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—17-007

April 6, 2017

***Issue**: Lack of Candor*

DECISION ON RECONSIDERATION

On February 23, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On March 10, 2017, the appellant 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, 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:

Deborah Kearse

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—17-008

April 3, 2017

***Issue**: Positive Drug Test*

DECISION ON RECONSIDERATION

On February 17, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On March 2, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On March 8, 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—17-015

April 27, 2017

***Issue**: Timeliness*

DECISION ON RECONSIDERATION

On March 8, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On April 25, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* The appellant argued that he sent an email request for a reconsideration on April 7, 2017. This email was sent to an incorrect email address. The email was sent to OPRAB@dhs.gov. The Handbook to MD 1100.77-1 clearly states the email address as OPRAB.AB@tsa.dhs.gov. The Handbook to MD 1100.77-1 states that a request for reconsideration must be filed with the Board within 14 days of receipt of the decision. The appellant received his decision on March 8, 2017. The appellant failed to file his appeal within 14 days. Accordingly, the request for reconsideration is DENIED.

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—17-016

April 11, 2017

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

DECISION ON RECONSIDERATION

On March 9, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On March 21, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On March 28, 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—17-017

April 13, 2017

***Issue**: Unauthorized Possession*

DECISION ON RECONSIDERATION

On March 13, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On March 27, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On March 31, 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—17-020

April 14, 2017

***Issue**: Positive Alcohol Test While on Duty*

DECISION ON RECONSIDERATION

On March 22, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On March 29, 2017, the appellant 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:

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—17-025

April 28, 2017

***Issue**: Intentional Failure to Follow Standard Operating Procedures; Neglect of Duty*

DECISION ON RECONSIDERATION

On March 23, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On April 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:

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—17-027

April 18, 2017

***Issue**: Jurisdiction*

DECISION ON RECONSIDERATION

On March 9, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision denying the appellant's request for an appeal. On March 16, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On March 23, 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 supports that the Board did not have jurisdiction to accept the appeal as the appellant had not been placed on an indefinite suspension and was not removed from Federal service. Therefore, there was no constructive indefinite suspension. 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—17-029

April 5, 2017

Issue: *Medically Unqualified for the TSO Position*

OPINION AND DECISION

On January 19, 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, *Medically Unqualified 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.

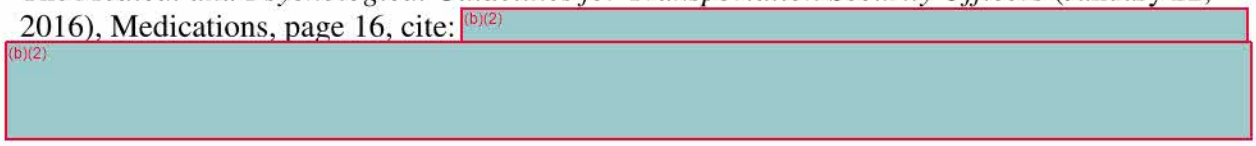
Management based the Charge, *Medically Unqualified for the TSO Position,* on one specification. The specification alleged that by the Office of Chief Medical Officer (OCMO) letter, dated October 7, 2016, the Medical Review Officer (MRO), reviewed the appellant's medical information and determined that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

In a letter dated October 7, 2016, the MRO described the relevant facts of the appellant's serious health condition, in part, that she was being treated for bipolar I disorder by a medical provider who wrote on October 5, 2016, that the appellant has a history of bipolar I disorder. In another document, dated September 27, 2016, the medical provider wrote that the appellant has a history of depression, substance abuse, and personality disorder. On the same date, the medical provider wrote that the appellant does not demonstrate appropriate judgment and attention, that she is

prescribed the sedating medication Vistaril and that she is "somewhat" compliant with her recommended treatment. The medical provider also wrote on September 27, 2016, that the appellant had impaired judgement, impaired impulse control, impaired concentration and impaired attention. Judgment, concentration and attention were also reported as impaired by the appellant's medical provider on August 4, 2016, July 20, 2016, July 11, 2016, and June 27, 2016. In accordance with the *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), the appellant is medically disqualified because she has been diagnosed with bipolar I disorder and because she is prescribed sedating medication.

The *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), page 14, cite: (b)(2)

The *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), Medications, page 16, cite: (b)(2)



The appellant was sent a Notice of Proposed Removal (NOPR) via Certified Mail on October 18, 2016. The NOPR informed the appellant of her right to reply orally and/or in writing and furnish evidence to support her reply within seven calendar days after the date of receipt of the proposal. The appellant submitted a written reply on November 2, 2016. In her reply to the NOPR, the appellant stated that she is being treated for bipolar I disorder and that her medical provider wrote that she has a history of depression, substance abuse and personality disorder. The appellant stated that she does deal with the issues daily but that she is being treated and it is now under control. The appellant stated that as far as the substance abuse; she has been clean and sober for 26 years. The appellant stated that she is prescribed the sedating medication Vistaril but that she is no longer on the medication and that her medical provider would verify that if needed. The appellant stated that her medical problem is a chronic illness that is classified as a

lifetime condition and that she was hired by TSA with the condition which is controlled by her medication.

The Board considered all of the evidence presented including: the OCMO Fitness for Duty Determination letter, dated October 7, 2016; and the *Medical and Psychological Guidelines for Transportation Security Officers*, dated January 22, 2016 (pgs. 14 and 16).

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 November 2, 2016. On December 29, 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 in addition to personal and unforeseen emergency issues at home, she had several medication changes and adjustments to her medication therapy which explains her medical provider's assessment during the time he wrote the June 27, July 20, August 4, September 27, and October 5, 2016, medical reports. The appellant stated that she received the Decision Notice on January 19, 2017, and that she was not able to respond because her union representative was out of town and she was not able to find representation to help her with her case. The appellant stated that she did not receive further guidance as to her next course of action and that she was scheduling appointments with her medical provider to update her fitness for duty status. The appellant stated that on February 9, 2017, her medical provider provided her with an updated Fitness for Duty Medical Questionnaire which she argued is evidence that she is indeed qualified to maintain her TSO position. She stated that in the updated Fitness for Duty Medical Questionnaire, her medical provider cleared her to return to duty by addressing each of the restrictions mentioned in the letter from the MRO. She stated that the medical provider indicated that the DSM-5 criteria for full remission has been met and that her most recent episode of functional impairment was October 2016. She stated that the medical provider stated that she demonstrates appropriate judgment and attention, that she has no cognitive impairment and that she is compliant with recommended treatment. The appellant stated that her medical provider documented that she has no history of psychotic features, no suicide attempt within the past 24 months, no psychiatric hospitalization within the past 5 years, no sleep disorder and no personality disorder. The appellant stated that her medical provider stated that he has not observed any side effects from the medication prescribed to her and that there is no restriction of recommended activity modification and that none of the activities would aggravate her condition. In addition, the appellant stated that she is no longer taking Vistaril. The appellant's physician wrote on February 9, 2017, that she is not on sedative medications. The appellant argued that she should be allowed to return to work immediately based on the evidence presented. She argued that management failed to prove the charge against her by preponderant evidence and failed to establish that removal is a reasonable penalty.

The appellant stated that it is true that she has experienced great challenges over the past few months of her life but argued that with her faith and the help of her health care providers she has

met those challenges with great courage and dedication. She argued that it is unjust to remove her from her TSO position when according to her medical provider, whom she stated specializes in psychiatry, she meets every requirement to maintain her position.

Management argued that the updated Fitness for Duty Medical Questionnaire and the medication history sheet submitted by the appellant, as part of her appeal, are dated several weeks after the appellant's removal; the documents are dated February 9, 2017, and February 7, 2017, respectively, and the appellant was removed on January 20, 2017. Management argued that the appellant did not provide any new documentation in response to the NOPR issued in October 2016, so the decision to remove her, issued on January 20, 2017, was made based on the medical information that had been submitted and reviewed by the MRO who determined that the appellant was "not medically qualified."

Management argued they relied on the October 7, 2016, decision by the MRO that the appellant was not medically qualified to perform the full and unrestricted duties of a TSA as required by ATSA and that the decision was based on all of the medical information submitted by the appellant prior to the decision to remove her on January 20, 2017, which was all the medical information provided by the appellant's medical provider to the MRO. Management argued that the preponderance of evidence supports management's conclusion that the appellant's medical condition disqualified her for the TSO position according to the applicable TSA Medical Guidelines and that therefore, management's decision to remove the appellant based on the non-disciplinary charge of *Medically Unqualified for the TSO Position* should be upheld.

Management argued that the appellant did not provide any new medical documentation for consideration until several weeks after her removal on January 20, 2017. Management argued that the appellant had numerous opportunities to provide new medical documentation in response to the MRO's decision, dated October 7, 2016, that she was not medically qualified for the TSO position, both before and during her reply period to the NOPR issued in October 2016. Management argued that not only did the appellant not submit any new medical documentation for consideration during her reply period, which lasted from October 25, 2016, until her removal on January 20, 2017, but that the new medical documentation submitted by the appellant with her appeal is dated several weeks after the decision was issued. Management argued that they should not be responsible for new information that they never received from the appellant.

The Board found the OCMO determination, dated October 7, 2016, shows that the appellant failed to meet the Bipolar disorder and Medications guidelines of the *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 October 7, 2016, the MRO described the relevant facts of the appellant's serious health condition, in part, that the appellant is treated for bipolar I disorder and has a history of depression, substance abuse, and personality disorder. The appellant's medical care provider wrote that the appellant does not demonstrate appropriate judgement and attention, that she is "somewhat" compliant with her recommended treatment, and that she is prescribed the sedating medication Vistaril. The appellant's medical provider wrote that the appellant has impaired judgement, impaired control, impaired concentration and impaired attention. The MRO stated that the appellant does not meet the Medical and Psychological Guidelines because she has been diagnosed with bipolar I disorder,

and because she is prescribed sedating medications. The Board determined that it is the appellant's burden to provide new evidence to refute the finding of the MRO and that the appellant failed to provide any evidence to support her written reply to the NOPR. The new documentation provided by the appellant was not obtained until several weeks after the appellant was removed from service. However, the new evidence does not disprove the assessment of the MRO on October 7, 2016. The appellant was diagnosed with bipolar I disorder. The appellant's medical provider provided evidence that conditions were met for any other bipolar disorder. There are no conditions to be met under bipolar I disorder. The appellant may no longer be on a sedating medication but the evidence clearly shows that she still does not meet the criteria set out in the guidelines under psychiatric disorders. 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 *Medically Unqualified for the TSO Position*.

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

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

_____

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-030

April 10, 2017

Issue: *Misuse of Government Badge; Inability to Display SIDA Identification; Misuse of Position for Personal Advantage; Failure to Follow Instructions; Off-Duty Misconduct*

OPINION AND DECISION

On February 2, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charges, *Misuse of Government Badge; Inability to Display SIDA Identification; Misuse of Position for Personal Advantage; Failure to Follow Instructions;* and *Off-Duty Misconduct.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence in the record. Management based the Charge, *Misuse of Government Badge*, on one specification. The specification alleged that on Thursday, July 28, 2016, at approximately 1624 hours, while off-duty, in civilian dress and on her Regular Day Off (RDO), the appellant displayed her Security Identification Display Area (SIDA) badge to TSA officers to gain access to the sterile area without authorization.

Charge 2, *Inability to Display SIDA Identification*, was based on one specification. The specification alleged that on Thursday, July 28, 2016, the appellant's SIDA badge was confiscated by the Aviation Department. Since that date, the appellant has not displayed her SIDA which is a condition of employment to perform her duties at the airport.

Charge 3, *Misuse of Position for Personal Advantage*, was based on one specification. The specification alleged that on Thursday, July 28, 2016, at approximately 1624 hours, while off-duty, in civilian dress and on her RDO, the appellant used her SIDA badge and TSO position to gain access to the D-Concourse sterile area for personal reasons.

Charge 4, *Failure to Follow Instructions*, was based on two specifications. Specification 1 alleged that on Thursday, July 28, 2016, at approximately 1630 hours, while inside the checkpoint, a Supervisory Transportation Security Officer (STSO) instructed the appellant to exit the sterile area. The appellant failed to comply with that supervisory instruction. Specification 2 alleged that on Thursday, July 28, 2016, at approximately 1630 hours, while inside the sterile area, a Supervisory Behavior Detection Officer (SBDO) instructed the appellant to exit the sterile area. The appellant failed to comply with that supervisory instruction.

Charge 5, *Off-Duty Misconduct*, was based on one specification. The specification alleged that on July 28, 2016, at approximately 1950 hour, the appellant was given a Promise to Appear (PTA) by Law Enforcement Officers of the Police Department on the charge of Use of Airport Identification for Personal Use.

Management found that the appellant violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Paragraph 5.D. provides that TSA employees are responsible to behave in a way that does not bring discredit upon the Federal government or TSA and for observing basic on-the-job rules. Paragraph 5.D.(2) provides that TSA employees must respond promptly to and fully comply with directions and instructions received from their supervisor or other management officials. Paragraph 5.D. (7) states that employees must observe and abide by all laws, rules, and regulations and other authoritative policies and guidance. Paragraph 5.D. (11) provides that TSA employees must uphold, with integrity, the public trust involved in the position to which assigned, abiding by the 14 general principles of ethical conduct (5 C.F.R. § 2635.101) and avoiding the appearance of using public office for private gain. Paragraph 6.A. provides that TSA employees shall comply with all standards and responsibilities established by this directive and that failure to comply with all standards and responsibilities established by this directive may result in corrective action, including discipline, up to and including an employee's removal. Paragraph 6.E. states while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. Paragraph 6.G. states that employees shall not use their office or position for their personal advantage or the advantage of others.

In addition, management found that the appellant's actions were in violation of the Handbook to TSA MD 1100.73-5. Sections D.9. (a) and (b) state that employees will use official (TSA or DHS-issued or authorized) identification media only for official or other permissible purposes. Section D.9 also states in part that employees have a requirement to wear, and visibly display an employee identification badge while on duty, and a prohibition from facility access during non-duty hours unless authorized. Section F. (1) states, in part, employees must cooperate fully with all TSA and DHS investigations and inquiries, including but not limited to inquiries initiated by supervisor 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.

Management also found that the appellant's actions are in violation of the Aviation Department's Rules and Regulations, Chapter 25-2.4, and 2.9. Chapter 25-2.4, *Entry to the AOA, SIDA or restricted area*s, states that no person shall enter the AOA, a SIDA area or a restricted area of any county airport except: (c) Persons who are employees or authorized representatives of the Department or other Federal, State or local governmental department or agency, having proper business thereon and bearing proper identification as approved and required herein. Chapter 25-2.9, *Prohibited Conduct*, states in part that it shall be unlawful for any person to remain in or on any area, place or facility at an Airport, unless such person has a bona fide purpose for being in such an area, place or facility.

Management found that the appellant's actions violated 49 CFR § 1540.105 (a) (3) which provides that no person may use, allow to be used, or cause to be used, any airport-issued or airport approved access medium or identification medium that authorizes the presence, or movement of persons or vehicles in secured areas, AOAs, or SIDAs in any other manner than that for which it was issued by the appropriate authority under this subchapter.

On Thursday, July 28, 2016, the appellant entered the checkpoint while on her RDO. The appellant was dressed in civilian clothes and displayed her SIDA badge to the Travel Document Checker (TDC) Officer and placed her personal items on the x-ray conveyor belt. An SBDO approached the appellant and questioned why she was at the checkpoint. The appellant stated that she was not flying and was there for a "shift trade." The appellant entered the checkpoint through a Walk-Through Metal Detector (WTMD). The SBDO and an STSO then questioned the appellant for the second time about the reason for her being at the checkpoint and in the sterile area. The appellant responded again that she was there to arrange a shift trade with a fellow employee. The SBDO and the STSO advised the appellant that she had no official reason to be in the sterile area and instructed the appellant to exit the sterile area. The appellant failed to exit the checkpoint as instructed. Rather than turning right towards the exit adjacent to the checkpoint, the appellant turned left and walked towards the upper Concourse gates. The SBDO observed the appellant walking away from the checkpoint exit and proceeding further into the sterile area towards the upper Concourse gates. The SBDO notified an STSO who also contacted a Transportation Security Manager (TSM). The appellant was subsequently stopped by the Primary Transportation Security manager (PTSM) and the TSM between gates D-27 and D-28. The PTSM asked the appellant why she was in the sterile area and the appellant replied, "I'm here for swap forms." The PTSM then asked the appellant why she was heading to the upper Concourse gates and the appellant replied, "I am heading to the exit." The PTSM asked the appellant why she did not exit through the checkpoint and she replied, "I am unfamiliar with this area." The TSM asked the appellant if she was meeting anyone in the airport and the appellant replied, "No, I am here for VLTP." VLTP is the Voluntary Leave Transfer Program. The appellant was then escorted back to the checkpoint to be interviewed by the Police Department's Law Enforcement Officers. Under questioning, the appellant indicated that she was there to meet a friend flying in from Chicago. The Aviation Department officials then confiscated the appellant's SIDA badge and the Police Department placed her under arrest. The appellant was issued a Promise to Appear and charged with Use of Airport Identification for Personal Use. The appellant was then escorted out of the sterile area by the Police Officers.

The appellant was issued a Notice of Proposed Removal (NOPR) on December 16, 2016. The NOPR advised the appellant of her right to make an oral and/or written reply within seven (7) calendar days of her receipt of the proposal. The appellant submitted a written reply on January 12, 2017. On February 2, 2017, the appellant received the Removal Decision.

Management provided as evidence: Police Department Arrest/Affidavit; statements of the SBDO, dated July 28, August 2, and August 4, 2016; statement of the MBDO, dated July 28, 2016; statement of the STSO, dated July 28, 2016; statement of a TSO, dated July 28, 2016; statement of the TSM, dated July 29, 2016; statement of the PTSM, dated August 4, 2016; statement of the appellant, dated August 19, 2016; employee shift trade documentation, dated May 31, 2016; Administrative Leave documentation, dated August 2, 2016; Incident report, dated July 28, 2016; Video Timeline Statement, dated July 31, 2016; Closed Circuit Television (CCTV) still pictures; Aviation Department Rules and Regulations, Chapter 25-2.4 and 25-2.9; and 49 Code of Federal Regulations, § 1540.105 (a)(3).

On appeal, the appellant argued that she merely intended to meet a co-worker at the baggage claim area in order to finalize discussions for her participation in the Voluntary Leave Transfer Program. The appellant claimed that contrary to the Agency's assertion, she had no knowledge of how to initiate the VLTP. The appellant also asserted that she did not knowingly disobey a supervisory order as she left the area in question in the only way she knew to exit. The appellant argued that she was not familiar with the area in question and did not intentionally leave the area in violation of a direct order. The appellant asserted that she has reacquired her security badge. The appellant claimed that she was subjected to an unlawful search and seizure and that her civil rights were violated, as well as the lack of proper union representation. The appellant argued that the evidence elicited during the incident cannot be used as a basis for the dismissal. She also argued that the agency has used the same set of facts for multiple disciplinary allegations in violation of the principles of "double jeopardy."

As to Charge 1, the appellant argued that she was not familiar with the VLTP process and assumed that she was in the area in question for a legitimate purpose. As to Charge 2, the appellant argued that she has successfully reacquired her security badge, thus the agency's conclusion that she is no longer able to display her security badge is entirely incorrect. As to Charge 3, the appellant argued that she did not use her credentials for personal reasons. The appellant argued that there is no factual basis to assign bad faith as she merely tried to initiate contact with a co-worker, for a valid business reason. As to Charge 4, the appellant argued the agency has imposed "double jeopardy" with the repetition of identical specifications. The appellant argued that the specifications arise from the same set of operative facts. She argued that she was not at all insubordinate but merely exited the area in a manner consistent with her prior familiarity of that area. As to Charge 5, the appellant argued that the charge is a restatement of the prior conduct, loss of the SIDA badge, as it arises from the same set of operative facts. The appellant asserted again that she was successful in reacquiring her security badge. The appellant argued that there has been no adjudication of guilt. The appellant noted in a footnote to the appeal that she successfully entered a pre-trial diversion program, completed the program and was not adjudicated with regard to any criminal offense pertaining to the use of the security badge.

In response to the appeal, management replied and asserted that the appellant has never reacquired her SIDA badge. Management argued that the appellant's explanation regarding the VLTP is not logical. Management asserted that the VLTP is not an interactive process and that employees who

are interested in applying do not approach co-workers with respect to securing other employee's participation in the VLTP. In addition, management argued that the appellant made multiple, conflicting statements from the time of her arrest through the pendency of the disciplinary process. Management stated that the appellant asserted three (3) different reasons for her presence in the checkpoint while off-duty. Management argued that the police report memorialized the appellant's statement that she was at the checkpoint off-duty to meet a friend, a reason that is strictly personal in nature and clearly prohibited. Management argued that the facts and circumstances for Charge 4 are different than those for Charge 5. Charge 4 involved the appellant's failure to follow the supervisors' direction to exit the sterile area while Charge 5 involves receipt by the appellant of a Promise to Appear, which is the equivalent of an arrest. The PTA was issued as a result of the appellant's off-duty presence in the sterile area utilizing her SIDA, a violation of the Aviation Department's rules and regulations.

With regard to Charge 1, the Board found that the Charge is redundant and is based on the same facts contained in Charge 3. Therefore, Charge 1 is merged into Charge 3.

With regard to Charge 2, management made no effort to show the reason behind the appellant's inability to display a SIDA badge nor whether the appellant was required to have a SIDA badge to work in her assigned location. The appellant's ability to obtain a SIDA badge is contingent on management's support of her request for a SIDA badge. The appellant cannot request on her own and had to be sponsored in order to obtain a SIDA badge. The appellant's inability to display a SDIA badge may have been a direct result of management's refusal to support the request to have her SIDA badge reinstated. Although management states in the decision letter that the appellant has failed to complete the SIDA badge issuance requirements; they failed to provide any evidence to support this assertion. Therefore, the Charge, *Inability to Display SIDA Identification*, is NOT SUSTAINED.

With regard to Charge 3, the police report indicated that the appellant stated that she was in the sterile area to meet a friend. In addition, the appellant's statement in her appeal that she was there to meet a co-worker at the baggage claim area is false. The text provided by the appellant did not show who the text was from and indicated that the person who sent the text had landed. The co-worker that the appellant stated that she was there to meet in baggage was working at the checkpoint. He provided a statement and said that he recognized the appellant as he had worked with her before. The co-worker asked her if she was doing K-9 and she said no and was there to fill out paper work for a swap with another employee. She then asked the co-worker if he could donate sick time to another employee and he told her to give him a call or send a text as a reminder. He stated that the appellant then exited the checkpoint. Management has proven by preponderant evidence that the appellant misused her SIDA badge to gain access to the sterile area for personal reasons. Therefore, the Charge, *Misuse of Position for Personal Advantage*, is SUSTAINED.

With regard to Charge 4, the Board found that the specifications were not redundant. In addition, the Board gave no merit to the appellant's argument that she was unfamiliar with the location of the exit. Management provided evidence that the appellant had in fact worked at that checkpoint and had familiarity with the area. As to specification 1, the statement of the STSO is preponderant evidence that the appellant did not exit the sterile area as directed. Specification 1 is SUSTAINED. As to specification 2, the statement of the SBDO is preponderant evidence that the appellant did not exit the sterile area as directed. Specification 2 is SUSTAINED. Therefore, the Charge, *Failure to Follow Instructions,* is SUSTAINED.

With regard to Charge 5, the Charge is not redundant of Charge 4. The police report is preponderant evidence that the appellant was charged with Use of Airport Identification for Personal Use. In addition, the appellant admitted that she completed a Pre-trial Diversion Program for said charge. Therefore, the Charge, *Off-Duty Misconduct*, is SUSTAINED.

Having sustained Charges 3, 4 and 5. 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 the conduct alleged does not warrant termination. The appellant argued that the disciplinary allegations have been enhanced by non-existent alleged violations, namely apparent charges of untruthfulness, which have not been formally alleged in this case. The appellant argued that the agency did not analyze the disciplinary factors correctly, or not at all. The appellant argued that the agency failed to adequately weigh and/or consider other lesser possible penalties which would have corrected her allegedly proscribed work behavior and the agency was mandated under the policy to consider lesser penalties. She alleged that the agency failed to consider that her actions were not intentional; no action was taken in bad faith; and she would have complied with any possible directive on how to properly exit the security area. The appellant argued that she has never committed a prior alleged similar offense and that management cited dissimilar conduct which does not constitute discipline. She argued that management attempted to aggravate the penalty through the use of one prior infraction. The appellant argued that management failed to follow the policy of progressive discipline. In addition, the appellant argued that she is an excellent prospect for remediation and/or rehabilitation. She stated that she has a long history of employment with the agency and has consistently demonstrated her work in a conscientious manner. She also stated that nothing in the record demonstrates that she will not continue to contribute to the efficiency of the federal service in the future. The appellant argued that the applicable disciplinary matrix does not justify the severe penalty of termination. She argued that the appropriate penalty is within the Mitigated Penalty Range. The appellant stated that she has shown initiative by regaining her security badge and/or her credentials. Once again, the appellant argued that management failed to consider pertinent factors in making the decision to remove her.

The appellant argued that the events of July 28, 2016, merely represented an isolated incident which should not result in a final termination.

Management responded and argued that management officials are not mandated to discuss every disciplinary factor when determining the appropriate penalty. Management stated that both the Proposing and Deciding Officials noted the significant factors that were relevant to the appellant's penalty determination. In addition, management disagreed with the appellant's assertion that her prior discipline was unrelated and should not have been considered. Management stated that her prior corrective actions were noted in the Decision to demonstrate that the appellant was on clear notice that her conduct up to that point was unacceptable and repetition of such behavior could result in disciplinary action, up to and including removal from Federal service. In addition, management stated that they utilized the Table for guidance to ensure that the appellant's penalty was consistent with the penalties imposed on other employees for the same or similar offenses.

Management noted that the Table permits consideration of aggravated penalty ranges for the most serious offense being charged and that the aggravated range for the above charges included removal.

In determining the penalty, the Deciding Official considered the nature and seriousness of the appellant's offenses. He considered that the appellant's conduct failed to meet the core value of integrity which is at the heart of the TSA mission. He also considered that the appellant's actions were intentional and constituted a serious security breach undermining security operations and the trust and the confidence of the traveling public in the integrity of the nation's transportation system. The Deciding Official considered that the appellant was issued a copy of MD 1100.73-5 and signed acknowledgment of receipt on June 18, 2016. The Deciding Official also considered that TSA employees are responsible and are held accountable for abiding by all laws, rules, regulations and supervisory directives.

The Deciding Official considered that the appellant expressed contrition for her actions and asserted that her actions were not intentional, in bad faith or malice. He also considered that the appellant has been with the agency since 2011.

As an aggravating factor, the Deciding Official considered the appellant's prior corrective and actions and interest-based conversation (IBC) history which included: Letter of Leave Restriction, dated January 13, 2013; Verbal Counseling- Failure to Follow Instructions, dated January 20, 2013; IBC Attendance, dated November 24, 2013; Verbal Counseling- Tardiness, dated December 3, 2013; Memorandum - Warning to Maintain Regular Schedule, dated March 30, 2015; Letter of Counseling- Tardiness, dated April 26, 2015; Verbal Counseling- Employee Conduct (Not being in lane after start of shift), dated September 22, 2015; Verbal Counseling- Employee Conduct (Disappeared from the lane), dated October 11, 2015; and Letter of Counseling - Tardiness, dated January 19, 2016. The Deciding Official considered that these actions placed the appellant on clear notice that such conduct was unacceptable. The Board noted that the corrective actions were for dissimilar conduct.

Section G.3 of the Table, which pertains to misuse of position, provides for a recommended penalty range of a five (5) day suspension to fourteen (14) day suspension, and an aggravated penalty range of fifteen (15) day suspension to removal. The Table also states under the recommended range that removal is permissible for TSOs. Section D.2, which pertains to failure to follow instruction, provides for a recommended penalty range of a Letter of Reprimand (LOR) to a 10 (ten) day suspension, and an aggravated range of an eleven (11) day suspension to removal. The Deciding Official failed to cite the specific section of the Table that was applicable to Charge 5, *Off-Duty Misconduct,* in his decision letter. The Deciding Official's failure in this regard is serious, and the Board determined that it need not accord any deference to the Deciding Official's penalty analysis. The Board did determine that the appellant's Off-Duty Misconduct charge was an aggravating factor to consider. The Board noted that the guidance under the Table does state that multiple offenses permit consideration of the aggravated penalty range for the most serious offense being charged. The Deciding Official stated that the aggravated penalty for all of the applicable charges includes removal.

The Board found that the appellant's misconduct supports management's decision to remove her from Federal service. When weighing the penalty factors, the aggravating factors clearly favor

removal. The appellant's actions brought undue attention to TSA from its stakeholders. In addition, the Board found the appellant's untruthfulness in the matter to be aggravating. She did not admit until questioned by police that she was meeting a friend at the gate. The appellant continued her assertion of meeting a co-worker in baggage during the filing of the appeal in light of the evidence showing otherwise. The Board found that management's decision to remove the appellant was within the bounds of reasonableness.

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

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

_____

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-031

April 5, 2017

Issue: *Tardy*

OPINION AND DECISION

On January 27, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Tardy.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Tardy,* on 12 specifications which alleged that the appellant was tardy 12 times between September 14, 2016 and November 28, 2016, ranging from one minute to nine minutes.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section 5. D. (1) states, in part, that employees are responsible for reporting to work on time and ready, willing, and able to perform the duties of their position. Section 5. D. (7) states that all employees are responsible for observing and abiding by all laws, rules, regulations, and other authoritative policies and guidance, written and unwritten. Management also found that the appellant's conduct violated

the Handbook to MD 1100.63-1, *Absence and Leave*, Section B. 4. which states that employees are expected to report for work on time and fit for duty and are expected to be on duty at all times during their tour of duty except during meal breaks and approved absences.

Management supported the Charge with: a Memorandum from a Transportation Security Manager (TSM), dated September 29, 2016; and Kronos reports for September 4, 2016 through November 29, 2016.

The appellant received a Notice of Proposed Removal on December 7, 2016. The written notice advised the appellant of his right to make an oral and/or written reply within seven days. The appellant replied via email on December 11, 2016 and December 21, 2016. In an email dated December 11, 2016, the appellant stated that he adjusted his time to be earlier but that he could not predict when the transit system would have construction. The appellant stated that he would like one more chance to prove that he could get to work on time and requested an extension to reply. Management responded on December 12, 2016, and granted the appellant an extension until December 21, 2016. In an email dated December 21, 2016, the appellant stated that he would like one last chance to prove that he is a reliable employee and that he can improve his attendance. The appellant stated that he had some personal issues that were interfering with his attendance and that he had moved to cut down his commute time.

The Board finds that the Kronos reports are preponderant evidence that the appellant arrived late for his shift for the time specified on each of the dates listed in the 12 specifications of the Charge. Additionally, the appellant did not contest the Charge. Therefore, the Charge, *Tardy*, is SUSTAINED.

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

On appeal, the appellant argued that management failed to establish that removal is a reasonable penalty. He argued that management failed to follow the Table and failed to provide any consideration to the mitigating factors. The appellant argued that under the Table, the aggravated penalty range for a charge of Tardy is a 1-day to 5-day suspension. The appellant noted that management removed him for 12 specifications of tardiness ranging from one minute to nine minutes. He argued that that the three specifications for tardiness of less than five minutes were petty and should not be sustained. The appellant argued that even if the maximum penalty was applied to each remaining specification the maximum penalty would be a 45-day suspension – not removal.

The appellant argued that in his response he stated that his tardiness was due to ongoing construction and maintenance on the transit system. He argued that the transit system has been undergoing major renovations since 2015 and only recently completed the renovation on the station he used. He argued that management gave no consideration to this mitigating factor. The appellant argued that the construction on the transit system is a substantial mitigating factor

because it caused unpredictable delays for its riders and that it was not unreasonable for him to be a little tardy on occasion.

Management responded and argued that they took both corrective and disciplinary action in an effort to positively improve the appellant's attendance issues. Management argued that on March 24, 2012, the appellant was issued a Letter of Counseling (LOC) for unscheduled absences; that on September 1, 2013, he was issued an LOC for Failure to Follow Directions (time clock procedures); and that on June 22, 2014, the appellant was issued a Requirement for a Regular Schedule and Avoiding Excessive Absence letter. Management argued that on March 22, 2015, the appellant was issued a 3-day suspension for Absent Without Leave (AWOL) and Failure to Follow Instructions related to attendance and leave policy; on November 8, 2015, the appellant was issued a 5-day suspension for Excessive Tardiness and Failure to Follow TSA Policy related to attendance and leave; and on May 23, 2016, the appellant was issued a 14-day suspension for Excessive Tardiness. Management argued that after considering the appellant's aforementioned misconduct, management concluded that the appellant was no longer considered to be a reliable employee and that removal was reasonable in this case.

Management argued that the Deciding Official considered as mitigating factors the appellant's employment since September 2007 as well as his satisfactory performance. Regarding the appellant's claim that the Deciding Official did not consider the unpredictable construction delays on the transit system as a substantial mitigating factor, management stated that the Deciding Official dismissed the appellant's reason because there are hundreds of employees at the airport who use the same transit system every day to commute to work and arrive on time. Management argued that the construction delays on the transit system cited by the appellant are an excuse, not a mitigating factor.

Management argued that the appellant's tardiness history is egregious and, irrespective of reasons, reflected the appellant's ongoing inability to arrive to work on time. With regard to the appellant's claim that the tardy specifications of less than five minutes are petty, management argued that on the contrary, those specifications of tardiness are the instances that were the most avoidable because they are not borne of a major inconvenience, rather by a lack of effort that is the cause behind the action.

With regard to the appellant's contention that management did not follow the Table, management argued that the Deciding Official cited note 6. of the Table Guidelines which allows management officials to go outside the ranges listed if circumstances warrant. Management argued that after considering the appellant's recent suspensions, plus corrective actions, the Deciding Official concluded that the previous actions had no effect on the appellant's misconduct and concluded that the appellant's removal was supported by the guidance outlined in the Table.

The Deciding Official considered the aggravating and mitigating factors including the seriousness of the appellant's action and their relationship to his duties and responsibilities as a TSO. The Deciding Official considered that as a TSO, the appellant is entrusted with securing the lives and safety of passengers. The Deciding Official considered that attendance problems adversely affect the appellant's coworkers as well as the effectiveness of the operation. She considered that the appellant is expected to meet high standards of conduct and that when he failed to come to work as scheduled, it placed an undue burden on both management and the

appellant's fellow officers. The Deciding Official considered that supervisors and managers must have the utmost confidence that the appellant will follow all direction given to him. The Deciding Official considered that on May 23, 2016, the appellant was issued a 14-day suspension for Excessive Tardiness; that on November 8, 2015, he was issued a 5-day suspension for Excessive Tardiness and Failure to Follow TSA Policy related to attendance and leave; and that on March 22, 2015, the appellant was issued a 3-day suspension for AWOL and Failure to Follow Instructions related to attendance and leave policy. The Deciding Official also considered that in addition to the three suspensions, the appellant received three corrective actions for violations of TSA attendance policy. Specifically, on June 22, 2014, the appellant was issued a Requirement for a Regular Schedule and Avoiding Excessive Absence letter; on September 1, 2013, the appellant was issued an LOC for Failure to Follow Directions; and on March 24, 2012, the appellant was issued an LOC for Unscheduled Absences. The Deciding Official noted that while not considered discipline, the corrective actions show that the appellant was clearly placed on notice regarding TSA's expectations related to attendance and leave policy.

The Deciding Official considered that despite all of the notices and disciplinary actions, the appellant's misconduct continued. She noted that since returning from the 14-day suspension on June 12, 2016, the appellant was tardy 27 times. The Deciding Official considered the burden the appellant placed on his supervisors and coworkers when he failed to report to work as scheduled and the fact that the appellant was aware of agency policy in regards to employee conduct and responsibilities as evidenced by a review of his Online Learning Center (OLC) history which shows that the appellant read and understood TSA MD 1100.73-5, as recently as December 6, 2015.

As mitigating factors, the Deciding Official considered that the appellant has been a TSA employee since September 2007 with satisfactory performance. The Deciding Official found however, that the mitigating factors in this situation were outweighed by the aggravating factors of the appellant's misconduct. The Deciding Official found the appellant's continued tardiness to be unacceptable. She stated that she lost confidence in the appellant's ability to report to work on time as scheduled and considered the appellant's rehabilitation potential to be poor.

Under Section A. 1 of the Table, pertaining to Tardy, the recommended penalty range is Letter of Reprimand and the aggravated penalty range is a 1-day to 5-day suspension. The Guidelines of that Table state that for second and/or successive offenses, the penalty should generally fall within the aggravated penalty range column. The Guidelines state that examples of aggravating factors include prior disciplinary record and prior warning and/or advisement not to commit misconduct. Additionally, as cited by management in their response to the appellant's appeal, the Guidelines of the Table also state that management has the discretion to go outside the ranges listed in the guide if they determine the circumstances warrant.

The Board finds that the appellant's removal, given his extensive history of discipline and corrective actions for similar misconduct related to attendance and leave, is within the bounds of reasonableness, and therefore SUSTAINS the penalty decision.

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:

Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

_____

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION
Management.

DOCKET NUMBER
OAB—17-034

April 28, 2017

Issues: *Failure to Maintain TSO Certification Requirements*

DECISION ON RECONSIDERATION

On April 5, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision denying the appellant's appeal. The appellant filed a timely request for reconsideration pursuant to Section 6.J of TSA Management Directive (MD) 1100.77-1, *OPR Appellate Board*, arguing that management failed to provide him a copy of its response, thereby depriving the appellant of his right to reply to Management's response. Management filed an opposition to the reconsideration request arguing that the Board's decision should be upheld.

Requests for reconsideration are reviewed to determine whether the Board misinterpreted the facts or misapplied TSA policy. For the reasons stated below, appellant's request for reconsideration is GRANTED.

Analysis

The evidence shows that management submitted a reply in response to the appellant's appeal. Management admits in their response to the request for reconsideration that their response was not served on the appellant. The Handbook to TSA MD 1100.77-1, *OPR Appellate Board*, Section C.(3), requires management to provide a copy of its response to the appellant and his/her representative, if applicable, either electronically or at the address provided in the appeal. Section C. (4) of the Handbook, provides that the appellant may reply to management's reply.

The appellant has correctly argued that management has violated TSA policy and consequently deprived him of his procedural right to reply. Section 6.E of the MD requires that the Board examine each appealed action for due process issues. Management's failure to provide the

appellant or his representative with a copy of its response deprived the appellant of his due process right to be given notice and an opportunity to respond to all evidence being considered in a disciplinary action.

Decision. Accordingly, the reconsideration request is GRANTED. The appellant will be reinstated as a TSO, subject to meeting current TSA employment conditions. Further, the appellant will receive back pay from the date of his removal in accordance with TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1. Accordingly, there is no further right to appeal

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—17-034

April 5, 2017

Issue: *Failure to Maintain TSO Certification Requirements*

OPINION AND DECISION

On February 3, 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 TSO Certification Requirements*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge 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 the appellant completed his initial Practical Skills Evaluation (PSE) on 12 October 2016, and was not successful. Following required remediation given on October 18, 2016, the appellant certified that he was properly remediated and was ready to take the reassessment. The appellant completed a retest on October 18, 2016, and was unsuccessful a second time. Consequently, the appellant has not met the requirements for annual re-certification as a TSO. The Aviation Transportation and Security Act requires TSA to conduct an annual evaluation or proficiency review (APR) of each Officer for re-certification. The law further states that an Officer who does not demonstrate success on the annual re-certification "may not continue to be employed" as a Transportation Security

Officer. See 49 U.S.C. § 44935(f) (5). Federal law does not allow continued employment as a Transportation Security Officer upon failure to meet the annual re-certification requirement.

The PSE-Individuals with Disabilities (IWD) 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 FY16 Annual Proficiency Review 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 4.7.I. (13) states that employees who fail a second scored PSE are subject to removal from TSA. Section 6.2 E. states 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 was issued a Notice of Proposed Removal on November 29, 2016, and submitted a written response. In his response, the appellant argued that he was not afforded sufficient time for self-study and that the remediation was not properly conducted. The appellant stated that he was not afforded an opportunity to review the SOP for Individuals with Disabilities (IWD) during the testing.

Management provided as evidence: Success factors report indicating failures on October 12, 2016 and October 18, 2016; APR Technical Proficiency Assessment Remediation Acknowledgment – PSE form, dated October 18, 2016; APR Supplemental Remediation Record and Acknowledgement- Supplemental, dated October 18, 2016; statement from the Quality Standards and Evaluation Assessor (QSEA), dated October 18, 2016; statement from the Standards and Evaluation Assessor (SEA), dated October 18, 2016, unidentified report indicating failures on October 12, 2016 and October 18, 2016; and IWD Feedback Reports.

On appeal, the appellant stated that the decision should be rescinded because he was not provided a fair opportunity to demonstrate his proficiency. Specifically, he argued that the testing process was inadequate under the 2016 APR Guidance and inconsistent with a new TSA policy that applies to him and implicitly acknowledges that the two-attempt process is unfair. The appellant stated that he has been with TSA for three and a half years and in that time, he has served the agency with dedication. The appellant argued that after his first failure, he requested that the testers explain the cause of his failure but they only responded that he missed an item and that it was getting late and

they had to go. He argued that they failed to discuss any strengths or weaknesses demonstrated during the assessment. He stated that their failure to discuss his fundamental strengths and weaknesses following the first failed attempt is a fundamental and necessary part of the remediation process. The appellant also argued that the remediation forms state that remediation lasted from 3:30 p.m. until 5:00 p.m. and that this contradicts the "Success Factors" form which shows remediation completed at 2:10 p.m. The appellant argued that outside of the MSTI "reviewing points," instructing him on procedures for specific body areas; and demonstrating an IWD-SPD with no errors; there were no additional activities, instruction or discussions. He also argued that there was no time allotted for self-study and that he was never given additional time for self-study.

The appellant argued that his removal should be rescinded because a new TSA policy requires that TSOs be given three attempts to pass the PSE/IWD and implicitly acknowledges that only two attempts at the PSE/IWD is not a fair opportunity to demonstrate proficiency. This policy was announced in January 2017 and was to begin in February 2017. The appellant argued that in February 2017, TSOs were entitled as a matter of TSA policy to three attempts at the PSE/IWD. The appellant stated that because the appeal is before the Board in March, the new policy applies to him and he is entitled to a third attempt. He also argued that if the Board disagrees with the language of the policy, the policy change should nevertheless be retroactively applied in his case.

Management responded and argued that removal is reasonable and his removal promotes the efficiency of the service.

The APR Technical Proficiency Assessment Remediation Acknowledgment – PSE form and supplemental form, dated October 18, 2016, show that the appellant was properly remediated and lists the remediation efforts. The feedback report indicates that the appellant failed to detect the item and he has acknowledged that he was provided this information. The appellant signed that he accepted and participated in the opportunity for self-study. His argument that he did not receive self-study has no merit. The APR Technical Proficiency Assessment Remediation Acknowledgement-PSE form is the official record for recording remediation. The times listed on the Success Factors form are not necessarily the times associated with the testing or remediation but rather times in which the information was uploaded into the system. In addition, 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 found that the preponderance of the evidence establishes that the appellant took and failed the PSE/IWD on October 12, 2016, and October 18, 2016. The evidence establishes that the appellant signed the remediation form on October 18, 2016, signifying that he accepted and participated in the opportunity for self-study, that he received remediation in accordance with APR program and policy requirements and that he was ready to take the PSE/IWD reassessment. The evidence also establishes that the appellant participated in proper and sufficient remediation after his initial test failure and was retested within a reasonable timeframe within the guidelines of the 2016 Annual Proficiency Review 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:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-035

April 11, 2017

Issue: *Arrest for Misconduct of a Sexual Nature*

OPINION AND DECISION

On January 27, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the charge: *Arrest for Misconduct of a Sexual Nature.* The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Arrest for Misconduct of a Sexual Nature*, on one specification. The specification alleged that on December 8, 2016, while off-duty, the appellant was arrested by the Police Department for indecent exposure.

Management alleged that the appellant's conduct violated TSA Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5.D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing basic on-the-job rules. Section 5.D. (7) requires that employees observe and abide by all laws, rules, regulations, and other authoritative policies and guidance. Section

6.E states that, while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness.

On December 8, 2016, the Police Department conducted a reverse prostitution investigation in an area known for prostitution complaints. A summary of the police report revealed that the appellant motioned an undercover police officer, posing as a prostitute, over to the vehicle he was driving. The undercover police officer, who was on a public sidewalk, approached the driver's side window and observed the appellant rubbing his genital area. The undercover police officer stated, "It's $40.00 for the fuck." The appellant replied, "Okay, get in," and "I'll prove I'm not a cop." The undercover police officer then saw the appellant unzip his pants, pull out his penis and stroke his genitals with his right hand. The appellant was subsequently arrested by the Police Department for indecent exposure.

The appellant provided a statement to management and indicated that he pulled into a BBQ restaurant looking for a parking spot and was about to pull out when a woman waved at him and asked him to pull in. He stated that he said something along the lines of him always being able to make friends and the woman made a solicitation attempt. The appellant stated that he did not remember exactly what he said but knew it was not an acceptance of anything. He stated that the woman asked him if he was law enforcement and said something like "hold on, there," and he reiterated that was not his intention. He stated that he left and was pulled over about ¼ of a mile down the road and was arrested. The appellant stated that they asked him where he worked and he told them. He then stated that one of the officers stated that he worked for Homeland Security and that he was going to call the airport and tell them that he was arrested. The appellant was released on bond.

Management provided the following evidence to support the Charge: pre-decision discussion, dated December 13, 2016; appellant's statements, dated December 8 and December 13, 2016; email from Coordination Center, dated December 14, 2016; email from the Assistant Federal Security Director- Law Enforcement (AFSD-LE), dated December 14, 2016; Police Department Report, dated December 8, 2016; Public Records search, dated December 8, 2016; and KRONOS timecard for appellant, December 7-9, 2016.

On appeal, the appellant stated that he has been employed with TSA since 2002, and has been a dedicated and loyal employee who has achieved above average performance ratings. The appellant stated that on December 8, 2016, he was arrested by the Police Department. The appellant argued that his removal has a fundamental due process error. He argued that his case is still pending and anything submitted on his behalf could potentially be used against him in criminal proceedings, which prevents him from presenting a full and complete defense. The appellant argued that if his appeal is not granted, he should be placed on indefinite suspension until his case is resolved. In addition, the appellant argued that the Deciding Official did not have the properly delegated authority to issue the Decision. The appellant also argued that management failed to prove the existence of a nexus between a legitimate government interest and the alleged misconduct. He argued that he was not on duty at the time of the incident, nor was he scheduled to be on duty that day. The appellant argued that there is no direct connection between any legitimate government interest or the TSA mission and operations and his off-duty

conduct. He also argued that an arrest is not dispositive of wrongdoing and should not be treated as such, especially while a case is still pending in court.

Management replied to the appeal and stated that the Federal Security Director received approval from the Assistant Administrator for the Office of Human Capital to delegate his authority to decide adverse actions to the Deputy Assistant Federal Security Director (DAFSD). In response to the appellant's argument that it is unfair to remove him before a determination of guilt, management responded that under MD 1100.75-3 TSA may take action whether or not criminal charges have been resolved and whether or not such charges have been resolved in favor of the employee. Management argued that the agency did prove the existence of a nexus between the legitimate government interest and the alleged misconduct. Management argued that TSA does have a legitimate government interest in taking appropriate action against employees whose behavior or lack of judgment serve to damage the agency's mission, image or the public's trust. Management stated that when the appellant was arrested and charged with exposing his genitals to an undercover police officer during a prostitution sting operation, the circumstances of the arrest itself were egregious enough to undermine the agency's ability to maintain the public's trust, his supervisor's trust, and served to damage the image and reputation of the agency among other government agency partners.

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

The Board gave no merit to the arguments put forth by the appellant. The appellant's arrest for misconduct of a sexual nature is sufficiently egregious to warrant a presumption of nexus. In addition, management was able to prove that the DAFSD was given the authority to effectuate removals for the agency. The appellant was not charged with the crime but rather with an arrest for misconduct of a sexual nature.

With respect to the Charge, the Board finds that the evidence in the record, to include the police documents coupled with the appellant's admission to being arrested, to be preponderant evidence to support that the appellant was arrested for indecent exposure. Therefore, the Charge, *Arrest for Misconduct of a Sexual Nature,* is SUSTAINED.

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

On appeal, the appellant argued that his removal was not reasonable. The appellant argued that management failed to consider mitigating factors. The appellant argued that he has been employed with TSA since 2002 and has performed at above average levels. He stated that while he has received minor discipline in the past, he has never been cited for repeating those errors or committing similar ones; demonstrating that he can be and has been successfully rehabilitated. The appellant argued that management has been overly harsh and punitive in their haste to remove him without a settled factual record. The appellant also argued that the efficiency of the federal service is not promoted by removing a dedicated and committed employee.

Management responded and stated that the penalty of removal is consistent with the TSA Table of Offenses and Penalties and is reasonable. Management stated that the decision clearly states that all of the relevant factors were considered in determining the reasonableness of the penalty. Management stated that they did consider mitigating factors but found that they did not outweigh the egregious nature of the off-duty misconduct and other aggravating factors noted. Management stated that the appellant's actions have negatively affected their confidence in his reliability, judgment, and trustworthiness as an employee of TSA. Management noted that the appellant's previous discipline placed him on notice of the consequences of future misconduct.

The Deciding Official considered the seriousness of the appellant's misconduct and its relationship to his duties as a TSO. He stated that as a TSO, the appellant is responsible for screening passengers and property in order to help ensure their security and the nation's aviation system. The Deciding Official stated that the appellant's off-duty arrest for sexual misconduct raises questions about his ability to follow laws and reflects negatively on TSA and diminishes TSA's ability to maintain the public trust; finding that his off-duty misconduct is directly related to his position as a TSO. The Deciding Official stated that the appellant's actions demonstrate a tremendous lack of judgement and trustworthiness and have adversely affected his confidence in the appellant's ability to carry out his responsibilities to the standards expected. The Deciding Official also considered the appellant's prior disciplinary record: a 3-day suspension on April 4, 2015, for failing to follow procedures, disrespectful conduct towards a supervisor, and failure to follow policy and a 1-day suspension on September 19, 2012, for tardiness. The Deciding Official found that the appellant's disciplinary actions placed him on notice that any future misconduct would result in further disciplinary action up to and including removal. The Deciding Official considered the notoriety of the offense and its impact upon the reputation of the agency. He noted that the public police report reasonably identifies the appellant as an employee of TSA, thus the potential for negative publicity is present. He also considered that the appellant's arrest further embarrassed and diminished the agency's reputation among its community partners, as his arrest was made known to local law enforcement and another federal agency. The Deciding Official determined that the appellant was not a good candidate for rehabilitation as he mostly offered doubtful claims about his off-duty conduct and showed no remorse or acceptance of responsibility for his off-duty misconduct. As mitigating, the Deciding Official considered that the appellant has been with the agency since October 13, 2002, and that his performance rating for 2016 was Achieved Excellence. The Deciding Official stated that he has personally observed and knows of the appellant's work ethic with respect to his performance. However, he stated that the mitigating factors do not outweigh the egregiousness nature of his off-duty misconduct.

Under Section G.24 of the Table, the recommended penalty range for criminal, infamous, immoral or notoriously disgraceful conduct is a thirty-one (31) day suspension to removal and the aggravated penalty is removal.

TSA employees, while on or off-duty, are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness. The appellant's misconduct was in clear violation of this policy. The Board finds that management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

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,

DOCKET NUMBER
OAB—17-036

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

April 12, 2017

Issue: *Not Medically Qualified for the TSO Position*

OPINION AND DECISION

On February 10 2017, management removed the appellant from her position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on one non-disciplinary Charge, *Not Medically Qualified for the 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 on June 21, 2016, the appellant submitted a light duty request listing "broken back" as the reason for the request. The appellant had been on light duty since June 23, 2016, with restrictions of no lifting, pushing, pulling over 20 pounds. The appellant had been prescribed alprazolam which is a benzodiazepine. The appellant's health care provider indicated that the appellant's condition was "chronic progressively worsening." In a letter dated October 24, 2016, the Chief Medical Officer (CMO) of the Office of the Chief Medical Officer (OCMO), reviewed the appellant's medical information and determined that she does not meet the Medical and Psychological Guidelines for the TSO position.

In a letter dated, October 24, 2016, the CMO described the relevant facts of the appellant's serious health condition, in part, that she is being treated for lumbar spinal stenosis, back pain,

leg pain, and spondylolisthesis of L4-5 and L5-S1. She has been on light duty since June 21, 2016. The CMO stated that the appellant's medical provider wrote on October 21, 2016, that the appellant was prescribed the medication alprazolam, a benzodiazepine, and that she needed the following job limitations: cannot repeatedly lift and carry items weighing more than 20 pounds, cannot stand for periods of time greater than two hours, and cannot walk up to three miles during a shift. The CMO stated that on the same date, when asked to estimate when the appellant would reach maximum medical improvement, the appellant's medical provider wrote that the appellant's condition was, "chronic progressively worsening." The CMO stated that the appellant does not meet the *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), because her condition interferes with performance of Essential Job Functions (such as repeatedly lifting and carrying items weighing up to 50 pounds, standing for prolonged periods of time during a shift (up to four hours), walking up to three miles during a shift), and because of the use of a benzodiazepine.

The *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), Spine, page 10, cite: (b)(2)

(b)(2)

The *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), Medications, page 16, cite: (b)(2)

(b)(2)

The *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016), Supervisory Transportation Security Officers Essential Job Functions, page 26, cite:

(b)(2)

On November 21, 2016, the appellant received a Notice of Proposed Removal (NOPR). The NOPR advised the appellant of her right to make an oral and/or written reply within seven days of receipt of the notice. The appellant responded in writing on November 27, 2016.

The Board considered all of the evidence presented including: the OCMO Fitness for Duty Determination letter, dated October 24, 2016; and the *Medical and Psychological Guidelines for Transportation Security Officers*, dated January 22, 2016 (pgs. 10, 16 and 26).

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 December 5, 2016. On February 1, 2017, 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 management deprived her of due process per TSA Management Directive (MD) 1100.00-6, *Workers' Compensation Program*, and the accompanying Handbook. The appellant stated that she was a dedicated officer since October 2002 and that throughout her career she performed all of the required duties at an acceptable level. The appellant stated that she had been promoted twice and had been an excellent employee with no disciplinary actions.

The appellant stated that on October 21, 2016, her medical provider completed a Fitness for Duty Medical Questionnaire provided to her by Human Resources. The appellant stated that she responded to the NOPR with a Department of Labor (DOL)/Office of Workers' Compensation (OWCP) CA-2a, Notice of Recurrence, and requested Leave Without Pay (LWOP) for periods of disability prior to adjudication by DOL/OWCP. The appellant stated that by letter dated January 10, 2017, DOL/OWCP acknowledged receipt of the Form CA-2a and advised that the description of the circumstances of what she described was a new occupational disease attributed to repetitive work/exposure over the course of more than one work shift. The appellant stated that at the recommendation of DOL/OWCP, she submitted a claim for an occupational disease. She stated that on January 31, 2017, she received a letter from DOL/OWCP acknowledging receipt of her claim for occupational disease that she filed on January 26, 2017.

The appellant also argued that the benzodiazepine she is prescribed was not being used while in the performance of duty. She stated that the dose was one .5 mg tablet by mouth daily every evening as needed versus a normal adult dose of .25 to .5 mg administered three times a day.

The appellant argued that her claim is still in the adjudication period through DOL/OWCP; that management is aware of a surgical referral and therefore, is aware that Maximum Medical Improvement (MMI) has not been reached; and that because MMI has not been reached, management cannot make a determination of the ability to perform the essential job functions.

The appellant also argued that management did not provide evidence to support that her performance was negatively affected because of her nightly prescribed medication.

Management argued that the Agency followed policy with respect to medically disqualified employees. Management argued that they followed HCM Policy No. 339-2, *TSO Job Search Program*, which states "Notwithstanding the requirements of the Rehabilitation Act of 1973, TSOs who are unable to meet the statutory requirements of the TSO positions, which include physical, medical, auditory, and visual requirements, are not eligible for reasonable accommodation. However, as a matter of TSA policy, incumbent TSOs who are medically disqualified for TSO positions and are determined to be individuals with disabilities, as defined under this HCM Policy, may be considered for reassignment." Management argued that therefore, the appellant was offered the choice of seeking a reassignment through the job search program and that the search was completed with no job match.

Management argued that it is uncontested that the appellant has significant lifting restrictions and cannot perform the full duties of her position. Management argued that limited duty positions are only for employees with an accepted workers' compensation claim. Management acknowledged that after receiving the NOPR, the appellant submitted a CA-2 and a CA-2a which they stated were received but have not been accepted. Management argued that under HCM Policy 820-2, *Light Duty*, light duty positions are temporary in nature and noted that the appellant admitted that she did not seek a further extension of light duty by submitting a TSA Form 1160-4 as required by HCM 820-2. Management argued that the appellant continues to be unable to perform the essential functions of the position. Management noted that the appellant was granted LWOP from November 27, 2016, to the date of her removal.

Management noted that the appellant claimed her removal is inappropriate given that she has a pending DOL claim and a surgical referral but argued that the appellant submitted her DOL claim after she received the NOPR and that she cannot use it as a shield to removal. Management argued that there are no DOL/OWCP provisions that would prevent the Agency from removing the appellant for medical disqualification. Management further argued that a surgical referral is not a determination that surgery is warranted or will successfully return the appellant to full duties. Management argued that the appellant has not submitted any evidence that she will be able to perform the full duties of her position in the foreseeable future. Additionally, management noted that on March 10, 2017, DOL/OWCP notified the appellant that her claim was denied.

The appellant replied to management's response and argued that she was not on a light duty assignment from June 21, 2016, to August 7, 2016, as indicated by management. The appellant stated that she was on a light duty assignment for three days from June 21, 2016, through June 23, 2016, and that she was on a light duty assignment from August 1, 2016, through September 15, 2016, a total of 45 days. The appellant argued that no written request for an extension was submitted. The appellant also argued that management's claim that she submitted a DOL claim as a "shield to removal" was not true. She stated that she submitted the DOL claim because the OCMO Fitness for Duty Medical Questionnaire indicated that the job activities were what was exacerbating her condition. The appellant also argued that as of February 10, 2017, DOL issued a Statement of Accepted Facts indicating that a "Recurrence is currently under development." She stated that DOL did request that she also file a CA-2 and that DOL did deny the claim for

compensation as the medical evidence did not demonstrate that the claimed medical condition is related to the established work-related events as required for coverage under the Federal Employees Compensation Act (FECA). The appellant stated that due to her physician being out of the office, she did not receive the medical report until after the Notice of Decision was issued and that she had since filed for a Reconsideration.

The appellant also argued that she invoked her entitlement under the Family and Medical Leave Act (FMLA) on January 27, 2017, while DOL/OWCP adjudicated her claims. The appellant attached a FMLA form from her health care provider, dated February 6, 2017. She argued that the form states that she is now able to perform her job functions. The appellant argued that management issued the Notice of Decision on February 10, 2017, which did not allow her the 15 calendar days to obtain the medical certification as required under FMLA. She argued that management interfered with, restrained, and denied her from exercising her FMLA rights. The appellant argued that management did not prove by preponderant evidence that she is not medically qualified to be a Transportation Security Officer.

The appellant discussed her light duty assignments in her appeal. However, it is the appellant's medical condition that restricts the appellant's ability to perform her full job duties, not the specific dates of her light duty requests/assignments.

The Board found the OCMO determination, dated October 24, 2016, shows that the appellant failed to meet the Spine guidelines, Medications guidelines, and Supervisory Transportation Security Officer Essential Job Functions of the *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016) and that therefore, she is not medically qualified to perform the full and unrestricted duties of an STSO as required by the Aviation and Transportation Security Act. After reviewing the appellant's medical documentation, as noted in the OCMO Fitness for Duty Determination, dated October 24, 2016, the CMO described the relevant facts of the appellant's serious health condition, in part, that the appellant is treated for lumbar spinal stenosis, back pain, leg pain, and spondylolisthesis of L4-5 and L5-S1. The appellant's medical provider wrote on October 21, 2016, that the appellant was prescribed the medication alprazolam, a benzodiazepine and that she needed the following job limitations: cannot repeatedly lift and carry items weighing more than 20 pounds, cannot stand for periods of time greater than 2 hours, and she cannot walk up to three miles during a shift. On that same date, the appellant's medical provider wrote that the appellant's condition was "chronic progressively worsening." The CMO determined that the appellant does not meet the *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016) because her condition interferes with performance of Essential Job Functions (such as repeatedly lifting and carrying items weighing up to 50 pounds, standing for prolonged periods of time during a shift (up to 4 hours), walking up to three miles during a shift), and because of the use of a benzodiazepine. The CMO stated that the documentation provided for the fitness for duty review provides medical fact or demonstration that the appellant does not meet the Spine guidelines, Medications guidelines, and Supervisory Transportation Security Officer Essential Job Functions of the TSO Medical Guidelines and she is therefore not medically qualified to perform the full and unrestricted duties of an STSO as required by the Aviation and Transportation Security Act. The appellant's argument regarding the dosage of her medication and the time of day she takes the medication is irrelevant as the guidelines address use of any prescribed benzodiazepines. The fact that the appellant has

filed claims with DOL/OWCP does not negate the fact that the appellant does not meet the medical guidelines. The appellant's OWCP claims will be addressed by DOL and do not change the appellant's non-disciplinary medical disqualification. Similarly, the FMLA documentation submitted by the appellant several months after she received the NOPR does not change the fact that the appellant does not meet the medical guidelines. The appellant submitted a form with her reply to management's response to her appeal entitled "Family and Medical Leave Act Certification for Patients of [health care facility] to Submit to Employers," dated February 6, 2017. The form was signed by the same medical provider referenced in the narrative of the CMO letter dated October 24, 2016. The Board noted inconsistencies with the form. Although the form was dated February 6, 2017, the medical provider indicated that the last date she treated the appellant for her condition and the "date of exam" was October 20, 2016. The medical provider indicated "no" on the form for the question regarding whether the employee is unable to perform any of her job functions due to a serious health condition. Additionally, the medical provider indicated that the appellant was not prescribed medication other than over-the-counter medication. However, the CMO indicated in the October 24, 2016, letter that the same medical provider "wrote on 10/21/16 that [the appellant] was prescribed the medication alprazolam, a benzodiazepine and that she needed the following job limitations: cannot repeatedly lift and carry items weighing more than 20 pounds, cannot stand for periods of time greater than 2 hours, and she cannot walk up to 3 miles during a shift." The medical provider's statements are contradictory. 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:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-037

April 12, 2017

Issue: *Arrest for Distribution or Intent to Distribute a Controlled Substance; Arrest for Felony Involving Bribery; Arrest for Unlawful Entry into an Aircraft or Airport Area in Violation of Security Requirements*

OPINION AND DECISION

On February 14, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on three Charges: 1) *Arrest for Distribution or Intent to Distribute a Controlled Substance*, 2) *Arrest for Felony Involving Bribery*, and 3) *Arrest for Unlawful Entry into an Aircraft or Airport Area in Violation of Security Requirements.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is 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 Charge 1, *Arrest for Distribution or Intent to Distribute a Controlled Substance,* on one specification. The specification alleged that on February 13, 2017, the appellant was arrested pursuant to a Superseding Grand Jury Indictment for Conspiracy to Possess with the Intent to

Distribute Cocaine. Pursuant to the Indictment, between 1998 and February 8, 2017, while employed in his capacity as a Transportation Security Officer at the airport, the appellant did knowingly and intentionally combine, conspire, confederate and agree with several other individuals to smuggle multi-kilogram quantities of cocaine by, bypassing security measures while employed as a TSO at the airport in violation of Title 21, United States Code (U.S.C.), Sections 846 and 841(a)(1) and (b)(1)(A). The Indictment states, in part, that the appellant smuggled multi-kilograms of cocaine through TSA X-ray machines by clearing suitcases containing kilograms of cocaine and allowed those suitcases onto airplanes. The Indictment adds that during the course of the conspiracy, the appellant and the other individuals identified, helped smuggle approximately 20 tons of cocaine through the airport to the Continental United States. In accordance with 21 U.S.C. Section 846, any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt of the conspiracy. Title 21 U.S.C. Section 841(b)(1)(A) provides, in part, that a person who violates 21 U.S.C. Section 841(a) shall be sentenced to a term of imprisonment which may not be less than ten (10) years or more than life.

Management based Charge 2, *Arrest for Felony Involving Bribery*, on one specification. The specification alleged that on February 13, 2017, the appellant was arrested pursuant to a Superseding Grand Jury Indictment for Accepting a Bribe as a Public Official. Pursuant to the Indictment, between 1998 and in or about 2016, the appellant directly and indirectly corruptly, demanded, sought, received, accepted and agreed to receive and accept, something of value personally, in return for being induced to do an act in violation of his official duty as a TSO; that is taking multiple cash payments totaling in excess of one thousand (1,000) dollars per suitcase, carry-on, in exchange for allowing luggage that the appellant knew to contain multi-kilograms of cocaine to bypass normal baggage screening procedures so that luggage could be placed on outbound airplanes departing the airport for destination to the Continental United States in violation of 18, United States Code, Sections 201 (b)(2)(C). A person who violates Title 18 United States Code, Section 201 (b)(2)(C) shall be fined and or imprisoned for not more than fifteen (15) years.

Management based Charge 3, *Arrest for Unlawful Entry into an Aircraft or Airport Area in Violation of Security Requirements*, on one specification. The specification alleged that on February 13, 2017, the appellant was arrested pursuant to a Superseding Grand Jury Indictment for entering aircraft or airport area in violation of security requirements. Pursuant to the Indictment, the appellant unlawfully and willfully entered, in violation of security requirements under Title 49, United States Code, Sections, 44901, 44903(b) and (c) and 44906, including Title 49 of the Code of Federal Regulations Sections 1540.105 and 1540.111, an airport area that serves an air carrier and foreign air carrier, with the intent to evade security procedures and restrictions by knowingly and intentionally entering an airport area after bypassing security requirements and procedures with five (5) kilograms or more of mixture and substance containing cocaine, and with the intent to commit, in the airport area, a felony under the law of the United States Code, Section 46314(a) and (b)(2). Title 49, United States Code, Section 46314(b)(1) provides, in part, that a person violating 49 U.S.C. 46314(a) shall be fined and or imprisoned for not more than one year. Title 49, U.S.C. 46314(b)(2) provides, in part, that a person who violates Title 49, U.S.C., Section 46314(a) with the intent to commit in the aircraft or airport area, a felony under a law of the United States or a State shall be fined and or imprisoned for not more than ten years or both.

Management found the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA. Section 5. D. (7) states that TSA employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative polices and guidance. Section 6.E states that TSA employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness.

Management also found that the appellant violated the Handbook to MD 1100.73-5, Section O (2)(b) which prohibits employees from possessing, distributing or trafficking in controlled and/or illegal substances in violation of federal, state or local law. This prohibition applies to employees both on and off-duty. Additionally, management referenced the Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A., Section (2) which provides certain offenses for which removal is required or permitted. The Handbook, Section D. (1)(b)(iv)(g) provides that a one-step removal is appropriate where a TSO is arrested for offenses listed under Appendix A, Section (2)(g), including (xxiii) distribution of, or intent to distribute, a controlled substance; (xxvi) (h) bribery; (xi) unlawful entry to an aircraft or airport area contrary to established security requirements; 49 U.S.C. 46314.

Management held a pre-decisional meeting with the appellant on February 14, 2017. During the meeting, the appellant advised management that he did not have anything to say.

Management included as evidence: United States District Court Superseding Indictment; dated February 8, 2017; United States District Court Arrest Warrant; dated February 8, 2017; Summary of Pre-Decisional Discussion, dated February 14, 2017; applicable statues; and the appellant's Online Learning Center (OLC) history.

On appeal, with regard to the Charges, the appellant stated that he was observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. With regard to Charges 1 and 2, the appellant stated that he was arrested but argued that he is innocent until proven guilty in the court of law of the United States of America. With regard to Charge 3, the appellant stated that as a TSO it is his duty to not enter any aircraft and that he obeyed those duties at all times. The appellant also stated that the same duties applied for him to enter an airport area and establish security requirements for passengers and baggage going into an aircraft to avoid terrorist acts against the aircraft and the airport itself.

Management did not reply to the appellant's appeal.

With respect to Charges 1, 2, and 3, the Board found that the Superseding Indictment and Arrest Warrant show that the appellant was arrested and charged with conspiracy to possess with the intent to distribute cocaine, bribery, and entering aircraft or airport area in violation of security requirements, and is substantial evidence to support the Charges. Therefore, Charge 1, *Arrest for Distribution or Intent to Distribute a Controlled Substance,* is SUSTAINED; Charge 2, *Arrest for Felony Involving Bribery* is SUSTAINED; and Charge 3, *Arrest for Unlawful Entry into an Aircraft or Airport Area in Violation of Security Requirements*, is SUSTAINED.

Having sustained the Charges, the remaining question is whether the penalty of removal is consistent with the TSA Table of Offenses and Penalties (Table) and is reasonable.

The appellant argued he is a reliable and trustworthy employee. The appellant reiterated his argument that he is innocent until proven guilty and argued that as of now there is not substantial evidence to support his removal from TSA. He argued that the penalty is too harsh because he obeyed TSA MD 1100.73-5. The appellant stated that he did not have any details relating to his arrest so no witnesses could be generated for his case. The appellant stated that management has evidence of his integrity throughout his 10 years of service and requested an action other than termination.

The TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A, lists offenses for which removal is required/permitted. Section (2) lists TSO offenses for which removal is permitted for the first offense and (g) includes arrests for any of the following: (xi) unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements; (xxiii) distribution of, or intent to distribute, a controlled substance; and (xxvi) felony involving, (h) bribery. The Board finds that given the nature of the appellant's misconduct, management's decision to remove the appellant was within the bounds of reasonableness and in conformance with the policy listed above.

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:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-038

April 13, 2017

Issue: *Indefinite Suspension*

OPINION AND DECISION

On February 10, 2017, management indefinitely suspended the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one charge. The Charge alleged that the TSA Office of Inspection (OOI) is conducting an investigation to investigate the allegation that the appellant brandished a firearm at another TSA employee. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the appeal is GRANTED.

ANALYSIS AND FINDINGS

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

> (c) An investigation being conducted on serious allegations against an employee that represents a threat, which is so serious that if it proves to be true, the employee's continued presence at the worksite would represent a threat to life, property, safety or the effective operation of the workplace. This could include investigation into or allegations of theft, fraud or falsification, for example, where there is substantial evidence for which removal would be the likely outcome.

Management based the Charge, *Pending Agency Investigation*, on one specification. The specification alleged that the TSA Office of Inspection is conducting an investigation to investigate an allegation that the appellant brandished a firearm at another TSA employee.

The issue before the Board is whether the appellant's placement on indefinite suspension on February 10, 2017, was appropriate under TSA policy.

The Board considered the evidence and arguments presented by both parties.

In the appellant's appeal, he argued that the indefinite suspension is not supported by a preponderance of evidence. The appellant argued that management's decision to indefinitely suspend him is based on the mere fact that he is being investigated by TSA OOI. The appellant argued that management has only relied on two pieces of evidence; a February 10, 2017, email from OOI and a copy of the February 10, 2017, pre-decisional discussion. He argued that the evidence submitted by management does not support the Charge. The appellant argued that the email from OOI simply provides a case number and provides no indication that the investigation is regarding an allegation that he brandished a firearm at another employee. The appellant asserted the same argument as to management's second piece of evidence; the pre-decisional discussion. The appellant argued that an indefinite suspension must be supported by evidence beyond the mere fact that TSA OOI has opened an investigation into unknown allegations.

In the Notice of Indefinite Suspension, the Deciding Official stated that there is substantial evidence that the appellant engaged in the misconduct. The Board notes that the standard in this one-step action is preponderant evidence, not substantial evidence. The Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section D.(1)(b) states that indefinite suspensions must meet the preponderance of the evidence standard of proof.

The Deciding Official argued that due to the fact that OOI has accepted the case for investigation; the Charge and specification are proven. The Deciding Official stated that he has serious concerns that by allowing the appellant to remain at the workplace it would jeopardize the security of the TSA workforce or of the traveling public. The Deciding Official also stated that the indefinite suspension would remain in effect until the investigation shows that there is sufficient evidence to either return the appellant to duty or to support an administration action against him.

In management's reply to the appeal, they contend that the indefinite suspension is appropriate. Management further stated that the indefinite suspension was issued because OOI has accepted the case for investigation. Management stated that they placed the appellant on indefinite suspension pending the results of the OOI investigation and that this investigation is the result of an allegation from another TSO in which he stated that the appellant brandished a firearm at him. Management stated that the appellant's written statement is part of the OOI investigation. Management argued that the appellant's presence at the workplace would represent a threat to the property and effective operation.

The appellant replied to management's response and argued that the Handbook to MD 1100.75-3 states "the mere fact of an employee being investigated does not automatically result in indefinite suspension." The appellant argued that management stated that his written statement is part of OOI's investigation but failed to produce the statement depriving the appellant of his opportunity to provide a meaningful response. In addition, the appellant argued that management's claim that it reasonably believes that the appellant committed the alleged misconduct is not supported by any proof that led them to this conclusion.

Management has the burden to show that the appellant's presence at the worksite would represent a threat to life, property, safety, or the effective operation of the workplace. The Board finds that management failed to support the Charge with preponderant evidence. Neither the appellant's statement nor the statement of the TSO was provided to support the charge. Without these critical pieces of information, management was not able show how the appellant's charged conduct met the conditions permitting indefinite suspension under TSA policy. The Board noted that the decision to suspend the appellant stated that the allegation was that the appellant brandished a firearm in October 2016. The appellant's statement and the statement of the TSO may have shed light on why it took over three months to come forward with the allegation. Although an ongoing investigation is a key element in the conditions required under subsection (c), listed above, it is not the only key element. Therefore, the Board determined that management's decision to place the appellant on indefinite suspension was not consistent with TSA policy.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-039

April 18, 2017

Issue: Failure to Follow Standard Operating Procedure (SOP); Lack of Candor

OPINION AND DECISION

On January 27, 2017, management removed the appellant from her position as a Lead Transportation Security (LTSO) with the Transportation Security Administration based on two (2) charges, *Failure to Follow Standard Operating Procedure (SOP)* 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 charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charge, management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Failure to Follow Standard Operating Procedure (SOP)*, on one specification alleging that on Monday, December 19, 2016, the appellant was at the checkpoint at the airport. While she was acting as an On-the-Job Training (OJT) Coach, the appellant told a Transportation Security Officer (TSO) she could return an alarmed bag to a passenger before screening of that bag had been completed. This action was in violation of TSA policy. The appellant was made aware of this policy by her initial and recurrent security officer training.

Management based Charge 2, *Lack of Candor*, on fours specifications. Specification 1 alleged that on December 20, 2016, the appellant was questioned concerning her role in a security incident on December 19, 2016, involving an incomplete bag check. Specifically, the appellant was asked how

the alarmed bag was not fully screened. The appellant answered the question by stating that the passenger grabbed the bag and left the checkpoint without permission and that she never told the TSO to not complete the search of the bag, when she knew or should have known in fact that she had told the TSO to close the alarmed bag so it could be returned to the passenger before screening of that bag was completed. Specification 2 alleged that on or about December 19, 2016, the appellant provided a written statement regarding her role in a security incident involving an interrupted bag check. In the appellant's written statement, the appellant stated that ". . . we got a bag search, we identify the passenger and he mention [sic] that he needed to leave to get his phone from his car. He tried to leave all his property at the checkpoint and I explained that he had to take all his property with him and that we were gonna [sic] to look in his bag and that we were going to escort him out," when the appellant knew or should have known in fact that she had not informed the passenger that his bag would be searched. Specification 3 alleged that on or about December 19, 2016, the appellant provided a written statement wherein she stated that, ". . . I informed the passenger to walk to the front of the table that we needed to look inside his bag and that we will escort him out if needed (assuming he had a prohibited item)," when the appellant knew or should have known in fact that she told the TSO to close the alarmed bag so it could be returned to the passenger before screening of that bag was completed. Specification 4 alleged that on or about December 20, 2016, the appellant provided a written statement where she stated that ". . . the pax [sic] was at the front of the ETD table and [the TSO] started to do the bag search. I told her that we were going to escort him out and I think that is when (not 100% sure) she closed the bag and the passenger grabbed it.," when the appellant knew or should have known in fact that she had told the TSO to close the alarmed bag so it could be returned to the passenger before screening of that bag was completed.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. requires that employees behave in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (11) upholding, with integrity, the public trust involved in the position to which assigned, abiding by the 14 general principles of ethical conduct (5 C.F.R. § 2635.101) and avoiding the appearance of using public office for private gain. Management stated that the TSA Guide to Major Ethics Rules 2016, which was in effect at the time of the incidents listed above, and 5 C.F.R. § 2635.101 (b)(5) state that certain general principles apply to every employee; and that among these principles is the requirement that "[e]mployees shall put forth honest effort in the performance of their duties." Section 6. E. of MD 1100.73-5 states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. Management also cited Section 5. D. (7) which states, in part, that employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Management alleged that the appellant's conduct also violated the Handbook to MD 1100.73-5, Section F. (1) which requires that employees cooperate fully with all TSA and DHS investigations and inquiries, which includes providing truthful, accurate, and complete information in response to matters of official interest, and providing a written statement, if requested to do so.

Management also alleged that the appellant's conduct violated the Screening Policies for Standard Operating Procedures, Chapter 8.1.2; Chapter 8.2.3.c.; and Chapter 9.2.2.

On December 19, 2016, the appellant was working as an OJT mentor for a TSO when a passenger indicated that he had left his cell phone in his rental car and needed to retrieve it. The passenger left through the exit with his bag before his bag was searched.

A Supervisory Transportation Security Officer (STSO) submitted a statement on December 20, 2016. In her statement, the STSO stated that on December 19, 2016, at approximately 0500, the appellant approached her saying that while conducting a bag check on a passenger, the passenger stated that he had forgotten his cell phone in his car and had to go back and get it. The STSO stated that the appellant said that the passenger ". . . grabbed his bag from them before they were able to complete their search and ran out." The STSO stated that the appellant followed him out the exit and then notified her, the STSO. The STSO stated that she immediately notified a Transportation Security Manager (TSM) and had the appellant tell him the story. The STSO stated that she notified the airport police and the Coordination Center (CC).

The appellant submitted three statements about the incident. In her first statement, the appellant wrote that on December 19, 2016, at approximately 0500, they got a bag search and that they identified the passenger and that the passenger mentioned that he needed to leave to get his phone from his car. The appellant stated that the passenger tried to leave all of his property at the checkpoint and that she explained that he had to take all of his property with him and that she and the other TSO were going to look in his bag and that they were going to escort him out. The appellant stated that the TSO had the passenger's bag on the Explosive Trace Detection (ETD) table and that the passenger "grabbed the bag from [the TSO] and run [sic]." The appellant stated that she ran after him and saw him walking out the exit toward the front of the checkpoint.

The appellant added an addendum and stated that once the TSO had the passenger's bag for a bag search, she, the appellant, "informed the passenger to walk to the front of the table that we needed to look inside his bag and that we will escort him out if needed (assuming he had a prohibited item. [sic]." The appellant continued, stating that the TSO started to do the search as the passenger was in front of the table when the passenger "reached and grabbed the bag and walked away almost running, I was standing behind [the TSO] when I saw him leaving with the bag, I followed him and saw him leaving east checkpoint down the exit lane." The appellant stated that she came back and reported the incident to an STSO and told her that a passenger grabbed his bag from the ETD table and that she followed him and saw him going to the exit and leaving the checkpoint.

In a statement dated December 20, 2016, the appellant stated that her statement was in addition to the continuation to her initial statement that she had done on December 19, 2016, and that the TSM was asking for details. The appellant stated ". . . I am not sure of all details of the incident at this point. I don't know what I said exactly word by word, but I do know that pax [sic] was at the front of the ETD table and [the TSO] started to do the bag search. I told her that we were going to escort him out and I think that is when (not 100% sure) she closed the bag and the passenger grabbed it." The appellant stated that she followed the passenger and saw him exit the checkpoint toward the public side. She stated that in her opinion, the passenger walked really fast. She stated that she might have said running in her other statement, but that it was her opinion. The appellant stated that she told the STSO what happened. She stated, "I think I told her we were doing a bag check and the passenger grabbed his bag and ran to the exit and that I followed him and saw him exit out." The appellant stated that she could not remember her exact words. The appellant also stated, "at this point, I am not sure, I can't remember exactly about the advisements before the bag search." The appellant stated that she never told the TSO to release the bag to the passenger and that she never

told the TSO that the bag was cleared. The appellant stated that she thought the TSO still had her hands on the bag when the passenger grabbed it.

The TSO working with the appellant at the time of the incident also submitted a statement. In the TSO's statement, she wrote that on December 19, 2016, at around 0500, a passenger who was waiting for his bag to be checked at the checkpoint came up to her and asked if he could leave all of his belongings with her and the appellant so he could run to his car to retrieve his cell phone. The TSO stated that they advised the passenger that he could not and that he had to take all of his belongings with him and that he would be escorted out. The TSO stated, "I zipped the bag back up awaiting confirmation from my OJT coach and then the passenger grabbed the bag on the table and began to rush to the exit. We called out to him and he continued to run out of the exit." The TSO later added to her statement indicating she was asked a clarifying question by the TSM as to why she zipped the bag back up. The TSO stated, "as a trainee, I didn't know the protocol in this specific situation. It was never my intention to zip the bag and give the passenger the bag. I knew we needed to keep control of the bag and escort the passenger out of the sterile area. I zipped the bag and was waiting for my coach to tell me to either screen the bag or proceed to escort him out."

The appellant was given a Notice of Proposed Removal (NOPR) on January 3, 2017. The NOPR advised her of her right to make an oral and/or written reply within seven days. The appellant provided a written response on January 12, 2017.

Management supported the Charges with: Fact Finder's Memo, undated; statements of the appellant, dated December 19, 2016, and December 20, 2016; statement of a TSO, undated; statement of an STSO, dated December 20, 2016; Closed Circuit Television (CCTV) footage dated December 19, 2016; and appellant's Online Learning Center (OLC) training records.

On appeal, the appellant argued that the decision to remove her is not legally sufficient because management failed to prove the alleged misconduct by a preponderance of the evidence. The appellant stated that on December 19, 2016, while she was working as an OJT coach at the checkpoint, a passenger's bag required additional screening. The appellant stated that the TSO who was working alongside and being trained by her, placed the bag on the ETD table and opened the top of the bag so that it could receive additional screening. The appellant stated that the passenger then alerted her that he left his cell phone in his car and wished to leave his bags at the checkpoint to retrieve it. The appellant stated that she told the passenger that he would have to take all his belongings with him, as no unattended bags could be left at the checkpoint.

The appellant stated that the passenger was instructed to approach the front of the ETD table where his bag was to be searched. The appellant stated that she then told the TSO that the passenger was leaving and that she could escort him out. The appellant stated that the TSO, unsure of whether she was instructed to search the bag and then escort the passenger out or to just escort the passenger out, awaited clarifying instructions from her. The appellant stated that while she and the TSO were speaking, the passenger abruptly pulled his bag off the ETD table and moved swiftly to the exit.

The appellant stated that at no point did she instruct the TSO to release the bag or authorize the passenger to take the bag from the table. She stated that she followed the passenger to the exit and immediately returned to the checkpoint to notify her supervisor of what just transpired. The appellant stated that directly after the incident, she and the TSO were questioned by a TSM and both provided written statements. The appellant stated that she was shown a 20 second CCTV video without the sound. The appellant stated that the next day she also provided an addendum to

her written statement because she felt her first statement was not detailed enough. The appellant stated that there is no evidence that shows that the passenger entered the sterile area or caused any kind of security breach. She stated that ultimately the passenger approached the security checkpoint again and received full security screening.

The appellant argued that both Charges alleged against her are based on the same incident. She stated that management asserts that she, based on the CCTV video and audio, told the TSO to release the bag to the passenger and to allow him to leave and that she never told the passenger that his bag was to be searched. The appellant argued that the assertion is false. She argued that management has the burden of production as well as the burden of persuasion to show that she made that statement. She argued that management is unable to do so. The appellant argued that neither the video nor the audio capture a moment in which management can point to as the one in which she is alleged to have made that statement. The appellant also noted that the fact finder/TSM who wrote the NOPR, stated that the video was mostly inaudible and that the video seemed to corroborate the appellant's previous statements. The appellant argued that the statements given by her and the TSO were consistent in that they both stated that she never instructed the TSO to release the bag to the passenger.

The appellant argued that management removed her from her position based upon a video that lasted all of 20 seconds, essentially showing nothing but the passenger taking the bag off the table. She argued that had the video been longer, it would have shown that she instructed the passenger to approach the front of the ETD table while the bag was to be searched. She argued that management failed to include that sequence of events in the video because it does not support their allegations. The appellant noted that in the removal, management stated that it appears that the TSO gave the bag back to the passenger. She argued however, that it is clear from the video that the passenger aggressively took the bag off the ETD table and moved quickly toward the exit before she or the TSO could act. The appellant also argued that management had the opportunity to question the passenger as he returned with his belongings through the same checkpoint to get more information or a clearer understanding of what happened; yet they failed to do so. The appellant argued that for management to be able to prove by preponderant evidence that she made those statements, considering the inaudible video, the minutes prior to and after the incident should have been reviewed. She argued that it would have allowed management to consider the totality of the circumstances instead of just a snapshot.

The appellant argued that it is clear from the evidence that she never told the passenger that he could leave the checkpoint, nor did she instruct the TSO to release the luggage to the passenger. The appellant argued that absent proof of such action, management's burden fails with respect to all charges. She argued that management must prove that she both made the statement then subsequently failed to be candid. The appellant argued that management cannot prove, based on the poor sound quality and the brevity of the video, that she made that statement and failed to properly instruct the passenger. She argued that if management cannot prove that she made that statement then they also cannot prove that she was not candid in her written statement. The appellant argued that management did not prove by preponderant evidence that she made a statement instructing the TSO to release the passenger's bag without first searching it and letting him go nor that she never told the passenger that his bag was to be searched.

Management responded and argued that with regard to Charge 1, management needed to establish that there was an SOP, that the appellant was aware of the SOP, and that the appellant failed to follow the SOP. Management argued that they met the first prong of the requirement when they

provided the controlling Screening Policies for Standard Operating Procedures in the NOPR and Decision. Management argued that they met the second prong of the requirement when they provided the appellant's SOP training records and that they met the third prong when it was established through CCTV audio and video footage that the appellant, who was in charge of the screening process at the time, failed to follow the SOP and clear the alarmed bag before she allowed it to be returned to the passenger and leave the search table.

Management argued that the appellant attempted to place the blame for the incident on the passenger or the TSO who was an uncertified trainee for whom the appellant was responsible for training and monitoring. Management argued that when she observed the deviation, the appellant was required to immediately correct the trainee, take charge of the screening process, and follow the established SOP.

With regard to Charge 2, management argued that to prove the charge, they needed to establish that statements provided to management by the appellant were less than candid, truthful, accurate or complete, or involved deceit; and that the appellant knowingly made the statements or knowingly withheld information. Management argued that they met both requirements when they established that, in direct opposition to what actually occurred, and in direct opposition to CCTV audio and video footage, the appellant purposely misreported the events that took place at the search table.

Management argued that the appellant had multiple occasions to ensure her statements were truthful and correct but chose not to do so, even in the fact of contradictory recorded evidence. Management argued that this fact, along with the appellant's attempts to deflect blame on an uncertified trainee for whom she was responsible, and then even the passenger himself, support the reasonable conclusion that her lack of candor was an intentional similar attempt to deflect blame or avoid responsibility for her failure to follow the SOP.

Management argued that when the appellant reported the incident differently than what had actually occurred, an incident in which she was intricately involved and caused, the appellant engaged in an obvious lack of candor; and that she did it at least four times for the one incident. Management stated that her statements were given to the TSM multiple times over a several day period and that over those several days, she was given opportunities to correct the record and chose not to do so, even after being provided the CCTV audio and video footage to review.

With regard to Charge 1, the specification specifically alleged that the appellant told the TSO she could return an alarmed bag to a passenger before screening of that bag had been completed. The Board found that management failed to show by preponderance evidence that the appellant made that statement to the TSO. The fact that the passenger's bag was not searched before the passenger took the bag was in violation of TSA policy and the appellant may have known the policy; however, the preponderant evidence does not show that the appellant told the TSO to return the bag to the passenger. To the contrary, it is evident from the CCTV footage that the appellant went after the passenger when he took the bag and walked away from the table, indicating that she understood that the bag had to be searched. The TSO's statement is consistent with the appellant's statement. The TSO stated that the passenger asked if he could leave all his belongings with her and the appellant so he could run to his car to retrieve his cellphone. The TSO stated, "we advised him that he could not and that he had to take all his belongings with him and he would be escorted out. I zipped the bag back up awaiting confirmation from my OJT coach and then the passenger grabbed the bag on the table and began to rush to the exit. We called out to him and he continued to run out of the exit." In her follow up statement, the TSO stated, "I zipped the bag and was waiting for my coach

to tell me to either screen the bag or proceed to escort him out." The TSO never stated that the appellant told her she could return the alarmed bag to the passenger before screening of that bag had been completed. Therefore, Charge 1, *Failure to Follow Standard Operating Procedures (SOP)*, is NOT SUSTAINED.

With regard to Charge 2, specification 1, the specification alleged that on December 20, 2016, the appellant stated that the passenger grabbed the bag and left the checkpoint without permission and that she never told the TSO to not complete the search of the bag. Management alleged that the appellant knew or should have known that she told the TSO to close the alarmed bag so it could be returned to the passenger before screening of the bag was complete. The Board found that the statements of the appellant and the TSO, the two officers present during the incident, were consistent. The TSO did not state that the appellant told her to close the alarmed bag so it could be returned to the passenger before screening of the bag was complete. The TSO stated, "we advised him that he could not and that he had to take all his belongings with him and he would be escorted out. I zipped the bag back up awaiting confirmation from my OJT coach and then the passenger grabbed the bag on the table and began to rush to the exit. We called out to him and he continued to run out of the exit." In her follow up statement, the TSO stated, "I zipped the bag and was waiting for my coach to tell me to either screen the bag or proceed to escort him out." It is clear from the CCTV footage that the TSO placed the passenger's bag on the search table and that the passenger went around to the front of the search table. It was clear that the TSO had her hand on the passenger's bag when the passenger grabbed the bag and left the area. It is also clear that the appellant immediately went after the passenger when the appellant grabbed the bag and left. The Board found no evidence in the CCTV footage or the statement of the TSO that the appellant told the TSO to close the bag. Management failed to prove by preponderant evidence that the appellant lacked candor in her statement. Therefore, the specification is NOT SUSTAINED.

With regard to Charge 2, specification 2, the specification alleged that on December 19, 2016, the appellant stated ". . . we got a bag search, we identify the passenger and he mention [sic] that he needed to leave to get his phone from his car. He tried to leave all his property at the checkpoint and I explained that he had to take all his property with him and that we were gonna [sic] to look in his bag and that we were going to escort him out" and that the appellant knew or should have known that she had not informed the passenger that his bag would be searched. The Board found no evidence in the CCTV or the TSO's statement to show that the appellant did not tell the passenger that his bag would be searched. It is clear from the CCTV footage that the TSO took the passenger's bag and placed it on the search table. It is also clear from the video that the appellant went after the appellant as soon as he grabbed the bag and left the area. The video does not show if there was a conversation between the appellant and the passenger prior to the TSO placing the passenger's bag on the search table. Management failed to prove by preponderant evidence that the appellant lacked candor in her statement. Therefore, specification 2 is NOT SUSTAINED.

With regard to Charge 2, specification 3, the specification alleged that the appellant wrote in her statement provide on December 19, 2016, that, ". . . I informed the passenger to walk to the front of the table that we needed to look inside his bag and that we will escort him out if needed (assuming he had a prohibited item)" and that the appellant knew or should have known that she told the TSO to close the alarmed bag so it could be returned to the passenger before screening of that bag was completed. In her statement, the TSO did not state that the appellant told her to close the alarmed bag so it could be returned to the passenger before screening of the bag was complete. The TSO stated, "we advised him that he could not and that he had to take all his belongings with him and he would be escorted out. I zipped the bag back up awaiting confirmation from my OJT coach and

then the passenger grabbed the bag on the table and began to rush to the exit. We called out to him and he continued to run out of the exit." In her follow up statement, the TSO stated, "I zipped the bag and was waiting for my coach to tell me to either screen the bag or proceed to escort him out." The Board found that management failed to prove by preponderant evidence that the appellant told the TSO to close the alarmed bag so it could be returned to the passenger. Therefore, specification 3 is NOT SUSTAINED.

With regard to Charge 2, specification 4, management alleged that on or about December 20, 2016, the appellant provided a statement where she stated, ". . . the pax [sic] was at the front of the ETD table and [the TSO] started to do a bag search. I told her that we were going to escort him out and I think that is when (not 100% sure) she closed the bag and the passenger grabbed it" when the appellant knew or should have known that she had told the TSO to close the alarmed bag so it could be returned to the passenger before screening of that bag was completed. The Board found that specification 4 was redundant to specification 3 and management failed to prove by preponderant evidence that the appellant told the TSO to close the alarmed bag so it could be returned to the passenger. Therefore, specification 4 is NOT SUSTAINED.

None of the specifications for Charge 2 were sustained, 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, and returned to duty subject to meeting TSA employment standards. Further, the appellant will receive back pay from the effective date of her removal, subject to TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-041

April 25, 2017

Issue: *Failure to Maintain Certification*

OPINION AND DECISION

On February 13, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Certification*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board GRANTS 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 the results of the appellant's Image Mastery Assessment (IMA) did not meet the minimum standards as per the 2016 APR User's Guidance. Specifically, the appellant failed to meet the minimum standard in her first attempt on November 21, 2016. The appellant was provided the required remediation prior to failing her second and third attempts on November 28, 2016, and December 7, 2016.

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 November 21, 2016, and failed. The appellant was then tested again on November 28, 2016, and failed. The appellant was tested again on December 7, 2016, and failed her third attempt. The appellant was issued a Notice of Proposed Removal (NOPR) on December 29, 2016. The NOPR advised the appellant of her right to make an oral and/or written reply within seven (7) calendar days of receipt of the proposal. The appellant provided a written response on January 3, 2017.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgment-IMA forms, dated November 22, 2016, and November 30, 2016; TRX Simulator Individual User Reports; Online Learning Center (OLC) Learning History; and an email from a Security Training Instructor (STI), dated December 6, 2016.

On appeal, the appellant cited a previous Board Decision in which the Board found that management failed to follow agency policy by failing to provide the employee with a testing platform similar to that in which he worked on a daily basis. The appellant argued that the testing platform did not afford her with a valid and reliable measure of her technical proficiency. The appellant also argued that management was conducting a pilot program which required IMA-certified employees (b)(3):49 U.S.C. § 114(r) while on the x-ray machine during normal screening processes. The appellant stated that Transportation Security Specialist Explosives (TSSEs), supervisors and managers briefing this during the briefing sessions and throughout the checkpoint when employees were on duty.

The appellant argued that in contrast with the APR User's Guidance, there was not a valid representation of current threats and/or challenges faced by the security screening workforce on a daily basis. She argued that the TSSEs gave feedback and implemented certain procedures which were not transferable to the synthetic testing procedures and that in all of her tests, it is clear that she over-threated in every one of the failed tests and not by a significant portion.

The appellant also referenced a Training Communication from TSA's Office of Training & Development (OTD), dated November 2, 2016, with the subject line: TRX Sessions Freezing on Windows 10 Training Computers. The appellant alleged that in the body of the letter there was specific guidance stating "After conferring with OHC [Office of Human Capital], airports with Windows 10 machines should consider delaying Image Mastery Test (IMT) and the Image Mastery Assessment (IMA) testing, until after the solution has been deployed." The appellant also alleged that on December 1, 2016, the Office of Security Operations (OSO) issued an OSO Communication to all Federal Security Directors (FSDs) regarding an update to the OTD Training Communication letter dated November 2, 2016, and that it stated that "until a solution can be implemented, training and testing may still occur without the freezing error, if the training computer is disconnected from the network." The appellant argued that initially, it was assumed, based on her recollection, that she was tested on the Windows 10 operating system on all three attempts of her IMA test and twice before the update memo from OSO. However, according to the Training Manager (TM), this was not the case and instead the TM asserted that the Windows 7 operating system was used. The appellant argued that the OSO Communication letter informs the authorized FSD designee to retain and manually enter the score into the user's learning history when the OLC updates are completed. The appellant stated that the TM later confirmed that the practice of unplugging the system from the network and manually entering the employee's score was done for her, however, this practice is inconsistent from the guidance issued by OTD, which only addressed the Windows 10 platform issue after November 30, 2016 – not the Windows 7 platform. The appellant argued that the TM stated that the practice of unplugging an operating system which was unaffected only serves to compromise the process, especially where there are already concerns regarding testing platforms.

The appellant stated that the Deciding Official afforded the TM an opportunity to respond to her response to the NOPR and argued that this was out of practice from normal practices at TSA. The appellant argued that management should have rescinded the initial proposal and reissued a revised NOPR. She argued that it appeared as though there were two officials making a decision in the matter. The appellant also argued that the Deciding Official did not provide her an opportunity to meet for an oral reply, despite her union representative's written notification that an oral reply was requested.

The appellant argued that for most of the year, the airport lacked a sufficient training department which placed employees like her at a significant disadvantage since she was forced to cram her entire TRX sessions at the end of the fiscal year. She argued that if she was allowed to practice on her TRX throughout the year, it would have alleviated the need to cram in August and September, which placed her at a clear disadvantage. She noted that the Deciding Official stated that she gave shifts away during training sessions but argued that management possesses an obligation to ensure that employees are properly trained and up-to-date with training. She stated that in cases where employees are behind in their OLC courses, management makes every effort to ensure that they are pulled from the operation and given the time to catch up on the course. The appellant argued that there is no reason why the TRX sessions should not be considered similarly except that management did not possess an adequate number of Security Training Instructors (STIs). The appellant further argued that the practice portions of her remediation process were at the airport which was on the Windows 7 platform, whereas her remediation TRX practice took place at another location which was on the Windows 10 platform. She reiterated that it placed her at a significant disadvantage.

Finally, the appellant argued that on two occasions she marked on the APR Remediation forms (TSA form 1176-3) that she was not ready to test on the IMA. She noted that in a document submitted by management regarding her learning history details, the comments section states, "employee acknowledged receiving remediation in accordance with APR program policy and that she was ready to take the IMA test." She argued however, that she continued to state via written response on forms dated November 22 and November 30, 2016, that she was not ready to test on the IMA platform. The appellant noted that the Deciding Official responded that she verbally acknowledged being ready to test, but argued that he failed to address that she clearly marked and notated the reasons why she was not ready to test. She argued that management and the training department had an obligation to read and review the APR Remediation form that she marked on, instead of her, the employee, who felt obligated to test once told she would begin testing. The appellant argued that the final determining factor for an employee to certify and declare their desire to test is indicated on the APR Remediation form and not in an informal conversation held the day or days prior to the date of testing.

In regards to the appellant's contention that management failed to follow policy with regard to her IMA, management stated that there are two entirely different issues being addressed. Management argued that they provided documentation to corroborate that the appellant was tested strictly in accordance with the 2016 Annual Proficiency Review (APR) User's Guidance which explicitly states that the IMA shall be administered in a form consistent with current security Screening Standard Operating Procedures (SOP). Management stated that as such, the IMA and all subsequent remediation associated with the appellant's testing processes were administered by personnel assigned to the Training Department only. Management stated that they provided the chronology of all testing, self-study, and remediation documentation that verifies that all associated procedures were administered in stringent scope and compliance with the APR. Management argued that the appellant has not provided any new information to indicate that the administration of any of the IMAs did not meet the standards as outlined in the 2016 APR.

Management argued that the appellant's contention that the training staff deviated from the APR's recommended testing and remediation is without foundation. With regard to the appellant's reference to the pilot program being conducted, management stated that between May 25 and July 1, 2016, a six-week pilot program was run at the airport pertaining to Threat Detection of organics. Management argued that the pilot was limited to part-time employees and that the testing process was run 1.5 hours a day, 2 days a week, and was limited to part-time volunteer officers who worked for straight time compensation after their respective four hour shifts. Management argued that the pilot was run on only one lane located at one checkpoint at the airport. Management argued that the processes were never implemented airport wide and were never intended to replace or override procedures in the SOP. Management reiterated that only part-time officers who volunteered to be a part of the program were involved and that the program was clearly earmarked as a temporary procedure for the purposes of gathering data. Management stated that records indicate that during this period, the appellant was assigned to a part-time shift and that all participants engaged in the program were advised that the program was not to supersede anything in the SOP, TRX, or IMA. Management reiterated that the program ended July 1, 2016. Management argued that the appellant did not participate in the pilot program, nor did she provide any documentation to indicate who told her that any procedures included in the pilot program were permanent and should be implemented beyond the testing dates. Management also argued that records indicate that the appellant did not test for the IMA until November 21, 2016, and that no processes associated with the pilot program

were exercised at the airport for a period of 4 months and 20 days before the appellant took her first IMA test.

Management argued that the appellant's contention that there was lack of training consistency throughout the year is vague. Management noted that the appellant stated that "at times" her remediation was conducted on a dual screen but argued that the appellant was not clear about how many times she contends that actually occurred nor did she identify who her remediation instructor was. Management argued that they provided ample documentation of the appellant's training and remediation sessions that corroborate that she was tested under the same circumstances for which she was remediated. Management stated that their response to her argument is that the appellant was never certified on dual screen resolution. Management further argued that Windows 7 does not utilize a dual screen resolution process which is evidence that the testing and remediation processes associated with the appellant's IMAs were performed on a Windows 7 platform.

Management also argued that the TM's statement, referenced by the appellant with regard to her argument about the OSO communication, acknowledged that IMA tests were conducted on Windows 7 platform and that the tests were performed while unplugged and not connected to the network. Management argued that the APR guidelines allow this to occur when there is poor connectivity or no connectivity on the OLC. Management stated that the guidelines specifically state that under these conditions, the IMA tests may be conducted as long as the TRX software is up to date and the testing results are recorded manually in OLC. Management argued that as documented in the TM's statement, all test computers were properly uploaded with current IMA software updates as approved by Headquarters. Management stated that unplugging Windows 7 did not affect the test version once installed per guidelines; nor did it affect the appellant's test scores. Management stated that the only action item associated with unplugging Windows 7 from the network was that the training staff was mandated to manually enter the appellant's test scores to the OLC.

With regard to the appellant's argument that the TM was asked to respond to the NOPR, management argued that the TM provided new information percipient to allegations raised by the appellant. Management argued that because the appellant offered new allegations in her reply to the NOPR, management diligently investigated her claims in order to ensure that a just decision was reached. Management stated that the Deciding Official asked the TM to address the Windows 10 platform issues and address the questions associated with the technical processes. Management argued that they provided the appellant with the TM's memo and provided her with additional time to make a second reply to the NOPR.

In response to the appellant's claim that she was placed in a position of disadvantage due to lack of training instructors, management argued that they provided documentation illustrating that on several occasions, the appellant knowingly missed training sessions by scheduling shift swaps and taking annual leave on assigned training days without initiating make up sessions. Management argued that the appellant's need for cram sessions were self-initiated and that it was her responsibility to make up the missed sessions.

With regard to the appellant's contention that she articulated that she was not ready to test, management stated that this issue was addressed in the Decision Notice. Management stated that they reviewed her training records starting with her IMA1 failure and that she elected self-study and remediation. Management stated that the remediation was documented as being conducted by a

Master Security Training Instructor (MSTI) on November 22, 2016. Management stated that on November 27, 2016, a Transportation Security Manager (TSM) sent the training department an email stating that the appellant had competed her self-study and was ready to test on November 28, 2016. Management stated that the TSM documented that the appellant had completed four hours of TRX and remediation with the training department. Management stated that after her IMA2 failure she elected self-study and remediation and the remediation was conducted by an MSTI on November 30, 2016. Management stated that training records indicated that on November 30, 2016, a Supervisory Transportation Security Officer (STSO) sent an email to the training department requesting several TRX sessions (b)(3):49 U.S.C. § 114(r) to the appellant's OLC learning plan. Management stated that that TM offered the appellant the opportunity to work with the training department in order to maximize the benefit of specifically assigned TRX sessions and that on December 4, 2016, the TSM emailed the training department documenting that the appellant had participated in self-study. Management stated that on December 5, 2015, the TSM emailed the training department documenting that the appellant went to the training trailer to work on self-study for 3 hours and 15 minutes. Management stated that on December 6, 2016, a Training Specialist (TS) contacted the TSM about the appellant's self-study and scheduled a time for the appellant's final IMA and the TSM informed the TS that the appellant advised him that she felt the TRX adaptive session was more helpful in preparing her for reassessment. Management stated that the TSM advised that the appellant declined the offer to work with the training department and that when asked for more clarification, the TSM stated that the appellant had annotated on her remediation paperwork that she had requested to do (b)(3):49 U.S.C. § 114(r) studies on the TRX prior to taking her final IMA. Management stated that the appellant had requested to work with a specific MSTI and that training obliged the appellant's request and that on December 6, 2016, the appellant received a one hour TRX session with the MSTI she requested. Management stated that at the conclusion of the session the appellant advised the MSTI that she was ready to test. Management stated that the MSTI documented the remedial training sessions and that the documentation included a statement from the MSTI including an advisory that the appellant told her that she was ready to test.

The appellant replied and argued that management failed to provide the appellant with a testing platform similar to that which she worked on a daily basis. With regard to training, the appellant clarified that she meant that certain functionalities of the IMA TRX training program were done at the airport while others were done at an off-site location, which required travel. She argued that it placed an undue hardship on her in addition to the test-induced stress that is associated with annual tests. The appellant stated that she maintains that the unnecessary unplugging of the Windows 7 compromised the testing process and may have placed her at an unknown disadvantage. The appellant stated there was no need to modify the process of unplugging Windows 7 from the network and that management chose, on its own, potentially with positive intentions, to unplug the Windows 7 in order to manually enter her IMA score. With regard to the pilot program, the appellant argued that in the context of the checkpoint where she worked and her part-time work status, she was reasonably placed in the vicinity of those who would have been affected by potential carry-over of the pilot program and that it is well known within the inner-workings of the checkpoint and screening environment that programs implemented by management often leak out and are instituted by supervisors and the screening workforce. With regard to her articulation that she was not ready to test, the appellant reiterated that because she articulated, in writing, that she was not ready to test, management possessed an obligation to seek further clarification, preferably in writing, as to the reasons why she was not ready to test. She argued that when a training department employee persists that an affected employee must test and that affected employee is not

certain of her rights, or if she possesses any, to outright deny taking the test, it is unfavorable to her ability to deny doing so, except in writing – which she did.

Under TSA Management Directive (MD) 1100.77-1, *OPR Appellate Board*, Section 6. I., the Board may issue orders necessary to arrive at or implement its decision. On April 11, 2016, the Board ordered management to provide proof of the timeline in which the appellant was tested by providing the appellant's time and attendance records from November 21, 2016 through December 7, 2016. Management responded and provided the appellant's time and attendance records as ordered. The time and attendance records showed that the appellant was tested within seven (7) working days.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the IMA on November 21, 2016, November 28, 2016, and December 7, 2016. The Board also found that on November 22, 2016, prior to her first IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form acknowledging that she accepted and participated in self-study, and that she had received a minimum of one hour of remediation in accordance with the APR program policy on the Image Mastery Assessment (IMA), and that she was not ready to take the IMA reassessment. The appellant noted on the form, "I don't feel I'm ready yet because the buttons are different on the checkpoint than on this test and I would feel more comfortable if I practiced more." On November 30, 2016, prior to her second IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form acknowledging that she chose to participate in self-study, that she received remediation in accordance with the APR program policy on the Image Mastery Assessment (IMA), and that she was not ready to take the IMA reassessment. The appellant noted on the form, "I would like to do (b)(3):49 U.S.C. § 114(r) studies not just adaptive learning on the TRX before I take my next test plz [sic] and if possible have [MSTI] set [sic] with me next week." The remediation provided by management met the requirements set out in the APR. The Board determined that once the appellant indicated that she was not ready to retest, management was obligated to go back to the appellant and ensure that she was in fact ready to test and officially document that she was ready prior to conducting the reassessment. The Board noted that the appellant's first reassessment was given on day five of the seven-day reassessment requirement window and determined that therefore, the appellant could have been allowed two more days before she was required to re-test. The appellant's second test was given on Day 7 and appellant would have been required to test on that date. The APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form is the official form required by the APR User's Guidance to document remediation and the APR Remediation forms in the record indicate that the appellant was not ready to take the IMA reassessment. There were no supplemental forms or notations on the original forms indicating otherwise.

Decision. The appeal is, therefore, GRANTED. Management shall reinstate the appellant and provide the necessary return to duty training, if required, as well as the IMA remedial training and assessment. The appellant will be in paid duty status during training. If the appellant meets the minimum standards for the IMA, the appellant will be entitled to receive back pay from the removal date in accordance with TSA policy. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

_____

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Lead Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-042

April 14, 2017

Issue: *Failure to Maintain Certification*

OPINION AND DECISION

On February 13, 2017, management removed the appellant from his position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Certification*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management supported the Charge with one specification. The specification alleged that the results of the appellant's Image Mastery Assessment (IMA) did not meet the minimum standards as per the 2016 Annual Proficiency Review (APR) User's Guidance. Specifically, the appellant failed to meet the minimum IMA standard in his first attempt on November 30, 2016. The appellant was provided the required remediation prior to failing his second and third attempts on December 7, 2016, and December 18, 2016.

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 November 30, 2016, and failed. The appellant was then tested again on December 7, 2016, and failed. The appellant was tested again on December 18, 2016, and failed his third attempt. The appellant was issued a Notice of Proposed Removal (NOPR) on December 26, 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 met with the Deciding Official and gave an oral reply and provided his written reply on January 5, 2017. In response to the appellant's reply, management obtained documents as part of an investigation into points raised by the appellant. Management provided the documents to the appellant on January 24, 2017, and the appellant provided a response on January 30, 2017. On February 13, 2017, the appellant received the Removal Decision.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgment-IMA forms, dated December 5, 2016, and December 14, 2016; Success factors reports showing failures on November 30, 2016, December 7, 2016, and December 18, 2016; Online Learning Center (OLC) Learning History indicating remediation on December 5, 2016 and December 18, 2016; memo from the Training Manager (TM) to the Deciding Official, dated January 10, 2017; email from the TM, dated November 9, 2016; email from IT Field Region Manager, dated November 9, 2016; email from IT Field Relations Branch Chief, dated November 8, 2016; memo from Assistant Administrator for Training and Development, dated November 21, 2016; email from TM, dated December 1, 2016; TRX simulator report run on the appellant; Image Mastery Assessment (IMA) tracking, dated November 30, 2016; December 7, 2016, and December 18, 2016; IMA test administrator guide, dated January 2015; Success Factors print out showing TRX usage by the appellant; IMA Script, dated January 2015; appellant's TIP record for November 2016; and Guide sheet for setting up resolution for IMA.

On appeal, the appellant argued that the management failed to support the removal notice with preponderant evidence. The appellant argued that an email message was sent to management concerning issues with Windows 10. The update stated that training and testing may still occur

without the freezing error, if the training computer is disconnected from the network. The appellant alleged that during his first IMA attempt, his computer was not disconnected from the network. The appellant argued that airports were told to discontinue IMA testing on Windows 10 training machines but went forward with testing him on November 30, 2016. The appellant argued that the temporary solution of unplugging the test computers was not communicated until December 1, 2016. As proof of this failure, the appellant argued that the document provided by management showed that the manual credit for OLC was only entered for the testing on December 7, 2016, and December 18, 2016. The appellant argued that although the TM indicated that she knew of the Windows 10 issue; there appears to be no direct evidence that the appellant was tested on the Windows 7 platform. As further proof, the appellant alleged that he had to wait anywhere from five minutes to one hour to receive his test results. The appellant also argued that during all three attempts, not all image manipulation and enhancement keys and x-ray screening SOP were able to be applied. The appellant argued that the inability to make use of all functional keys available on the Rapiscan 620 DV operator control panel during IMA testing ran contrary to guidance that the IMA is "consistent with current security screening" SOP and that "standard x-ray screening processes are to be applied when responding to the IMA images." The appellant asserted that although management argued that he completed TRX sessions throughout the year; this argument is without merit as the TRX sessions differ greatly from IMA testing.

In addition, the appellant argued that he was not able to make use of other available x-ray screening procedures; specifically, the use of a second image. The appellant argued that he was unable to resubmit property for a second image to assist with image interpretation as any Officer can do in an operational environment. Therefore, he argued that he was forced to guess "Threat" or "No Threat." The appellant also argued that during 2016, management was running a pilot program that was a change to screening procedures. He argued that this changed his approach to the IMA attempts causing him to have had too high a percent for false alarms. He argued that this was tied to the changes in training and emphasis on organics. The appellant also alleged that as a Dual Function (DFO) LTSO, he did not receive enough time performing x-ray screening functions. The appellant stated that during his oral reply he noted that not receiving enough Threat Image Projection (TIP) images was indicative of his lack of x-ray time. The appellant argued that the Deciding Official should have produced these records as they are within the sole control of management.

The appellant also argued that management at the hub airport implemented a new program called the Threat Detection Training Plan (TDTP) across the hub and spoke airports, effective October 1, 2016, and that under this program he should not have been allowed to complete the third IMA attempt without first completing a specialized training plan. Under the plan, the appellant alleged that after an officer received two (2) to three (3) remediation sessions based on threat detection measures in an officer's scorecard, the Officer would be placed on a minimum thirty (30) day training plan. The appellant argued that the IMA is an area addressed on an officer's scorecard which can lead to officers being placed on a TDTP.

Management replied to the appeal and addressed all the arguments put forth by the appellant. Management asserted that the evidence shows that the training department was fully aware of the issues regarding the Windows 10 system and affirmatively took steps to ensure that all testing was done on a Windows 7 platform that was not connected to the network. Management asserted that the TM stated in an email that she concurred with the notification not to use Windows 10 and stated that she would not use Windows 10 until a solution was deployed. In regards to the appellant's

contention that he was not able to make use of all applicable enhancement keys, management asserted that the self-paced training guide delineates the manipulation and enhancement keys but notes that all other keys are non-functional on the simulator. Management stated that the appellant completed twenty-six (26) TRX sessions on the Rapiscan AT simulator in FY 2016, utilizing the same operator control panels that were available in the IMA. In none of those twenty-six (26) sessions were the button that the appellant referenced operable. Management argued that the appellant was aware of or should have been aware of the platform's constraints and that he was adequately prepared prior to taking all three (3) of his IMA assessments.

In response to the appellant's argument that he could not resubmit property for a second image, management argued that there is not nor has there ever been any criteria to resubmit property for a second image on the IMA. In response to the appellant's argument that the introduction of new training is inconsistent with the IMA testing, management asserted that the appellant must be referring to a pilot program conducted between May 25 and July 1, 2016. Management asserted that the pilot program was limited to part-time employees who volunteered to be part of the program. Management argued that the appellant was a full-time LTSO and was not qualified to participate in the program nor did he ever receive any briefings or instructions to utilize anything associated with the pilot program and therefore, the pilot could not have possibly affected his ability to successfully complete any of his IMAs.

Management also responded to the appellant's assertion that he did not receive enough x-ray screening time. Management asserted that because the appellant could not provide any supporting evidence; they considered this contention to be without merit. As to the appellant's argument that he was not placed on a TDTP, management responded that the TDTP has nothing to do with recertification testing. Management asserted that the TDTP is a program designed to improve deficiencies observed during the day-to-day performance of the officers prior to placing an officer on a Performance Improvement Plan. Management argued that the TDTP process is not available to TSOs who fail recertification because it is statutorily mandated that those officers be removed from service.

The appellant responded to management's response and argued that management's evidence regarding the Windows 10 issue is circumstantial and its value diminished by other facts surrounding the case. As to the inoperable buttons, the appellant asserted that the test instructions were inconsistent and gave officers false understanding of the scope of the IMA assessments. In response to the argument on resubmission of accessible property, the appellant argued that he is being punished for being unable to make full use of all resources available in an operational environment. The appellant argued that there was new training outside of the pilot program that put new emphasis on x-ray skills. He stated that the Missions Essentials: Organics for the AT X-ray (ME2) and Image Interpretation (ME4) changed the mindset of the x-ray operator that made the 2016 IMA incompatible with the real x-ray screening processes applied in operational environments. The appellant argued once again that management had sole control of the performance records and has requested copies of such records. Lastly, the appellant argued that the memorandum concerning TDTP takes into consideration IMA test results, as well as other APR assessments as part of the review process.

In light of the appellant's argument regarding insufficient x-ray time, the Board issued an order to management, dated April 10, 2017, requiring management to submit the appellant's TIP logs for the month of November. The submission clearly shows that the appellant had x-ray time and thus was

certified as an x-ray operator and available for testing. The Board considered all of the arguments made by the appellant but found no merit to any of the arguments. Management sufficiently rebutted all of the arguments put forth by the appellant.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the IMA on November 30, 2016, December 7, 2016, and December 18, 2016. The Board also found that on December 5, 2016, prior to his first IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form declining the opportunity for self-study and indicating that he received remediation in accordance with the APR program and policy requirements and that he was ready to take the IMA reassessment. On December 14, 2016, prior to his second IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form acknowledging that he chose to participate in self-study, that he received remediation in accordance with the APR program and policy requirements, and that he was ready to take the IMA reassessment. The Board finds that the appellant was properly assessed and remediated in accordance with the 2016 APR User's Guidance. The Board also finds that the TIP report provided by management clarified that the appellant was certified at the time of his IMA assessments. 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:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-043

April 19, 2017

Issue: *Failure to Maintain Certification*

OPINION AND DECISION

On February 13, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Certification*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board GRANTS 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 December 27, 2016, the appellant failed after three (3) attempts to meet the minimum standard technical proficiency for the On-Screen Alarm Resolution Protocol Assessment (OSARP) as required by the 2016 Annual Proficiency Review (APR) User's Guidance. All officers must pass the OSARP as part of the baggage recertification requirement.

The OSARP/OAA (Annual Assessment) is part of a larger annual proficiency review that TSA administers to all employees who occupy TSO positions. TSA administers the annual proficiency review pursuant to the legal requirements imposed on it by the Aviation and Transportation Security Act (ATSA). ATSA specifically requires that every TSO undergo an annual proficiency review, and that any individual employed as a TSO "may not continue to be employed in that capacity

unless the evaluations establish that the individual . . . demonstrates the current knowledge and skills necessary to . . . effectively perform screening functions." 49 U.S.C. § 44935 (f) (5).

The TSA 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 December 6, 2016, and failed. The appellant was tested again on December 14, 2016, and failed. On December 27, 2016, the appellant was tested again and failed his third attempt. The appellant was issued a Notice of Proposed Removal (NOPR) on January 11, 2017. The NOPR advised the appellant of his right to make an oral and/or written reply within seven (7) calendar days of his receipt of the proposal. The appellant submitted a written response on January 23, 2017, and was given the opportunity to submit a supplemental reply on February 1, 2017. On February 23, 2017, the appellant received the Removal Decision.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgment-IMA forms, dated December 14, 2016, and December 27, 2016; and an OOA3 report indicating failure on December 27, 2016.

On appeal, the appellant argued that his removal should be rescinded because management failed to consider the penalty factors in determining the appropriateness of its penalty and failed to prove that his removal promotes the efficiency of the service. The appellant asserted that he has been with TSA for over nine (9) years and received many awards and recognition and has had no history of disciplinary actions. The appellant argued that the remediation that he received did not sufficiently prepare him for success on the assessments because of the limited instruction and the incongruity between the training and the testing. The appellant argued that management did not conduct the reassessment within seven working days as required in the APR Guidance. The appellant asserted that his second reassessment was administered on December 14, 2016, yet the third and final assessment was not administered until December 27, 2016. The appellant argued that his seventh working day would have been December 26, 2016. He argued that this included his RDOs and Christmas Day. The appellant asserted that the guidelines state "Test Administrators do not have to be OSARP-certified to proctor the OAA." In addition, the appellant argued that he was not provided adequate remediation between assessments. He argued that the images he was provided for remediation were outdated and not applicable to the current standards and the reassessment. The appellant also argued that his removal does not promote the efficiency of the service.

In response to the appellant's argument that he was not tested within the seven working days, management agreed that the appellant was tested on day 8. Management argued that the APR guidance states "…If there is no SEA/QSEA or Test Administrator available on the seventh working day, the remediation period may be extended until one is available on the employee's next scheduled working day without requesting a formal extension." Management argued that the appellant was offered to take the reassessment on December 22, 2016, and was notified that the next available testing date would not be until December 27, 2016, due to his RDOs and the test administrators' availability. Management asserted that he declined the offer to test on December 22, 2016, and opted for the December 27, 2016, test date. Therefore, management asserted that they acted within the APR guidelines since they administered the test on the next available day for both the appellant and the test administrator.

As to the appellant's argument that he was not provided adequate remediation between assessments, management argued that the appellant's remediation was clearly documented on the APR Technical Proficiency Assessment Remediation Acknowledgment forms, dated December 6 and December 14, 2016. Management asserted that the USP simulator images that were used were the required courses for the OAA remediation. Management also asserted that in the removal decision, they explained to the appellant that the actual OAA testing images could not be used to practice for the test. As to the appellant's argument that his removal does not promote the efficiency of the service, management asserted that passing the OAA is a requirement for maintaining screening certification and maintaining screening certification is required to perform TSO duties. Therefore, the appellant was no longer able to perform all of the essential duties of his position.

The Board found no merit to any of the arguments put forth by the appellant. The Board found that the preponderance of the evidence establishes that the appellant took the OSARP/OAA on December 6, 2016, December 14, 2016, and December 27, 2016. The Board also found that on December14, 2016, prior to his first IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form acknowledging that he accepted and participated 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 December 27, 2016, prior to his second IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form acknowledging that he chose to participate in self-study, that he received remediation in accordance with the APR program and policy requirements, and that he was ready to take the IMA reassessment.

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 stated in not only their removal letter but also in their appeal that the remediation forms were dated December 6, 2016, and December 14, 2016. There is no APR Technical Proficiency Assessment Remediation Acknowledgement-OAA dated December 6, 2016. The APR Technical Proficiency Assessment Remediation Acknowledgment forms in the record are dated December 14, 2016, and December 27, 2016. The APR guidance establishes that that a TSO will receive at least one (1) hour of remediation after an assessment failure prior to reassessing. The December 14, 2016, OAA form shows that the appellant was provided with one (1) hour of remediation but the form dated December 27, 2016, fails to show that he was remediated for one (1) hour of remediation. There is no other evidence in the record to prove that he was remediated for one (1) hour. The Board determined that management made a critical error by

failing to provide the required one (1) hour of remediation to the appellant prior to his final reassessment. It is management's responsibility to ensure that the official APR records are properly completed. Accordingly, the Board finds that management failed to follow agency policy.

In addition, management failed to provide documentation to prove that the appellant failed the OSARP/OAA on December 6, 2017, and December 14, 2017. The only evidence in the record was a document titled OOA Feedback which showed a failure on December 27, 2016. Management must show by preponderant evidence that the appellant failed the tests administered to him but failed to do so. Accordingly, the Board finds that management did not prove the Charge by a preponderance of the evidence. As such the Board concludes that the appellant's removal was not appropriate or consistent with TSA policy.

Decision. The appeal is, therefore, GRANTED. Management shall reinstate the appellant and provide the necessary return to duty training, as well as the OAA remedial training and assessment, if required. The appellant will be in paid duty status during training. If the appellant meets the minimum standards for the OAA, the appellant will be entitled to receive back pay from the removal date in accordance with TSA policy. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-045

April 26, 2017

Issue: *Inability to Maintain a Regular Full-Time Work Schedule*

OPINION AND DECISION

On February 16, 2017, management removed the appellant from his position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Inability to Maintain a Regular Full-Time Work Schedule.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Inability to Maintain a Regular Full-Time Work Schedule,* on one specification which alleged that a review of the appellant's leave record shows that from February 22, 2015 through January 7, 2017, excluding any leave taken under his entitlement to the Family and Medical Leave Act (FMLA), the appellant has been absent from duty for a total of one thousand five hundred fifty-two one-half (1,552.5) hours. The appellant utilized 134 hours of annual leave, 110.5 hours of sick leave and 20 hours of other paid leave. The appellant has been charged as absent without leave (AWOL) for 144.5 hours. Additionally, due to an insufficient leave balance, the appellant was approved for 1,143.5 hours of leave without pay

(LWOP). Since January 7, 2017, the appellant has been absent for approximately 40% of his available work schedule.

Due to the appellant's excessive absences, management requested that the TSA Medical Review Officer (MRO) complete a fitness for duty medical review. On August 22, 2016, the MRO found the appellant medically qualified to perform the full and unrestricted duties of an LTSO. The appellant's level of absenteeism did not improve after receiving the MRO decision. On October 31, 2016, a Letter of Intent (LOI) and duty status update was sent to the appellant informing him that he has been unavailable for regular and recurring duty for approximately 22 months with no end in the foreseeable future. The appellant was notified that his continued absenteeism may result in administrative action such as proposing his removal. The appellant was informed in the LOI that if he had additional information for management to consider; he may submit recent medical documentation within fifteen (15) calendar days of the receipt of the LOI. The appellant replied to the LOI but did not provide any supporting medical documentation. The appellant stated that he had been off work recently; but was returning back to work as of November 17, 2016. Management noted that as of November 17, 2016, the appellant continued to be off work intermittently for an additional 104 hours; 64 hours of leave without pay, 8 hours of AWOL, 8 hours of annual leave, 12 hours of sick leave and 12 hours of other paid leave.

Management supported the Charge with: Leave Audit for period of February 22, 2015 through January 7, 2017; Letter of Intent, dated October 31, 2016; and WebTA records for PP 04/2015-PP26/2016.

The appellant received a Notice of Proposed Removal on January 23, 2017. The appellant provided both an oral and written response on February 6, 2017. As part of the meeting, the appellant provided medical notes from two of his physicians. The notes both stated that the appellant's health has stabilized and he should be able to continue to work without restrictions and should be able to maintain a regular work schedule. The appellant also provided nine letters of recommendation from fellow officers, supervisors and managers.

On appeal, the appellant argued that management failed to establish that removal is a reasonable penalty and that his removal does not promote the efficiency of the service. The appellant argued that he has been with TSA for almost twelve (12) years and has been a great employee and asset to TSA. The appellant acknowledged that for the last two years, he has suffered from several health complications, including seven heart attacks and other complications from his coronary artery disease. He argued that recent surgery has stabilized his medical condition and both of his doctors have indicated that he will be able to maintain a regular full-time work schedule. The appellant argued that management failed to follow progressive discipline and failed to properly weigh the Douglas factors.

Management responded by arguing that the appellant's non-disciplinary removal from federal service would be in the efficiency of the service. Additionally, management argued that the appellant's continued excessive absences caused a hardship for management to staff daily operations while meeting the mission of the Agency. Management stated 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 appellant alleged in his appeal that the removal does not follow progressive discipline and that management did not properly consider the mitigating factors. The Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section G. Penalty Determinations, states that the penalty factors do not apply to non-disciplinary removals.

The Board finds that management's decision to remove the appellant from the LTSO position is supported by a preponderance of the evidence. The Board gave no merit to the arguments put forth by the appellant. The Board finds that there is a clear nexus between a legitimate government interest and appellant's unavailability for duty. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary Charge*: Inability to Maintain a Regular Full-Time Work Schedule.*

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:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Supervisory Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—17-046

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

April 25, 2017

Issue: Negligent Performance of Duty; Failure to Follow Screening Standard Operating Procedures (SOP)

OPINION AND DECISION

On February 16, 2017, management removed the appellant from his position as a Supervisory Transportation Security (STSO) with the Transportation Security Administration based on two (2) charges, *Negligent Performance of Duty* and *Failure to Follow Screening Standard Operating Procedures (SOP)*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board GRANTS the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. 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 Charge 1, *Negligent Performance of Duty*, on two specifications. Specification 1 alleged that on December 19, 2016, the appellant was assigned as the Supervisory Transportation Security Officer (STSO) of the baggage screening room from 1330-0000. Under the appellant's supervision, at least sixty-five (65) pieces of checked luggage missed their flights, which caused the airline to delay three (3) of their flights. Specification 2 alleged that on December 19, 2016, the appellant was assigned as the STSO on duty at the checked baggage screening room from 1330-0000. At 1420, the appellant left the baggage room to report to training, without notifying a Transportation Security Manager (TSM).

Management based Charge 2, *Failure to Follow Screening Standard Operating Procedures (SOP)*, on one specification. The specification alleged that on December 19, 2016, the appellant was assigned as the STSO on duty at the checked baggage screening room from 1330-0000. The appellant failed to communicate the need for additional staffing at the baggage screening room and did not make every effort to ensure the staffing level was appropriate for the workload during his shift.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 6.E states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgement or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred. Section 6.B states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. Section 5.7 states that TSA employees must observe and abide by all laws, rules, regulations and other authoritative policies and guidance.

Management also alleged that the appellant's conduct violated the Screening Standard Operating Procedures, Chapter 20, section 2(2) and Chapter 21, section 4 (3.B).

On December 19, 2016, the appellant was assigned as the STSO on duty at the checked baggage screening room from 1330-0000. The appellant left the baggage room at 1420 to report to training without notifying his TSM. Upon the appellant's return from training, the bag room was inundated with pending bag searches.

The appellant submitted a statement on December 25, 2016, and stated that he communicated to his manager at 1915 that they were getting slammed and she told him that she had no one to send him. He stated that if his TSM tells him she has no one to send to him; he believes her. The appellant also stated that Lead Transportation Security Officers (LTSO) create the rotation and he has chosen not to modify the breaks because they are vital both physically and psychologically. He also stated that he is used to not getting sufficient help and just barreling on through. The appellant stated that he did not know that he could mandate overtime unless the FSD declared an emergency.

The appellant's TSM provided a statement on December 20, 2016. She stated that her normal practice is to visit the bag room one to two times per day but concurrent circumstances prevented her from doing so on December 19, 2016. The TSM stated that on December 18, 2016, the appellant advised her that he might need additional staff and that he was aware that an LTSO would be in the next day on overtime and wanted to know if he could have him report directly to the JetBlue bag room. She stated that she advised him to check his manning report for his staffing the next day and if he needed the LTSO, he could have him report directly to the bag room (which he did). She stated that she was next notified by the LTSO at 1530 that the baggage room was very busy and they needed additional staffing. The LTSO informed her that the appellant was attending training. When the appellant returned from training at 1617, he sent a text to the TSM requesting to extend the LTSO. The TSM stated that the checkpoint questioned whether the officer they sent to baggage could be sent back as they were having a peak push. The TSM advised the STSO to contact the bag room to see if they could send the officer back and they advised her no. The TSO

returned to the checkpoint at 1710. At 1912, the TSM missed a call on her phone and noticed a text message from the appellant. She called to speak to him without reading or responding to the text. During the call, he told her that they were very busy and asked if they could get the officer from the checkpoint back, to which she responded no. She stated that the appellant responded "Okay" and did not advise her that the room was unable to maintain their load or that there were any issues with the belts. She stated that his demeanor and response simply indicated that the room was routinely busy and he just wanted an extra hand. At 1950, the TSM sent the checkpoint officer back to the baggage room. The TSM stated that she was notified by another TSM that the baggage room was seeking additional officers because they needed help and the belts were working intermittently. She stated that this was the first time that she became aware of any back log of bags in the room. The TSM stated that she did not read the text that the appellant sent until the next day because she had reached out to him personally with a phone call. The text stated that they were getting slammed. The TSM stated that if the appellant had articulated the entire situation earlier in the day, she would have provided extra officers.

The LTSO in the checked baggage room submitted a statement on December 20, 2016. He stated that on December 19, 2016, at approximately 2100, he heard the appellant on the phone with the TSM with a Code 1. He stated that he assumed it was about something found in a bag search but when he heard that the TSM dispatched officers to help in the bag room, he knew the call was for emergency help. The LTSO stated that he was in the oversize area and called the appellant and told him that he needed at least one person to help him process the bags in the oversize room. The LTSO stated that within 10 minutes another LTSO came to help him process the bags. The LTSO also stated that he was informed by the appellant around 1400 that he was going to the training center for a little while. While the appellant was gone, bags started backing up and he called the STSO at the checkpoint but she stated that she could not spare anyone as they were understaffed as well. He also called the Central Monitoring Facility (CMF) to see if they could help but they also had no one to send. The LTSO then stated that he was informed that Line 4 was down and that he had to reboot it which took about 10-15 minutes. He stated that when he came back he immediately called the TSM and asked for help and within 5 minutes had one officer. He stated that another officer arrived around 1600, the same time that the appellant came back from the training center.

The appellant was given a Notice of Proposed Removal (NOPR) on January 21, 2017. The NOPR advised him of his right to make an oral and/or written reply within seven days. The appellant did not respond to the Notice of Proposed Removal.

Management supported the Charges with: statement from the appellant's TSM, dated December 20, 2016; statement from the LTSO, dated December 20, 2016, statement from the appellant, dated December 25, 2016; Coordination Center PING, dated December 19, 2016; email from the airline to the Deputy Assistant Federal Security Director (DAFSD), dated December 20, 2016; Shift summary from checked baggage screening room, dated December 19, 2016; email string from Assistant Federal Security Director (AFSD), dated December 21, 2016; email from another TSM, dated December 20, 2016; and report by a TSM, dated December 29, 2016.

On appeal, the appellant argued that management disregarded the facts and made up facts to suit their desired narrative. As to Charge 1, specification 1, the appellant argued that it cannot be possible for bags to miss flights and also have the flights delayed. As to Charge 1, specification 2, the appellant argued that it is common to go to training and get it over with at the beginning of the shift. He stated that this was mandatory training and was a lab that would only take about 90 minutes. He argued that he has never had to get permission to go to mandatory training. He argued

that he chose to attend the training at what is normally the slowest part of the shift but this turned out not to be the case on December 19, 2016. However, he stated that his absence did not create the issue and that the LTSO notified the TSM as soon as he realized that the room was getting heavy volume. As to Charge 2, the appellant stated that he did everything to ensure proper staffing. He stated that on the 18th, he informed the TSM that they would be short staffed on the 19th. He also stated that on the 19th, he communicated with his TSM by email, text, and by radio and phone that they were getting slammed. He stated that he was told that there were no resources and he believed her. The appellant stated that he was sent two staff at 2035 but that their shifts ended in 25 minutes and they both declined to stay. The appellant argued that he was placed in a catch-22 circumstance as no matter what decision he chose to make; he would have faced trouble. He argued that if he had mandated overtime, he would have been violating the Collective Bargaining Agreement (CBA), and if he did not, he would face management retribution. The appellant argued that Section 6.E of MD 1100.73-5 is inapplicable. He also argued that there is no evidence that he did not perform professionally in violation of Section 6.B of the MD. He also argued that he was not in violation of Section 5.7 of the MD. The appellant claimed that he is not in possession of the SOP and cannot defend himself regarding management's citations.

Management responded and argued that appellant's response was untimely. In addition, management argued that the appellant did not state any relief which the Board can grant, since the appellant's relief was to be allowed to retire. Management argued that the remedy sought by the appellant is already in his possession. Management also argued that the allegations presented by the appellant do not provide sufficient arguments to rebut. As to Charge 1, specification 1, management argued that a flight could be delayed waiting for a bag and once an airline realized that it cannot take any more delay time, a flight would depart without some bags on it and still be delayed. As to Charge 1, specification 1, management stated that it is clear that the appellant's superiors were surprised to hear that he had left the bag room. Management also argued that there is no provision in the CBA that prevents mandating overtime and that security operation requirements would have allowed the mandating of staff to ensure security integrity.

The appellant had requested a thirty-day extension to properly mount an adequate response due to losing his paycheck, his residence and trying to coordinate the necessary documentation for the appeal, while also dealing with a serious rotator cuff injury. The appellant was granted an additional seven days to submit his appeal. The extension granted was until March 28, 2017. The appellant did in fact mail out his appeal on March 28, 2017. The Board instructions clearly state "If delivery is by mail or commercial carrier, the date the appeal is postmarked (or accepted for delivery by the carrier) is considered the date the appeal is filed." Thus, the appeal was considered timely. In addition, the appellant succinctly outlined his objections to the Charges against him and thus, provided management with the arguments to which they did in fact provide a rebuttal. Although management is correct that the Board does not have the authority to require management to allow the appellant to retire; the Board is given authority under MD 1100.77-1 to conduct a complete review of all appealed actions properly before the Board. The fact that the appellant only requested retirement does not prohibit the Board from evaluating the evidence and reviewing the procedural and substantive issues.

With regard to Charge 1, specification 1, although management was able to prove that 65 pieces of luggage missed their flight and three flights were delayed, this does not prove negligence. The appellant notified management the day before the incident that there was improper staffing. On the day of the incident, the appellant sent a text to and spoke to a TSM to request more assistance. The TSM failed to read the text from the appellant in which he indicated that the baggage room was

getting slammed. The appellant asked the TSM for additional staff and she said that she had no one to send. The LTSO also informed the TSM of the issues occurring in the checked baggage room but the TSM failed to respond to the checked baggage room to assess the situation. Management has been unable to show that the appellant's actions on December 19, 2016, rose to the level of negligence. Therefore, specification 1, is NOT SUSTAINED. With regard to Charge 1, specification 2, management alleged that the appellant was negligent because he failed to notify the TSM that he left the baggage room to report to training. Management failed to support the specification with a policy or process which states that an STSO must notify their TSM prior to attending training. The Board notes that the training was mandatory and the LTSO was informed of the appellant's absence. Management failed to support the specification with preponderant evidence. Specification 2 is NOT SUSTAINED. Therefore, Charge 1, *Negligent Performance of Duty*, is NOT SUSTAINED.

With regard to Charge 2, management alleged that the appellant failed to follow the SOP by failing to communicate the need for additional staffing and did not make every effort to ensure the staffing level was appropriate for the workload during his shift. The evidence failed to support the allegation. The evidence showed that the night before the incident, the appellant notified the TSM that there was insufficient staffing for December 19, 2016. In addition, on the day of the incident, the appellant sent a text to and spoke to the TSM to request more staffing, which was denied. The appellant's text indicated that he was getting slammed but the TSM failed to read the text until the next day. The TSM indicated that she normally rotated through the baggage room one to two times per day but concurrent circumstances prevented her from doing so on this day. The TSM was advised not only by the STSO but also by the LTSO that there were staffing issues in the checked baggage room. Management failed to prove by preponderant evidence that the appellant failed to communicate the need for additional staffing. Therefore, Charge 2, *Failure to Follow Screening Standard Operating Procedures (SOP)* is NOT SUSTAINED.

Decision. Accordingly, the appeal is GRANTED. The appellant is ordered reinstated to his position as a Supervisory Transportation Security Officer, and returned to duty subject to meeting TSA employment standards. Further, the appellant will receive back pay from the effective date of his removal, subject to TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-048

April 25, 2017

Issue: *Disorderly Conduct*

OPINION AND DECISION

On March 3, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the charge: *Disorderly Conduct.* The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Disorderly Conduct*, on one specification. The specification alleged that on January 24, 2017, at approximately 0729 hours, the appellant was on duty as the Dynamic Officer (DO) at Terminal 1. At this time, a TSO, the x-ray operator, requested that the appellant conduct additional screening for a possible threat in a female passenger's bag. At approximately 0732 hours, the appellant approached the TSO from behind and placed the female passenger's personal sexual device on the TSO's shoulder. The appellant then proceeded to wave the item and touch the TSO in his face and arm area with the item while in the presence of the airport police officers, the traveling public, the appellant's supervisor, and co-workers.

Management alleged that the appellant's conduct violated TSA Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (7) requires that employees observe and abide by all laws, rules, regulations, and other authoritative policies and guidance. Section 6. D. states that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA; and 6. E. states that, while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness. Management also alleged that the appellant's conduct violated Section L. of the Handbook to MD 1100.73-5, which states that violent, threatening, intimidating, or confrontational behavior is unacceptable and will not be tolerated.

On January 24, 2017, the appellant was working as the DO at the checkpoint. The x-ray operator called for the appellant to conduct a bag check of a female passenger's bag. The appellant removed a personal sexual device from the passenger's bag and Closed Circuit Television (CCTV) video footage shows that the appellant walked over to the TSO working as the x-ray operator and placed the personal sexual device on the TSO's shoulder. The appellant then walked around to the other side of the TSO and placed the personal sexual device on or near the TSO's upper arm and face.

The TSO who was operating the x-ray at the time of the incident submitted a statement on January 24, 2017. The TSO stated that on January 24, 2017, at approximately 0730 hours, he was operating the x-ray and had identified and annotated a mass in a roller bag. The TSO stated that the appellant retrieved the bag from the Manual Diverter Roller (MDR) to conduct a bag check on the mass. The TSO stated that while he was in the middle of screening bags on the x-ray, the appellant came up behind him and set something on his shoulder. The TSO stated that he tilted his head as a knee jerk reaction having his face touch the item. The TSO stated that he stopped the x-ray belt and turned around to see what it was and it was a personal sex toy. The TSO stated that appellant then proceeded to wave the item around, tap him on the bicep and stick the item in his face while verbally antagonizing him about the bag check, stating that the TSO knew what the item was when he called the bag check. The TSO stated that he was disgusted, embarrassed and enraged. The TSO stated that he felt "physically/sexually assaulted" by the sex toy because it touched his face. The TSO stated that he also felt publically humiliated in front of his peers, colleagues, and passengers.

The appellant also submitted a statement on January 24, 2017. In his statement, the appellant stated that at about 0720 on January 24, 2017, he performed a bag check. He stated that during the bag check he discovered that the item being called for was a personal item belonging to the passenger. The appellant stated that he decided to ask the passenger if it was okay to remove the item and show the x-ray operator what the item was. The appellant stated that with the passenger's permission, he removed the item and showed the x-ray operator the item and then returned it to the passenger.

A Supervisory Transportation Security Officer (STSO) submitted a statement on January 24, 2017. He stated that at approximately 0730 hours he witnessed the appellant walk up to the TSO who was manning the x-ray and hit the TSO with a passenger's sexual toy from the back around the shoulder/neck area. The STSO stated that as the TSO was getting tapped out, he immediately

noticed that the TSO was clearly bothered and that the TSO informed him, as he was approaching to talk to him, that he was going to lunch. The STSO stated that at approximately 0735 he notified another two other STSOs about what he witnessed and was instructed to bring the appellant to talk with the other two STSOs.

A pre-decisional discussion was held with the appellant on January 24, 2017. The appellant submitted a written response via email on January 26, 2017. In his response he stated that to the best of his recollection and after viewing the CCTV, he did not recall "striking" the TSO. The appellant stated that there was no question as to his remorse for his actions and that he took full responsibility for his actions.

The appellant was issued a Notice of Proposed Removal (NOPR) on February 2, 2017. The NOPR advised the appellant of his right to reply orally and/or in writing within seven days of receipt of the NOPR. The appellant responded in writing on February 9, 2017, and made an oral reply on February 14, 2017.

Management included as evidence: Summary of Pre-Decisional Discussion, dated January 24, 2017; Email correspondence from the appellant, dated January 26, 2017; Memorandum from a Lead Transportation Security Officer (LTSO), dated January 25, 2017; Memorandums from a TSM, dated January 24 and 25, 2016; statement from a TSO, dated January 24, 2016; statement from the appellant, dated January 24, 2016; Memos to File from two STSOs, each dated January 24, 2017; statement from an STSO, dated January 25, 2017; statement from a TSO, dated January 24, 2017; No-Contact Order, dated January 24, 2017; Online Learning Center (OLC) Acknowledgement from the appellant; and Closed Circuit Television (CCTV) video.

On appeal, the appellant stated that he was called to a bag check by the TSO, which he conducted. The appellant stated that upon inspection of the bag, he found the personal sexual device. He stated that he proceeded to screen the item as requested using the proper screening procedures. The appellant stated that the passenger engaged in conversation with him and stated words to the effect of, "that's fine, you can show him what it is," so he proceeded to show the TSO the item he had threated. The appellant noted that it was clear the passenger was not uncomfortable and even encouraged him to show the x-ray operator what he threated. The appellant stated that he asked the passenger, prior to inspecting the bag, if she would like private screening to which she replied words to the effect of "no, right here is fine," so he checked the bag where he stood at the inspection table. He argued that he did not maliciously intend to degrade, berate, or otherwise embarrass the TSO, and that instead his intention, at the time, was to bring to the TSO's attention the item he had threated. The appellant stated that at the time he believed the TSO had purposely threated the item despite knowing full well what it was since the TSO was the veteran officer of the two. The appellant stated that he admits that he may have been wrong about the TSO's intentions and that he reacted too quickly. The appellant argued that although it is inconclusive as to whether or not the TSO knew what the item was, it is noted that his perceived provocation on the part of the TSO is a mitigating factor to be considered.

The appellant argued that the allegation that he hit or struck the TSO on the face with the passenger's personal sexual device, as asserted by management, clearly aggravated the charge to make it more notorious. The appellant argued that the provided evidence, the CCTV, does not show him striking or touching the TSO's face, although he stated there is a moment in the video where it appears the item goes near the TSO's face. The appellant argued that although the TSO

mentioned the item touched his face, the provided CCTV does not concur with the TSO's statement. The appellant noted the NOPR and the Decision both state the item touched the TSO's face but argued again that it is not substantiated by his recollection or the provided CCTV evidence. The appellant argued that the appellant did jerk away from the item once it was presented into his viewing which, the appellant stated, may have had the appearance of the item touching his face.

The appellant stated that it is accurate that police officers and at least one passenger were seen in the video during the alleged incident however, he argued that neither the passenger nor the police officers were seen viewing the incident itself. The appellant stated that during the time he was taking the item back to the passenger, the police officers visibly noticed the item in his hand and apparently commented and gestured regarding the item. He argued however, that there is no indication that any passenger, co-worker, police officer, or the passenger whose item was being screened submitted any written statements, complaints, or other forms of notice to TSA indicating anything improper was done. The appellant noted that the only statements provided were from STSOs and one LTSO.

Management replied and argued that it is clear from the CCTV video; the STSO's statement; and the TSO's statement that the appellant touched the TSO with the personal sexual device. Management argued that the STSO witnessed the appellant "hit [the TSO] with a passengers [sic] sexual toy from the back around the shoulder/neck area." Management argued that the TSO stated that "[the appellant] came up behind me and set something on my shoulder, I tilted my head as a knee jerk reaction having my face touch the item. I stopped the X-ray belt and turned around to see what it was and it was a personal sex toy 'dildo.' [The appellant] then proceeded to wave the item around, tap me on the bicep and stick it in my face while verbally antagonizing me . . ." Management argued that the video shows that, at approximately 0732 hours, the appellant approached the TSO from behind and placed the female passenger's personal sexual device on the TSO's shoulder. Management stated that he then proceeded to wave the item and touch the TSO in the face and arm area with the item while in the presence of police officers, the traveling public, his supervisor and co-workers.

With respect to the Charge, the Board finds that the evidence in the record, to include the CCTV video coupled with the appellant's statement and the statements of the TSO and STSO present at the time of the incident, to be preponderant evidence to support the Charge. Therefore, the Charge, *Disorderly Conduct,* is SUSTAINED.

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

On appeal, the appellant argued that the matter was not so egregious as to warrant removal. He argued that the Deciding Official did not fully consider mitigating factors as determined by the Table. The appellant noted that the Deciding Official considered a corrective action he received, a Letter of Counseling (LOC), as an aggravating factor. The appellant argued that the LOC was unrelated to the current matter or any matters similar to the current matter; he argued that it was an isolated incident which was not repeated. The appellant argued that he has taken

responsibility, apologized for his actions, and assured management that he has learned from his mistake and that it will not happen again. The appellant argued that it is reasonably concluded that management aggravated the penalty due to the TSO's visible, verbal and aggressive outrage at the incident. He argued that notwithstanding his role in the matter, had the TSO not reacted in such a forceful manner, management may have not proposed and ultimately imposed such a harsh penalty.

The appellant noted that the Deciding Official mentioned that he is not aware of any matters similar to the current matter of which to compare, in keeping with the Penalty Determination of consistency across the agency. The appellant cited two Board cases from 2014 from the airport where he is stationed where the appellant in each case was charged with Disorderly Conduct. The appellant stated that in the two cases, there was horseplay involved, some of a sexual nature, with other co-workers, in public view and caught on CCTV. The appellant noted that the Board mitigated the penalties of removal in both cases due to management's assertion that there was no further ability for the employees to be rehabilitated and citing management's bounds of unreasonableness in issuing the penalty. The appellant noted that the Board considered both appellants' admittance of wrongdoing, the fact that they took responsibility, and their assurance that the displayed behavior was a lapse of judgment. The appellant argued that management did not apply the lowest form of discipline available to impress upon him the seriousness of his misconduct and that instead, management chose to remove him. He argued that he has been rehabilitated, has learned his lesson, and will not conduct himself in such a manner as an employee of the Federal government. The appellant argued that he had no prior discipline and that this first matter was dealt with in a manner that is unseemly, unwarranted and unfair.

The appellant stated that while he is admittedly at fault for part of the charge claimed by management, he should not have been removed from Federal service. The appellant reiterated that as referenced in the previous Board decisions he cited, the Board considered mitigating factors such as employees taking responsibility, sorrow for their displayed behaviors, lack of previous disciplinary action, and totality of Government service. The appellant stated that he proudly served in the United States Armed Forces for four years, at the United States Postal Service for over one year, and at TSA for nearly three years. He stated that this incident was a momentary lapse in judgment and not an indicator of his work ethic, principles, or Government service with no previous discipline. The appellant stated that he is an exemplary employee and noted that he received an "Exceeds Expectations" on his 2016 performance review, has volunteered and served as an On-the-Job training (OJT) mentor and has successfully mentored many officers. He stated that he is an honest, hard-working employee with an extremely high ability to learn from his mistakes and continue serving his country as a public servant.

Management responded and stated the appropriate penalty determination factors were properly considered. Management argued that, as the Deciding Official noted, the appellant's highly disruptive and disgraceful conduct has damaged the image of TSA at the airport; and absolutely undermined management's confidence and trust in him. Management argued that the appellant's actions were extremely humiliating and abusive, and that they are entirely distinguishable from the Board decisions that the appellant referenced in his appeal. Management argued that both cases cited by the appellant involved TSO horseplay in the baggage screening area, and did not involve the level of notoriety of the incident involving the appellant. Management argued that in both cases cited by the appellant, there was no physical touching of another officer, in front of stakeholder witnesses, with a passenger's personal sexual device.

Management argued that they did take into consideration a number of factors as noted in the NOPR and Decision letter. Management argued that in noting mitigating factors, the Deciding Official specifically acknowledged the appellant's satisfactory performance and that he had been employed with TSA for almost three years. Management argued that the Deciding Official found however, that the seriousness of the appellant's misconduct is incompatible with continued employment. Management argued that the Table indicates that in cases where the misconduct is egregious enough or is accompanied by sufficiently aggravating circumstances, progressive discipline may be inappropriate and removal or other severe action would be warranted on the first offense. Management stated that the egregious nature of the appellant's misconduct and both the Proposing and Deciding Officials' conclusion that the appellant lacked any rehabilitation potential resulted in removal as the only action that would promote the efficiency of the service in this matter.

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

As potential mitigating factors, the Deciding Official considered the appellant's satisfactory job performance, and that he has been employed with TSA for nearly three years. The Deciding Official stated that he did not find however, that the appellant's length of service or performance is sufficient enough to outweigh the severity of the offense. The Deciding Official considered that the appellant was trained on the requirement under the Employee Responsibilities and Code of Conduct to avoid conduct that would cause TSA to lose confidence in his reliability, judgment and trustworthiness. The Deciding Official considered that the appellant engaged in highly disruptive and disgraceful conduct that has damaged the image of TSA at the airport and that the appellant's actions undermine management's confidence in his judgment.

The Deciding Official considered as an aggravating factor that the appellant received a corrective action. Specifically, on March 9, 2015, the appellant received an LOC for his failure to report for duty with his appropriate badge. The Deciding Official stated that through this action, the appellant was placed on notice that any future misconduct could result in more severe discipline action, up to and including removal from Federal service.

The Deciding Official also considered whether the appellant's misconduct was inadvertent. He stated that although the appellant stated during his oral response that he let his pride override his common sense and allowed himself to react the wrong way by making a mistake in judgment; the video shows that the appellant intentionally placed the item on the TSO's shoulder and then touched him with the object in a disruptive manner. The Deciding Official considered that the appellant's actions violated the trust that management and the traveling public places in him; and were extremely humiliating and abusive towards the TSO. The Deciding Official considered that as a result of the appellant's behavior, the TSO became upset and distracted, which could have had serious consequences on the Agency's security mission. The Deciding Official also considered that the appellant's misconduct occurred in a public area and caused embarrassment to TSA in front of passengers and police officers. The Deciding Official stated that based on the

egregious nature of the appellant's action, he does not believe the appellant has the potential for rehabilitation.

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

TSA employees, while on or off-duty, are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness. The appellant's misconduct was egregious. His actions humiliated a co-worker at the checkpoint in view of passengers, co-workers and stakeholders. His actions disrupted security operations and could have caused a major security event. The appellant's actions were dissimilar to the actions of the employees cited in previous Board decisions by the appellant. The Board finds that management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

_____

Debra S. Engel
Chair
OPR Appellate Board