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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-004

February 7, 2017

Issue: *Failure to Maintain Certification*

OPINION AND DECISION

On January 9, 2017, management removed the appellant from his position of Transportation Security Officer (TSO), with the Transportation Security Administration (TSA) based on one Charge: *Failure to Maintain Certification*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, management bears the burden of establishing that it followed proper TSA protocol in remediating and testing the appellant and provided him with a fair opportunity to demonstrate proficiency.

Management supported the Charge with one specification. The specification alleged that on September 30, 2016, the appellant failed his first attempt to meet the practical skills evaluation (PSE) on the Physical Bag Search – Checkpoint (PBSPAX). When an employee fails an Annual Proficiency Review (APR), he/she is offered remedial training in accordance with the 2016 Annual Proficiency Review (APR) User's Guidance, dated December 22, 2015. The appellant was given the opportunity to improve his performance. On October 1, 2016, the appellant received remediation for one hour. The appellant was reassessed on October 1, 2016, and failed a second time on the PSE for PBSPAX. Consequently, the appellant has not met the requirements for technical proficiency as a Transportation Security Officer.

The evidence shows that the appellant successfully completed the required Online Learning Center (OLC) Physical Bag Search Standard Operating Procedures Refresher Training on April 21, 2016, in accordance with Section 4.7. C. of the 2016 APR User's Guidance. On September 30, 2016, the appellant participated in a practice observation and passed. On September 30, 2016, the appellant took his first PBSPAX PSE assessment and was unsuccessful in passing the first assessment. On October 1, 2016, the appellant was provided with one (1) hour of remediation and signed TSA Form 1176-7, *APR Technical Proficiency Assessment Remediation Acknowledgment-PSE*, acknowledging that he had been provided with the required remediation and training, and was ready to take the applicable PSE reassessment. The appellant declined the opportunity for self-study. On October 1, 2016, the appellant took his second PBSPAX PSE assessment and was unsuccessful in passing the second assessment.

The appellant was issued a Notice of Proposed Removal (NOPR) on November 3, 2016. The notice advised the appellant of his right to submit an oral and/or written reply within seven calendar days of receiving the proposal. The appellant submitted a written response on November 7, 2016, citing multiple reasons why he objected to the proposed removal. In response to the appellant's reply to the NOPR, the Deciding Official met with and obtained supplemental statements from three Standards and Evaluation Assessors (SEAs). The appellant was provided with the statements on December 3, 2016, and given an additional seven days to respond to the additional information. On December 6, 2016, the appellant provided a written response.

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

The TSA 2016 APR User's Guidance sets forth the requirements TSOs must meet to remain certified for employment as a TSO. Section 1.2 of the Guidance provides: To maintain the standards of the annual proficiency review (screening certification) and employment with TSA, employees in the following positions must successfully complete annual recertification requirements on all applicable assessments . . . Transportation Security Officer (TSO); Lead TSO (LTSO); Supervisory TSO (STSO); Master TSO (MTSO) and Expert TSO (ETSO) – Security Training Instructors (STI); and Master TSO (MSTO) and Expert TSO (ETSO) – Behavior Detection Officers (BDO), Lead BDO (LBDO) and Supervisory BDO (SBDO). Section 4.1.B. provides that employees must successfully complete the required APR assessments related to their official position of record and job function once annually as a condition of employment with TSA. Section 6.2.J. states that employees who do not pass any of the PSE assessments within two attempts or any other APR assessment within three attempts are subject to removal from TSA. FSDs are not permitted to convert the employee to single function or to any other function and are not permitted to retain the employee for any reason. Appendix A, Section (1) (a) of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal of a TSO who fails to maintain certification requirements.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgement-PSE, dated October 1, 2016; OLC History; OLC History Details Accessible

Property Search ETD/Physical Search SOP Refresher Training Fiscal Year (FY) 16, dated April 21, 2016; OLC History Details Practical Skills Practice Physical Bag Search – Checkpoint 1st Observation, dated September 30, 2016; OLC History Details Practical Skills Evaluation Physical Bag Search – Checkpoint 1st Attempt, dated September 30, 2016; OLC History Details Remediation Review Physical Bag Search – Checkpoint, dated October 1, 2016; OLC History Details Practical Skills Evaluation Physical Bag Search – Checkpoint 2nd Attempt, dated October 1, 2016; PSE AP-PBS SA1 Feedback Reports, September 30, 2016 and October 1, 2016; a statement from an SEA, dated November 23, 2016; a statement from an SEA, dated November 28, 2016; and a statement from an SEA, dated November 29, 2016.

On appeal, the appellant stated that he was removed from Federal service on January 9, 2017, for failing a PSE physical bag test two times. The appellant stated that he received an email sent to his TSA email account, dated January 10, 2017, which stated that the testing procedures were changed to include a 100% score on a practice test counting as a pass and giving a third chance to test, instead of only two chances. The appellant stated that he received a 100% score on a practice test before taking the actual test. He stated that his first test was on November 30, 2016, and that his second test was on October 1, 2016. The appellant argued that in light of the email sent to him on January 10, 2017, it is unfair to remove him knowing that the agency was in the process of changing the testing procedures to where he would have passed. The appellant stated that he passed all of his practice assessments 100% on the first try and argued that it is a great injustice to remove him from service on one day and then change the rules the very next day.

Management did not reply.

The Board found that the preponderance of the evidence establishes that the appellant participated in a practice observation on September 30, 2016, and passed. The Board found that the appellant participated in and failed the PBSPAX PSE assessment on September 30, 2016 and October 1, 2016. The evidence establishes that the appellant signed the remediation form affirming that he had received remediation, was ready to reassess, and declined the opportunity for self-study. The evidence also establishes that the appellant was reassessed within the timeframe defined in the guidelines of the 2016 Annual Proficiency Review User's Guidance and received the required one hour of remediation. Additionally, the Board found that the appellant's argument referring to changes to APR policy for 2017 is irrelevant, as the appellant tested in 2016 and failed to meet the requirements of the 2016 APR Guidelines. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is a failure to maintain required certification and certification is a condition of continued employment as a TSO.

Pursuant to the 2016 Annual Proficiency Review User's Guidance, each employee who conducts screening functions must complete and pass all recertification requirements on all applicable APR assessments in order to meet the basic conditions of employment with TSA. Consequently, the Board finds that the appellant's non-disciplinary removal based on his failure to maintain his certification was appropriate and consistent with TSA policy.

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

FOR THE BOARD:

DEBRA S ENGEL

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DN: c=US, o=U.S. Government, ou=Department of Homeland Security, ou=TSA, ou=People, cn=DEBRA S ENGEL, 0.9.2342.19200300.100.1.1=0876087875.TSA
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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-005

February 16, 2017

Issue: *Failure to Cooperate with an Official Investigation; Lack of Candor; Absence Without Leave (AWOL); Failure to Follow Direction*

OPINION AND DECISION

On December 12, 2016, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on four Charges: (1) *Failure to Cooperate with an Official Investigation*, (2) *Lack of Candor*, (3) *Absence Without Leave (AWOL)*, and (4) *Failure to Follow Direction*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Failure to Cooperate with an Official Investigation*, on one specification alleging that on June 29, 2016, during an official TSA investigation the appellant was directed to provide flight itinerary information for her travel dates on June 15 and June 20, 2016. The appellant refused to provide the information.

Management based Charge 2, *Lack of Candor*, on two specifications. Specification 1 alleged that on June 29, 2016, the appellant provided a written statement that on June 15, 2016, she flew out of the airport on a flight at around 3:00 p.m., when she knew in fact that she was scheduled

to depart at approximately 11:00 a.m. Specification 2 alleged that on June 28, 2016, in response to being questioned about her attendance, the appellant submitted a written statement indicating words to the effect that she had approved leave for June 15, 2016, when she knew that she did not have approved leave for that day.

Management based Charge 3, *Absence Without Leave (AWOL)*, on two specifications. Specification 1 alleged that on June 15, 2016, the appellant was scheduled to work from 0400-1230 hours. The appellant did not report for her assigned shift. The appellant did not have approved leave to support her absence. As a result, the appellant was charged eight hours of AWOL. Specification 2 alleged that on June 20, 2016, the appellant was scheduled to work from 0400-1230 hours. The appellant did not report for her assigned shift. She did not have approved leave to support her absence. As a result, the appellant was charged eight hours of AWOL.

Management based Charge 4, *Failure to Follow Direction*, on one specification alleging that on June 23, 2016, the appellant was directed by a Supervisory Transportation Security Officer (STSO) to turn in her statement by the end of her shift on June 24, 2016. The appellant failed to follow this direction, and in fact did not turn it in until four days later on June 28, 2016.

Management found the appellant violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (1) reporting to work on time and ready, willing and able to perform the duties of their position; (2) responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials; (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance; (11) upholding, with integrity, the public trust involved in the position to which assigned; and (13) seeking advice and guidance as needed through their supervisory chain concerning their responsibilities under this and other policies governing employee conduct. Section 6. A. states that employees must comply with all standards, responsibilities, and code of conduct established by this directive and that failure to comply with the directive and/or failure to report violations of the directive may result in appropriate corrective, disciplinary, or adverse action, up to and including removal. The Handbook to MD 1100.73-5, Section F. (1) states that employees must cooperate fully with all TSA and DHS investigations and inquiries including but not limited to inquiries initiated by supervisors and management officials. This includes providing truthful, accurate, and complete information in response to matters of official interest, and providing a written statement, if requested to do so. Subsection BB. (1) of the Handbook states that employees are expected to schedule and use earned leave in accordance with established leave 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. 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 May 31, 2016, the appellant purchased plane tickets for departure on June 15, 2016, and return on June 20, 2016. On the date she purchased the tickets, her regular days off (RDOs) were Sunday and Monday (June 19 and June 20, 2016). On June 2, 2016, the appellant was notified that a Personal Needs Request (PNR) that she had requested had been approved and that her new schedule was Monday through Friday from 0400 – 1230 hours with Saturday and Sunday as her RDOs. The new schedule conflicted with the appellant's previously arranged travel schedule for June 20, 2016. On June 8, 2016, the appellant submitted a Request for Leave or Approved Absence (SF71) for Leave Without Pay (LWOP) for June 20, 2016 and on June 10, 2016, her leave request was denied by management with "suspected leave abuse" noted as the reason for disapproval on the SF71.

On June 14, 2016, the appellant called off for her June 15, 2016, shift stating that her son was ill. Management provided as evidence Closed Circuit Television (CCTV) footage showing the appellant going through security at the airport with her son at approximately 0908 hours. On June 19, 2016, the appellant called off for her shift on June 20, 2016, also stating that her son was ill. When the appellant returned to work on June 21, 2016, a Transportation Security Manager (TSM) asked her to provide a statement explaining why she called off for her scheduled shift on June 15, 2016 and June 20, 2016. On June 22, 2016, the TSM asked the appellant for the statement and the appellant stated that she could not finish it until June 27, 2016. The TSM instructed a Supervisory Transportation Security Officer (STSO) to tell the appellant to have the statement in by no later than close of business on June 24, 2016. Upon completing her statement, the appellant sent it to the Union for review. The appellant submitted her statement to the TSM on June 29, 2016.

The STSO submitted a written statement on June 29, 2016. In his statement, the STSO stated that on June 23, 2016, he gave direction to the appellant to write a statement regarding her LWOP request. The STSO stated that the appellant said she would have it done on Friday, June 24, 2016. The STSO stated that the TSM said that it needed to be turned in to him no later than close of business on June 24, 2016. The STSO stated that at the end of the day he asked the appellant for her statement and that the appellant stated that she completed it and sent it to the Union. The STSO stated that he explained to her that she was supposed to have the statement turned in to him by the time she left work. He stated that the appellant again stated that she sent it to the Union and would turn it in on Monday. The STSO stated "I explained that [the TSM] was expecting it and that we would have to contact him, I called him and [the appellant] stated she would turn it in to him after the Union examined it."

The appellant submitted her statement to management on June 28, 2016. In her statement, the appellant stated, "I had approved leave for June 15th through June 20th which included my RDOs of Sunday June 19th and Monday June 20th." The appellant stated that she had a pending request for a PNR to accommodate her childcare conflicts and that she was notified by the TSM on June 2, 2016, that her PNR had been granted and that her RDOs would be changing from Sunday/Monday to Saturday/Sunday effective June 5, 2016. The appellant stated that she advised her TSM that she had purchased airline tickets for travel beginning on June 15, 2016, returning June 20, 2016. The appellant stated that she asked the TSM what she needed to do to adjust her already approved leave with her new RDOs and that the TSM told her to fill out and submit a leave request form. The appellant stated that she submitted an SF71 for LWOP for June 20, 2016, to the TSM to be routed to the Assistant Federal Security Director (AFSD), with a brief

description as to why she needed the time off approved in the remarks section. The appellant stated that on June 9, 2016, the TSM submitted supporting documentation as to the reason why she needed approved leave for June 20 and that on June 10, 2016, she received an email from the Deputy Assistant Federal Security Director (DAFSD) stating "Leave Threshold Exceeded. Leave disapproved per AFSD I." The appellant stated that she did not have an opportunity to check her email until June 14 at which time she saw that her LWOP request for June 20 was denied. The appellant stated that on June 14, 2016, at 0458 hours she sent an email directly to the AFSD stating her reason for her request for LWOP and asking her to reconsider the request. The appellant stated, ". . . at 0920 hours [the AFSD] responded to my request with an unattainable solution considering the time parameters that existed. My leave was to begin the very next day, less than 24 hours before my travel was to begin." The appellant stated that at the time of her request for LWOP her sick leave balance was limited and that was the reason she requested LWOP.

The appellant was issued a Notice of Proposed Removal (NOPR) on September 16, 2016, and provided a written response on October 17, 2016.

Management included the following as evidence to support the Charges: Memorandum from a TSM, dated July 8, 2016; e-mail from a TSM, dated June 19, 2016; statements from the appellant, dated June 28, 2016 and June 29, 2016; Request for Leave or Approved Absence forms (SF71), dated June 8, 2016 and June 21, 2016; WebTA Certified Time and Attendance (T&A) Summary; e-mail concerning shift trades, dated July 22, 2016; Witness Statements from a TSO, dated July 12, 2016 and September 15, 2016; a Witness Statement from an STSO, dated June 29, 2016; and CCTV timeline and footage from June 15, 2016.

On appeal, the appellant stated that she took her child to the doctor on June 13, 2016, and was told that her child had an upper respiratory infection. The appellant stated that the next day, the daycare called at the end of her shift and she was informed that because her son was sick he could not return to the daycare center until he was on antibiotics for at least 24 hours; meaning that she did not have child care for her son on June 15, 2016 because the 24-hour window had not elapsed. The appellant stated that she followed procedures by promptly calling her manager and informing him of the situation and letting him know that she would not be able to work her scheduled shift the next day. The appellant stated that since she was not able to work her shift on June 15, 2016, because of her child's illness, her husband helped her change her flight to an earlier flight as she no longer needed to be concerned about her shift conflicting with the flight schedule and he wanted to be able to assist her with the sick child during their travel. The appellant stated that on June 19, 2016, she called her manager again to call out for her scheduled shift the next day because she was not able to provide the daycare with evidence that her son had been on antibiotics for 24 hours and because he was still sick.

With regard to the allegation that she failed to follow instructions, the appellant argued that she was told to write a statement explaining why she had called off of work during the shifts she had been scheduled to work and for which she was charged with AWOL. She stated that she was asked to complete the statement by the end of her shift. The appellant stated that she finished the statement in a timely manner, as directed, however, she wanted her Union representative to have an opportunity to review her statement prior to its submission. The appellant stated that the representative was not able to review the statement and return it to her until a few days later. She argued that she promptly submitted that statement after receiving the comments from her

representative and therefore, management did not show that she failed to follow instructions. She argued that she complied with management's request to complete the statement on the assigned day and that she was never told, nor did management allege that she was told, that she would not be able to submit the statement to her Union representative. The appellant argued that this was a misunderstanding, not willful misconduct by her. She argued that the facts, at most, demonstrate that she failed to clarify the instructions given to her and confirm that her Union representative would be permitted to review the statement.

With regard to management's allegation that she failed to cooperate in an investigation, the appellant argued that the Charge mischaracterized her actions. She argued that she did not refuse to provide the information; rather she was not able to obtain the information and provide it to management. She argued that she wrote statements and other relevant documents to support her case and was an active participant in the investigatory process but that she was simply unable to provide management with the exact documentation requested. She argued that she instead provided the best documents she was able to obtain to satisfy any requests.

With regard to the Lack of Candor Charge, the appellant admitted that the statement that she provided was not completely accurate. She stated that she apologized for those "incidental discrepancies." The appellant stated she informed management in her response to the NOPR that her original flight was at 3:00 p.m. but that her flight was changed to an earlier time of 11:00 a.m. by her husband because her child was not able to go to daycare that day and therefore she was unable to go to work and had to take care of her child. The appellant argued that in her other statement, it was just a careless mistake when she stated that she had approved leave for June 15-20, 2016. The appellant stated that it was partially correct, as she was approved for the 16th-17th and her RDOs were originally the 19th and 20th and were changed to the 18th and 19th. The appellant acknowledged that her statement should have been more precise and detailed in explaining her statement but argued that it was oversight on her part and not willful misconduct.

Management replied and noted that the appellant did not dispute the sufficiency of the evidence for each Charge and specification. Management argued that the Charges and specifications against the appellant were proven based on the preponderance of evidence in the materials relied upon and should be sustained.

With regard to Charge 1, management used the fact-finding memorandum written by a TSM to support the Charge. In the memorandum, the TSM stated, ". . . during follow-up questioning on June 29, 2016, [the appellant] was asked to provide flight information for her departing on June 15, 2016. [The appellant] in the company of [a TSM], [a TSO] and [the TSM] stated the information was not relevant and refused to respond." The Board determined that there is no evidence or indication that the appellant was directly ordered by management during the meeting on June 29, 2016, to provide her flight information as part of an official investigation. In addition, the TSM stated that he concluded the meeting by informing the appellant that he would email the questions to her and she would have until 1230 that same day to respond with a signed statement. The appellant complied with this direction and provided flight information. Therefore, the Charge, *Failure to Cooperate with an Investigation*, is NOT SUSTAINED.

With regard to Charge 2, specification 1, in the appellant's statement dated June 29, 2016, regarding her June 15, 2016, flight, the appellant wrote, "I flew out of [airport] on [airline] around 3 p.m. and my return flight was out of [airport] around 11 a.m." In her appeal, the

appellant stated that her husband helped her change her flight to an earlier flight because she no longer needed to be concerned about her shift conflicting with the scheduled flight and that her son being ill and unable to attend daycare caused her to call off of work on June 15, 2016, and "resulted in the decision to take an earlier flight than originally planned." The Board found that it is clear that the appellant lacked candor in her June 29, 2016, statement when she said she flew out at 3:00 p.m. on June 15, 2016. The Board determined that the CCTV footage and the appellant's statement is preponderant evidence to support the specification. Therefore, specification 1 is SUSTAINED.

With regard to Charge 2, specification 2, although the appellant did write in her June 29, 2016, statement that she had approved leave "for June 15th through June 20th" the Board found merit in the appellant's argument that it was a careless mistake and that she did not intentionally mislead management. The evidence in the record shows that she did not have leave on that date and she consistently maintained the correct dates throughout the other documents. Therefore, specification 2 is NOT SUSTAINED.

Having sustained specification 1, the Charge, *Lack of Candor*, is SUSTAINED.

With regard to Charge 3, specifications 1 and 2, the SF71s and WebTA reports are preponderant evidence to prove the specifications. Therefore, the Charge, *Absence Without Leave (AWOL)*, is SUSTAINED.

With regard to Charge 4, the Board found that, based on the statements of the appellant and the STSO, management accepted the fact that the Union was reviewing the appellant's statement when the appellant notified the STSO. There is no evidence that the appellant was given a direct order to turn her statement in immediately without Union review after she told the STSO on Friday, June 24, 2016, that her statement was done but had been sent to the Union for review. The STSO wrote in his statement, "She stated again she sent it to the Union and will turn it in on Monday. I explained that [the TSM] was expecting it and that we would have to contact him. I called him and [the appellant] stated she would turn it in to him after the Union examined it." Additionally, in the fact-finding memorandum by the TSM, he wrote, "On Friday 6/24/2016 at 1230 PM I received a phone call and was notified by [the appellant] that she would not be submitting her statement to me and that I would get it Monday. She then stated she had submitted her statement to the union for review. On Wednesday June 29, 2016 during review of my email account, I noticed an email from [the appellant] dated 6/28/2016 04:59 AM. The email contained her statement regarding her unscheduled absence on June 20, 2016." While the appellant did not turn her statement in on June 24, 2016, it is clear that she did speak to both the STSO and the TSM on that day and there is no evidence that management ever stated that the appellant could not have her statement reviewed by the Union prior to turning in the statement nor is there any evidence that the appellant was ever made aware that waiting until the Union review was complete was a problem. The appellant turned in her statement once the Union had reviewed it. Therefore, the Charge, *Failure to Follow Direction*, is NOT SUSTAINED.

Having sustained Charges 2 and 3, the question is whether the Deciding Official has shown that the penalty of removal is consistent with the TSA Table of Offenses and Penalties (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to Management Directive 1100.75-3, *Addressing*

Unacceptable Performance and Conduct have been considered properly by the Deciding Official.

In her appeal, the appellant argued that management failed to consider the mitigating factors and failed to prove that her removal promotes the efficiency of the service. She also argued that her removal does not comport with progressive discipline. The appellant cited the Table and argued that management alleged that she was AWOL on two separate instances which would normally have placed her within a recommended penalty range of a 2-5-day suspension. She also noted that Lack of Candor has a mitigated penalty range of a 14-30-day suspension. The appellant noted that management stated in the Notice of Removal that had she "been forthright and candid" her AWOL would certainly not have resulted in her proposed removal. She argued that she was indeed forthright and candid during the entire investigative process. She argued that although the dates of her son's illness and her flight itinerary coincided, it was merely an unfortunate coincidence. The appellant argued that her son was sick and was not able to attend daycare per the daycare's policy so her only alternative was to call out for her shift. The appellant argued that this does not rise to the level of removal.

The appellant argued that she had been a committed TSA employee for more than 14 years and that during her long tenure, she notably had no incidents in the past that required formal disciplinary action. She argued that she received much recognition and multiple awards for her outstanding work ethic and ability to, more than satisfactorily, perform her job duties. She stated that her fellow TSOs admire her leadership and consider her a positive example for others.

The appellant also argued that she had purchased her plane ticket before her PNR was approved, altering her RDOs, and well before her son became ill, which she could not have predicted. The appellant argued that had the two events never occurred, none of the allegations would have been charged against her. She argued that the unusual and difficult confluence of the events is unlikely to ever happen again and therefore, the conduct at issue should be viewed as a one-time incident. The appellant reiterated that her son being ill and unable to attend daycare caused her to call off of work on June 15 and resulted in the decision to take an earlier flight than originally planned. She argued that once she learned that her RDOs had been changed, she tried numerous avenues, communicating with management all the while, to avoid having to call out of her shift but was unsuccessful. She also reiterated that when she learned of her son's illness she took the proper course of action, notified her manager and called out of work. She argued that it was a difficult, confusing situation to begin with and that the addition of a sick child was an additional stressor.

The appellant argued that she is capable of rehabilitation as the incident was an isolated occurrence and that she has never and will never have an issue again. She argued that her long history of service with no formal disciplinary action demonstrates that she is deeply committed to the Agency and her work. She argued that a more appropriate mitigated penalty, one that is less than removal, would be more effective in deterring her from engaging in similar behavior. She stated that her promotion to LTSO shows that she is a hard-working, dedicated employee that management believes has the capability to lead her coworkers successfully. The appellant noted that management claimed that they took these factors into account in making their determination to remove her but argued that had they properly weighed the mitigating factors, removal would have never been an option.

The appellant argued that removing her would result in the loss of a valuable employee. She argued that her removal should be rejected and mitigated because management failed to establish that her removal would promote the efficiency of the service.

Management replied and argued that the appellant failed to present any new evidence or arguments concerning the penalty determination. Management argued that even a casual reading of the Decision Notice establishes that the Deciding Official thoroughly considered all mitigating factors. Management also argued that the appellant's entire course of conduct established in the Charges and specifications supports the Deciding Official's determination that the appellant's removal promotes the efficiency of the service. Management argued that the penalty is reasonable because all penalty factors were considered and the penalty is consistent with the Table of Penalties.

The Deciding Official considered a number of factors in determining the penalty. As mitigating factors, the Deciding Official considered the appellant's service with the Agency since October 13, 2002, and that she had no record of formal discipline. She also considered the appellant's recent performance evaluations which indicated she achieved excellence, passed her annual recertification tests, and was part of a successful checkpoint team.

The Deciding Official considered the nature of the appellant's violations and their relationship to her duties as an LTSO. She considered that the policy violations are serious offenses and relate directly to her duties, position, and responsibilities as an LTSO. The Deciding Official stated that she believed the appellant's acts were intentional in order for her to take time off of work while out of the state. She stated that the appellant made no effort to have her shift covered or notify management when she did not find someone to cover her shift. The Deciding Official considered that as an LTSO, the appellant is required to behave in an honest, open, and fair manner and model high standards of ethics. She considered that the appellant is required to have a command presence; demonstrating responsible and dependable behavior, and take responsibility for personal performance through a high level of effort and commitment to the mission. The Deciding Official also considered that as an LTSO, the appellant is required to lead and inspire others toward goal accomplishments and mentor and encourage a diverse workforce through trust, openness and respect for individuals in the performance of her duties. She considered that the appellant's misconduct indicates that the appellant is not able to perform the essential functions of the position in a trustworthy manner, nor that she can be trusted to set an example for her team. The Deciding Official considered that the appellant diminished the public and her team's trust in the value of her duties. She considered that the appellant's position requires that management have confidence that she will apply TSA security policies, directives, and regulations, and understand how to implement these policies, directives and regulations. The Deciding Official considered that taken as a whole, the facts strongly suggest that the appellant's misconduct was intentional and committed for personal gain. She considered that the facts establish that the appellant was aware of TSA's attendance and leave guidance, yet she misled management by omitting complete and accurate information in support of the leave requests she submitted for leave that had been previously disapproved. The Deciding Official considered that the offenses committed are contrary to TSA's core values and expectations of all TSA employees and the appellant's duties and responsibilities. She considered that in the appellant's position she is held to a higher standard and expected to lead and serve as a role model by reporting to work on time and abiding by all laws, rules, regulations and other authoritative policies and guidance, written and unwritten. The Deciding Official considered that the appellant's misconduct does

not demonstrate leadership qualities and that rather than seek advice and guidance from her supervisory chain, she ignored her responsibilities and well established policy and procedures, and chose to mislead management by omitting crucial information and failing to cooperate during an inquiry into her leave and attendance.

The Deciding Official considered that the appellant's failure to follow attendance policies directly impacts the proper and effective accomplishment of TSA's mission by placing undo liability and risk upon the organization and her coworkers due to her absence from her assigned location and duties affecting team rotations and checkpoint efficiency. She considered that while any notoriety of the appellant's offenses on the reputation of the Agency might be limited to her local coworkers, it is still a legitimate concern. The Deciding Official considered that the appellant was aware that the offenses committed and rules violated were clearly communicated to her because she read and acknowledged them on an annual basis.

The Deciding Official considered the effect the offenses will have on the appellant's ability to perform at a satisfactory level if she were to return to her duties. The Deciding Official stated that she could not depend on the appellant to meet the standards and expectations set for a TSA employee. She considered that the appellant was less than truthful, provided misleading information and omitted material facts and that after numerous opportunities to accept responsibility for her actions, she failed to acknowledge that she could have handled things better. The Deciding Official considered that lack of candor is unacceptable and has no place in maintaining the integrity of the Agency's security operations. She found that the seriousness of the appellant's misconduct outweighed any mitigating factors.

Under Section A.3 of the Table for AWOL from 1 to 5 workdays, the recommended penalty is a 2-day to 5-day suspension and the aggravated penalty is a 6-day suspension to removal. Under Section E.2, for Lack of Candor, the recommended penalty is removal. Although harsh, the Board finds that under the Table, management had the right to remove the appellant. Therefore, the Board finds that the decision to remove the appellant was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Supervisory Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-006

February 17, 2017

Issue: *Positive Drug Test*

OPINION AND DECISION

On December 14, 2016, management removed the appellant from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on one Charge: *Positive Drug 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(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, *Positive Drug Test*, on one specification alleging that on November 17, 2016, the appellant was subject to random drug testing pursuant to the TSA Drug and Alcohol Free Workplace Program. The results of the drug test, as indicated on the Medical Review Officer Final Report from University Services MRO Toxicology Services Group showed that the appellant tested positive for marijuana (THC). This result was certified by the Medical Review Officer (MRO) on behalf of TSA and he found no justified medical reason for the drug use.

A pre-decisional meeting was held with the appellant on November 28, 2016. The appellant stated during the pre-decisional that the MRO had contacted him on November 21, 2016, and advised him of the positive results of the random drug test. The appellant stated that he provided the MRO with

the names of the medications that he was currently taking, and then accepted the MRO's offer to have the split sample tested. In addition, the appellant provided management with a copy of the formal request to have the split sample tested. Management offered the appellant the opportunity to provide any information that he would like management to take into consideration. The appellant did not offer any explanation other than to acknowledge that he was aware of the potential consequences stemming from a positive drug test result.

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

On November 17, 2016, the appellant was selected for random drug and alcohol testing. On November 21, 2016, the MRO issued a report indicating that the appellant's drug test was positive for marijuana. On November 22, 2016, the appellant requested to have his split sample retested. The MRO responded back to the appellant on December 7, 2016, and stated that the specimen has been analyzed and reconfirmed for marijuana. Management was also notified on December 7, 2016, that the split sample was found to be positive for marijuana.

Management provided as evidence: Summary of Pre-Decisional with appellant, dated December 9, 2016; MRO certified Final Report, dated November 21, 2016; Request from appellant for a split sample retest, dated November 22, 2016; MRO report on split sample, dated December 7, 2016; and Federal Drug Testing and Custody and Control Form, dated November 17, 2016

On appeal, the appellant argued that he has dedicated over fourteen years of federal service to TSA and has never been disciplined in his eighteen (18) years of federal service. The appellant stated that on November 16, 2016, he attended a going away party for a friend and the party was held in an unventilated basement. The appellant stated that there was smoke present in the basement of this party but he was unaware of marijuana being smoked at the party. The appellant argued that he was only made aware of this fact after he received the purported results of the drug test. He argued that he did not knowingly or intentionally inhale marijuana smoke. The appellant submitted statements from employees at the party who stated that he did not smoke marijuana at the party.

In his appeal, the appellant asserted that he has not been shown chain of custody documentation for his urine specimen and for the split sample nor has he been provided toxicology and test results from the laboratory. The appellant argued that he was not provided with his urine specimen sample so that he could test it and challenge the accuracy of the positive drug test. In addition, the appellant argued that the meeting held on November 28, 2016, was never identified as a pre-decisional meeting and he was not given the opportunity to have a witness or representative at this meeting. The appellant argued that management did not inform him that this was his only opportunity to provide information or evidence in his defense before being removed. The appellant also alleged that he was never given the opportunity to respond orally and/or in writing to the charge and was told that the matter would be discussed after the results from the test on the split sample came back. Additionally, the appellant argued that he was not notified that he could have requested that the Federal Security Director make a written request for an exception to the Agency

directive that removal is mandated for a validated drug test. The appellant stated that while awaiting the results of the split sample, he had a drug and alcohol evaluation with a Ph.D., on December 6, 2016. The appellant stated that he was tested for drugs and was negative for all drugs, including marijuana. He stated that the Ph.D. concluded that there was no evidence of him having cannabis abuse or dependence and that he did not require further treatment services. The appellant also stated that on December 27, 2016, he had a hair specimen tested for controlled substances and that on January 3, 2017, he was provided with the results which indicated negative for controlled substances, including marijuana. The appellant argued that the penalty of removal is unwarranted and not within the bounds of reasonableness and that the penalty fails to promote the efficiency of the service. The appellant argued that the penalty factors dictate that the removal penalty cannot be sustained and must be mitigated. Finally, the appellant argued that no evidence has been provided that the purported drug test was validated and is a valid drug test.

Management replied and argued that the evidence presented clearly established that while employed with TSA, the appellant was subjected to random drug testing which produced a positive result for marijuana and that removal was required under MD 1100.75-3. In response to the appellant's claim that there was an absence of proper chain of custody, management argued that there is no oversight for contracted specimen collection at the local level. However, management argued that the official documents received both indicate the same specimen number. In response to the argument that the appellant was not advised the meeting was a pre-decisional meeting and he was not provided the opportunity for representation or the opportunity to provide an oral or written reply, management argued that the appellant acknowledged that he participated in a pre-decisional meeting. Management asserted that the appellant was put on notice of the positive drug result and the consequential one-step removal action. Management also argued that that the appellant was directly asked if he wanted to offer any information and elected not to provide any further information. Management also argued that at no time did the appellant request to have a personal representative or otherwise invoke a right to representation. As to the argument that the appellant was not given an opportunity to pursue an exception to mandatory removal by the FSD, management argued that there is no obligation on behalf of management to advise the employee of this caveat, nor is there an entitlement for the employee to have the opportunity to request this exception be pursued. As to the argument that the appellant had independent testing performed that produced negative results, management argued that this information was neither provided to nor considered by management in their decision to remove. As to the argument that the penalty of removal was unwarranted, management argued that removal is required for a validated failure of a drug test. Management also asserted that penalty determination factors do not apply to mandatory removals.

The Board found that management sufficiently addressed and refuted each of the appellant's arguments in their response to the appeal. Management is correct that penalty factors do not apply to mandatory removals and that there is no obligation for management to advise the employee of the Federal Security Director's right to seek an exception. This right belongs exclusively to the Federal Security Director. In addition, there is no requirement for the appellant to be provided a sample of the urine tested. The appellant's test results were provided to him in two decisions by the MRO. Management is correct in that they have no oversight over the chain of control, as the collection is provided by a contractor. What is clear is that the same specimen number is provided on all three documents provided to the appellant. The results of any tests conducted by a third party and after the test on November 17, 2016, are irrelevant and will not be considered. In addition, management followed the requirements for a pre-decisional meeting as set out in TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct.*

The Board found that the Medical Review Officer's Final Report is substantial evidence to support the Charge. Therefore, the Charge, *Positive Drug Test*, is SUSTAINED.

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

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-007

February 23, 2017

Issue: *Lack of Candor*

OPINION AND DECISION

On December 15, 2016, management removed the appellant from his position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on one Charge: *Lack of Candor*. 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 a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charge, management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Lack of Candor*, on one specification alleging on June 17, 2014, the appellant completed a Questionnaire for National Security Positions Standard Form (SF-86) when applying for a position as a Transportation Security Officer in which he denied illegal drug use within the last seven years knowing this response was not fully forthcoming and candid.

Management found that the appellant's actions violated Title 5, Code of Federal Regulations, part 731.202, which states that an intentional attempt to withhold information, or furnish false information, that is capable of influencing decisions about the individual's suitability, qualifications, or other matters related to the appointment process is disqualifying. Management also found that the appellant's actions violated the TSA Handbook to Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section F., Providing Statements and/or Testimony, which states that employees must cooperate fully with all TSA and DHS

investigations and inquiries, including but not limited to inquiries initiated by supervisors and management officials, OOI or DHS OIG, unless a Garrity warning is issued to the affected employee. This includes providing truthful, accurate, and complete information in response to matters of official interest, and providing a written statement, if requested to do so. Employees must follow established TSA and DHS procedures when responding to such requests for information and testimony.

On August 24, 2014, the appellant began working with TSA as a Transportation Security Officer and was found eligible for employment on December 8, 2014, based on a favorable adjudication on his background investigation. As part of his required background investigation, the appellant submitted a Questionnaire for National Security Position (SF-86) that was certified on June 17, 2014, in which the appellant denied illegal drug use in the previous seven years prior to completing the SF-86. In 2016, the appellant applied for a position as a Federal Air Marshal (FAM) and completed an SF-86, certified on May 4, 2016, where he disclosed using marijuana ten times from January 2009 to January 2012, purchasing marijuana one time in July 2010 and misusing the prescription drug Klonopin one time. On September 15, 2016, TSA's Office of Personnel Security (PerSec) notified the Federal Security Director (FSD) that based on the appellant's responses on his May 2016 SF-86, wherein the appellant admitted to illegal drug use in the past seven years, a referral was being made for a post-employment misconduct/discipline review. A review of the appellant's two SF-86 forms and his responses revealed a discrepancy in his responses regarding his use of illegal drugs.

On October 20, 2016, the appellant was issued a Notice of Proposed Removal (NOPR). The written notice advised the appellant of his right to make an oral and/or written reply. The appellant gave an oral reply on November 7, 2016, and submitted a written reply on November 8, 2016. In his written reply, the appellant stated that he originally applied to TSA by filling out an SF-86 online questionnaire on June 17, 2014. He stated that he mistakenly failed to disclose past drug use. He stated that it is without dispute and that he fully admitted that he did not include relevant drug use on his original SF-86 form. The appellant argued however, that as a novice to not only the federal employment application, but to any post-secondary education application, he was not accustomed to the online format used to complete the questionnaire, the extensive amounts of questions, or the unfamiliar wording.

Management included as evidence: a Memorandum from PerSec, dated September 15, 2016, and Electronic Questionnaires for Investigations Processing (e-QIP)/SF-86 forms, certified May 4, 2016, and June 17, 2014.

In his appeal, the appellant did not dispute the Charge but stated that while applying for a position with TSA on June 17, 2014, he completed his employment application online and in haste, while trying to complete the application before the job posting closed, he did not thoroughly read through a few of the questions on the SF-86 form before answering the questions and submitting the application. The appellant stated that the questions were in regard to his history of drug use and that the questions were immediately preceded by inquiries regarding prior criminal history. He argued that as a result, he was under a mistaken impression that the drug use questions were in reference to any criminal convictions involving drug use. The appellant stated that he responded "no" to those inquiries. He stated that had he been more attentive to the questions he would have surely answered those questions as truthfully as he did with the other questions on the application. The appellant stated that after gaining and maintaining successful employment with TSA, on December 2, 2015,

he applied for a position with Customs and Border Patrol (CBP). The appellant stated that the application for the position required a polygraph examination to be administered and that during that polygraph examination, the test administrator questioned him about his history of prior drug use over his lifetime. The appellant stated that he responded that he had engaged in a miniscule amount of drug use while in college. He stated that the test administrator pressured him to give the exact quantity and would not accept an answer absent a numerical value. The appellant stated that under the pressure of the demand, he proceeded to give a rough, albeit, inaccurate estimate of his prior drug usage.

The appellant stated that on May 4, 2016, he applied for a position as a Federal Air Marshal (FAM) and once again was required to complete an SF-86 form. The appellant stated that this time, armed with an understanding of what the question was truly asking, adequate time to answer the question and an environment free of pressure and anxiety, he was able to reflect and give an accurate, detailed account of his history of drug use. The appellant stated that the SF-86 form asked for an account of any drug use within the past seven years prior to the application where in contrast, the polygraph examiner demanded an account of drug use throughout appellant's entire life; leading to the discrepancy in the usage reported in both instances.

Management replied and argued that for a TSA employee, especially those performing security screening functions, any demonstration of deception cannot be tolerated. Management argued that in addition to demonstrating a lack of candor, the appellant failed to accept responsibility for his actions, explaining that his false statements were due to him being a "novice" to Federal employment.

With regard to the Charge, the appellant's admission, along with copies of the appellant's SF-86 forms and the letter from PerSec, is preponderant evidence that the appellant was not truthful on his June 17, 2014, SF-86 form. Therefore, the Charge, *Lack of Candor*, is SUSTAINED.

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

On appeal, the appellant argued that management failed to show that removal is a reasonable penalty, failed to consider the mitigating factors, and failed to prove that his removal promotes the efficiency of the service. He also argued that his removal does not comport with progressive discipline. The appellant noted that under section E.2 of the Table, for Lack of Candor, the mitigated penalty range is a 14-day to 30-day suspension and argued that mitigation is exactly what is required for his case. The appellant argued that although a Lack of Candor charge does not require management to prove an intent to deceive or mislead, management still failed to comport with progressive discipline. He argued that he has been with TSA for a little more than two years and was already promoted to an LTSO position. The appellant argued that this demonstrates that management thinks highly of his ability to lead, his work ethic and his commitment to integrity. He argued that management could have taken these factors into account when making their determination but failed to do so. The appellant also argued that charging him with the lowest discipline possible would have sufficed in deterring him from engaging in similar behavior in the future.

The appellant argued that management did not properly weigh the penalty factors. He reiterated that he has been a TSA employee for more than two years and stated that he has received much recognition and multiple awards for his outstanding work ethic and ability to, more than satisfactorily, perform his job duties. The appellant argued that several coworkers had written character references on his behalf, speaking to his dedication and commitment to excellence during his employment with TSA. He argued that he has an exemplary record that is absent any disciplinary actions during his tenure with TSA which contributed to his promotion to the LTSO position.

The appellant also argued that management did not consider the mitigating circumstances surrounding his responses to the questions at issue. He reiterated that while applying for employment as a TSO with TSA, he responded to the history of drug use question in the SF-86 form in haste. He stated that he mistakenly answered those questions in the negative, stating that he had no history of drug use. He argued that had he not been under the pressure of time constraints, he would have been able to read the questions with care and would have discerned the fact that the questions were indeed asking about his history of drug use and not a history of criminal convictions as a result of a history of drug use. as he erroneously thought the question asked. The appellant argued that it was an understandable oversight as the drug use questions were immediately preceded by questions regarding criminal convictions. The appellant argued that he alerted management to that fact in his reply to the NOPR, yet management did not take it into account in makings its determination.

The appellant also argued that management failed to adequately consider the reasons for the discrepancy between his answers regarding drug use during the polygraph examination and the SF-86 form he completed while applying for the Federal Air Marshal position. The appellant stated that during the polygraph examination, the test administrator demanded and subsequently pressured him to provide a numerical value of his history of drug use throughout his entire life. He argued that to put someone on the spot and make them give an exact quantity of anything, especially an infrequent activity that occurred a significant amount of time prior to the questioning is unreasonable. The appellant argued that he did his best as he tried to recollect and estimate his drug usage under the persistent insistence from the test administrator. He stated that the numerical values that he gave in response to the interrogation deviated from his subsequent responses that he gave on the SF-86 form he completed for the FAM position simply because the separate inquiries were soliciting answers to two separate and distinct questions. He stated that the polygraph exam was interested in his lifetime drug usage, whereas the SF-86 asked only about his drug use within seven years prior to completing the form. The appellant stated that holding him responsible for his conflicting responses is reasonable but argued that removing him from service as a result is not.

The appellant argued that with no history of disciplinary actions against him combined with management's recognition of his commitment to integrity during his tenure with TSA, it is reasonable to believe that he can be rehabilitated and that a lesser penalty than removal would more than suffice to deter any actions or remote similarity to this charge to even happen again. The appellant stated that he is remorseful in that management had to spend time and effort to investigate this situation and that his actions brought his integrity into question.

Management replied and argued that the penalty is reasonable and appropriate. Management argued that the appellant served in a position of trust and was expected to act with honesty and

integrity, including when being asked to provide pertinent information related to employment screening. Management further argued that the appellant's appeal provided no new, mitigating, or persuasive evidence which would support a penalty less than termination. Management argued that the NOPR and the Decision clearly specified the reasons and justification for the appellant's removal from service, reasons that remain unchanged despite the appellant's assertions in his appeal. Management argued that the Deciding Official carefully considered the relevant penalty determination factors, including the evidence collected, and determined that removal from Federal service was the required action in accordance with TSA policies and procedures.

The Deciding Official considered the nature and seriousness of the charge against the appellant and the relationship to his employment with TSA as an LTSO. The Deciding Official considered that as an LTSO, the appellant is responsible for guiding and developing junior staff members and is expected to behave in an honest, fair and ethical manner, showing consistency in words and actions as well as being a role model of high ethical standards. The Deciding Official considered that the appellant served as a first line supervisor and a representative of the agency. He also considered the lack of candor the appellant displayed when providing responses to his 2014 SF-86 and stated that the appellant's demonstrated untruthfulness is evidence that the appellant lacks the requisite judgment and reliability expected of all employees. Additionally, the Deciding Official considered that the appellant's misconduct has damaged the trust that management has in the appellant's ability to perform his duties without close supervision.

Under section E.2 of the TSA Table of Penalties (Table), pertaining to *Lack of Candor*, the recommended penalty range is removal. The Board finds that the decision to remove the appellant was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-008

February 17, 2017

Issue: *Positive Drug Test*

OPINION AND DECISION

On December 22, 2016, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Positive Drug 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(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, *Positive Drug Test*, on one specification alleging that on December 7, 2016, while in a duty status, the appellant was subject to random drug and alcohol testing pursuant to the TSA Drug and Alcohol Free Workplace Program. The appellant's drug test result was positive for opiates and codeine.

A pre-decisional meeting was held with the appellant on December 22, 2016. A written statement was provided on December 22, 2016. The appellant stated that he was contacted on December 16, 2016, by the Human Resource Specialist to contact the lab that took his urine sample on December 7, 2016. The appellant stated that he called the lab on December 16 and "they" stated that he tested positive for codeine and he was instructed to send a list of his prescriptions from his doctor. The

appellant stated that he did not know how he could have tested positive for codeine. On December 19, 2016, the appellant sent the list of his prescriptions from the VA medical center to the lab. The appellant stated that he did not hear anything until 0500 on December 22, 2016, at which time he was told that he was being placed in a non-screening function. In addition, the appellant stated in his written statement that he had another Sports Medicine doctor that had also prescribed him pain medications but TSA had already started the one-step process.

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

On December 7, 2016, the appellant was selected for random drug and alcohol testing. On December 19, 2016, the MRO issued a report indicating that the appellant's drug test was positive for opiates and codeine. Management was notified on December 21, 2016, of the appellant's positive random drug test by the Drug and Alcohol-Free Workplace Program.

Management provided as evidence: Summary of Pre-Decisional with appellant, dated December 22, 2016; MRO certified Final Report, dated December 19, 2016; Federal Drug Testing and Custody and Control Form, dated December 7, 2016; and appellant's statement, dated December 22, 2016.

On appeal, the appellant argued that he has been employed by TSA for over fourteen years and has been a great employee and asset to TSA. The appellant stated that he is a 60% disabled Veteran who suffers from knee pain and patellofemoral and medical compartment arthritis. The appellant stated that he only takes the medications prescribed to him and nothing else and does not take any of these medications during his work shifts. The appellant provided a list of the medications that he takes. The appellant argued that management failed to prove by preponderant evidence that he had abused opiates and codeine, and was unable to demonstrate a fitness for duty. The appellant argued that it is the burden of management to demonstrate through preponderant evidence that the appellant is unable to perform his job duties due to injuries and/or Opiates and Codeine. The appellant stated that management has provided no evidence that he had used illegal drugs and not the prescription provided by his physician. In addition, the appellant alleged that management has not provided any evidence that his condition has limited his work. He argued that he never takes the medications at work and only takes the medications when he has episodes of extreme pain. The appellant also argued that his removal does not promote the efficiency of the service and that no legitimate government interest would be furthered by removing him from federal service.

Management replied and stated that the MRO had made several attempts to contact the appellant and that the appellant was instructed to call the MRO immediately. In regards to the appellant's submission of his list of medications, management referred to the MRO manual. Management stated that the MRO manual states when a specimen is reported as positive for codeine, and the donor does not present a legitimate medical explanation for the presence of codeine (e.g., a valid prescription), the MRO verifies the results as positive. However, if the donor presents a legitimate medical explanation for the presence of codeine (e.g., a valid prescription), the MRO verifies the

result as negative. Management argued that the appellant did not provide the MRO with a valid reason for failing the drug test for opiates and codeine. Management argued that the appellant was given an opportunity to provide any and all relevant information and documentation to the MRO. As indicated on the Final Test Report, the MRO validated the drug test failure.

Both management and the appellant argued that the standard is preponderant evidence. This is incorrect. The applicable standard is substantial evidence, not preponderant evidence. The Board found that management sufficiently addressed and refuted the appellant's arguments in their response to the appeal. Management also correctly stated that penalty factors do not apply to mandatory removal. The appellant was given the opportunity to provide all of his prescriptions to be reviewed by the MRO. The list provided in the appellant's appeal does not contain any opiates or codeine. In addition, the appellant's written statement, dated December 22, 2016, states that he has a Sports Medicine Doctor that has also prescribed him pain medications. The appellant did not provide this information to the MRO and specifically stated in the appeal that he only takes the prescribed medications listed in the appeal and nothing else. TSA policy prohibits the use of illegal substances and the inappropriate use of legal substances. The appellant's arguments concerning his job performance have no merit. The MRO validated the drug test and by doing so found that there was no legitimate explanation for the presence of codeine.

The Board found that the Medical Review Officer's Final Report is substantial evidence to support the Charge. Therefore, the Charge, *Positive Drug Test*, is SUSTAINED.

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

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Supervisory Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-009

February 21, 2017

Issue: *Failure to Maintain Annual Certification Requirements*

OPINION AND DECISION

On November 10, 2016, management removed the appellant from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Annual Certification Requirements*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, management bears the burden of establishing that it followed proper TSA protocol by providing proper testing, remediation and retesting, if applicable, for the appellant, with a fair opportunity to demonstrate proficiency.

Management supported the Charge with one specification. The specification alleged that on July 25, 2016, the appellant was administered the Image Mastery Assessment (IMA) and failed to qualify and demonstrate the level of proficiency required to successfully pass the IMA. On July 27, 2016, the appellant completed the required remediation conducted by a Master Transportation Security Officer- Security Training Instructor (MTSO-STI). On August 3, 2016, the appellant was administered the second IMA. The appellant again failed to qualify and demonstrate the level of proficiency required to successfully pass the IMA. On August 14, 2016, the appellant completed the required remediation conducted by an MTSO-STI. On August 16, 2016, the appellant was administered the third IMA and again failed to qualify and demonstrate the level of proficiency required to successfully pass the IMA.

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

The TSA Fiscal Year (FY) 2016 Annual Proficiency Review (APR) User's Guidance sets forth the requirements TSOs must meet to remain certified for employment as a TSO. Section 1.2. of the Guidance provides: To maintain the standards of the annual proficiency review (screening certification) and employment with TSA, employees in the following positions must successfully complete annual recertification requirements on all applicable assessments . . . Transportation Security Officer (TSO); Lead TSO (LTSO); Supervisory TSO (STSO); Master TSO (MTSO) and Expert TSO (ETSO) – Security Training Instructors (STI); and Master TSO (MSTO) and Expert TSO (ETSO) – Behavior Detection Officers (BDO), Lead BDO (LBDO) and Supervisory BDO (SBDO). Section 4.1.B. provides that employees must successfully complete the required APR assessments related to their official position of record and job function once annually as a condition of employment with TSA. Section 6.2.E. provides that employees who fail any single scored PSE assessment two times or any other APR assessment three times are subject to removal from TSA. Appendix A, Section (1) (a) of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal of a TSO who fails to maintain certification requirements.

The appellant took the first assessment on July 25, 2016, and was then tested again on August 3, 2016. The appellant failed the second reassessment on August 16, 2016. The appellant was issued a Notice of Proposed Removal (NOPR) on September 4, 2016. The NOPR advised the appellant of his right to make an oral and/or written reply within seven (7) calendar days of his receipt of the proposal. The appellant presented an oral reply on September 14, 2016. On November 10, 2016, the appellant received the Removal Decision.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgment-IMA forms, dated July 27, 2016, and August 14, 2016; and the Online Learning Center (OLC) Report indicating test failures for July 25, 2016, August 3, 2016, and August 16, 2016.

On appeal, the appellant argued that he has a medical condition called Sarcoidosis and this condition caused him to fail the image test. The appellant argued that his condition caused uveitis of his left eye which inflames his eye causing him not to see correctly. The appellant argued that the Training Manager observed that his left eye was inflamed and that he should not have been allowed to take the test. In addition, the appellant argued that he has been with TSA for seven (7) years and with the Navy for eight (8) years and has always passed his tests in the past.

Management replied and argued that on July 25, 2016, August 3, 2016, and August 16, 2016, the appellant signed a statement attesting that he was fit for duty. Management supported their claim with the signed statements from the appellant. Management also argued that at no time did the appellant report that he was impaired and not fit for duty and unable to test due to his medical condition. Management supported their claim with emails and declarations from the MSTIs. All of

the statements indicate that the appellant made no comments or claims of any medical conditions that may affect his testing. In addition, management argued that the appellant had sufficient time between the tests to seek medical assistance for his malady if he was in distress.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the IMA on July 25, 2016, August 3, 2016, and August 16, 2016. The Board also found that on July 27, 2016, prior to his first IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form declining to participate in self-study, that he received remediation in accordance with the APR program and policy requirements, and that he was ready to take the IMA reassessment. On August 14, 2016, prior to his second IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgement-IMA form acknowledging that he chose to participate in self-study, that he received remediation in accordance with the APR program and policy requirements, and that he was ready to take the IMA reassessment. The Board found that the appellant was properly assessed in accordance with the 2016 APR User's Guidance. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is failure to maintain required certification and certification is a condition of continued employment as a TSO.

Pursuant to the 2016 APR User's Guidance, each employee who conducts screening functions must complete and pass all recertification requirements on all applicable APR assessments in order to meet the basic conditions of employment with TSA. Consequently, the Board finds that the appellant's non-disciplinary removal based on his failure to maintain his certification was appropriate and consistent with TSA policy.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Master Transportation Security Officer (BDO)
Appellant,

DOCKET NUMBER
OAB—17-011

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

February 23, 2017

Issue: *Refusal to Submit to TSA-Ordered Drug Test*

OPINION AND DECISION

On December 30, 2016, management removed the appellant from his position as a Master Transportation Security Officer (BDO) with the Transportation Security Administration (TSA) based on one Charge: *Refusal to Submit to TSA-Ordered Drug Test*. The appellant filed a timely appeal with the TSA Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Refusal to Submit to TSA-Ordered Drug Test,* on one specification alleging that on November 15, 2016, the appellant was subjected to random drug testing. The appellant was unable to provide a sufficient urine specimen. On December 30, 2016, management received notification that the Medical Review Officer (MRO) reported the appellant's refusal to test.

The Aviation and Transportation Security Act (ATSA), Public Law No. 107-71, requires screeners to have the ability to demonstrate daily a fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication or alcohol. ATSA also requires Officers to have the ability to

demonstrate daily a fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication or alcohol. Additionally, the Handbook to TSA Management Directive (MD) No. 1100.73-5, *Employees Responsibilities and Code of Conduct*, Section O. (2) (a), prohibits employees from using illegal drugs. The TSA Drug and Alcohol Policy states that individuals in Testing Designated Positions (TDPs) are subject to random drug or drug and alcohol testing which is unannounced and can occur on any workday and that refusal to submit to such testing, failing to appear for a test, refusal to provide a urine specimen or adequate breath sample, failure to cooperate with the collection process or tampering/adulterating/substituting the specimen is grounds for removal from the Federal Service.

The issue before the Board is whether the appellant was properly removed from his MTSO (BDO) position for failing to submit to TSA-ordered drug testing.

The appellant was subjected to a random drug and alcohol test on November 15, 2016. The appellant reported for testing at 1157 hours and received a Department of Homeland Security (DHS) Transportation Security Administration (TSA) form 1156A, titled *Drug and Alcohol Testing – Employee Instructions*, which the employee signed. The appellant's first attempt to provide a urine sample was at 1208 hours and the collector noted on Form OMB No. 0930-0158, *Federal Drug Testing Custody and Control Form*, "no sample." The appellant was then informed that he had up to three hours to provide a sufficient sample. At 1455 hours, the appellant again attempted to provide a urine sample. The collector again noted on Form OMB No. 0930-0158, "no sample." At 1509 hours, the appellant attempted to provide a urine sample for the third and final time since the three hours to provide a sufficient sample had expired. The collector noted on Form OMB No. 0930-0158, "no sample provided." The test result of the appellant's drug test was recorded as "None Provided."

On November 23, 2016, as a result of the appellant's test result reported as "None Provided," the appellant received written instructions from a Transportation Security Manager (TSM) to obtain an evaluation by a certified urologist to determine whether there was a medical basis for his inability to provide a sufficient urine sample during the random testing on November 15, 2016. On November 28, 2016, the appellant informed the TSM that he had scheduled a medical appointment for November 29, 2016, with a urologist. The appellant's medical results were sent directly to the MRO. Based on the results of the appellant's medical examination, the MRO reviewed the documentation and issued a letter to TSA, dated December 8, 2016, deeming the appellant's status a "Refusal to Test." The MRO noted in the letter that a refusal to test is handled the same as a verified positive.

On December 30, 2016, TSA management was notified by the Drug and Alcohol-Free Workplace Program (DAFWP) that the MRO reported a refusal to test result for the appellant. The refusal to test was based on the appellant's medical evaluation; which determined there was no adequate medical basis for the appellant's failure to provide a sufficient urine sample.

On December 30, 2016, the Assistant Federal Security Director (AFSD) held a pre-decisional discussion with the appellant. The appellant replied in writing on December 30, 2016.

Management provided as evidence: TSA Form 1156A – Drug and Alcohol Testing – Employee Instructions, signed by the appellant on November 15, 2016; Summary of Pre-Decision Discussion, dated December 30, 2016; Appellant's written Response to the Pre-Decisional Discussion, dated

December 30, 2016; Federal Drug Testing Custody and Control Form, signed by the appellant and collector on November 15, 2016; letter to the appellant from the TSM, dated November 23, 2016; email correspondence from the DAFWP Manager to management, dated December 30, 2016; and University Services, Toxicology Services Group letter from the MRO, dated December 8, 2016.

In his appeal, the appellant argued that his alleged misconduct is not supported by a preponderance of the evidence. He argued that management did not prove that he willfully refused to submit to drug testing. The appellant argued that he fully cooperated with the entire drug screening process. He stated that he willingly participated in the random drug screening on November 15, 2016; drank the amount of water that he was allowed; and even offered to provide a blood, hair or saliva sample. The appellant also argued that he was willing to stay in the testing location until he was able to provide a sufficient sample. The appellant argued that he complied with the procedural requirements for visiting a physician and that his physician found that he had a shy bladder with frequent voids. The appellant stated that his physician also stated that he has had a shy bladder since childhood. The appellant argued that management was thus provided with a valid medical explanation as to his failure to provide a sufficient urine sample. He argued that the MRO refused to accept the diagnosis and provided no reason for the decision. The appellant argued that if management is terminating him for allegedly failing to provide a valid medical explanation, management must provide actual evidence for why it deemed his medical evaluation inadequate.

The appellant also argued that his drug test was not handled appropriately. He argued that on at least one occasion, the chain of custody was not documented properly. The appellant cited DOT Order 3910.1 D, Chapter IV – Specimen Collection, Section 11 (b) (2) and (3), which states that if the collector fails to print and/or sign his or her name in Step 4 of the form the specimen will be rejected by the laboratory and that if the collector fails to sign his or her name in Step 4 and fails to submit a memorandum for the record within five business days, the laboratory will reject the specimen for testing. The appellant argued that the collector failed to sign his name on the Federal Drug Testing Custody and Control Form and failed to submit a memorandum for the record within five business days and that therefore, the test must be canceled.

Additionally, the appellant argued that management did not prove that removal is a reasonable penalty and that mitigating factors establish that his removal is overly harsh and unwarranted.

Management responded and argued that the Agency is statutorily required to ensure that all employees meet the qualifications for their position, as required by ATSA. Management argued that the MRO reported there was no adequate medical basis for determining a medical condition interfered with the collection of the appellant's urine sample and that they implemented what the qualified medical professional determined and what ATSA required. Management argued that they have proven the charge by preponderant evidence that the appellant failed to provide a urine sample, resulting in a drug test status of refusal to test – shy bladder evaluation without adequate medical basis. Management argued that a refusal to test is handled the same as a verified positive; therefore, requiring the appellant's removal from Federal service.

With regard to the appellant's contention that the drug test was handled inappropriately, management argued that since the appellant did not provide a specimen within three hours from the time of his first attempt, the appellant's result was considered a shy bladder. Management argued that because there was no specimen collected, the collector is not required to sign Step 4, which states "I certify that the specimen given to me by the donor identified in the certification section of

Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements." Management argued that it is standard procedure for shy bladder that the collector does not sign certifying they received a specimen when no specimen was provided.

With regard to the appellant's argument that his removal is unreasonable because management failed to properly apply the mitigating factors, management argued that per the Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, the penalty factors do not apply to mandatory removals; including a validated failure of a drug test.

Management argued that the result of the appellant's drug test was a Refusal to Test, which is handled the same as a validated positive. Management argued that the appellant was given an opportunity to provide any and all information and documentation to the MRO and as indicated on the Controlled Substance Test Report, the MRO validated the appellant's drug test failure on December 8, 2016. Management stated that the appellant's distinguished career at TSA was never in question and that his removal is consistent with TSA policy as the rules are clear that a validated drug test failure requires removal.

The Board considered the evidence and arguments submitted by the appellant and management. The record shows that the appellant was subjected to a random drug test on November 15, 2016, but failed to provide a sufficient amount of urine within the allowable timeframe. The appellant does not dispute that he was unable to provide a sufficient amount of urine but argued that he has a shy bladder and was unable to produce a specimen. The appellant complied with management's orders to undergo a shy bladder evaluation. Based on the appellant's medical evaluation, the MRO determined that there is no valid medical explanation for the appellant's failure to provide an adequate specimen and that his failure to provide an adequate specimen will be considered a refusal to test. It is clear from the email chain that the MRO reviewed the shy bladder evaluation information provided by the appellant's physician. The Board finds that management has proven by substantial evidence that the appellant failed to provide viable urine samples without adequate medical basis which resulted in a "Refusal to Test" determination by the MRO. The MRO indicated by letter dated December 8, 2016, that a refusal to test is handled the same as a verified positive. Therefore, the Board SUSTAINS the charge of *Refusal to Submit to TSA-Ordered Drug Test*.

Section C.3 of the TSA *Table of Offenses and Penalties* states that removal is required for the offense of refusal or failure to submit to a TSA-ordered drug test. Additionally, Appendix A.1 (d) of the Handbook to TSA Management Directive1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal for certain TSO offenses, including refusal to test. Therefore, the Board determined that management's decision to remove the appellant was reasonable and consistent with TSA policy.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—17-013

February 23, 2017

Issue: *Jurisdiction*

OPINION AND DECISION

The appellant petitions for review of the respondent's decision to remove her based on the Charge: *Not Medically Qualified for the TSO Position*. For the reasons stated below, the appeal is DISMISSED.

BACKGROUND

On January 26, 2017, the appellant submitted an appeal form to the TSA Office of Professional Responsibility Appellate Board (Board). The appellant is seeking to have management's decision rescinded, or in the alternative to remain on leave without pay status, as granted by the decision, until either OPM has ruled on her disability retirement application or until management has had an opportunity to reevaluate her after she has had surgery.

ANALYSIS AND FINDINGS

The Board has jurisdiction to review certain disciplinary actions involving TSOs.[1] Actions covered include suspensions of more than fourteen (14) days, indefinite suspensions, involuntary demotions for performance/conduct, furloughs of any length, and removals. Management replaced the removal letter dated December 22, 2016, with a letter dated February 23, 2017. The February 23, 2017, letter makes clear that the appellant's removal action is being held in abeyance while her disability application is processed or until her approved six months of Leave Without Pay is completed on June 22, 2017.

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

Conclusion. The Board lacks authority to decide the appellant's appeal because the appellant has not been removed from Federal service.

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—17-021

February 21, 2017

Issue: *Jurisdiction (Untimely)*

OPINION AND DECISION

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

BACKGROUND

On January 6, 2017, management terminated the appellant based on the Charge, *Failure to Follow Proper Screening Procedures*. On February 20, 2017, the appellant appealed her termination to the TSA Office of Professional Responsibility Appellate Board (Board).

ANALYSIS AND FINDINGS

The Handbook to TSA Management Directive 1100.77-1, *OPR Appellate Board*, states that appeals must be filed no later than 30 days after the action is effected. It goes on to state that failure to file within 30 days, without a demonstration of good cause, will result in dismissal of the appeal as untimely. The appellant was notified of management's actions on January 6, 2017, and did not file an appeal with the Board until February 20, 2017. The appellant stated that she filed an appeal with the Board on January 23, 2017. However, the appeal was not sent to the Board but sent to TSAhelpdesk@afge.org. The appellant received clear directions in her removal letter on how to file an appeal with the Board and failed to follow the directions.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Master Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—16-196

February 8, 2017

***Issue**: Failure to Follow Directions and Lack of Candor*

DECISION ON RECONSIDERATION

On December 7, 2016, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On December 16, 2016, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. Management responded on December 19, 2016, arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Deputy Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—16-217

February 9, 2017

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

DECISION ON RECONSIDERATION

On December 21, 2016, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's thirty (30) calendar day suspension. On January 4, 2016, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On January 9, 2017, management filed a response arguing that the request for reconsideration should be denied. After considering the underlying record, the request for reconsideration and the opposition to the request, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Deputy Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—16-224

February 24, 2017

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

DECISION ON RECONSIDERATION

On January 23, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision GRANTING the appellant's appeal, in part, and MITIGATING the appellant's removal to a five (5) calendar day suspension. On February 6, 2017, management filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Deborah Kearse

Deborah Kearse
Acting Deputy Assistant Administrator
Office of Professional Responsibility

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—16-230

February 14, 2017

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

DECISION ON RECONSIDERATION

On January 12, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On January 17, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On January 25, 2017, management filed a response arguing that the request for reconsideration should be denied. After considering the underlying record, the request for reconsideration and the opposition to the request, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Deputy Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—16-234

February 1, 2017

Issue: *Failure to Maintain Certification*

OPINION AND DECISION

On November 28, 2016, management removed the appellant from his position of Transportation Security Officer (TSO), with the Transportation Security Administration (TSA) based on one Charge: *Failure to Maintain Certification*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, management bears the burden of establishing that it followed proper TSA protocol in remediating and testing the appellant and provided him with a fair opportunity to demonstrate proficiency.

Management supported the Charge with one specification. The specification alleged that on October 1, 2016, the appellant failed the first scored assessment and failed to meet the standard for re-certification on the Physical Bag Search – Checkpoints (PBSPAX). On October 5, 2016, the appellant was provided the requisite remediation and opportunity to reassess. On October 8, 2016, the appellant failed to meet the standards for technical proficiency for the PBSPAX after his second scored assessment.

The evidence shows that the appellant successfully completed the required Online Learning Center (OLC) Physical Bag Search Standard Operating Procedures Refresher Training on February 13,

2016, in accordance with Section 4.7. C. of the 2016 APR User's Guidance. On October 1, 2016, the appellant participated in a practice observation and passed. On October 1, 2016, the appellant took his first PBSPAX Practical Skills Evaluation (PSE) assessment and was unsuccessful in passing the first assessment. On October 5, 2016, the appellant was provided with one (1) hour of remediation and signed TSA Form 1176-7, *APR Technical Proficiency Assessment Remediation Acknowledgment-PSE*, acknowledging that he had been provided with the required remediation and training, and was ready to take the applicable PSE reassessment. The appellant also accepted the opportunity for self-study. On October 8, 2016, the appellant took his second PBSPAX PSE assessment and was unsuccessful in passing the second assessment.

The appellant was issued a Notice of Proposed Removal (NOPR) on October 14, 2016. The notice advised the appellant of his right to submit an oral and/or written reply within seven calendar days of receiving the proposal. The appellant submitted a written response in which he argued that the bag was searched properly. The Deciding Official did an investigation based on the appellant's response to the NOPR and collected statements from both of the Standards and Evaluation Assessors (SEAs) and the appellant's Supervisory Transportation Security Officer (STSO) and provided the statements to the appellant.

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

The TSA 2016 APR User's Guidance sets forth the requirements TSOs must meet to remain certified for employment as a TSO. Section 1.2 of the Guidance provides: To maintain the standards of the annual proficiency review (screening certification) and employment with TSA, employees in the following positions must successfully complete annual recertification requirements on all applicable assessments . . . Transportation Security Officer (TSO); Lead TSO (LTSO); Supervisory TSO (STSO); Master TSO (MTSO) and Expert TSO (ETSO) – Security Training Instructors (STI); and Master TSO (MSTO) and Expert TSO (ETSO) – Behavior Detection Officers (BDO), Lead BDO (LBDO) and Supervisory BDO (SBDO). Section 4.1.B. provides that employees must successfully complete the required APR assessments related to their official position of record and job function once annually as a condition of employment with TSA. Section 6.2. J. states that employees who do not pass any of the PSE assessments within two attempts or any other APR assessment within three attempts are subject to removal from TSA. FSDs are not permitted to convert the employee to single function or to any other function and are not permitted to retain the employee for any reason. Appendix A, Section (1) (a) of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal of a TSO who fails to maintain certification requirements.

Management provided as evidence: Online Learning Center (OLC) Learning History; APR 2016 PBSPAX Practice Observation, dated October 1, 2016; APR 2016 PBSPAX First Scored Assessment, dated October 1, 2016; Accessible Property Physical Search 1st Scored Assessment report; Accessible Property Physical Search 2nd Scored Assessment report; APR Technical Proficiency Assessment Remediation Acknowledgment-PSE, dated October 5, 2016; a

Memorandum from a Quality Standards and Evaluation Assessor (QSEA), dated October 26, 2016; a Memorandum from a Standards and Evaluation Assessor (SEA), dated November 15, 2016; a Memorandum from a Supervisory Transportation Security Officer (STSO), undated; an email from an STSO, dated November 16, 2016; and email correspondence from the appellant, dated November 17, 2016, November 3, 2016, and October 14, 2016.

On appeal, the appellant argued that the information provided by management does not show that he failed to inspect the interior pocket of the bag. He argued that it is unclear exactly how he failed the test. The appellant noted that the scoring sheet for his second scored assessment stated that he failed to screen the interior lid pocket. He also noted that in the QSEA's statement, she acknowledged that he inspected the bottom of the pocket and argued that if he failed because he did not run the pocket between two hands; that there is no requirement to do so. He argued that because the QSEA stated that he inspected the "bottom" of the interior lid pocket, it is not clear why he still failed the test.

Management responded and argued that a preponderance of evidence supports the Charge. Management argued that the record shows that the appellant failed the PBSPAX two times. Management argued that the reason for the appellant's test failure is clear. Management stated that the appellant believes he was told by the testers that he failed the second test because he failed to use both hands on a fabric pocket. Management stated that additional input was solicited from the testers about the reason the appellant was given for his testing failure and that both testers confirmed that he was informed he failed because he did not search the top portion of the interior lid pocket. Management argued that on November 3, 2016, the appellant was given the opportunity to review the SEA's statement and that again the appellant stated that he had no idea what the testers were referring to. Management stated that they then conferred with the second SEA and the supervisor who acknowledged a conversation with the appellant after completing the assessment. Management argued that the supervisor stated that when he asked the appellant what happened, the appellant stated that the testers said he did not properly clear the side pocket in the bag. The supervisor said that the appellant stated that he opened and looked in the pocket and patted it down from the outside of the bag to the inside of the bag but on the outside of the pocket and that his hand was not in the pocket when he did it. The STSO stated that he asked the appellant why he did not put his hand in the pocket as required and that the appellant replied that nothing could have been in there and that if there was, he would have found it the way he screened it. The STSO stated that the appellant also said, "I guess I'm done now." Management argued that the statements of the two SEAs, along with the statement provided by the STSO who had a conversation with the appellant shortly after the failure, are consistent. Management argued that the testing documentation demonstrates that the appellant failed to physically search the top portion of the interior pocket.

The appellant replied to management's reply and reiterated his argument that the evidence provided by management does not support that he failed his second assessment. He argued that his testing paperwork conflicts with the QSEA's account of the testing failure.

The Board found that the preponderance of the evidence establishes that the appellant participated in a practice observation on October 1, 2016, and passed. The Board found that the appellant participated in and failed the PBSPAX PSE assessment on October 1, 2016 and October 8, 2016. The evidence establishes that the appellant signed the remediation form affirming that he had received remediation, was ready to reassess, and accepted the opportunity for self-study. The evidence also establishes that the appellant was reassessed within the timeframe defined in the

guidelines of the 2016 Annual Proficiency Review User's Guidance and received the required one hour of remediation. Additionally, the Board found that the statements of the SEAs and the STSO are consistent and provide preponderant evidence that the appellant failed to meet certification requirements. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is a failure to maintain required certification and certification is a condition of continued employment as a TSO.

Pursuant to the 2016 Annual Proficiency Review User's Guidance, each employee who conducts screening functions must complete and pass all recertification requirements on all applicable APR assessments in order to meet the basic conditions of employment with TSA. Consequently, the Board finds that the appellant's non-disciplinary removal based on his failure to maintain his certification was appropriate and consistent with TSA policy.

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—16-235

February 7, 2017

Issue: *Jurisdiction*

OPINION AND DECISION

On or about November 30, 2016, the appellant was removed from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). On or about January 3, 2017, the appellant appealed his removal to the TSA Office of Professional Responsibility Appellate Board (Board). On February 3, 2017, management rescinded the removal action.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-001

February 9, 2017

Issue: *Not Medically Qualified for the TSO Position*

OPINION AND DECISION

On December 8, 2016, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one non-disciplinary Charge, *Not Medically Qualified for the TSO Position.* The appellant filed a timely appeal of her removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Not Medically Qualified for the TSO Position,* on one specification. The specification alleged that by the Office of Chief Medical Officer (OCMO) letter, dated September 7, 2016, the Medical Review Officer (MRO), reviewed the appellant's medical information and determined that she did not meet the medical guideline requirements for the TSO position.

In a letter dated September 7, 2016, the MRO described the relevant facts of the appellant's serious health condition, in part, that she was being treated for depression, asthma, eczema, GERD, acne and sleep apnea. The MRO cited a letter from the appellant's physician, dated December 18, 2015, who noted a history of depression, anxiety, agoraphobia, and panic attacks. The MRO further cited a letter dated August 30, 2016, from the appellant's physician, in which the appellant's physician opined that the appellant has "not reached the DSM-5 criteria for full

remission for her depression" and that her "panic attacks have not yet been successful [*sic*] treated." The appellant's physician diagnosed the appellant with depression and anxiety with agoraphobic features, which have impeded her ability to get to work in a timely manner. The MRO determined that as a result, the appellant does not meet the *Medical and Psychological Guidelines for Transportation Security Administration Transportation Security Officer Job Series* (January 22, 2016) because she does not meet the DSM-5 criteria for full remission for depression because her panic disorder (i.e., panic attacks) has not been successfully treated.

TSA Transportation Security Officers are required to meet the physical/medical standards established by TSA pursuant to the Aviation and Transportation Security Act (ATSA) for the TSO position. 49 U.S.C. § 4935(f). The *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), (b)(2)

The *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), (b)(2)

The MRO considered the following documentation in his September 7, 2016, fitness for duty determination: the *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), Anxiety Disorder, page 14; the *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), Depressive disorder, page 15; letter from the appellant's physician, dated August 30, 2016; memo from the appellant, dated April 25, 2016; notes from the appellant's physician, dated April 22, 2016; and Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), (Form WH-380-E), dated December 18, 2015.

The Board considered all of the evidence presented including: the OCMO Fitness for Duty Determination letter, dated September 7, 2016; and the *Medical and Psychological Guidelines for Transportation Security Officers*, dated January 22, 2016 (pgs. 14 and 15).

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 she may be eligible for a reassignment. The appellant submitted a Job Search Questionnaire to TSA on September 9, 2016. On November 21, 2016, the appellant received a response from the TSO Job Search Program stating that her TSA and DHS job search was completed and no job matches were found where it was determined that she met the minimum qualifications for a vacant funded position, and that the job search process was complete.

On appeal, the appellant argued that she has worked for TSA since September 25, 2011, and has performed her required duties in a better than simply satisfactory fashion. The appellant argued that her attendance performance was developed and exacerbated by her job. In addition, the appellant argued that her physician's statement clearly indicates that the therapies that she is employing to address her condition have not been given any time to improve her issues to the level required by the agency.

Management argued that the MRO's review of the appellant's medical condition determined that the appellant did not meet the medical/psychological guidelines required of security screening personnel. In response to the appellant's arguments on appeal, management noted that the appellant's record as an Officer is not in any way associated with the reason for her removal from federal service. Management stated that the appellant's work performance played no part in the decision to remove her from federal service and that her claims involving FMLA or OWCP had nothing to do with the OCMO's determination that she was medically unqualified to perform her duties as a TSO. In addition, management argued that the OCMO clearly determined that the appellant was not medically qualified to continue as a TSO and that any issues she or her physicians believed to be of sufficient weight to overturn the OCMO determination would have presumably been provided in support of the appellant. Finally, management argued that the appellant was provided every aspect of her due process rights to provide appropriate counter-arguments and to independently reach out to the OCMO.

The Board found the OCMO determination, dated September 7, 2016, shows that the appellant failed to meet the Anxiety disorder and Depressive disorder guidelines, *Medical and Psychological Guidelines for Transportation Security Officers,* dated January 22, 2016. After reviewing the appellant's medical documentation, as noted in the OCMO Fitness for Duty Determination, dated September 7, 2016, the MRO described the relevant facts of the appellant's serious health condition, in part, that the appellant is being treated for depression, asthma, eczema, GERD, acne, and sleep apnea. The MRO stated that the appellant's health care provider wrote that the appellant has a history of depression, anxiety, agoraphobia, and panic attacks and has "not reached the DSM-5 criteria for full remission for her depression" and that her "panic attacks have not yet been successfully treated." The Board found that preponderant evidence supports management's

conclusion that the appellant does not meet the medical guidelines and is disqualified from the TSO position, according to the applicable TSA medical guidelines.

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

DOCKET NUMBER
OAB—17-003

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

February13, 2017

Issue: *Misuse of Position; Lack of Candor;*

OPINION AND DECISION

On December 13, 2016, management demoted the appellant from her position as a Lead Transportation Security Officer (LTSO) to a Transportation Security Officer (TSO) based on two Charges: *Misuse of Position* and *Lack of Candor.* 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 Charge 1, *Misuse of Position*, on 1 specification alleging that on Monday, September 12, 2016, while assigned as the Lead Officer in the checked baggage area, the appellant left the airport grounds for 57 minutes from 0724 until 0821. Knowing there was no supervisor on duty, the appellant took advantage of and misused her position as an LTSO and left the baggage screening area and airport property without notification or approval of a supervisor or management official.

Management based Charge 2, *Lack of Candor*, on one specification alleging that in the appellant's written response on September 12, 2016, she falsely stated, "*while on lunch I left the airport property. At about 0726 I left CBRA-A, and returned at about 0820 this would have been my normal lunch and break time. So I figured it would not be that bad we weren't busy. I took*

my foster child to school. I did not realize at the time we did not have a supervisor, or we could not leave."

Management stated that the appellant's conduct is a direct violation of TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states in part, "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: (6) Conserving, protecting and ensuring appropriate use of federal resources, time, information and personnel (both Federal and contract) and (11) upholding, with integrity, the public trust involved in the position to which assigned, abiding by the 14 general principles of ethical conduct and avoiding the appearance of using public office for private gain. Section 6. D. states that employees shall not use their office of position for their personal advantage or the advantage of others. In addition, management alleged that the appellant violated Section F of the Handbook to MD 1100.73-5, which requires employees to cooperate fully with all TSA and DHS investigations and inquiries to include providing truthful, accurate, and complete information.

On September 12, 2016, the appellant, an LTSO, was assigned to the checked baggage area. At approximately 0726, the appellant told a TSO she was taking her lunch break. The appellant left the airport and did not return until approximately 0820.

The appellant submitted a statement on September 14, 2016, stating that on September 12, 2016, while on lunch, she left the airport property. She stated that she left at about 0726 and returned at about 0820. The appellant stated that this would have been her normal lunch and break time.

An LTSO submitted a statement on September 15, 2016. In her statement, the LTSO stated that on September 12, 2016, at approximately 0350 she was coming in to work overtime. She stated that when she entered the baggage area she noticed the appellant seated at the supervisor's desk. The LTSO stated that the appellant informed her that she had not seen a baggage supervisor. The LTSO stated that as the appellant was talking, a Transportation Security Manager (TSM) entered the room and asked the LTSO and the appellant about staffing and if they were good with running baggage. The LTSO stated that the appellant said "[the LTSO] it's all you; I don't want to be responsible." The LTSO stated that she informed both the appellant and the TSM that she was on overtime and only scheduled until 0800. The LTSO stated that she then told another LTSO that he would be in charge of baggage for the day.

A TSO submitted a statement on September 14, 2016. In his statement, the TSO stated that he was working in the CBRA on September 12, 2016, and that he was working with the appellant and two TSOs. The TSO stated, "I'm not sure what time [the appellant] left to go to lunch or what time she returned because I was busy between doing my annual 3 bag PSE test and checking bags." The TSO stated that he tried a few times to get help sent over to help keep up and get the lines cleared and that help came at 1100. The TSO stated that another TSO asked where the appellant was at one point because she was supposed to relieve her from the monitors so that she could go to lunch. The TSO stated, "I'm not sure what else to put down other than this is not the first time for [the appellant] to take an extended lunch."

A TSO submitted a statement on September 16, 2016. In his statement, the TSO stated that on September 12, in the baggage room, at approximately 0515, the appellant stated that she was

going on her first break and then at approximately 0726 the appellant stated that she was going on her lunch break. The TSO stated that during the lunch break the room had a steady pace of bags and that there was Practical Skills Evaluation (PSE) testing scheduled to start.

Another TSO submitted a statement on September 16, 2016. In her statement, the TSO stated that she was working in baggage on September 12, 2016, and that the lead on duty on the side that she was working on was the appellant. The TSO stated that at around 0515 the appellant announced she was going on break and that the appellant returned sometime around 0535. The TSO stated that at 0700 the baggage area was getting increasingly busy and that after about 20 minutes, "I noticed [the appellant] left the room, presumably to take her lunch break." The TSO stated that after "quite some time," the other officers working noticed the appellant's absence and remarked that the appellant had been gone for a long time. The TSO stated "as far as I recall, there was not much communication from [the appellant] about where she was going or for how long, except that she was going on lunch." The TSO concluded her statement stating that her shift ended at 0800 and that she was not present for any further activity.

The appellant was issued a Notice of Proposed Demotion (NOPD) on November 3, 2016. The written notice advised the appellant of her right to make an oral and/or written reply. On November 16, 2016, the appellant provided a written statement.

Management provided as evidence to support the Charge: a statement from a TSO, dated September 16, 2016; a statement from a TSO, dated September 16, 2016; a statement from a TSO, dated September 14, 2016; a statement from an LTSO, dated September 15, 2016; a statement from the appellant, dated September 14, 2016; and Closed Circuit Television (CCTV) footage from September 12, 2016.

On appeal, the appellant argued she was denied her due process rights and that management did not prove the charges by a preponderance of the evidence. She argued that management failed to provide the video footage from Monday, September 12, 2016. The appellant also stated that her representative asked management for copies of her Transportation Officer Performance System (TOPS) scores and was told the documents would be emailed to the appellant but argued that she never received the email. The appellant argued that without the ability to access the actual image that was used as evidence, she was denied the opportunity to refute the statement used against her and that as a result, she was denied her due process rights. The appellant further argued that management attempted to prove the charges by not providing any evidence to her. She argued that it is not stated who viewed the CCTV but that it is duly noted that management did not provide the CCTV footage to review the times stated in the charge. The appellant argued that without presenting the evidence, management failed to prove by preponderant evidence that she is in violation of the charges against her.

In regard to the Misuse of Position charge, management argued that employees are responsible for conserving, protecting and ensuring appropriate use of Federal resources, time, information, and personnel per TSA MD 1100.73-5, Section 5. D. (6). Management argued that the appellant acknowledged in her September 14, 2016, statement that she departed from her work station at 0726 and returned at 0820. Management also argued that witness testimony, backed by CCTV confirmation, supported that timeline and revealed that the appellant was also absent from her work station for periods from 0513 – 0538 and 1018 – 1049. Management argued that in total,

the appellant removed herself from her work station for 112 minutes wherein under normal circumstances, employees are allotted a total of 60 minutes of combined paid break time of 30 minutes and unpaid lunch of 30 minutes. Management argued that there is no assertion or even suggestion that the appellant sought any approval for the additional 52 minutes of leave for which she was paid. Management argued that the appellant took advantage of the lack of supervisory oversight and her position as an LTSO to abandon her post for an extended period of time without approval.

With regard to the video, management argued that the airport, like many TSA locations, makes the video relied upon for disciplinary cases available for review. Management argued that neither the appellant nor her representative ever asked to review the video, nor did they request a personal hardcopy. Management argued that the appellant did not dispute the facts of the case and that she only argued that she should not have been disciplined for abandoning her security post without permission.

In regard to the Lack of Candor charge, management argued that the appellant falsely stated on the record that she "did not realize at the time we did not have a supervisor, or we could not leave." Management argued that testimony provided by another LTSO contends that she, the appellant, and a TSM met at approximately 0350 to discuss the fact that no supervisor would be assigned to checked baggage during the shift and to identify an LTSO stand-in. Management argued that it is entirely implausible to believe that the appellant was unaware of the supervisory situation throughout the course of her shift. Management also argued that they knew the appellant could not have reasonably believed it to be permissible for her to take off from work in such a manner. Management argued that on September 8, 2016, just days prior to the incident, the appellant encountered the exact same set of circumstances and followed proper procedures. Management stated that on that date a supervisor was assigned to checked baggage and the appellant properly requested and was granted and charged leave to attend to her personal situation. Management argued that the appellant's failure to provide truthful, accurate and complete information in her statements relating to the September 12 incident was clearly intended to mislead management and help her avoid the repercussions of her actions. Management argued that the operational impact of the appellant's unauthorized absence was that her coworkers were left to accomplish her share of the work without any information as to how long she would be gone or if she would be readily available for recall when needed. Management argued that more importantly, there was a deleterious impact to the morale, trust and confidence of the line officers who relied on their chain of command to provide alarm resolution, assistance and direction, and modeling of appropriate conduct.

With regard to Charge 1, the appellant admitted that she was gone for the timeframe in question. The Board found that although management would have been able to prove a Charge of *Absent without Leave (AWOL)*, management chose to charge *Misuse of Position*. Therefore, management must prove that the reason the appellant was able to take additional time was because she was an LTSO. Management failed to cite any TSA policy that prohibits an employee from leaving airport property during their lunch break. Additionally, management failed to cite any TSA policy that requires that a supervisor be present in the situation described by management in this case. The Board found that management failed to prove that the fact that the appellant took an extended lunch break was related to her position as an LTSO or that her ability to do so was tied to her position as an LTSO. Statements from two TSOs working in the CBRA with the appellant on the date in question acknowledged that the appellant stated that she was going to lunch. A third TSO present in the

CBRA with the appellant that morning wrote in his statement that it was not the first time the appellant took an extended lunch. Additionally, in the statement from an LTSO, she stated that a male LTSO would be in charge of baggage for the day. Management noted in the Decision letter that extended meal breaks are permitted with preapproval from management. There is no distinction between TSOs and LTSOs noted with regard to who must seek preapproval from management or who is delegated as management in the absence of an STSO. While it was clear from the appellant's statement and the CCTV footage that the appellant was gone for approximately 57 minutes, there is no evidence that her extended absence was related to or the result of her position as an LTSO. The Board found that management was unable to prove by preponderant evidence that the appellant misused her position. Therefore, Charge 1, *Misuse of Position*, is NOT SUSTAINED.

With regard to Charge 2, the Board found that the specification directly quoted the appellant's statement but failed to specify why the statement was false. The appellant admitted to leaving at 0726 and returning at 0820. Although the appellant indicated that this would have been her lunch and break time, management failed to provide policy to show what the normal lunch and normal break times would have been. Short of providing the policy, the fact that she was missing during additional times in the morning does not make her statement false. In addition, the statement of the LTSO clearly stated that the TSM told the appellant that the male LTSO would be in charge of baggage for the day; in essence having the LTSO act as an STSO in the baggage area. Thus, the appellant's statement that she did not realize that they did not have a supervisor was not inaccurate. The Board did not find that the appellant knowingly made a statement that was less than candid. The statement provided by the appellant did not deliberately convey a misleading impression. Therefore, Charge 2, *Lack of Candor*, is NOT SUSTAINED.

Decision. Accordingly, the appeal is GRANTED. The appellant is ordered reinstated to her position as a Lead Transportation Security Officer. Further, the appellant will receive back pay from the date of her demotion 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

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government, ou=Department of Homeland Security, ou=TSA, ou=People, cn=DEBRA S ENGEL, 0.9.2342.19200300.100.1.1=0876087875.TSA
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Transportation Security Administration

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OPR Appellate Board