing the relevant penalty factors, the Board finds that removal is not within the bounds of reasonableness. Many of the aggravating factors considered by the Deciding Official were not valid. The Deciding Officials' reliance on facts that were not correct must be considered by the Board. In addition, the Deciding Official's determination appeared to be based primarily on her criminal background and Lack of Candor; both of which were proven incorrect. The Board must also consider that seven out of nine specifications were not upheld in Charge 2 and there were extenuating circumstances surrounding Charge 2.

The Deciding Official argued that guidance in the Table provides that "in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the 'Aggravated Penalty Range' column corresponding to the most serious offense being charged."

On November 4, 2017, the appellant was stopped and arrested for traffic violations. During both the traffic stop and at the detention center, the appellant was confused for her sister who had a criminal record. The appellant admits that her behavior that morning was not ideal but she was scared, fearful and nervous especially once she was told that she could serve jail time. The appellant stated in her appeal that she was not proud of the arrest and was embarrassed. In the appellant's statement to management she also stated that she was livid and embarrassed since this was the first time being arrested. In light of multiple Charges being sustained, management did have the right to go to the aggravated penalty. However, in weighing all of the penalty factors, the Board finds that a penalty in the middle of the aggravated range is appropriate.

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 her removal, subject to TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.03.01 13:18:39 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-016

March 9, 2018

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

OPINION AND DECISION

On January 3, 2018, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charges, *Failure to Follow Standard Operating Procedures (SOP), Inattention to Duty, and 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 Standard Operating Procedures (SOP)*, on two specifications. Specification 1 alleged that on October 26, 2017, the appellant was working in Checked Baggage loading bags into the CT-80 (x-ray) machine. The appellant placed a passenger's bag into the CT 80, the bag alarmed. Without completing required procedures to resolve the alarm, the appellant marked the bag as cleared and sent it through to the airline for transport. The appellant failed to follow the On Screen Alarm Resolution Procedure (OSARP) to properly clear the bag.

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Specification 2 alleged that while the appellant was working on the checkpoint on October 22, 2017, at approximately 1530 in the x-ray position, she annotated items in a passenger's carry-on bag for a physical bag search. After annotating the items, the appellant failed to pull the bag onto the Manual Divest Roller (MDR) to be searched by the Physical Search Officer (PSO).

Charge 2, *Inattention to Duty*, was based on one specification which alleged that on October 30, 2017, at approximately 1432 hours, the appellant was working in checked baggage screening a passenger's golf bag. The appellant properly screened the golf bag and released the bag to the airline for transport. A Supervisory Transportation Security Officer (STSO) then noticed that there were two vacuum sealed bags of clothes on the screening table. The STSO asked the appellant about the items, to which the appellant stated that they belonged to the passenger whose golf bag she had just cleared. The appellant's failure to return all the items to the passenger's bag required TSA to contact the airline to retrieve the golf bag to properly repack the passenger's items.

Charge 3, *Failure to Follow Instructions*, was based on three specifications. Specification 1 alleged that on October 25, 2017, the appellant was working on the Advanced Imaging Technology (AIT), left her position and walked over to the x-ray on the Pre-check lane and picked up two bowls off of the end of the x-ray tunnel belt, which contained a passenger's jewelry, and brought them to the front of the x-ray and placed them on top of the x-ray where empty bowls are placed. Just one day prior, on October 24, 2017, an STSO had instructed the appellant not to leave her assigned area to perform x-ray duties, if she was not assigned in that position. The appellant failed to follow the STSO's instructions.

Specification 2 alleged that on October 24, 2017, the appellant was assigned to the PSO and while in this position, she pulled a bag out of the x-ray tunnel, told the passenger that she was pulling the electronics out of their bag and going to rerun everything through the x-ray. The STSO had to reiterate to the appellant that it was the responsibility of the x-ray officer not the PSO to pull the electronics and rerun the bag. She stated that this is one of the reasons for wrong bag pulls. The STSO instructed the appellant on July 13, 2017, that she was required to remain in her assigned position until she has been instructed to rotate.

Specification 3 alleged that on July 26, 2017, the appellant was assigned as the x-ray operator. The appellant left her position and completed the bag search on the passenger's bag that she had just annotated. The STSO instructed her on July 13, 2017, that she was required to remain in her assigned position until she has been instructed to rotate.

Management found that the appellant's misconduct violated Baggage Screening Standard Operating Procedures (SOP), Chapter 5, Section 4.A, Chapter 2, Section 2.A; Screening Checkpoint SOP, Chapter 11, Section 2.C; Enhanced Accessible Property Screening SOP, Chapter 1, Section E; and Screening Policies SOP, Chapter 9, Section 1.

Management also found that the appellant's misconduct violated TSA Management Directive (MD), 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal

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Government or TSA; (2) responds promptly to and fully complies with directions and instructions received from their supervisor or other management officials and (7) observes and abides 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.

While performing screening duties, the appellant on two occasions failed to follow the SOP. On October 22, 2017, while working at the checkpoint in the x-ray position, the appellant failed to pull a bag for a physical search. On October 26, 2017, while in baggage, the appellant failed to clear an alarm on a bag. On October 30, 2017, while working in baggage, the appellant properly screened a bag but failed to return the passenger's items to the bag. While performing screening duties, the appellant failed on three occasions to follow the directions provided by the STSO. On July 26, 2017, the appellant, after being told on July 13, 2017, by an TSO to remain in her assigned position, left her position on x-ray and performed a bag search on a bag that she had just annotated. On October 24, 2017, after being told on July 13, 2017, that she was to remain in her assigned position, the appellant while in the PSO position pulled a bag out of the x-ray tunnel, removed items from the bag and reran the bag. On October 25, 2017, after being told on October 24, 2017, not to leave her position, the appellant left the AIT position and walked to the x-ray and moved two bowls which contained a passenger's property.

The appellant was issued a Notice of Proposed Removal (NOPR) on November 21, 2017. The NOPR advised the appellant of her right to make an oral and/or written reply. The appellant provided a written reply on November 28, 2017. Management removed the appellant on January 3, 2018,

Management provided as evidence: statement of a Lead Transportation Security Officer (LTSO), with photos, dated October 26, 2017; statement of a Transportation Security Manager (TSM), dated October 26, 2017; statements of an STSO, dated July 26, 2017, and October 22, 2017; statements from an STSO, dated October 26, 2017 and October 30, 2017; statement from the appellant, dated October 26, 2017; Closed Circuit Television (CCTV) footage, dated October 26, 2017; Alarm light photo, dated October 26, 2017; and Memo for Record (MFR) from an STSO, dated July 13, 2017.

On appeal, the appellant argued that Charge 1, specification 2 was not proven by preponderant evidence. The appellant argued that the STSO assumed that the bag must not have been pulled based on the fact that there was an image on the Alternate Viewing Station (AVS) but no corresponding bag waiting to be searched. The appellant argued that it is possible that the bag search officer failed to clear the image from the AVS station; or the passenger retrieved the bag themselves and left the area. The appellant questioned why management failed to support the specification with CCTV footage.

The appellant also argued that management failed to prove Charge 3, specification 1. The appellant argued that the instructions given to her were merely not to pull bags or items if she was not in the x-ray position. She argued that she did not fail to follow instructions when she moved what appeared to be empty bowls from the end of the x-ray belt to the front of the x-ray belt. As to specifications 2 and 3, the appellant argued that there were no instructions given to her about

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remaining in her assigned position until she had been instructed to rotate. She argued that she was instructed that if she were to see something that is a serious security issue, she should notify a supervisor immediately. The appellant argued that she was not in violation of the instructions provided when she removed electronics from a bag and was not in violation of the instructions provided when she left her position to complete a bag search. Additionally, the appellant argued that specification 3 was untimely and that it is not uncommon for an x-ray operator to perform their own bag check at the airport.

As to Charge 1, specification 2, management responded and argued that the MFR, dated October 22, 2017, from the STSO, documents that management did perform due diligence and determined the exact cause of the incident. The MFR states that both the STSO and the PSO Officer viewed the image on the viewing screen and agreed that the bag for the annotated image was not available on the MDR. Management asserted that they conducted a complete investigation and determined that the appellant failed to pull the bag from the x-ray tunnel to the MDR. Management argued that had the bag been pulled, the passenger would not have had access to the bag as the MDR location is behind a Plexiglas barrier. In addition, management stated that neither the STSO, PSO, nor the appellant stated that the image shown was due to a failure to clear the image from the AVS. Management responded that CCTV footage was not available and that the appellant stated that she must have forgotten to pull the bag.

As to Charge 3, management responded and noted that the appellant does not argue that each of the situations occurred, just that she had not been given specific instructions to remain in the exact position until instructed to rotate for each of the specifications. Management argued that they have instructed the appellant on multiple occasion to remain in her assigned position until instructed to rotate. Management asserted that in specification 2, she did not remove the items from the bag only because management stopped her prior to removing the electronics when they heard her give the advisement to the passenger. Management argued that x-ray operators do not leave their position to perform their own bag checks as that would result in the x-ray not operating and stop the progression of passengers through the checkpoint resulting in long delays. In addition, management argued that they were fully staffed to cover the shift.

The Board notes that management attempted to support its response to the appeal with evidence that is not in the record; specifically, Performance Improvement Plan (PIP) notes and Transportation Officer Performance System (TOPS) interim meeting notes. These documents will not be considered.

The appellant responded to management's reply and argued as to Charge 1, specification 2, that management is making the assumption that the bag must not have been pulled by the x-ray operator, but has failed to show that the x-ray operator did not pull the bag. The appellant argued that there was no statement from the PSO in the record nor does the MFR state who was assigned as the PSO, so it is not clear if the PSO was asked about the image on the screen.

In regards to Charge 3, the appellant replied and argued that although she does not dispute that the situations occurred, she does argue that they did not occur in violation of any instructions previously provided to her. The appellant argued that the MFR from the STSO, dated July 13,

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2017, essentially instructs her to mind her own business, and to report serious security issues to an STSO but does not mention "rotation." The appellant then argued that although there was specific instruction in the MFR from the STSO, dated July 26, 2017, it only dealt with her leaving her post at x-ray. The appellant asserts that it was not uncommon practice for an x-ray operator to perform their own bag check and that management did not challenge this but simply stated that it is not common with full staffing and did not address staffing at the time the incident occurred.

Additionally, as to Charge 3, specification 1, the appellant argued that it is common for officers to move bowls while at the AIT position and that it is not an official duty of an x-ray operator. She argued that management was not concerned with her actions until the passenger began to look for her jewelry. As to specifications 2 and 3, the appellant argued that the MFR, dated July 13, 2017, did not require her to remain in her assigned position until she had been instructed to rotate. She stated that not only did the instructions not provide that but she did not leave her assigned position when she attempted to assist the x-ray operator with the rerun of the electronics.

With regard to Charge 1, specification 1, in the appellant's email statement, dated October 26, 2017, she stated "I'm not sure why I didn't look to see whether or not the light was on the CT 80, showing that the bag had alarmed. I'm just so used to listening for the grumble that it didn't occur to me to check to see if the light was on." Additionally, in the MFR from the TSM, summarizing an interview with the appellant on October 26, 2017, the TSM stated that when the appellant was asked why she did not use the proper procedures since she clearly knew what the procedures were, the appellant replied "I just didn't look, I don't know why, I just didn't look!" The Board found that the appellant's statement, the statement from the LTSO present during the incident, the statement of the TSM, the alarm light still photo and the CCTV footage are preponderant evidence that the appellant failed to follow procedures to properly clear the bag. Therefore, specification 1 is SUSTAINED.

With regard to Charge 1, specification 2, in a statement signed by the appellant on October 30, 2017, she stated, "I must have forgotten to pull the bag for screening." The STSO involved in the incident stated that once the image in question was cleared off the screen, the next image was the correct image for the bag being searched at the time and therefore, it was determined that the bag that matched the image that was cleared must not have been pulled by the x-ray operator. The evidence shows that there was a missed bag that was not pulled from the MDR; it is the x-ray operator's responsibility to pull the bag from the MDR and the appellant was the x-ray operator at the time of the incident. The Board found that the appellant's statement and the STSO's statement are preponderant evidence that the appellant failed to follow SOP by failing to pull the bag. Therefore, specification 2 is SUSTAINED.

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

With regard to Charge 2, the Board found that the statement of the STSO, dated October 30, 2017, detailing the incident is preponderant evidence that the appellant was inattentive when she failed to return all of the item's removed from a passenger's bag before releasing the bag to the airline for

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transport. It was the appellant's responsibility to return the items to the passenger's bag. Therefore, the Charge, *Inattention to Duty*, is SUSTAINED.

With regard to Charge 3, specification 1, the MFR, dated October 26, 2017, from the STSO states that on October 24, 2017, she asked the appellant not to pull bags or items if she was not in the x-ray position and that the STSO pointed out and reviewed the responsibilities of the positions with the appellant from the SOP. Additionally, the MFR, dated July 13, 2017, states that the STSO spoke to the appellant about focusing on her assigned position. The evidence in the record shows that on October 25, 2017, the appellant left her position at the AIT and returned two bowls from the x-ray belt to the front of the x-ray. It is clear that the appellant was instructed to stay in the position she was assigned. The fact that she was not at the X-ray but in the AIT position is irrelevant. She had been provided instructions by an STSO to remain in her position. The Board found that the appellant failed to follow instructions when she left her position at the AIT. Therefore, specification 1 is SUSTAINED.

With regard to Charge 3, specification 2, the Board determined there was not enough information presented to determine what happened, including how the appellant knew there were electronics in the bag and which bag contained electronics. Without that information, the Board determined there was not preponderant evidence to support that the appellant failed to follow instructions. Therefore, specification 2 is NOT SUSTAINED.

With regard to Charge 3, specification 3, the MFR to the appellant from an STSO, dated July 13, 2017, states that the STSO spoke to the appellant about the need to focus on herself and the position that she is on at the checkpoint and not to worry about what other officers are doing and let them do their jobs. The Board determined that the appellant failed to follow the instructions given to her by the STSO on July 13, 2017, when she left her position at the x-ray on July 26, 2017, and completed a bag search. The appellant failed to heed the instructions of the STSO as she was not focused on the position that she was on at the checkpoint. Therefore, specification 3 is SUSTAINED.

Having sustained specifications 1 and 3, the Charge, *Failure to Follow Instructions*, is SUSTAINED.

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

On appeal, the appellant argued that removal is not reasonable. She also argued that Section H. 6 of the Table which refers to "inattention to duty, where there is a potential danger to human life, property, or revenue, or damage/injury/loss actually occurs" is excessive for the situation involved in her case. The appellant argued that had the STSO also been attentive in her role of observing her during the Skills Enhancement, the STSO could have prevented airline involvement as well; instead of watching and hoping she would correct her error.

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Management responded and stated that the reference to H. 6 was a typographical error and should be adjusted to H. 5. Management argued that prior to conducting the penalty factor analysis, the Deciding Official conducted an analysis to determine whether the appellant's behavior was misconduct or performance and determined that a preponderance of the evidence demonstrated that the violations were intentional refusal to perform, or a negligent failure due to factors of inattention to duty, poor judgment or negligence.

Management cited TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section J. (1) which states that when appropriate, TSA will take progressively more severe action until the unacceptable performance or conduct is corrected, or the employee is demoted or removed, as appropriate. Management also cited the guidelines of the Table which state that for second and/or successive offenses, the penalty should generally fall within the "Aggravated Penalty Range," and may often include removal. Additionally, an employee may be charged with several offenses none of which alone would result in removal, but when combined may support such a penalty.

Management argued that the Deciding Official conducted a thorough penalty analysis and determined that the aggravating factors outweighed the mitigating factors.

The appellant responded to management's reply and reiterated the arguments in her appeal.

In determining the penalty, the Deciding Official considered the nature of the appellant's offenses and their relationship to her duties, position, and responsibilities, including whether the offenses were intentional, technical or inadvertent, or were frequently repeated. The Deciding Official noted that the primary responsibility of a TSO is to properly perform all security screening duties to ensure the safety of the traveling public. The Deciding Official considered that the appellant repeatedly failed to follow very specific instructions from her supervisors to remain in her assigned positions, to ensure compliance with TSA procedures and to ensure screening effectiveness. She found that the appellant's repeated failure to correctly perform screening duties gravely undermines the ability of the management team to have trust and confidence in the appellant as a TSO. The Deciding Official considered that the appellant was responsible for multiple security violations, which undermines aviation security and the safety of the traveling public which she considered an aggravating factor.

The Deciding Official also considered the appellant's past disciplinary record as an aggravating factor. She considered that the appellant was issued a 14-day suspension on September 26, 2016, for Failure to Follow SOP and Failure to Follow Instructions; a 3-day suspension on November 10, 2015, for Failure to Follow SOP; and a 2-day suspension on August 30, 2014, for Negligence of Duty-Safety Violation. The Deciding Official considered that as each of the disciplinary actions were issued, management spoke to the appellant about her responsibilities and the consequences of failing to follow TSA polices and management policies and that despite the conversations, the appellant continued to violate policy and failed to follow her supervisor's instructions.

As additional aggravating factors, the Deciding Official considered the appellant's past work record and dependability, noting that in 2014, 2015, and 2016, her performance rating was rated as

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unsuccessful and she was placed on a PIP on December 21, 2015, and again on December 7, 2016. She considered that the appellant was provided remedial training that involved direct coaching to aid her in improving her performance yet despite all of the additional training and support, in October 2017, the appellant had multiple incidents of failure to follow SOP while conducting security screening. The Deciding Official considered the effect of the offenses upon the appellant's ability to perform at a satisfactory level and the effect upon the supervisor's confidence in her ability to perform her assigned duties. She stated that despite the prior discipline issued and extensive additional training, the appellant's repeated failure to successfully perform her TSO duties caused management to lose confidence in her ability to perform her assigned duties.

The Deciding Official considered the notoriety of the offense and its impact upon the reputation of the agency noting that all of the incidents could have resulted in lack of confidence in TSA and damage to the reputation of the agency. She considered the clarity with which the appellant was on notice of the TSA policies and procedures noting that the appellant has read MD 1100.73-5 annually since her date of entry on duty; most recently on June 22, 2017. She also noted that the appellant's training records indicate that she completed a Level 2 Return to Duty Series, which includes the reading of the screening SOPs on July 11, 2017, as well as Enhanced Accessible Property Search classroom instruction on September 19, 2017, with On-the-Job training completed on October 1, 2017.

The Deciding Official considered the appellant's potential for rehabilitation and found that despite her past PIPs, discipline and direct guidance and instruction from supervisors, she continually failed to follow standard operating procedures. The Deciding Official also considered the appellant's "causal attitude" when the TSM interviewed the appellant regarding the incidents noting that the appellant did not express remorse or give any indication that she took the duties of a TSO seriously. She considered that the TSM's concern was so great that she removed the appellant from screening duties effective November 5, 2017. The Deciding Official considered that the management team has gone to great lengths to aid in the appellant's rehabilitation with no lasting success and found that there is no potential for rehabilitation.

As mitigating factors, the Deciding Official considered the appellant's tenure with TSA since November 8, 2009, and satisfactory performance through 2013. She considered that each year the appellant successfully completed the Annual Proficiency Review evaluations, which demonstrates that the appellant was thoroughly trained and understood the policies and procedures that she must be in compliance with to successfully perform the duties of a TSO. The Deciding Official found however, that the nature and seriousness of the appellant's misconduct, along with the aggravating factors, outweighs the mitigating factors.

Under Section M.1 of the Table, which pertains to Failure to Follow Standard Operating Procedures, the recommended penalty is a 5-day suspension to removal and the aggravated penalty is removal. The Board determined that H. 5 is the appropriate Section of the Table for Inattention to Duty in this case. The recommended penalty is a Letter of Reprimand (LOR) to 10-day suspension and the aggravated penalty is an 11-day suspension to removal. Under Section D. 4 for Failure to Follow Instructions, the recommended penalty is an LOR to 14-day suspension and the aggravated penalty range is a 15-day suspension to removal. The guidelines of the Table state that

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examples of aggravating factors include prior disciplinary record and prior warning/advisement not to commit misconduct. The guidelines also state that for second and/or successive offenses, the penalty should generally fall within the "Aggravated Penalty Range" column, and may often include removal and in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the "Aggravated Penalty Range" column corresponding to the most serious offense being charged.

The Board determined that the appellant had numerous security violations. The numerous violations alone would have supported management's removal of the appellant. In addition, management followed progressive discipline and in light of the appellant's previous disciplinary actions for similar misconduct, management's decision to remove the appellant is within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.03.09 17:36:30 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-017

March 21, 2018

Issue: *Jurisdiction*

OPINION AND DECISION

On or about December 29, 2017, the appellant was removed from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). On or about January 21, 2018, the appellant appealed his removal to the TSA Office of Professional Responsibility Appellate Board (Board). On March 16, 2018, the removal decision was rescinded.

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:

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Debra S. Engel
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OPR Appellate Board

Transportation Security Administration

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-018

February 28, 2018

Issue: *Positive Alcohol Test*

OPINION AND DECISION

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

ANALYSIS AND FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR THE BOARD:

DEBRA S ENGEL

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

Debra S. Engel
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OPR Appellate Board

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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-019

March 7, 2018

Issue: *Misconduct of a Sexual Nature*

OPINION AND DECISION

On December 21, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge, *Misconduct of a Sexual Nature*. The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Misconduct of a Sexual Nature*, on one specification alleging that on November 5, 2017, while in TSA uniform and on duty, the appellant hugged and attempted to kiss an airline flight attendant on the lips without her consent.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (3) states that employees are responsible for exercising courtesy and tact in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation. Supporting and assisting in creating a productive and hospitable model work environment.

Section 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.

Management also alleged that the appellant's conduct violated the Handbook to MD 1100.73-5, Section K., which states that TSA is committed to providing a workplace free from sexual harassment or misconduct of a sexual nature. All employees have a right to work in an environment where they are treated with dignity and respect. Section K. (2) states that misconduct of a sexual nature may not rise to the legal definition of sexual harassment, but is nonetheless inappropriate for the workplace and will not be tolerated; and Section K. (3) states that all employees have a responsibility to behave in a proper manner and to take appropriate action to eliminate misconduct of a sexual nature in the workplace.

On November 9, 2017, an airline manager approached a Supervisory Transportation Security Officer (STSO) and advised him of a complaint she had received from one of her employees about a TSO. In a statement, dated November 15, 2017, the STSO stated that the airline manager told him that one of her officers had complained about one of the TSA officers and reported that the TSA officer forcefully gave her a hug and a kiss on the cheek while they were on the train. The STSO stated that the airline manager identified the appellant as the TSA officer the airline officer referred to.

The airline officer submitted a statement on November 13, 2017. In her statement, the airline officer stated, "I met the gentleman involved a few months ago when I was going through [the airport]. He was very friendly and talkative and hugged me upon leaving – an encounter that I never said yes to, but at the time, I thought he was just a harmless old man. The second time I saw him, we were in passing, and he kissed my cheek without asking, which was another unwarranted advance that made me feel uncomfortable. The third time I ran into him, we briefly chatted and as I turned away to leave, he asked to exchange personal information that I was very uncomfortable giving. I felt this was a very inappropriate request and predicament to be in. I said goodbye and he hugged me and attempted to kiss me on the lips. I pulled away and he kept leaning towards my face. These encounters have made me feel on edge about running into him and have made me very uncomfortable in the workplace. I have been purposefully avoiding areas where he is known to have worked. I feel that this is not appropriate behavior to be using towards anyone and hopefully something can be done about it."

The appellant met with a Special Agent about the incident on November 21, 2017, and provided a written statement. The appellant stated that he had known the airline officer for a few months and saw her often at the airport. He stated that their relationship was casual and that they did not have a romantic relationship. The appellant stated that he felt over time that he and the airline officer built up a rapport and that he hugged her in greeting. He stated that he later hugged her and kissed her on the cheek. In his statement, the appellant stated, "Approximately two to three weeks ago, I went to hug her and my lips inadvertently brushed up on hers on the corner of her mouth. [The airline officer] made a noise like 'Oooh,' and upon hearing that, I said to myself that I hope I did not go overboard. I thought about saying something to her, but I did not." The appellant stated that the incident occurred when he was getting off the train at the airport and that he was in uniform at the time. The appellant stated, "I understand that [the airline officer] is very frightened of me now and I feel absolutely terrible about the fear I have caused her."

Management provided the following evidence to support the Charge: appellant's statement, dated November 21, 2017; statement from airline officer, dated November 13, 2017; statement from an STSO, dated November 15, 2017; and emails from Deputy Assistant Federal Security Director – Screening (DAFSD-S) and airline management, dated November 22, 2017.

On appeal, the appellant stated that there were no witnesses to the incident to provide any statements but he did deny that the incident took place.

The Board found that the statement of the airline officer along with the statement of the appellant in which he admitted that he went to hug the airline officer and his lips inadvertently brushed up on hers on the corner of her mouth, is preponderant evidence to support the Charge. Therefore, the Charge, *Misconduct of a Sexual Nature*, is SUSTAINED.

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

On appeal, the appellant argued that he was never granted or offered an Alternative Dispute Resolution (ADR) to try to resolve the matter and that a lower penalty was not considered. He argued that the penalty is too harsh because he is a senior employee with over 30 years of Federal service and numerous military deployments and stations of duty. He stated that he has been at the airport since 1994 and has built up a good relationship with both his fellow TSA team members and managers and various airline and other security personnel. The appellant referenced training courses he has taken, his Annual Proficiency Review scores, and his reliability with regard to attendance and requested the opportunity to continue to serve and protect the traveling public.

Management responded and argued that ADR is not a forum that was available to the appellant and was not appropriate for the charge in this case. With regard to the appellant's tenure and good performance record, management argued that they do not offset the seriousness of the appellant's conduct and factors that put it in the aggravated penalty range. Management stated that the Deciding Official considered the appellant's long tenure with TSA but rejected it as a basis for mitigation in light of the egregious nature of the misconduct and other aggravating factors. Management stated that while the Deciding Official may not have expressly considered the appellant's performance, it is not a persuasive basis for mitigation under the facts of the case. Management argued that even assuming the appellant had a strong performance every year, a good professional performance should not negate the untenable position in which the appellant placed the airline officer in this case. Management argued that the appellant showed an inability to change his behavior noting that in just over the year in which it was reported, the appellant's behavior progressed from making discomfiting remarks, to touching, to hugging and kissing. Management argued that the appellant's performance, no matter how good, should not outweigh the need to remove him from causing further anxiety to those with whom he would have to work.

The Deciding Official considered both mitigating and aggravating factors and stated that she reviewed and agreed with each of the factors considered in the Notice of Proposed Removal. The Deciding Official stated that hugging and attempting to kiss a female in the workplace and

who, as a matter of business, may have to pass through a checkpoint where the appellant works, is very serious and has no place in the Agency. The Deciding Official considered that the Agency cannot tolerate the risk of liability accompanying this type of behavior, nor can it tolerate the strained relationships both within and outside of TSA, among employees and stakeholders who do not want to have to encounter the appellant in the workplace.

The Deciding Official considered that the appellant was previously issued a 3-day suspension for Misconduct of a Sexual Nature on September 2, 2017, and that he was counseled earlier in 2017 for sending texts and hugging a female co-worker. The Deciding Official considered that this was not the first complaint of misconduct of a sexual nature received about the appellant. The Deciding Official stated that it appears that the appellant has not changed his behavior and stated that she has little confidence that the appellant can be rehabilitated.

The Deciding Official also considered that the appellant was well aware of MD 1100.73-5, as he acknowledged reading the MD on February 2, 2017.

As a mitigating factor, the Deciding Official considered the appellant's employment with TSA since October 20, 2002, but found that the nature and seriousness of the appellant's misconduct, along with the aggravating factors, outweigh the mitigating factors and warrant removal.

Under Section B. 3 of the Table, the recommended penalty range for misconduct of a sexual nature is a 3-day to 14-day suspension and the aggravated penalty range is a 15-day suspension to removal. The guidelines of the Table states that for second and successive offenses, the penalty should generally fall within the aggravated penalty range, and may often include removal.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2018.03.07 15:18:58 -05'00'

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