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

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—17-047

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 7, 2017

***Issue**: Refusal to Take TSA-Ordered Alcohol Test*

DECISION ON RECONSIDERATION

On May 16, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On May 26, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. 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

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-048

June 1, 2017

***Issue**: Disorderly Conduct*

DECISION ON RECONSIDERATION

On April 25, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On May 10, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On May 16, 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 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,

DOCKET NUMBER
OAB—17-050

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 16, 2017

***Issue**: Failure to Follow Standard Operating Procedures; Failure to Follow Uniform Policy; Inappropriate Conduct; Misuse of Position*

DECISION ON RECONSIDERATION

On May 8, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision denying the appellant's appeal and upholding management's removal of the appellant. The Board upheld Charge 1, *Failure to Follow SOP*, specification 2 of Charge 2, *Failure to Follow Uniform Policy*, specifications 3, 4, 6, 7 and 8 of Charge 3, *Inappropriate Conduct* and Charge 4, *Misuse of Position*. The appellant filed a timely request for reconsideration pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board* arguing that the Board misinterpreted the facts. Management filed an opposition to the reconsideration request arguing that the Board's decision should be upheld. Management also requested reconsideration of the Board's decision not to sustain specification 1 of Charge 2, *Failure to Follow Uniform Policy*. This request was untimely and was not considered.

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, in part. This reconsideration decision finds that specifications 3, 4, 6, 7 and 8 of Charge 3, *Inappropriate Conduct*, were not supported by a preponderance of the evidence. However, this does not change the penalty of removal.

Analysis

The appellant argued that the Board misinterpreted the facts with regards to Charge 2, specification 2, specifications 3 ,4, 6, 7, and 8 of Charge 3, and Charge 4. After reviewing the

underlying record, the request for reconsideration and the opposition to the request, I find that the Board did not misinterpret the facts or misapply policy with respect to Charge 2, specification 2, *Failure to Follow Uniform Policy*, and Charge 4, *Misuse of Position*.

This reconsideration decision finds that that management did not support specifications 3, 4, 6, 7, and 8 with preponderant evidence. The appellant's tweets did not rise to the level of inappropriate conduct. Although the appellant did identify herself as working for TSA, the tweets were complimentary and did not show any level of inappropriateness. In addition, the tweets did not speak ill of TSA, did not use profanity and were positive.

Although not on consideration, I believe that the Board erred in Not Sustaining specifications 1 and 2 of Charge 3. These Facebook posts were inappropriate and a clear nexus existed to the job since the appellant had allowed another TSA employee access to her Facebook site. Although the Board may have erred, these specifications cannot be considered. Therefore, Charge 3, *Inappropriate Conduct* is NOT SUSTAINED.

Penalty Determination

Having sustained three of the four charges, the question becomes whether the imposed penalty is consistent with the TSA *Table of Offenses and Penalties* (Table) and whether it is reasonable.

In determining the appropriateness of the penalty, the Board would look to the Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct* and the TSA *Table of Offenses and Penalties* (Table). The appellant argued that the Deciding Official should not have relied upon statements made by the appellant's colleagues since she was not charged with making these statements. On appeal, the appellant did not raise the issue of the statements relied upon by the Deciding Official. These statements should not have been considered by the Deciding Official but this issue was not raised to the Board. Although an error, I do not deem this to be a harmful error as this error does not change the outcome of the penalty proposed by the Deciding Official. It cannot be alleged that the Board misinterpreted the facts or misapplied policy if the issue was not raised on appeal. The Board did not err in their assessment of the penalty. The Table states that in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the "Aggravated Penalty Range" column corresponding to the most serious offense being charged. Removal is included in the aggravated range under the penalty ranges for Failure to Follow SOP and Misuse of Position.

Decision. Accordingly, the reconsideration is GRANTED, in part. Charge 3 is not supported by preponderant evidence and is NOT SUSTAINED, however, the penalty of removal is upheld. 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.

OFFICIAL: Office of Professional Responsibility

Arlington, VA 20598

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Lead Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—17-052

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 7, 2017

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

DECISION ON RECONSIDERATION

On May 21, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On May 23, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. Management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-053

June 8, 2017

Issue: *Misrepresentation*

DECISION ON RECONSIDERATION

On May 23, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision granting the appellant's appeal, in part, and mitigating the appellant's removal to a fourteen (14) day suspension. On May 31, 2017, management filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On June 2, 2017, the appellant 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 Assistant Administrator
Office of Professional Responsibility

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

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

DOCKET NUMBER
OAB—17-056

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 30, 2017

***Issue**: Inattention to Duty; Submitting Inaccurate Time and Attendance Records; Failure to Follow Procedures; Absence without Leave (AWOL)*

DECISION ON RECONSIDERATION

On June 1, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's demotion from the position of Supervisory Transportation Security Officer (STSO) to the position of Transportation Security Officer (TSO). On June 5, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On June 15, 2017, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Deborah Kearse

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

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

DOCKET NUMBER
OAB—17-056

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 1, 2017

Issue: *Inattention to Duty; Submitting Inaccurate Time and Attendance Records; Failure to Follow Procedures; Absence without Leave (AWOL)*

OPINION AND DECISION

On April 19, 2017, management demoted the appellant from his position of Supervisory Transportation Security Officer (STSO), SV-1802-G, to the position of Transportation Security Officer (TSO), SV-1802-E, with the Transportation Security Administration (TSA) based on four charges: *Inattention to Duty; Submitting Inaccurate Time and Attendance Records; Failure to Follow Procedures; Absence without Leave (AWOL).* The appellant filed a timely appeal of his demotion to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Inattention to Duty*, on one specification. The specification alleged that on March 3, 2017, the appellant was the STSO overseeing a checkpoint. The appellant had the responsibility to ensure the proper staffing level was maintained. However, the appellant allowed the checkpoint to drop below the required staffing level required to support the number of Pre-Check lanes in operation.

Management based Charge 2, *Submitting Inaccurate Time and Attendance Records*, on one specification. The specification alleged that on January 7, 2017, the appellant did not report for his scheduled shift due to weather. Upon the appellant's return to duty, he submitted an OPM 71, requesting emergency annual leave for his absence. On January 11, 2017, the appellant learned that those who called out sick on January 7 would be granted sick leave, but those who were absent due to weather would receive a Letter of Counseling or discipline. As a result, the appellant submitted another OPM 71 for January 7, 2017, for sick leave, although he was not sick.

Management based Charge 3, *Failure to Follow Procedures*, on four specifications. Specification 1 alleged that on January 27, 2017, a Transportation Security Officer (TSO) was scheduled to attend required training from 0500 hours to 1330 hours. Instead of reporting to training at 0500 hours, the TSO reported to the checkpoint at 0345 hours for her regular shift of 0345 hours to 1215 hours, where the appellant was the STSO in charge. As the STSO in charge, the appellant had a responsibility to correct the TSO and instruct the TSO to report to training as scheduled. The appellant only did so after being notified that the TSO was missing from her scheduled training day. As a result, the TSO missed approximately 30 minutes of training. Specification 2 alleged that on January 7, 2017, the appellant was scheduled to work from 0345 hours to 1215 hours. Snow had fallen in the airport's area, and as a designated emergency employee, the appellant was required to come to work in inclement weather unless otherwise advised. The appellant called the manager on duty and left a message stating that he would not be reporting for his scheduled shift due to weather and icy road conditions, and he failed to report for his scheduled shift. Specification 3 alleged that on January 3, 2017, a TSO was scheduled to attend required training from 0500 hours to 1330 hours. Instead of reporting to training at 0500 hours, the TSO reported to Bravo checkpoint at 0345 hours for her regular shift of 0345 hours to 1215 hours, where the appellant was the STSO in charge. As the STSO in charge, the appellant had a responsibility to correct the TSO and instruct her to report to training as scheduled. The appellant failed to instruct the TSO to report to training and as a result, the TSO missed her scheduled training day. Specification 4 alleged that as an STSO, the appellant had been instructed that he was required to view 500 bags per month during x-ray screening. In the month of December 2016, the appellant viewed 273 bags through x-ray screening; thus, the appellant failed to view the required 500 bags through x-ray screening for the month of December 2016.

Management based Charge 4, *Absence without Leave (AWOL)*, on two specifications. Specification 1 alleged that on January 11, 2017, the appellant was scheduled to work from 0345 hours to 1215 hours. The appellant arrived for his scheduled shift at 0417; 32 minutes tardy. As a result, the appellant was charged 30 minutes of Absence without Leave (AWOL). Specification 2 alleged that on January 7, 2017, the appellant was scheduled to work from 0345 hours to 1215 hours. As a designated emergency employee, the appellant was required to come to work in inclement weather unless otherwise advised. The appellant called the manager on duty and left a message stating that he would not be reporting for his scheduled shift due to weather and icy road conditions. As a result, the appellant was charged eight hours of Absence without Leave (AWOL).

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5.D., which provides 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. (1) requires employees to report on work on time and ready, willing and able to perform the duties of their position. Section 5. D. (2) provides that employees are responsible for responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials. Section 5. D. (7) provides that employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 5. C. (4) provides that STSOs are responsible for providing positive leadership and serving as a role model for subordinates by complying with all employee responsibilities, and demonstrating a commitment and sense of responsibility to their job and high ethical standards. Section 6. B. provides that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgement or trustworthiness.

The Handbook to TSA MD 1100.61-1, *Dismissals and Closures*, Section D.1, provides that absent unusual circumstances or a management determination that they may be excused, employees who occupy positions designated as emergency because they are necessary to sustain a facility or function for continuity of TSA operations during emergencies will not be dismissed or excused from duty during severe weather conditions or if an emergency arises. Section 2. (j) defines Supervisory TSOs as those who occupy positions designed as emergency.

The Handbook to TSA MD 1100.73-5, Section BB, requires employees to schedule and use earned leave in accordance with established procedures. Whenever possible, employees must obtain prior approval for all absences, including leave without pay (LWOP). Moreover, employees are required to contact their supervisor as far in advance of their scheduled tour of duty as possible, or by the time established in the call-in procedures for their organization, to request and explain the need for unscheduled leave. The Handbook further states that absences not approved, as required, will be charged as Absence with Leave (AWOL) and may form the basis for administrative action, including discipline, up to and including removal from Federal service.

Management also cited the airport's Threat Image Projection (TIP) Improvement Plan that states that STSOs are required to view a minimum of 500 bags on a monthly basis during x-ray screening. Additionally, the Screening Policies for Standard Operating Procedures (SOP), Chapter 20, Section 2 (Implement Staffing Requirements), requires STSOs to make every effort to maintain proper staffing levels.

On March 3, 2017, the appellant was the STSO assigned to oversee the checkpoint. The checkpoint fell below the required staffing levels to support the three Pre-Check lanes in operation. During this time, there was heavy volume at the checkpoint. The Lead Transportation Security Officer (LTSO) who was in charge of running the rotation closed one lane so that there was enough staffing to support the remaining two lanes. During this time frame, the appellant was in front of the checkpoint and engaging in a conversation with the Passenger Engagement Officer (PEO) for approximately 10 minutes. The appellant failed to notify the LTSO that he was leaving the checkpoint.

The appellant was designated as an emergency employee by memorandum dated November 7, 2015. He was advised in this letter that he was required to report for duty on time or remain on

duty if an emergency situation occurs unless he was specifically notified otherwise by TSA management. The appellant was reminded of this status via email on January 4, 2017. On January 7, 2017, the airport area experienced inclement weather. The appellant called the Transportation Security Manager (TSM) and advised that he would not be reporting for his scheduled shift due to weather and icy road conditions. The appellant did not report for his shift. Upon his return, he submitted an OPM 71, dated January 7, 2017, requesting emergency annual leave (EAL) for his absence due to weather. The request was denied and he was charged eight (8) hours of AWOL. On January 11, 2017, the appellant was advised in a supervisor's meeting that those who called out sick on January 7, 2017, would be granted sick leave and those who called out due to weather would receive a Letter of Counseling (LOC) for failure to come to work as is required of a designated emergency employee. The appellant was also advised that anyone who had received a previous LOC for calling out during a weather event, which the appellant had, would be considered for progressive discipline. After the meeting, the appellant approached the TSM and asked that she return the OPM 71, dated January 7, 2017. The appellant's request was denied and he submitted another OPM 71 for January 7, 2017, requesting sick leave.

On January 27, 2017, a TSO was scheduled to attend required training but reported to the checkpoint supervised by the appellant. The appellant failed to send the TSO to her training until the training personnel and the TSM brought the error to his attention. As a result, the TSO missed approximately 30 minutes of her training day. On January 3, 2017, the appellant also failed to send a TSO to training and as a result, the TSO missed her training day.

The appellant is required as part of the airport's TIP Plan to view 500 bags per month through x-ray screening. In the month of December 2016, the appellant viewed 273 bags through x-ray screening. On January 11, 2017, the appellant was scheduled to work from 0345 to 1215 hours. He arrived for his scheduled shift at 0417 hours; 32 minutes tardy. The appellant submitted an OPM 71 which stated that he was late because he thought it was his training day, or words to that effect. The appellant was charged 30 minutes of Absence without Leave (AWOL).

A pre-decisional meeting was held with the appellant on January 19, 2017. The appellant provided a written statement responding to the charges on January 18, 2017. A follow-up pre-decisional was held on February 4, 2017, to discuss the charges occurring after January 19, 2017. The appellant provided an additional statement to address these charges. A third pre-decisional meeting was held with the appellant on March 11, 2017, to discuss Charge 1, *Inattention to Duty*. On March 25, 2017, the appellant was issued a Notice of Proposed Demotion. On March 28, 2017, the Assistant Federal Security Director (AFSD) met with the appellant to receive his verbal response. The Deciding Official issued a decision on April 19, 2017, and demoted the appellant from the position of Supervisory Transportation Security Officer to the position of Transportation Security Officer.

Management provided the following evidence to support the Charge: Designation of emergency employee memorandum, dated November 7, 2015; Letter of Counseling, dated February 3 ,2016; email advisement of designation as emergency employee; dated January 4, 2017; OPM 71, dated January 7, 2017; WebTA payroll record, dated January 7, 2017; statement of a TSM, dated January 24, 2017; email from a TSM, dated January 24, 2017; OPM 71, dated January 7, 2017; email from a TSM, dated January 10, 2017; statement from the appellant, dated January 18, 2017; STSO Manning Roster, dated January 27, 2017; IShare Manning Roster, dated January 27,

2017; emails from a TSM, dated January 25, 27 and 29, 2017; email from a Training Specialist, dated January 25, 2017; Appellant's Online learning history, dated June 17, 2016; TIP Improvement Plan; December 2016 bag counts for the appellant; OPM 71, dated January 11, 2017; WebTA Payroll records, dated January 11, 2017; Time Detail Report, dated January 11, 2017; Pre-decisional meeting notes from the TSM , dated January 19, 2017; WebTA Payroll records for a TSO, dated December 25, 2016 through January 7, 2017; WebTA Payroll records for appellant, dated December 25, 2016 through January 7, 2017; Follow up pre-decisional notes, dated February 4, 2017; statement from the appellant, dated January 18, 2017; WebTA Payroll records for a TSO, dated December 11, 2016 through December 24, 2016; WebTA payroll records for appellant, dated December 11, 2016 through December 24, 2016; Memorandum from a TSM, dated March 9, 2017; statement from the appellant, dated March 4, 2017; statement from an LTSO, dated March 3, 2017; pre-decisional meeting, dated March 11, 2017; email-checkpoint staffing, dated March 3, 2017; and audio recording of call-out on January 7, 2017.

On appeal, as to Charge 1, the appellant argued that he gave direct instructions to the LTSO to close down lane 2 and informed the LTSO that he was going out front to direct the PEO not to send all the passengers to this checkpoint when another checkpoint was also open with a pre-check lane. The appellant argued that he left the checkpoint with the faith that the LTSO would follow through with the directions given to her.

As to Charge 2, the appellant argued that the day prior to the storm, the supervisors were advised that in case of an emergency they were to call a TSM and this information was passed on to their teams. The appellant argued that he was in fear of losing his life in an accident as ice had formed over the snow. He stated that he immediately called the Coordination Center to report that it was not safe to come into work. The Coordination Center was not able to provide any direction to employees calling in due to weather related issues. The appellant stated that he knew that a request for emergency annual leave could only be approved by a manager. He stated that he informed the Coordination Center that he was requesting emergency annual leave and was told that he would need to contact a manager for approval. The appellant stated that he was confused over the type of leave that he should be using. The appellant contacted the TSM and left a voicemail indicating that he could not report due to icy road conditions. The appellant stated that as soon as he returned to work, he submitted a 71 for emergency annual leave. The appellant stated that he was confused when he and other supervisors were told in a meeting that if you requested emergency annual leave that you would receive a letter of reprimand but those that called off sick would be able to use their sick leave. The appellant stated that he filled out his 71 incorrectly and went into the office to resubmit a new 71 since his original 71 had not been approved. He argued that he would have to submit a 71 that reflected what leave the Coordination Center put him down for which was sick leave initially. The appellant asked for his 71 back but the TSM stated "no" and she would give him another one to fill out. The appellant argued that he tried to explain that he was not trying to falsify documents but was just trying to match what leave the Coordination Center originally put him down for. The appellant noted for the record that the TSM wrote on the OPM 71 that he did not call a manager when he clearly did.

As to Charge 3, specification 1, the appellant argued that the TSO reported to the checkpoint instead of training but informed him that she went to training the week before and he found nothing wrong with this story since she may have had upcoming annual leave. The appellant noted that once he was called by training, he immediately directed her to report to the training

lab and spoke to her about keeping up with her training schedule. The TSO stated that she was confused as she had been sent to training the week before. As to specification 2, the appellant reiterated that he feared for the loss of his life due to the inclement weather and dangerous icy road conditions. As to specification 3, the appellant argued that the TSO reported for her regular shift and that this was not his direct report. The appellant argued that this was his first day back from his RDOs and he had no prior knowledge of her need to report for training. As to specification 4, the appellant argued that he was gone due to his mother's passing for the first two weeks in December and there were several things going on during that time frame. He argued that he tried to get someone to watch the back of the checkpoint, so he could get his bag count in but it was a busy month for not only passengers but for leave. The appellant argued that he normally gets above his bag count and scores high in TIPS.

As to Charge 4, specification 1, the appellant argued that he forgot that he had training on January 11 and that December was a busy month with a lot going on. As to specification 2, the appellant argued that he called the TSM to report that he could not report for his scheduled shift due to weather and icy road conditions. He argued that no one returned his phone call.

Management argued that a preponderance of the evidence supported their decision to demote the appellant. As to Charge 1, management argued that the supervisor is the individual ultimately responsible for effective and efficient operations at the screening checkpoint but in this situation, he was conversing with an airport employee in the lobby for 10 minutes and was not in a position to monitor the passenger volume and manning level at his checkpoint. As to Charge 2, management argued that the issue is not whether the appellant reached the Duty manager. The issue is that he called out requesting emergency annual leave due to weather and then changed the 71 to sick leave after hearing that those who called out due to weather would receive counseling/discipline. Management argued that the evidence is clear that the appellant submitted a second OPM 71 hoping to avoid discipline. In addition, management argued that appellant was advised of the procedures and also knew when it is appropriate to use sick leave and when it is not.

As to Charge 3, specification 1, management argued that the manning roster shows that the TSO was scheduled for training and thus, there is no merit to his argument that he was confused regarding the training day. Management also argued that the appellant not only had access to the manning roster but also had the training schedule mounted on the wall by his own admission. As to specification 2, management argued that the appellant was very aware of the procedures regarding inclement weather due to having received a Letter of Counseling (LOC) on February 3, 2016, for failing to report for his shift due to a weather event. Management argued that the evidence is clear that the appellant is designated as an emergency employee and that he was aware of this status and the fact that emergency employees are required to report to work during emergencies. As to specification 3, management argued that the appellant was advised via email, dated December 29, 2016, of the TSO's training date on January 3, 2017; and as a supervisor he had a responsibility to ensure that the TSO was released to attend training. As to specification 4, management argued that all of the issues going on in December did not absolve the appellant of his responsibility to maintain his skill level. Management argued that contrary to the appellant's argument; there were several days when at least two supervisors were present. Additionally, management argued that it would only have taken 2-3 hours for the appellant to accomplish the requirement and at no time did he reach out to management for assistance or to communicate that he was struggling to meet the requirement.

As to Charge 4, specification 1, management asserted that the appellant arrived late to work and admitted that he forgot that it was his regular scheduled training day on January 11, 2017. As to specification 2, management asserted that the appellant did not report to work and left a message that he would not be reporting to work due to weather and icy road conditions.

As to Charge 1, the Board found that the appellant was the supervisor in charge of the checkpoint on March 3, 2017. The checkpoint was clearly the appellant's responsibility. The evidence showed that the appellant was in front of the checkpoint talking for 10 minutes. During this time, the checkpoint fell apart. The LTSO stated that she took the initiative to close down the third lane; she did not state that she was told to close down the third lane. She also stated that she could not locate the appellant. This contradicts the appellant's statement that he told the LTSO to shutdown lanes so that he and another STSO could attend a supervisor's meeting. The preponderance of evidence supports that the appellant was inattentive to his duties on March 3, 2017. Therefore, the Charge, *Inattention to Duty* is SUSTAINED.

As to Charge 2, the issue is not whether the appellant informed management that he was facing weather issues in reporting to work. The Board found that the evidence in the record is clear that the appellant first submitted an OPM 71 for emergency annual leave. It was not until after a meeting in which he heard that those who were absent due to weather would have discipline taken against them that he submitted a second OPM 71 reflecting sick leave. The appellant was not sick on January 11, 2017, yet he submitted an OPM 71 for sick leave. The preponderance of evidence shows that the appellant submitted inaccurate time and attendance records. Therefore, the Charge, *Submitting Inaccurate Time and Attendance Records*, is SUSTAINED.

As to Charge 3, specification 1, the evidence does not support that the appellant had the sole responsibility for ensuring that the TSO attended training. Management failed to support the Charge with any procedures that placed the responsibility on the appellant for sending the TSO to training. Although management has cited that there was a manning roster; they failed to show that the supervisor had the responsibility to not only review the roster, but to ensure that the TSO attended training. It is evident that the TSO had some responsibility for knowing when she was required to attend training. The TSO informed the appellant that she had been to training the previous week. Therefore, specification 1 was NOT SUSTAINED.

As to Charge 3, specification 2, the Board did not find that the appellant failed to follow policy or procedures. Although the appellant was designated an emergency employee, a memorandum issued to the appellant on November 7, 2015, stated "Employees who are unable to safely report must notify management following established call-in procedures." This same information was relayed to the appellant via mail on December 16, 2016. The appellant notified his management that he could not safely get to work. Management did not respond to the call from the appellant. The appellant abided by the guidelines provided to him in the email and memorandum by contacting management to advise them that he was unable to report without jeopardizing his safety. Management failed to provide a copy of the established call-in procedures. Therefore, specification 2 is NOT SUSTAINED.

As to Charge 3, specification 3, the evidence did not support that the appellant had the sole responsibility for ensuring that the TSO attended training. Management failed to support the Charge with any procedures that placed the responsibility on the appellant for sending the TSO

to training. Management cited the email that was sent to the appellant informing him that the TSO had training. However, January 3, 2017, was the appellant's first day back from his RDOs and management could not prove that he had prior knowledge of the TSOs need to report for training. Therefore, specification 3 is NOT SUSTAINED.

As to Charge 3, specification 4, the Board found that management did show that the appellant was required to view 500 bags per month and failed to do so in December. The appellant failed to notify management that due to personal reasons and a busy checkpoint he would be unable to meet the 500 bag standard. Therefore, specification 4 is SUSTAINED.

Having sustained specification 4, Charge 3, *Failure to Follow Procedures*, is SUSTAINED.

As to Charge 4, specification 1, management was able to show by preponderant evidence that the appellant arrived 32 minutes past his start time and was charged AWOL. The appellant's reasons for his absence did not excuse the absence. Therefore, specification 1 is SUSTAINED.

As to Charge 4, specification 2, although the appellant was designated an emergency employee, in a memorandum issued to the appellant on November 7, 2015, management wrote "Employees who are unable to safely report must notify management following established call-in procedures." This same information was relayed to the appellant via email on December 16, 2016. The appellant notified his management that he could not safely get to work. Management did not respond to the call from the appellant. The appellant abided by the guidelines provided to him in the email and memorandum by contacting management to advise them that he was unable to report without jeopardizing his safety. Management failed to provide a copy of the established call-in procedures. The appellant followed the guidelines and notified management that safety issues prevented him from reporting. The appellant's leave on January 1, 2017, should not have be deemed AWOL. Therefore, the specification is NOT SUSTAINED.

Having sustained specification 1, Charge 4, *AWOL*, is SUSTAINED.

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

On appeal, the appellant argued that a demotion was not merited for the charges. The appellant alleged that he has an uncomfortable relationship with his TSM and that she has reminded him that she has the power to make the decision to end his supervisory career. The appellant argued that the charges were brought against him at a time when she knew that he was at his lowest due to his mother's death and that the TSM built a case against him after he stood up for his LTSO and appealed a TOPs Performance appraisal.

Management responded and argued that they were reasonable in choosing demotion over removal. Management argued that the appellant's previous disciplinary and corrective actions clearly indicate that the appellant had been placed on notice of TSA's requirements of him and demonstrate a pattern of misconduct. Management cited the Table which states that for second and/or successive offenses, the penalty should generally fall within the "Aggravated Range" and

may often call for removal. In addition, the Table states that in cases in which an employee commits more than one offense, the Deciding Official may consider whether the penalty should be in the Aggravated Penalty Range. Management asserted that the Deciding Official carefully and correctly considered mitigating factors that led to demotion as opposed to removal.

The Deciding Official considered both mitigating and aggravating factors. He considered that the appellant is in a leadership position and thus, held to a higher standard. The Deciding Official determined that management has lost confidence in the appellant' ability to perform assigned duties and has lost faith and trust in his ability to carry out the duties of an STSO. The Deciding Official questioned the appellant's truthfulness in the statements which he provided. As mitigating, the Deciding Official considered that the appellant has been employed with TSA since September 1, 2002. He also considered that the appellant has acceptable performance evaluations. As aggravating, he considered that the appellant had been placed on notice of TSA's expectations through numerous corrective actions: an LOC, dated February 3, 2016, for failure to report to work as a designated employee during a weather event and an LOC, dated February 1, 2015, for failure to follow direction. The Deciding Official considered the appellant's disciplinary history; a Letter of Reprimand, dated March 10, 2015, for failure to follow instructions and a 3-day suspension, dated July 22, 2013, for improper use of his government credit card. The 2013 disciplinary action was not considered for purposes of progressive discipline. The Deciding Official considered that in spite of numerous attempts to impress upon the appellant the importance of correcting his misconduct, his misconduct has continued. The Deciding Official determined that the potential for rehabilitation in his current position as an STSO does not exist. The Deciding Official found that while removal from Federal service is inappropriate, a suspension was also inappropriate because it will not improve the appellant's behavior as a supervisor. In addition, the Deciding Official noted that the appellant's attempt to deceive management on his OPM 71 would have been grounds for removal but in an effort to retain employment; a demotion to TSO is appropriate. The Deciding Official consulted the Table in arriving at his determination to demote.

Under Section E.4 of the Table, the recommended penalty range for submitting inaccurate time and attendance records is a 5-day suspension to a 14-day suspension. The aggravated penalty range is a 15-day suspension to removal. Under Section H.6, for Inattention to Duty, the recommended penalty range is a 14-day suspension to removal and the aggravated range is removal. Under Section D.4, the recommended penalty range for failure to follow procedures is an LOR to a 14-day suspension and the aggravated penalty range is a 15-day suspension to removal. Under Section A. 2, the recommended penalty range for AWOL is an LOR to a 2-day suspension and the aggravated penalty range is a 3-day suspension to removal. The Table provides that for second and/or successive offenses, the penalty should generally fall within the "Aggravated Penalty Range" column, and may often include removal. Additionally, in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the "Aggravated Penalty Range" column corresponding to the most serious offense being charged. The Table provides that a demotion may always be considered as an option when the applicable penalty range includes removal. Demotion may also be considered in appropriate circumstances when the applicable penalty range does not include removal.

The Board agrees with the Deciding Official's conclusions and finds that the Deciding Official correctly analyzed the penalty factors in making the determination to demote. In addition, the

Deciding Official followed the guidance provided in the Table. The Board finds that the appellant's misconduct as to the Charge, *Submitting Inaccurate Time and Attendance Records*, to be egregious. It is clear that the appellant only changed his OPM 71 once he realized that he was to receive discipline. These actions are not reflective of an STSO.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-057

June 2, 2017

Issue: *Absence Without Leave (AWOL)*

OPINION AND DECISION

On March 16, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge, *Absence without Leave (AWOL)*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Absence Without Leave (AWOL)*, on three specifications. Specification 1 alleged that on November 7, 2016, the appellant contacted the Coordination Center at 0955 advising that he was sick for his eight-hour shift scheduled to begin at 1200 hours. The appellant had zero hours of leave to cover his absence; he was coded eight hours of AWOL.

Specification 2 alleged that on November 22, 2016, the appellant contacted the Coordination Center at 0932 advising that he was sick for his eight-hour shift scheduled to begin at 1200 hours. The appellant had a four-hour time-off award and 15 minutes of leave available which covered 4.15 hours of his eight-hour shift. The remaining 3.45 hours was coded AWOL.

Specification 3 alleged that on November 25, 2016, the appellant contacted the Coordination Center at 0938 advising that he was sick for his eight-hour shift scheduled to begin at 1200 hours. The appellant had zero hours of leave to cover his absence, therefore, he was coded eight hours of AWOL.

Management referenced the Handbook to TSA Management Directive (MD) 1100.63-1, *Absence and Leave*. Section B. 5. (c) states that an employee who has exhausted his/her personal leave will be granted LWOP for absence related to illness when the employee has provided administratively acceptable documentation to cover the absence. Section D. 3. addresses administratively acceptable medical documentation and lists the requirements for documentation to be administratively acceptable. It states that a form of administratively acceptable documentation may be required to support a request for sick leave. When required, medical documentation at a minimum must include the following:

(a) Date the medical condition began;
(b) A clear statement that the employee is or was incapacitated for duty;
(c) Information on how the condition affects the employee's ability to perform the duties of the position;
(d) The expected duration of the employee's absence; and
(e) The signature of the employee's personal physician or authorized health care provider.

Management alleged that the appellant violated the Handbook to TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section BB. (1) which states that employees are expected to schedule and use earned leave in accordance with established procedures. Whenever possible, employees must obtain prior approval for all absences including leave without pay (LWOP). Employees are required to contact their supervisor as far in advance of their scheduled tour of duty as possible, or by the time established in the call-in procedures for their organization, to request and explain the need for unscheduled leave. Exceptions to this requirement include when the employee is incapacitated or when there are other exigent circumstances. In such instances, the employee, a family member or other individual should, as soon as is reasonably practical, notify the employee's supervisor of the unplanned leave. Repeated absences may negatively reflect on the employee's dependability and reliability, and may adversely affect TSA's mission. Unapproved absences will be charged as absent without leave (AWOL). AWOL may form the basis for administrative action including discipline, up to and including removal from TSA.

The appellant was charged AWOL on November 7, 22, and 25, 2016, after calling out sick without having a leave balance to cover his absences.

The appellant was issued a Notice of Proposed Removal (NOPR) on January 19, 2017. The NOPR advised the appellant of his right to make an oral and/or written reply. The appellant gave an oral reply on January 27, 2017, and submitted additional medical documentation.

Management provided as evidence: WebTA Certified T&A Summaries; Airport Information Management (AIM) Employee Absence List; Email correspondence between the appellant and a Transportation Security Manager (TSM), dated November 27, December 2, December 6, and December 17, 2016; Pre-Decisional Discussion Summary, dated December 12, 2016; and Work/School Release Form, dated December 13, 2016.

On appeal, the appellant argued that he should not have been considered AWOL for his absences on November 7, 22, and 25, 2016. He stated that he has had a number of medical and physical conditions, beginning in May 2014, that caused him to miss a substantial number of workdays and that at times, when he was recovering from one malady, another struck him. The appellant stated that he has had a run of bad luck and argued that the record is clear that his reasons for calling in sick have been legitimate. The appellant argued that TSA has not questioned the legitimacy of his statements made regarding his inability to come to work, nor has management identified him as a sick leave abuser. The appellant argued that he was not on a sick leave restriction at the time in question.

The appellant argued that in this case management imposed a leave restriction on him without prior notice and that as a result, he was unfairly deprived of the opportunity to present administratively acceptable documentation for the absences referenced in the case. The appellant cited Section D. 9 of MD 1100.63-1, which provides that for sick leave requests of three workdays or less, a supervisor has the authority to require the employee to provide administratively acceptable documentation but that otherwise, for short absences because of illness or injury, an employee's self-certification is sufficient. The appellant stated that the Collective Bargaining Agreement (CBA) defines self-certification stating that an employee need only submit an OPM-71 stating the reason for the absence. The appellant argued that the rationale is obvious as many illnesses or injuries are of very short duration that would not necessitate seeing a health care provider. The appellant argued that, as noted, in circumstances of possible sick leave abuse, the supervisor may require an employee to provide administratively acceptable documentation for the absences but that in those situations the employee must be notified in advance. The appellant argued that his supervisors imposed no such requirement on him and that on the days in question, while he was incapacitated for work, he was not so ill or hurt that he needed to see a medical professional, and that he did not see one. The appellant argued that it was not until those days had passed that his TSM told him he needed to obtain administratively acceptable medical documentation.

The appellant argued that while he asserts that TSA failed to give him advance notice of the requirement to submit medical documentation for absences of three days or less, the circumstances of each charged absence further indicate that the charges should not be substantiated.

With regard to specification 1, the appellant argued that the record is silent on the nature of his illness on November 7, 2016, although it is acknowledged that he called in advising he was sick and unable to work. The appellant argued that the record shows that on or about November 15, 2016, a TSM instructed him to contact the DAFSD about his absence on November 7, and that following the TSM's instructions, the appellant emailed the DAFSD on November 15 stating that he believed he had accrued leave the previous week that would cover his absence. The appellant stated that the DAFSD responded stating that he was not involved in that process and did not have any information about the absence. The appellant stated that the DAFSD copied the TSM on the email, questioning the TSM about the appellant's absence on that date. The appellant stated that the TSM replied to the DAFSD stating that he could not find an email stating that the appellant had been marked AWOL for that date. The appellant stated that the TSM told the DAFSD that he had requested that the appellant provide medical documentation for the absence.

The appellant stated that he had a medical visit on December 13, 2016, and that at that visit, his medical provider prepared a note that stated that the appellant was unable to attend work on November 2, 22, and 25, and December 12, 2016, for medical reasons. The appellant stated that the note did not say anything about November 7, but argued that after stating to the DAFSD and TSM that he believed he had leave to cover his absence on that date, and not hearing anything to the contrary from them, he saw no need to have his provider address his absence on November 7. The appellant argued that it was reasonable for him to rely on management's silence.

With regard to November 22, 2016, the appellant stated that he had a cold that incapacitated him for work. The appellant stated that he did not see a doctor for his illness and that when questioned by his TSM about his absence and asked for medical documentation, he responded by email on December 2 and 6 stating that he did not see a doctor. The appellant stated that on December 12, 2016, during the pre-decisional discussion, when asked by a TSM to sign the emails sent on December 2 and 6, he complied. The appellant argued that although that information was not included on the OPM-71 forms, it was equivalent to a self-certification of an absence less than three days.

The appellant noted that he was not charged AWOL for the entire day on November 22 because he had earned a four-hour time off award and had 15 minutes of sick leave accrued that was applied to his absence. The appellant argued that the crediting of the award and the sick leave is significant because it shows that management did not question whether he was sick that day and that the AWOL charge was based solely on the lack of medical documentation. The appellant reiterated that he had not seen a doctor that day and that there was nothing his doctor could knowingly attest to.

With regard to his absence on November 25, 2016, the appellant stated that he called in sick that day because of back spasms he suffered while doing some loading at work on the evening of November 23, 2016. The appellant argued that in his explanation for his absence, he identified three co-workers who witnessed the incident that caused the back spasms. The appellant stated that he did not go to the doctor for the back spasms, nor, did he file a workers' compensation claim with the Department of Labor (DOL). The appellant argued that had he filed a claim and had DOL accepted his claim, he not only would have been paid for the day, but he also would not have suffered an adverse action for his absence. The appellant argued that after informing management of the three employees who witnessed the incident that caused his back spasms, neither the Deciding Official nor anyone assigning him took the trouble to inquire into his claims.

The appellant also argued that TSA officials were biased against him and described an incident that took place with one of the TSMs in October of 2015. The appellant claimed that the TSM never got over the incident and that another employee informed the appellant that the TSM expressed the intention of "getting rid of [the appellant] after [the appellant] came off Family and Medical Leave Act (FMLA) leave." The appellant stated that the employee declined to provide the appellant with a statement regarding what he had heard. The appellant claimed that the TSM's "desire to get rid of him started to become a reality" when the TSM made the decision to suspend the appellant for 3-days for AWOL in May 2016, and was the Proposing Official for his 14-day suspension for AWOL in August 2016.

Management responded and argued that management has been empathetic with the appellant throughout his personal issues. Management noted that a full-time TSO has the ability to utilize up to 480 hours of time under FMLA, and that the appellant also had the ability to accrue up to 104 hours of sick leave and 156 hours of annual leave on an annual basis. Management argued that the appellant consistently failed to manage his leave, resulting in a continuing adverse effect to the Agency.

With regard to the appellant's contention that the TSM was biased against him, management argued that no corrective action was taken against the appellant for the incident in 2015, and that there is no credence to the appellant's allegation that the TSM was not going to let it go. Management argued that the TSM is a 14 year TSM that has shown consistent dedication to the mission. Management argued that the TSM was very transparent with his communication with the appellant, starting in July 2015, which gave the appellant ample time to request clarifying information from his chain of command or Human Resources. Management argued that despite the fact that the appellant clearly acknowledged the discussion with the DAFSD regarding acceptable medical documentation, the appellant consistently failed to correct his conduct, ultimately resulting in removal. Management cited several examples of correspondence between the TSM and the appellant and stated that the purpose of the lengthy example of communication between the TSM and the appellant was to illustrate that there was routine information communicated to the appellant. Management argued that despite management's best efforts, the appellant consistently failed to correct his conduct or provide acceptable medical documentation, which would have stopped the corrective action process, well before removal. Management argued that the appellant's contention that he had notes from his doctor but belatedly learned they were insufficient is simply untrue.

With regard to the Charge, the Board finds that the WebTA reports in the record are preponderant evidence that the appellant was charged with AWOL on the dates specified in specifications 1, 2, and 3. The Board gave no merit to the appellant's arguments regarding management's requirement to inform him ahead of time regarding the requirement for medical documentation, the fact that he was not on a leave restriction, and that the TSM was biased against him. The issue is the fact that the appellant did not have leave to cover his absences. His request for leave therefore, was unapproved and unapproved absences may be charged as AWOL. The appellant admitted that he did not see a medical provider on the dates he was absent and he failed to provide acceptable medical documentation to support his absence. Without administratively acceptable medical documentation, Leave without Pay (LWOP), the only other option given his negative leave balance, was not an option as LWOP represents an approved absence. The appellant was absent from duty and did not have accrued leave to cover his absences, therefore, specifications 1, 2, and 3 are SUSTAINED. Having sustained the specifications, the Charge, *Absence without Leave (AWOL)*, 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.

In his appeal, the appellant argued that the Deciding Official incorrectly analyzed the aggravating and mitigating factors in determining the appropriateness of his removal. The appellant argued that the Deciding Official's analysis of the aggravating and mitigating factors, in large part, parrot the analysis of his 3-day and 14-day suspensions.

Management argued that one significant decision factor in the appellant's case was his consistent inability to correct attendance issues, causing an adverse effect on the ability of the Agency to carry out its mission. Management argued that the appellant chose to blame the TSM, claim policy ignorance for his issues instead of managing his leave effectively, and repeatedly failed to provide acceptable medical documentation, all of which resulted in progressive discipline and eventually resulted in removal.

In determining the appropriateness of the penalty, the Deciding Official stated that he considered that when employees fail to report for duty as scheduled, it adversely affects management's ability to schedule the security officers necessary to provide efficient and effective security at the airport. He considered that unauthorized absences place a significant burden on the appellant's co-workers who must work without a full schedule of employees. The Deciding Official stated that although the appellant's actions seemed unintentional, non-technical, and inadvertent, the appellant was still responsible and accountable for following instructions. The Deciding Official considered that although the appellant's actions were not committed maliciously, or seen as a personal gain, he continued to repeat the same offense.

As mitigating factors, the Deciding Official considered the appellant's past work record, including length of service, his performance on the job and his ability to get along with fellow co-workers. He noted that since joining the Agency in 2004, the appellant had a good work record, got along with fellow workers and performed his duties as a TSO satisfactorily.

The Deciding Official considered the circumstances surrounding the appellant's misconduct including his absences due to illness, but determined that the appellant's failure to provide acceptable medical documentation to substantiate his absences resulted in being coded as AWOL.

As aggravating factors, the Deciding Official considered that attendance and timeliness are critical components in fulfilling the appellant's job and are essential to the efficiency of the agency. He also considered the clarity with which the appellant understood the rules he violated. The Deciding Official noted that the appellant acknowledged reading and understanding TSA MD 1100.73-5 multiple times throughout his career, including on March 10, 2015, March 18, 2016 and October 31, 2016. The Deciding Official considered that the policy is very clear and that the appellant had been put on notice of the policies.

The Deciding Official considered the appellant's past disciplinary record and that fact that he received a 3-day suspension on May 19, 2016, and a 14-day suspension on August 19, 2016. The Deciding Official stated that based on the appellant's significant absences resulting in over 300 hours of AWOL in 2016, he considered the appellant's potential for rehabilitation and questioned whether the appellant could comply with the conduct expectations of MD 1100.73-5, particularly related to attendance. The Deciding Official determined that the appellant's consistent misconduct eroded his confidence in the appellant's ability to change his behavior.

Under Section A.2 of the Table, pertaining to AWOL for a period of one workday or less, the recommended penalty range is a Letter of Reprimand (LOR) to 2-day suspension and the aggravated penalty range is a 3-day suspension to removal.

The Board found that management gave the appellant multiple opportunities to correct his behavior and followed progressive discipline. The Board specifically noted that the appellant was suspended twice in 2016 for the same Charge. The Board determined that management had the right to consider a penalty in the aggravated range due to his previous 3-day suspension and 14-day suspension for similar misconduct.

The Board finds that the appellant's removal, given the appellant's disciplinary history, is in accordance with TSA policy and within the bounds of reasonableness, and therefore SUSTAINS the penalty decision.

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-058

June 8, 2017

Issue: *Absence Without Leave (AWOL); Tardy; Failure to Follow Leave Procedures*

OPINION AND DECISION

On March 29, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the three Charges, *Absence without Leave (AWOL), Tardy,* and *Failure to Follow Leave Procedures.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based Charge 1, *Absence Without Leave (AWOL)*, on 10 specifications alleging that the appellant was scheduled for duty for the period of 2145-0345 hours and that on December 10, 2016, she reported 30 minutes late for her shift; on December 13 and 18, she reported 45 minutes late for her shift; on December 19 and 24, 2016, and January 1, 2017, she reported 1 hour and 15 minutes late for her shift; on December 20, 2016, she reported 1 hour and 45 minutes late for her shift; and that on December 11, 17, and 23, 2016, the appellant failed to report for 3 hours and 45 minutes of her shift. The appellant's absences had not been authorized or approved in advance of her shift start time. For specifications 2, 4 and 7, management noted that the appellant notified management that due to "Family and Medical Leave Act (FMLA)," she would not be reporting for work that date, but failed to submit an OPM-71 upon her return to

duty. The appellant's time was recorded as AWOL for the time the appellant was absent on each date noted in the 10 specifications.

Management based Charge 2, *Tardy*, on 13 specifications alleging that on 13 dates between November 28, 2016 and January 16, 2017, the appellant reported between 1 minute and 1 hour and 44 minutes late for her shift without prior authorization from management.

Management based Charge 3, *Failure to Follow Leave Procedures*, on eight specifications alleging that on eight dates between November 30 and December 23, 2016, the appellant failed to follow established leave procedures when she failed to submit an OPM-71, *Request for Leave or Approved Absence*, for her unscheduled absences upon her return to duty.

Management alleged the appellant violated TSA Management Directive (MD) 1100.63-1, *Absence and Leave* and the accompanying Handbook. Section 5. C. states that (1) employees are responsible for following established leave procedures and policies; (2) managing their leave; and (3) minimizing requests for unscheduled leave. Section B. 1. (b) of the Handbook states that the OPM-71, Request for Leave or Approved Absence, is the required method for employees to use when requesting time. Section B. 1. (c) states that an employee who wishes to take leave is required to inform his or her supervisor in advance of the request following established procedures. Section L. 1. (a) states that an employee's time may be charged as absence without leave (AWOL) when an employee fails to report for duty without approval, has an unauthorized absence from the workplace during the workday, or does not give proper notification for an absence. Section O. 5. (e) states that employees requesting FMLA leave are responsible for following established leave requesting procedures, including procedures for requesting unscheduled leave.

Management also alleged that the appellant violated TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct* and the accompanying Handbook. 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 the TSA or negatively impact it ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness. Management also noted that the MD states that an employee's failure to comply with the provisions of this directive and/or failure to report violations of the directive may result in appropriate corrective, disciplinary, or adverse action, up to and including removal. Section BB. 1. of the Handbook states that employees are expected to schedule and use earned leave in accordance with established procedures. Whenever possible, employees must obtain prior approval for all absences including leave without pay (LWOP). Employees are required to contact their supervisor as far in advance of their scheduled tour of duty as possible, or by the time established in call-in procedures for their organization, to request and explain the need for unscheduled leave. Exceptions to this requirement include when the employee is incapacitated or when there are other exigent circumstances. In such instances, the employee, a family member or other individual should, as soon as is reasonably practical, notify the employee's supervisor of the unplanned leave. Repeated unscheduled absences may negatively reflect on the employee's dependability and reliability, and may adversely affect TSA's mission. Unapproved absences will be charged as absent without leave (AWOL). AWOL may form the basis for administrative action, including discipline, up to and including removal from TSA.

The appellant was charged AWOL for arriving late or missing a portion of her shift on 10 occasions between December 10, 2016, and January 1, 2017. The appellant also arrived late and was deemed tardy for her scheduled shift on 13 occasions between November 28, 2016 and January 16, 2017. Additionally, management alleged that on eight occasions between November 30 and December 23, 2016, the appellant failed to follow leave procedures by failing to turn in an OPM-71 form after returning to duty after an absence.

On March 10, 2017, a Notice of Proposed Removal (NOPR) was mailed, both regular and certified mail, via the United States Postal Service (USPS) to the appellant's last known mailing address listed in the Airport Information Management (AIM) system. Both copies of the NOPR sent were returned marked "not deliverable . . . unable to forward." Management stated that the Acting Deputy Federal Security Director (Acting ADFSD) also attempted to contact the appellant at the four phone numbers listed for the appellant in the AIM system.

Management provided as evidence: Appellant's call-off history, November 27, 2016 to January 21, 2017; Punch Origin Printout for November 27, 2016 to January 12, 2017; OPM-71 forms for December 24, 26, 27, 30, 2016 and January 2, 6, 13, 2017; and WebTA Certified T&A Summaries for pay periods 2016-24, 2016-25, and 2016-26.

On appeal, the appellant argued that she was not given an opportunity to respond to the NOPR. The appellant argued that she was out sick and that when she came back to work on her Regular Day Off (RDO) to do training, she was terminated. The appellant argued that it is not true that management had no way to contact her. The appellant included with her appeal, documents showing her current address that she claimed has been updated for two years. The appellant argued that if her W-2 form, medical information and Thrift Savings Plan (TSP) documentation could be sent to her, clearly the NOPR could have been sent to her as well. The appellant argued that while management claimed they tried to call her and left messages, she never received a phone call. The appellant stated that she updated her contact information and argued that she feels targeted.

The appellant also argued that some of the dates she was charged with AWOL were days that she invoked FMLA and filled out an OPM-71 form. The appellant also argued that she could not provide certain information as evidence because she no longer had access to copies of OPM-71 forms. Additionally, with her appeal, the appellant included a Work Status Report, dated March 22, 2017, which states that she was placed off work from March 13, 2017 through March 22, 2017.

Management responded and argued that on March 10, 2017, the appellant's NOPR was mailed to her address of record in the Airport Information Management (AIM) system. Management argued that it is up to the employee to update address information when necessary. Management argued that if the appellant asserts that the address the NOPR was sent to is no longer valid and that she has a different address, it was incumbent upon her to update her address in AIM. Management argued that the NOPR was sent via regular mail and certified mail to her address in AIM, which is a Post Office Box address. Management stated that the NOPR that was sent certified mail was returned to airport management unopened and marked "not deliverable . . . unable to forward," however the United States Postal Service (USPS) tracking summary advised that the letter was delivered "to an individual at the address at 1:01 p.m. on March 13, 2017." Management stated that the NOPR which was mailed via regular mail was returned to the airport

unopened and marked "not deliverable . . . unable to forward." Management argued that in addition, the Acting Duty Transportation Security Manager made several attempts to contact the appellant from March 22-23, 2017, at the phone numbers listed in AIM, but was unable to reach her.

Management also argued that the medical note that the appellant referred to is not relevant for the dates at issue as they covered her absence from March 13-22, 2017. Management also argued that the appellant's removal was not just for the AWOL charges; that she was also charged with numerous instances of tardiness and failure to follow leave procedures. Management argued that TSA policy is clear that employees requesting FMLA leave are responsible for following established leave requesting procedures, including procedures for requesting unscheduled leave.

The Board agrees with management that it is the appellant's responsibility to update her contact information and ensure that it is correct in the AIM system. The Board determined that management made every effort to contact the appellant to issue the NOPR with the contact information they had access to. The system from which the appellant received her W-2 and TSP forms is based on her address recorded in the Employee Personal Page (EPP) system. Management does not have access to the EPP system information of airport employees. The appellant was responsible for ensuring that her address was updated in the AIM system used and accessible by local airport management.

With regard to Charge 1, the Board finds that WebTA summaries and the Punch Origin Printout are preponderant evidence to support that the appellant was not at work, did not have authorized leave, and was not approved in advance during the timeframes specified in specifications 1, 3, 5, 6, 8, 9 and 10. Therefore, specifications 1, 3, 5, 6, 8, 9 and 10 are SUSTAINED. With regard to specifications 2, 4 and 7, the Board found that management failed to provide FMLA documentation for the Board to ascertain the merits of the specifications. Therefore, specifications, 2, 4 and 7 are NOT SUSTAINED.

Having sustained specifications 1, 3, 5, 6, 8, 9 and 10, Charge 1, *Absent without Leave (AWOL)*, is SUSTAINED.

With regard to Charge 2, the Board finds that the Punch Origin Printout is preponderant evidence to support that the appellant did not clock in on time for the dates specified in specifications 1-6 and 8-13. With regard to specification 7, the Board found an OPM-71 in the record for January 2, 2017, which was approved by management on January 3, 2017, showing that the appellant was approved for Annual Leave from 0945 to 1130 hours. There was also an OPM-71 in the record for January 2, 2017, for Annual Leave for the hours of 0945 – 1100 that was disapproved by management on January 3, 2017, citing "Failure to Follow Leave Procedures." Management did not provide an explanation for the two OPM-71 forms for January 2, 2017. The appellant cannot be marked as tardy during a period of time when she was approved for leave. Therefore, specification 7 is NOT SUSTAINED.

Having sustained specifications 1-6 and 8-13, Charge 2, *Tardy*, is SUSTAINED.

With regard to Charge 3, the Board finds that all of the specifications allege the appellant failed to submit an OPM-71 for her absence however, management did not submit any evidence to

show that the appellant failed to submit the OPM-71s. Additionally, the Board noted that the appellant stated in her appeal that she could not provide information as evidence because she no longer had access to OPM-71 forms; which calls into question the existence of the forms or lack thereof. Management failed to prove that the appellant did not submit the OPM-71 forms and therefore failed to prove the Charge by a preponderance of evidence. Therefore, Charge 3, *Failure to Follow Leave Procedures*, is NOT SUSTAINED.

Having sustained Charges 1 and 2, 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.

In her appeal, the appellant argued that removal is too harsh because she was out sick with a medical condition that is covered by FMLA. The appellant argued that she was not given the proper opportunity to "fight against this matter" and stated that she was not notified about the charges. The appellant also argued that management used a Letter of Reprimand, dated March 2, 2016, about her uniforms, as progressive discipline. She argued that she could not give a police report for something that happened in 2009 when her home was flooded and all of her uniforms destroyed. The appellant argued that she did not know that her supervisor gave her an LOR or that it was in her file and used against her.

Management argued that the penalty determination is reasonable. Management argued that the Deciding Official discussed that as a TSO, the appellant was responsible for reporting to work as scheduled and using leave in accordance with established leave procedures. Management argued that the Deciding Official also discussed that he found it aggravating that the appellant was previously suspended for 14 days for AWOL and failure to follow leave procedures and that the appellant's work record included an LOR, dated February 11, 2015, a Letter of Counseling, dated October 7, 2010, that was attendance-related, and several Letters of Leave Restriction.

In determining the appropriateness of the penalty, the Deciding Official considered the nature and seriousness of the offenses and the relation to the appellant's duties. He found the appellant's conduct to be extremely serious and stated that regular attendance and reporting for a scheduled shift on time is a bona fide condition of employment. He stated that the appellant's misconduct is directly related to her responsibility as a TSO. The Deciding Official stated that as a TSO, the appellant is responsible for observing and abiding by all laws, rules, and regulations; reporting to work as scheduled and is expected to schedule and use earned leave in accordance with established leave procedures. The Deciding Official considered the appellant's "flagrant disregard" for TSA policy which was evidenced by AWOL and failure to follow leave procedures and noted that it reflects poorly on the appellant and her judgment, dependability, trustworthiness, and reliability and also adversely affects TSA's mission. The Deciding Official considered that when the appellant failed to report for duty as scheduled, it adversely affected the ability to schedule the security officers necessary to provide efficient and effective security at the airport.

The Deciding Official considered that the public and TSA expect the appellant to use sound judgment and demonstrate professionalism and integrity in all matters on or off-duty. The

Deciding Official considered that as a TSO, the appellant has an integral role in the accomplishment of the Agency's mission. He considered that the successful operation of TSA security screening depends upon every officer coming to work as assigned and that absence without leave burdens the appellant's co-workers and may affect the efficiency of security screening, potentially resulting in unnecessary delays for, and adversely affecting the experience of, travelers and other persons who rely on TSA security screening. The Deciding Official considered the appellant's failure to report for duty as scheduled, without advance notice or obtaining authority/approval for her absence is unacceptable. The Deciding Official considered that when the appellant repeatedly failed to come to work as assigned and failed to follow leave procedures, she sent the wrong message to the workforce and the public, and as a result, the appellant caused TSA to question her reliability, judgment and trustworthiness, and she negatively impacted management's ability to discharge TSA's mission of protecting the traveling public from harm.

As an aggravating factor, the Deciding official considered that on December 4, 2015, the appellant was suspended for 14 days for AWOL and Tardiness and that on July 8, 2015, the appellant was suspended for 5 days for Failure to Follow Leave Procedures and AWOL. The Deciding Official also noted that on March 2, 2016, the appellant was issued a Letter of Reprimand (LOR) for Failure to Follow Instructions for failing to provide a police report for missing uniforms. The Deciding Official considered that the appellant's disciplinary actions placed her on notice of the related management directives and advised her that future instances of misconduct could result in further disciplinary actions, to include removal from Federal service.

As mitigating factors, the Deciding Official considered the appellant's length of service since February 5, 2006, and the appellant's performance scores of "Exceeded Expectations" the last two years.

The Deciding Official considered however, that the appellant's tenure has not been without incident. The appellant noted that in addition to the disciplinary actions mentioned, the appellant was issued an LOR for Failure to Comply with Leave Restriction on October 7, 2010 and Letters of Leave Restriction for excessive unscheduled absences issued August 12, 2013, November 14, 2012, and September 30, 2010. The Deciding Official considered that all of the actions are a negative reflection on the appellant's dependability and indicate that she cannot be relied upon for her assigned shifts.

The Deciding Official considered the effect upon the appellant's ability to perform at a satisfactory level, and the effect upon the confidence of supervisors and the Agency in the appellant's ability to perform her assigned duties. The Deciding Official considered that the incidents have caused the appellant's supervisors and managers to question the appellant's ability to make sound judgement decisions given the fact that even after having been issued numerous attendance-related disciplinary and correction actions over the past almost six and a half years, the appellant's attitude and attendance have not improved as she repeatedly continued her attendance misconduct by being AWOL, tardy, and failing to follow leave procedures. The Deciding Official stated that this has resulted in management losing confidence in the appellant's ability to properly perform her duties as a TSO in terms of her trustworthiness, reliability and judgment.

The Deciding Official also considered the clarity with which the employee was on notice of the rules she violated and noted that each year the appellant was responsible for reading and certifying that she has read, MD 1100.73-5 and the accompanying Handbook. He noted that the appellant's Online Learning Center (OLC) history indicates that the appellant completed her last annual review of MD 1100.73-5 on December 14, 2016. The Deciding Official also considered that the appellant's prior disciplinary actions put her on notice regarding the Agency's rules.

Finally, the Deciding Official considered the appellant's potential for rehabilitation. He found that based on the appellant's attendance and reliability consistently being an issue during a significant portion of her tenure at TSA, along with her flagrant disregard for adhering to TSA attendance policies and procedures by failing to correct her attendance misconduct even after receiving numerous attendance-related corrective and disciplinary actions over the past almost six and a half years, the appellant does not have the ability to be rehabilitated.

Under Section A.3 of the Table, pertaining to AWOL for a period of one to five work days, the recommended penalty range is a 2-day to 5-day suspension and the aggravated range is a 6-day suspension to removal. Under Section A.1 of the Table for Tardy, the recommended penalty is a Letter of Reprimand and the aggravated range is a 1-day to 5-day suspension. The Guidelines of the Table state that for second and/or successive offenses, the penalty should generally fall within the Aggravated Penalty Range column and may often include removal.

The Board found that management gave the appellant multiple opportunities to correct her behavior and followed progressive discipline. The Board determined that management had the right to consider a penalty in the aggravated range due to her previous 5-day suspension and 14-day suspension for similar misconduct.

The Board finds that the appellant's removal, given the appellant's disciplinary history, is in accordance with TSA policy and within the bounds of reasonableness, and therefore SUSTAINS the penalty decision.

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—16-059

June 7, 2017

Issue: *Inattention to Duty*

OPINION AND DECISION

On March 21, 2017, management suspended the appellant for twenty-one (21) calendar days from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration based on the Charge: *Inattention to Duty.* 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(s), management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Inattention to Duty*, on one specification. The specification alleged that on January 18, 2017, the appellant was on duty at the x-ray operator position. At approximately 1015 hours, a female passenger submitted accessible property for screening. The appellant annotated the image of a potential prohibited item in the passenger's bag. However, the appellant pulled a different bag for the required additional screening. As a result, the passenger was allowed to enter the sterile area with accessible property that had not been properly cleared.

The appellant was at the x-ray position when she annotated a bag with what appeared to be three rolls of coins. The appellant pulled a bag from the conveyor belt that appeared to contain the

three rolls of coins and placed it on the Manual Diverter Roller (MDR). Another TSO removed the bag from the MDR to perform the bag search. The TSO informed the appellant that he had searched the bag but did not find the rolls of quarters. The TSO placed the bag in the x-ray for a rerun. After rerunning the bag, it was determined that the appellant had pulled the wrong bag from the belt. The appellant called a Supervisory Transportation Security Officer (STSO) and briefed her on the incident. The appellant accompanied the STSO to view the CCTV footage and identified the passenger. The passenger was found and escorted back to the checkpoint where the appellant reran the bag and annotated the rolls of coins. A comparison was made to the original image and it was determined that none of the alarmed items were missing.

Management alleged that the appellant's actions violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, which provides that employees are responsible for reporting to work ready, willing and able to perform the duties of their position, and for conducting themselves in a manner that does not adversely reflect on the agency, negatively impact the agency's ability to discharge its mission, or cause the agency to question their reliability, judgment, or trustworthiness.

On appeal, the appellant argued that management violated her due process rights by failing to provide a listing of all documents relied upon to support the adverse action. The appellant argued that she was only provided the evidence after the proposed removal had been decided. In addition, the appellant argued that she was not inattentive to her duties but simply made a mistake in grabbing the wrong bag.

Management replied and argued that although they did not provide her with a list of all the documents relied on to support the decision; they actually provided all of the documents to her. Management argued that the appellant was provided a copy of her statement and the statement of the TSO which was the evidence relied upon. Management argued that the appellant was allowed to view the CCTV footage and the statements on March 13, 2017. Management asserted that the appellant made no claim that she did not receive the materials relied upon.

TSA MD 1100.77-1, *OPR Appellate Board*, Section 6.E, Procedural Matters, requires the Board to conduct a complete review of all appealed actions properly before the Board. The Board is required to evaluate the evidence and review the procedural and substantive issues, as appropriate. In addition, the Board is tasked with examining each appealed action for due process issues and procedural compliance with TSA MD 1100.75-3. The Board panel is also tasked with reviewing and considering procedural errors when deliberating the appeal.

The Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section H. (1) (a), Adjudication Process/Proposal and Decision, states that the notice of proposed adverse or disciplinary action must include the charges(s) and specification(s) for each charge including a description of the evidence that supports the charge(s). Section H. (1) (n) states that the notice of proposed adverse or disciplinary action must include a listing of all the documents relied upon which supported the action. In addition, Section H. (1) (g) states that the notice of proposed adverse or disciplinary action must include a statement that the employee will be provided a copy of the material relied upon to support each charge and specification with the proposal letter. The section goes on to state that alternatively, if the material is voluminous or

contains SSI, the employee shall be given the opportunity to review the material at a designated TSA location. The Notice of Proposed Removal provided to the appellant does not list the evidence relied upon. Additionally, the evidence supporting the charge was neither voluminous nor did it contain SSI and it should have been provided to the appellant. The Board determined that management made a critical error by failing to list and provide to the appellant all documents relied upon. The documents relied upon were not provided to the appellant until after the decision to suspend. Accordingly, the Board finds that management failed to follow agency policy.

Decision. The appeal is, therefore, GRANTED. The suspension is overturned. Further, the appellant will receive back pay from the effective dates of her suspension, subject to TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

DOCKET NUMBER
OAB—17-060

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 8, 2017

***Issue**: Due Process Violation*

DECISION ON RECONSIDERATION

On May 26, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision granting the appellant's appeal on the basis that management failed to provide the appellant with the opportunity to review the evidence relied upon in her removal. The Board found that the appellant's due process rights were violated by failing to provide her with a March 22, 2017, fitness for duty reconsideration issued by the Office of the Chief Medical Officer

Management filed a request for reconsideration pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*, and argued that the March 22, 2017, letter had been provided to the appellant. Management submitted proof that on March 24, 2017, the March 22, 2017, letter from the Office of the Chief Medical Officer was provided to the appellant and her representative. The appellant responded to the request for reconsideration but did not contest that they had not received the determination from the Office of the Chief Medical Officer.

After considering the underlying record and the request for reconsideration and the opposition to the request, the evidence supports that the Board did misinterpret the facts. Therefore, the request for reconsideration is GRANTED. The action is mandated back to the Board.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

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

DOCKET NUMBER
OAB—17-060

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 20, 2017

Issue: *Not Medically Qualified for the TSO Position*

OPINION AND DECISION

On April 5, 2017, management removed the appellant from her position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on one non-disciplinary Charge, *Not Medically Qualified for the TSO Position.* The appellant filed a timely appeal of her removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Not Medically Qualified for the TSO Position,* on one specification. The specification alleged that by the Office of Chief Medical Officer (OCMO) letter, dated February 9, 2017, the Chief Medical Officer (CMO), reviewed the appellant's medical information and determined that she did not meet the medical guideline requirements for the TSO position.

TSOs are required to meet the physical/medical standards established by TSA pursuant to the Aviation and Transportation Security Act (ATSA) for the TSO position. 49 U.S.C. § 44935(f). The *Medical and Psychological Guidelines for Transportation Security Administration Transportation Security Officer Job Series,* dated January 22, 2016, Psychosis (page 16), state "Provide restrictions for brief psychotic disorder," and "Provide restrictions for schizoaffective disorder."

In a letter dated February 9, 2017, the CMO described the relevant facts of the appellant's serious health condition. The CMO indicated that the appellant was diagnosed with schizoaffective disorder. The CMO noted that the appellant's psychiatrist wrote on January 18, 2017, that the appellant was diagnosed with schizoaffective disorder and that she was admitted on November 17, 2016, with "bizarre behavior." On November 24, 2016, the appellant was given a discharge diagnosis of schizoaffective disorder.

On February 27, 2017, the appellant was issued a written Notice of Proposed Removal based on the non-disciplinary Charge: *Not Medically Qualified for the TSO Position.* The appellant and her representative met with management and provided updated medical documentation from the appellant's psychiatrist, dated February 20, 2017. The medical documentation stated that "[the appellant] was cleared to return to her duties at TSA on February 7, 2017, after a medical leave. At this time, she was found to be free of psychotic symptoms and ready to incorporate to her regular responsibilities at work. If the treatment plan continues, and she continues with the advised psychiatric and psychological treatment, her chances of relapses would be minimum." The updated medical information, dated February 20, 2017, was submitted to the OCMO for review. By letter, dated March 22, 2017, the CMO determined that the appellant was still "Not medically qualified." The CMO addressed the appellant's new medical condition by writing "That statement does not change the fact that [the appellant] does not meet the Medical and Psychological Guidelines for Transportation Security Officers (January 22, 2016) because she was diagnosed with schizoaffective disorder."

In accordance with TSA Human Capital (HCM) Policy No. 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 which asked the appellant to elect whether she wished to be considered for reassignment and to define the specific parameters of the job search. The appellant did not complete and return the TSO Job Search Preference questionnaire.

The evidence management relied upon to support the appellant's removal included a letter from the CMO, dated February 9, 2017; Page 16 of the TSA *Medical and Psychological Guidelines for Transportation Security Administration Transportation Security Officer Job Series,* dated January 22, 2016; and a letter from the CMO, dated March 22, 2017.

On appeal, the appellant argued that management has failed to prove that the appellant has been unable to perform the essential functions of her position with the agency. The appellant opined that management's denying reinstatement to work is a violation of the Rehabilitation Act. Under TSA Management Directive 1100.77-1, *OPR Appellate Board*, the Board is not authorized to review and decide allegations of discrimination and harassment based on race, color, religion, sex, national origin, age, disability sexual orientation, protected genetic information, parental status, and retaliation. Therefore, appellant's arguments concerning the Rehabilitation Act will not be considered by the Board.

The appellant next questioned the qualifications of the CMO. The CMO is tasked with making decisions on whether or not TSA employees are fit for duty. There is no evidence to dispute that he is qualified to make these decisions. In addition, the appellant argued that the medical guidelines were not promulgated in accordance with any rule making authority. Management

has correctly pointed out that under ATSA, the Administrator of TSA has the authority to establish hiring criteria for security screening personnel and to "develop a security screening personnel examination for use in determining the qualification of individuals seeking employment as security-screening personnel." Based on the authority under ATSA, the Agency determined that basic medical guidelines should be identified for other body systems, conditions, and diseases. By statutory authority, the TSA Administrator is not obliged to promulgate the Agency's Medical Guidelines under rule making provisions of the Administrative Procedures Act.

The appellant argued that her psychiatrist cleared her to return to work at a full duty status and the Agency's own guidelines dispel the application of the guidelines as set forth by the CMO. The appellant argued that the Agency's medical guidelines state that the broad medical prohibition, precluding reinstatement to work, will not be applicable, when the following conditions are present: (i) the psychotic symptoms have been resolved; (ii) the cause of the psychotic disorder has been successfully treated; (iii) the risk of recurrence is low; and (iv) an evaluation has been performed by a psychiatrist or by a licensed doctoral level psychologist. The Board disagrees. The appellant failed to state the key portion of the citation which states: "Provide restrictions for psychotic disorder due to another medical condition or substance-induced unless all of the following conditions are met:" The Guidelines do not state that if the conditions are met for schizoaffective disorder then the broad medical prohibition will not be applicable. The conditions cited by the appellant are only applicable for psychotic disorder due to another medical condition or substance-induced. Therefore, the conditions cited by the appellant are not applicable to the appellant's diagnosis of schizoaffective disorder. In addition, the medical documentation provided by the appellant indicates that she is free of psychotic symptoms; it does not state that the symptoms have been resolved. Additionally, her psychiatrist placed a caveat on the recurrence of her condition. The psychiatrist stated that if the treatment plan continues, and she continues with the advised psychiatric and psychological treatment, her chances of relapse would be minimal. The CMO found that the medical documentation provided by the appellant's psychiatrist on February 20, 2017, did not "... change the fact that [the appellant] does not meet the *Medical and Psychological Guidelines for Transportation Security Officers* (January 22, 2016) because she was diagnosed with schizoaffective disorder."

The appellant also argued that management failed to provide a reasonable accommodation for her. The evidence in the record shows that in accordance with TSA Human Capital (HCM) Policy No. 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 which asked the appellant to elect whether she wished to be considered for reassignment and to define the specific parameters of the job search. The appellant did not complete and return the TSO Job Search Preference questionnaire

Additionally, the appellant argued that she has been retaliated against under the Family Medical Leave Act of 1993 (FMLA). The appellant argued that her absence from the workplace to receive care for her condition was protected under the statute. The issue of the appellant's ability to take FMLA is not at issue here. The issue in front of the Board is whether she met the medical conditions set out for TSOs in the *Medical and Psychological Guidelines for Transportation Security Officers,* effective 1/22/2016. The appellant also argued that the medical review was

performed in the abstract and possessing a certain condition should not automatically exclude one from employment. There is no evidence that the review was performed in the abstract. The CMO listed numerous documents that he reviewed prior to making his determination.

Management responded to the appeal and argued that the OCMO letter, dated February 9, 2017, is preponderant evidence to prove the Charge. Management cited the numerous documents used by the CMO to make the determination and that the CMO after analyzing these documents made the conclusion that the appellant does not meet the *Medical and Psychological Guidelines for Transportation Security Officers*, dated January 22, 2016, because she has a diagnosis of schizoaffective disorder. Management also argued that under the statement provided by the appellant's physician, there is no certainty that the psychotic symptoms have resolved since she is dependent on continued treatments which she may or may not engage in at her discretion.

The appellant responded to management's reply and argued that ATSA does not divest the Equal Employment Opportunity Commission of jurisdiction and that the appellant is an individual with a disability. As stated above, the Board is not authorized to review disability cases and has no jurisdiction over a claim concerning the Rehabilitation Act. Therefore, the appellant's arguments concerning the Rehabilitation Act will not be considered by the Board. The appellant also argued that since management did not address the issue of retaliation under FMLA, it is deemed to be unrebutted at this point. The Board notes that although management did not address this argument in their reply; their silence does not mean that there is no merit to the claim. The Board has addressed above the appellant's claims concerning FMLA.

The Board found the OCMO determination, dated February 9, 2017, and the Fitness for Duty Reconsideration Report, dated March 22, 2017, shows that the appellant failed to meet the Psychosis guidelines as set forth in 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 February 9, 2017, the CMO described the relevant facts of the appellant's serious health condition, in part, that the appellant was diagnosed with schizoaffective disorder on November 24, 2016. The CMO stated that the appellant's health care provider wrote that the appellant was admitted with "bizarre behavior" on November 17, 2016. He also states that she does not meet the Psychosis guideline of the TSO Medical Guidelines and thus, is not medically qualified to perform the full and unrestricted duties of an LTSO as required by ATSA. The CMO reviewed new medical documentation provided by the appellant's health care provider and stated that the statement provided by the appellant's health care provider does not change the fact that she does not meet the *Medical and Psychological Guidelines for Transportation Security Officers* because she was diagnosed with schizoaffective disorder. The Board found that preponderant evidence supports management's conclusion that the appellant does not meet the medical guidelines and is disqualified from the LTSO position, according to the applicable TSA medical guidelines.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-062

June 12, 2017

Issue: *Failure to Maintain Required Certification*

OPINION AND DECISION

On April 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 Required 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 September 13, 2016, the appellant failed to successfully qualify on the Annual Proficiency Review (APR) On-Screen Alarm Resolution Protocol (OSARP) Annual Assessment (OAA) by failing to maintain his Baggage (BAG) screening certification required to be retained as an employee.

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

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

The TSA FY 2016 APR User's Guidance sets forth the requirements TSOs must meet to remain certified for employment as a TSO. Section 1.2. of the Guidance provides: To maintain the standards of the annual proficiency review (screening certification) and employment with TSA, employees in the following positions must successfully complete annual recertification requirements on all applicable assessments . . . Transportation Security Officer (TSO); Lead TSO (LTSO); Supervisory TSO (STSO); Master TSO (MTSO) and Expert TSO (ETSO) – Security Training Instructors (STI); and Master TSO (MSTO) and Expert TSO (ETSO) – Behavior Detection Officers (BDO), Lead BDO (LBDO) and Supervisory BDO (SBDO). Section 4.1.B. provides that employees must successfully complete the required APR assessments related to their official position of record and job function once annually as a condition of employment with TSA. Section 6.2.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 September 4, 2016, and failed. The appellant was tested again on September 8, 2016, and failed. On September 13, 2016, the appellant was tested again and failed his third attempt. Management stated that the appellant was issued a Notice of Proposed Removal (NOPR) on February 23, 2017. On April 13, 2017, the appellant received the Removal Decision.

On appeal, the appellant argued that there were numerous extenuating circumstances and procedural due process violations which violated Agency protocols.

Management did not respond to the appellant's appeal.

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. There is no evidence in the record to support that management complied with this obligation. Management failed to provide documentation to prove that the appellant failed the OSARP/OAA on September 4, 2016, September 8, 2016, and September 13, 2016. Additionally, management failed to support the charge with evidence that the appellant was provided remediation in accordance with the APR guidance. The only evidence submitted by management was the Decision letter, dated April 13, 2017, and a Notice of Proposed Removal, dated November 23, 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. Therefore, the Charge, *Failure to Maintain Required Certification*, is NOT SUSTAINED.

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 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:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)
Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—17-064

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 30, 2017

Issue: *Inattention to Duty; Failure to Follow SOP*

DECISION ON RECONSIDERATION

On June 14, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision granting the appellant's appeal, in part, and mitigating the appellant's removal to a fourteen (14) day suspension. On June 22, 2017, management filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On June 28, 2017, the appellant 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

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-064

June 14, 2017

Issue: Inattention to Duty; Failure to Follow SOP

OPINION AND DECISION

On April 6, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charges: *Inattention to Duty and Failure to Follow SOP*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is GRANTED, in part, and the appellant's removal is mitigated to a fourteen (14) day suspension.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Inattention to Duty*, on one specification. The specification alleged that on March 9, 2017, the appellant was observed with his eyes closed at the x-ray operator's position while on duty. The appellant was observed by a passenger who told the supervisor that he was sleeping and stated that she observed the appellant doze off and on. Further, a Supervisory Transportation Security Officer (STSO) approached the appellant and stood next to him and the appellant remained with his eyes closed until she said something to him. The appellant denied sleeping and stated to the STSO that he was doing "eye exercises."

Management based the Charge, *Failure to Follow SOP*, on three specifications. Specification 1 alleged that on March 9, 2017, while assigned to the x-ray operator's position, at approximately 12:36:41 x-ray time, the appellant failed to call a bag check on an opaque image located in a passenger's bag. Specification 2 alleged that on March 9, 2017, the appellant was assigned to the x-ray operator's position. At approximately 12:40:11 x-ray time, the appellant failed to call a bag check on liquids located in a passenger's bag. Specification 3 alleged that on March 9, 2017, the appellant was assigned to the x-ray operator's position. At approximately 12:40:32 x-ray time, a bag image came across that contained an opaque image and liquids. In addition, the bag was cut off on the right screen and should have been rerun. The appellant did not call for a bag check as required by the SOP.

Management found the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 6.B states, "[E]mployees' 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." Further, Section 6.E states "[W]hile 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." Management alleged that the appellant's failure to follow the SOP is a violation of TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct,* Paragraph 5.D.(7): Observing and abiding all laws, rules, regulations and other authoritative policies and guidance. Management failed to cite the sections of the SOP which they alleged the appellant violated.

On March 9, 2017, an STSO was approached by a passenger and informed that the appellant was asleep at the x-ray operator position. The STSO approached the appellant and stood next to him and his eyes remained closed until she spoke to him. In light of this incident, management reviewed the images that had passed through while the appellant was on the x-ray and identified three bag images that required additional screening. Management determined that the appellant had not referred any of the three bags for additional screening.

Management provided as evidence: timeline taken from Closed Circuit Television (CCTV); Customer Comment card, dated March 9, 2017; statement of an STSO, undated; statement of an STSO, undated; statement of the appellant, dated March 9, 2017; CCTV footage from March 9, 2017; and five screen images.

On appeal, the appellant argued that management failed to meet its burden of proof. As to Charge 1, the appellant argued that there is no evidence to support the allegation that the employee was sleeping on duty. The appellant argued that the actions of the STSO are inconclusive and although she stood by the appellant; she did nothing consistent with the actions to awaken a sleeping employee, such as calling the employee's name, touching the employee's shoulder, etc. In addition, the appellant argued that the passenger's statement is inconclusive as it does not name or describe the appellant.

As to the SOP violations, the appellant argued that bag checks were not required in the instances described by management. The appellant argued that the images used by the appellant were taken of a screen using a digital camera. The appellant argued that this renders the pictures

incapable of being enough to carry management's burden and that such pictures have authenticity and accuracy issues, as they are not true and accurate representations of images that would be on the x-ray screen.

Management responded and argued that a preponderance of the evidence supports the charges and specifications. In response to Charge 1, management argued that the appellant was not charged with sleeping on duty. Management stated that the video shows that the appellant was tapping on the keyboard during much of his shift and therefore, could not have been asleep. In response to the appellant's argument that his "eye exercises" were due to "hours of looking at the computer screen," management argued that the appellant had only been at the x-ray position for 11 minutes when the STSO observed him with his eyes closed.

Management argued that the CCTV video shows that the appellant only pulled one item for further screening while at the x-ray position. Management described the images provided and stated the reasons why the appellant failed to follow the SOP.

The appellant replied to management's reply and argued that management's statement indicating that "the Appellant was tapping on the keyboard during much of his shift and therefore could not have been asleep," is prejudicial to him. The appellant argued that forming an inaccurate narrative of events in the decision created a false impression of the appellant. The appellant argued that management's admission that he was actively manipulating the machinery directly refutes their charge of inattention to duty; and the charge should not be sustained.

With regard to the Charge, *Inattention to Duty*, the Board determined that the appellant was inattentive to his duties. It is clear that the appellant was not charged with sleeping on duty and thus, management did not have the burden of proving that he was sleeping. The evidence clearly showed that the appellant had his eyes closed. The Customer Comment Card does not have to identify the appellant by name since it was filled out in front of the STSOs. In addition, the STSO's statement made it clear that while at the x-ray machine the appellant had his eyes closed and it was not until she spoke to him that he opened his eyes. Therefore, Charge 1, *Inattention to Duty*, is SUSTAINED.

With regard to Charge 2, *Failure to Follow SOP*, management failed to support the charge with preponderant evidence. Management submitted five images to support the three specifications. These images were not identified by date or time-stamp nor did management tie the images into the x-ray machine that the appellant was assigned to. There was no narrative describing the photographs or authenticating that these were in fact the images taken from the x-ray at the dates and times, as alleged. Therefore, Charge 2, *Failure to Follow SOP*, is NOT SUSTAINED.

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

The appellant argued that the removal should be mitigated because management failed to follow the concept of progressive discipline and failed to consider the mitigating factors. The appellant argued that management failed to consider as mitigating his lack of a disciplinary record and the

fact that there was no breach in security alleged. Additionally, the appellant argued that the infractions did not have an impact on the Agency and were not notorious since there was no news coverage. The appellant argued that the penalty of removal is too harsh and that the mitigating factors indicate that a lesser penalty is appropriate and more effective.

With regard to progressive discipline, management stated that Section 6.J.(3) of MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, explains that..." Nothing in this section or in the accompanying Handbook prevents management officials from removing an employee after a first offense when the misconduct is so serious as to warrant removal...." Management then argued that the Table provides that "in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the 'Aggravated Penalty Range' column corresponding to the most serious offense being charged. Management then state that the appellant's multiple instances of Failure to Follow SOP support the Deciding Official's decision to remove. In addition, management argued that the penalty factors were considered and that the appellant was removed for failure to follow SOP and for not being attentive to his duties at the x-ray. Management also argued that the appellant's removal promotes the efficiency of the service because the Agency cannot afford to have employees work at the x-ray and close their eyes. Management also stressed that the appellant was unwilling to admit that he failed to follow policy.

The Deciding Official considered the penalty factors. The Deciding Official considered that the appellant had no past disciplinary record and has been with the Agency since February 27, 2011. He also considered that the appellant has maintained an above average work record and an acceptable relationship with his co-workers. In addition, the Deciding Official considered that the appellant's inattention to duty is a very serious offense. The Deciding Official considered as aggravating that a passenger observed the appellant's behavior and that the appellant' failure to accept responsibility shows that he was not a good candidate for rehabilitation.

The Deciding Official turned to the Table for the penalty. The Deciding Official stated "I find that your multiple SOP failures and inattention to duty warrant removal."

Section H.5 of the Table carries a recommended penalty of a Letter of Reprimand (LOR) to a 10-day suspension and an aggravated penalty of an 11-day suspension to removal. After considering all of the facts and weighing the relevant penalty factors, the Board finds that removal is not within the bounds of reasonableness. The Deciding Official argued that guidance in the Table provides that "in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the 'Aggravated Penalty Range' column corresponding to the most serious offense being charged." Management clearly stated that the multiple SOP failures and inattention to duty led them to warrant removal. Management tied their removal into both charges being sustained. Management's own language made it clear that the aggravated charge was selected because of the two charges. Although management cited in their response to the appeal that MD 1100.75-3 states that "Nothing in this section or in the accompanying Handbook prevents management officials from removing an employee after a first offense when the misconduct is so serious as to warrant removal...," this language was not cited in either the NOPR or the Decision. The Board found the appellant's actions to be serious and could have led to catastrophic results. In light of this, the Board found that the aggravated range was appropriate due to the egregious nature of

the appellant's conduct. However, in weighing all of the penalty factors, the Board finds that a penalty at the bottom of the aggravated range under Section H.5 is appropriate.

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

FOR THE BOARD:

DEBRA S ENGEL

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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—17-065

June 12, 2017

Issue: *Unsatisfactory Performance*

OPINION AND DECISION

On March 30, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration based on the Charge: *Unsatisfactory Performance*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board GRANTS the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Unsatisfactory Performance*, on one specification. The specification alleged that the appellant failed to perform at a satisfactory level under two Critical Elements of Screening (Goal 1) – as established within the Transportation Officer Performance System (TOPS) FY2016 and FY2017 which states, "Performs applicable security functions related to the screening of people, property, and/or cargo through the use and application of the TSA standard operating procedures (SOPs), directives, and techniques in order to deter foreign and domestic terrorists and other individuals from causing harm or disrupting the transportation system and/or its users." Conscientiousness (Competency 1) – as established within the Transportation Officer Performance Systems (TOPS) FY2016 and FY2017 which states, "Demonstrates responsible and

dependable behavior; takes responsibility for personal performance through a high level of effort and commitment."

As background, on October 24, 2016, the appellant was issued a Performance Improvement Period (PIP) due to her unacceptable performance which management stated resulted in three access control incidents where the appellant pulled the incorrect bag to the Manual Diverter Roller (MDR) on April 20, 2016, July 31, 2016, and September 25, 2016. Additionally, management stated that the appellant had six separate incidents of failure to apply TSA standard operating procedures (SOPs), directives and/or techniques to screening of people and/or property on February 14, March 9, April 15, May 21, August 9, and August 20, 2016. The appellant was advised at the time of the issuance of the PIP that continued failure to meet the required performance standards could result in an adverse action up to and including the appellant's removal from Federal service. The appellant's PIP concluded on December 28, 2016.

On January 29, 2017, the appellant was given notice that she had failed to successfully complete the PIP and that her performance was at an unacceptable level for Competency 1 – Conscientiousness, as outlined in the FY2016 and FY2017 Transportation Officer Performance System (TOPS). Management stated that the appellant's unacceptable level of performance does not meet the minimum standard of Achieves Expectations. Management stated that during the performance period the appellant failed to meet the performance level standard of Achieves Expectations on Competency 1: Conscientiousness.

TSA MD 1100.77-1, *OPR Appellate Board*, Section 6.E, Procedural Matters, requires the Board to conduct a complete review of all appealed actions properly before the Board. The Board is required to evaluate the evidence and review the procedural and substantive issues, as appropriate. In addition, the Board is tasked with examining each appealed action for due process issues and procedural compliance with TSA MD 1100.75-3. The Board panel is also tasked with reviewing and considering procedural errors when deliberating the appeal.

The Board found that the specifications in the Notice of Proposed Removal (NOPR) and Decision are different. The specification in the NOPR states, "You failed to perform at a satisfactory level under the Critical Element of Conscientiousness (Competency 1) – as established within the Transportation Officer Performance System (TOPS) FY2016 and FY2017 which states, 'Demonstrates responsible and dependable behavior; takes responsibility for personal performance through a high level of effort and commitment.'" The specification in the Decision Notice states, "You failed to perform at a satisfactory level under two Critical Elements of Screening (Goal 1) – as established within the Transportation Officer Performance System (TOPS) FY2016 and FY2017 which states, 'Performs applicable security functions related to the screening of people, property, and/or cargo through the use and application of the TSA standard operating procedures (SOPs), directives, and techniques in order to deter foreign and domestic terrorists and other individuals from causing harm or disrupting the transportation system and/or its users.' Conscientiousness (Competency 1) – as established within the Transportation Officer Performance System (TOPS) FY2016 and FY2017 which states, 'Demonstrates responsible and dependable behavior; takes responsibility for personal performance through a high level of effort and commitment.'" The specification in the Decision Notice added the element of screening which was not included in the specification in the NOPR. The appellant did not have the

opportunity to respond to the allegations regarding screening. Therefore, the Board only considered the element of Conscientiousness.

In the Decision Notice, management described four instances where the appellant allegedly failed to meet the performance level standard of Achieves Expectations for Competency 1: Conscientiousness. Management alleged that on November 28, 2016, the appellant was directed to complete a one-hour Standard Operating Procedures (SOP) review and failed to do so. Management alleged that on December 21, 2016, the appellant failed to complete a required SOP and Online Learning Center (OLC) review and although the appellant reported to the supervisor area to complete the task, a review of her OLC records showed no courses were completed. Management alleged that on December 25, 2016, the appellant reported to the supervisor area of the checkpoint to complete her SOP and OLC review at 20:15 hours and that during her time on the computer the appellant was observed viewing a website for a restaurant and was advised by a Supervisory Transportation Security Officer (STSO) that she was not to be on unauthorized websites. Management also alleged that on December 26, 2016, an STSO verified that the appellant was on the computer for an hour, yet OLC records showed no classes were completed. Management alleged that during this period the appellant asked an STSO to assist her in the Airport Information Management (AIM) system to apply for leave.

Management described the four incidents in the action, yet failed to provide any evidence to support the allegations of unsatisfactory performance. Management failed to prove the Charge by a preponderance of evidence. Therefore, the Charge, *Unsatisfactory Performance*, is NOT SUSTAINED.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

DOCKET NUMBER
OAB—17-066

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 7, 2017

***Issue**: Jurisdiction*

DECISION ON RECONSIDERATION

On May 19, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision dismissing an appeal filed by the appellant. The appellant appealed her demotion from Supervisory Transportation Security Officer to Lead Transportation Security Officer. The appeal found that the Board lacked jurisdiction to hear the appeal because the appellant was still serving in her Supervisory Trail Period at the time of her demotion. On May 22, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On May 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 does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

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

DOCKET NUMBER
OAB—17-067

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 16, 2017

Issue: *Unavailability for Full Duty*

OPINION AND DECISION

On April 12, 2017, management removed the appellant from her position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration based on the Charge: *Unavailability for Full Duty*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board 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(s), management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Unavailability for Full Duty*, on one specification. The specification alleged that the appellant has been unavailable to perform the full range of duties of her position, being off work on Leave Without Pay (LWOP) from November 15, 2015 to present.

As background, management stated that on January 21, 2015, the appellant filed a traumatic injury claim that was accepted by the Department of Labor. Management stated that the appellant has been in an LWOP status since November 15, 2015, as a result of the appellant's injury.

TSA MD 1100.77-1, *OPR Appellate Board*, Section 6.E, Procedural Matters, requires the Board to conduct a complete review of all appealed actions properly before the Board. The Board is required to evaluate the evidence and review the procedural and substantive issues, as appropriate. In addition, the Board is tasked with examining each appealed action for due process issues and procedural compliance with TSA MD 1100.75-3.

The Board finds that although management based the Charge on the allegation that the appellant has been off work on LWOP from November 15, 2015, to the date of removal, management did not provide any evidence for the Board to consider, such as Request for Personnel Action (SF-52) forms showing LWOP status or WebTA Time and Attendance records, to prove that the appellant was in fact in an LWOP status from November 15, 2015, to the date of removal, as alleged. Management is responsible for submitting evidence to support the Charge. Management failed to prove the Charge by a preponderance of evidence. Therefore, the Charge, *Unavailability for Duty,* is NOT SUSTAINED.

Decision. The appeal is, therefore, GRANTED. The appellant is ordered reinstated to her position as a Lead Transportation Security Officer. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—17-068

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

June 20, 2017

Issue: *Failure to Follow Standard Operating Procedures*

OPINION AND DECISION

On April 12, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge, *Failure to Follow Standard Operating Procedures.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence in the record. Management based the Charge, *Failure to Follow Standard Operating Procedures*, on one specification alleging that on January 26, 2017, at approximately 1707 hours, while assigned as the Dynamic Officer (DO) at the security checkpoint, the appellant failed to follow proper screening procedures when she screened a bag identified by the x-ray as containing a Possible Threat item.

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] (7) which states that TSA employees are responsible for observing and abiding by all laws, rules, regulations and other

[1] Management incorrectly referenced Section 5. A. (7) of MD 1100.73-5 in the Notice of Proposed Removal and Decision letters; the correct citation is Section 5. D. (7).

authoritative policies and guidance. Management also alleged that the appellant violated the Screening Checkpoint for Standard Operating Procedures (SOP): Chapter 13 – Property Search Procedures: Sections 2.A.2.a. and 2.B.1.a-c, and 2.B.2.a.

On February 7, 2017, management learned that a prohibited item, a handgun, was detected and seized from a passenger in Canada. The passenger reported that he flew out of the airport where the appellant worked with the handgun in his carry-on bag. A Transportation Security Manager (TSM) contacted the Canadian airline's corporate security office and requested contact information for the passenger and on February 9, 2017, the airline's corporate security officer sent the TSM an email that contained the passenger's phone number. Management contacted the passenger and the passenger stated that he flew from the airport where the appellant is assigned to Canada. The passenger provided his description to management and management obtained a photograph of the passenger along with a photograph of the backpack the passenger used as a carry-on. Management used the information to determine what took place during the screening process at the airport. On February 9, 2017, the TSM and a Supervisory Transportation Security Officer (STSO) reviewed archived images on the x-ray to retrieve the image of the bag that had an asterisk item inside and they were able to pull the image from the Alternate Viewing Station (AVS). After reviewing the image, the STSO and TSM reviewed Closed Circuit Television (CCTV) footage and saw the passenger enter the screening checkpoint and submit his property for x-ray screening. They identified who was on the x-ray at the time the bag came through and who conducted the bag check. The TSM and STSO were able to determine that a TSO was on the x-ray and that the appellant conducted the bag check. In a Memo to File written by the TSM, the TSM stated that the TSO assigned to the x-ray officer position requested a bag check for the passenger's property. The CCTV footage shows that at approximately 1707 hours on January 26, 2017, the appellant took the bin with the suspect bag to the AVS for additional screening. The bin contained two bags and a jacket. The appellant first checked a purse. She then checked a backpack. The appellant opened and searched three compartments in the backpack and then applied Explosive Trace Detection (ETD) screening to the bag. After receiving no alarm, the appellant returned the property to the male passenger.

The TSO operating the x-ray submitted a written statement on February 9, 2017. In his statement, the TSO stated that on January 26, 2017, at approximately 1705 while on x-ray, an image appeared on the screen with a strange looking item inside of the bag. The TSO stated that after further examination the item vaguely resembled a firearm. The TSO stated that he called the appellant over to take a look at the image. He stated that the appellant informed him that the item "may just be a lighter or some electronics" and that she would check it out. The TSO stated that he then annotated the item and gave it to the appellant for a bag check.

The appellant also submitted a written statement on February 9, 2017. The appellant stated "Unfortunately I can't remember anything about this incident at all. Although I understand the severity of an incident like this. And I feel horrible about the poor judgement I made that day. In my 14 years of employment with DHS I have never had an incident like this occur. To my recollection I did not find the threat the manager said I missed but I always look through every bag using the proper methods I was trained with. Unfortunately I cannot remember anything about this incident. When a bag check is called I always screen it thoroughly."

The appellant was issued a Notice of Proposed Removal (NOPR) on February 17, 2017. The NOPR advised the appellant of her right to make an oral and/or written reply within seven calendar days of her receipt of the proposal. On March 8, 2017, the Assistant Federal Security Director – Screening (AFSD-S) provided the appellant with two photos showing the image of the passenger who was detained by Canadian authorities when he tried to bring a firearm through airport security screening in Canada and an image of the bag and folder that contained the firearm that was discovered by the Canadian authorities. The appellant was given an additional seven days to reply. The appellant submitted a written reply on February 24, 2017, and a second written response on March 22, 2017. The appellant also gave an oral reply on March 6, 2017, and again on March 28, 2017.

Management provided as evidence: Memos to File from a Transportation Security Manager (TSM), dated February 10, 2017; Pre-Decisional Discussion Summary by a TSM, dated February 9, 2017; statement from an STSO, dated February 9, 2017; statement from a TSO, dated February 9, 2017; statements from the appellant, dated February 9, 2017; x-ray image photos from January 26, 2017; photographs of passenger and passenger's bag; and CCTV footage from January 26, 2017.

On appeal, the appellant stated that management used archived images to identify what they believed to be the Air Canada passenger's bag. She stated that management traced the bag back to the terminal and x-ray where they believe it went through screening at approximately 1707 hours on January 26, 2017. The appellant argued that because the firearm was never located at the airport, and because management's search was based on limited information, it is only management's best guess that the image of the bag provided and the corresponding CCTV footage is correctly attributable to the Air Canada passenger who allegedly passed through security with a firearm. The appellant argued that it should be noted that the time stamp on the x-ray image of the carry-on bag does not match up with the time stamp on the CCTV footage.

The appellant stated that at 1707 hours on January 26, 2017, she was working the Dynamic Officer position while a TSO operated the x-ray. She acknowledged that the TSO observed a "strange looking item" inside a carry-on bag that "vaguely resembled a firearm." The appellant stated that the TSO called her for a second opinion because he was unsure of what the item was. The appellant stated that she opined that the item may just be a lighter or some electronics but elected to conduct a bag search. She stated that she brought the carry-on luggage to the AVS screening table to perform the search. The appellant argued that the quality of her search is management's sole justification for her removal.

The appellant argued that her alleged error is a performance mistake and not willful misconduct and should be addressed through additional training or placement on a Performance Improvement Plan (PIP). The appellant argued that TSA policy encourages management, when deciding whether an employee's actions warrant discipline, to consider if the actions were conduct-based or performance-based. She argued that her conduct was performance-based; that the performance deficiency involved the quality of her work assignments/duties and indicated a lack of training. The appellant argued that the search was not cursory nor was it willfully unsatisfactory. She argued that the CCTV footage shows that she spent 1 minute and 40 seconds searching the small carry-on bag for the threated item and that she searched each pocket of the backpack and screened the bag using two ETD tests.

The appellant also argued that management did not show by preponderant evidence that the carry-on bag at issue in the case actually contained a firearm. The appellant stated that there is concrete evidence that a firearm was present at an airport in Canada but argued that it does not mean that the firearm ever went through security at the airport where she is assigned. The appellant argued that it is entirely possible that the passenger acquired the handgun in Canada and, when caught at airport security, lied about having it in his carry-on when going through security during the first half of his trip. The appellant argued that if the bag did contain a firearm when it went through screening at the airport where she worked, there is still doubt that the bag she screened at 1708 hours is the same bag. The appellant stated that the x-ray images provided by management have a time stamp of 17:12:03, not 1708 which is when she conducted the additional search of the threated item. The appellant argued that the fact that management was only able to attempt to trace the bag back to its origin two weeks after the incident provides additional uncertainty about the contents of the bag. She argued that without preponderant evidence that the bag contained a firearm, it is hard to fault her for failing to find a firearm.

Management did not respond to the appellant's appeal.

With regard to the Charge, while management did not directly address the timestamp discrepancy, on March 15, 2017, management provided the appellant with a photo of the passenger and a photo of the passenger's backpack which the Deciding Official used to determine that the backpack the appellant searched on January 26, 2017, at approximately 1707 hours belonged to the same individual who claimed to have taken a firearm through the checkpoint at the airport. The Board finds that the pictures of the Air Canada passenger and bag match the passenger and bag seen in the CCTV footage and that the x-ray images included as evidence are the images the TSO operating the x-ray saw when he conferred with the appellant. The Board also found that it was clear that the image presented on the x-ray images resembled a firearm and that the TSO at the x-ray acted appropriately in seeking assistance from the appellant. Management took appropriate action to address the appellant's misconduct. The Board reviewed the sections of the SOP referenced by management, as well as the CCTV footage of the appellant searching the passenger's bag, and determined that the appellant failed to follow the SOP. The Board determined that she failed to conduct several keys steps required by the SOP for the specific situation involving clearing the passenger's bag. If the appellant had conducted any of the key steps outlined in the SOP; she would have located the firearm. The Board finds that the evidence in the record is preponderant evidence to support that the appellant failed to follow the SOP. Therefore, the Charge, *Failure to Follow SOP*, is SUSTAINED.

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

On appeal, the appellant argued that management has not shown that the penalty is reasonable. She argued that management did not show that removal is a reasonable penalty for her one-time failure to follow SOP. The appellant stated that beyond her 14 years of service and satisfactory job performance, management failed to adequately consider the mitigating factors when making its penalty determination. The appellant stated that screening is a core function of her job and that employees are expected to follow the SOP in carrying out that duty but argued that management

failed to appreciate the fact that it was an isolated and nonrecurring incident. She argued that management has not demonstrated, and has no reason to believe, that she has a pattern of failing to follow the SOP. The appellant argued that she has been an employee of TSA for 14 years and that this was the very first problem to arise in relation to her ability to adhere to the SOP. The appellant argued that, overall, she is good at following the SOP.

The appellant argued that management incorrectly treated discipline from ten and nine years ago, respectfully, as an aggravating factor. She argued that previous discipline loses its potency as an aggravating factor when it occurred a long time ago; or was dissimilar in character to the misconduct currently considered. She argued that her 2007 and 2008 discipline, which were both short-term suspensions for misconduct related to leave procedures, fit both categories and should be given little if any weight in a penalty factor analysis. She also argued that her remaining discipline, a 3-day suspension in 2015 for tardiness, is similarly unrelated to the type of conduct at issue in the current matter.

The appellant argued that while management noted that it considered the consistency of the penalty on those imposed on similarly situated employees for the same or similar offense, management made mention of similar cases and did not even assert that removal is consistent with other cases.

The appellant argued that management erred by charging at the highest end of the recommended penalty range. She argued that her alleged SOP mistakes were inadvertent, and were certainly without malice. She argued that she simply made a mistake and that a 5-day suspension would be consistent with the Table of Penalties while still recognizing that a 14-year veteran of TSA is still susceptible to making honest mistakes, albeit infrequently.

The appellant also argued that management incorrectly disregarded her potential for rehabilitation. She argued that in her statement given after the incident, she acknowledged the severity of the allegations, expressed sincere remorse, and promised to make efforts to become an even better TSO. She argued that management gave no explanation as to why it disregarded her fairly obvious rehabilitative potential, other than a conclusory belief that she has, after 14 years of service, become "complacent." The appellant argued that it is not a sufficient explanation and is not supported by evidence. The appellant argued that management did not demonstrate that removal is reasonable for a single alleged mistake.

The appellant further argued that management did not show that removal promotes the efficiency of the service. She argued that removing her, an employee with 14 years of experience, only to spend significant amounts of time and money to train a completely new person to perform the same job is plainly inefficient.

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

The Deciding Official considered that to accomplish TSA's security mission, the agency must fill TSO positions with individuals who take to heart the importance of their screening duties. The

Deciding Official considered that screening duties are essential to the security operation and that screening is the appellant's core function as an employee. He considered that the traveling public depends on TSOs to carry out this function in a careful and effective manner. The Deciding Official considered that based on his review of the x-ray image of the firearm the appellant missed, the threat was clearly annotated, and the appellant performed a careless search of accessible property. The Deciding Official noted that the appellant expressed remorse for her actions but stated that he does not feel that she accepted full responsibility.

As a potential mitigating factor, the Deciding Official considered the appellant's satisfactory job performance, and that the appellant had been employed with TSA for 14 years. The Deciding Official considered that in the appellant's statement dated February 9, 2017, the appellant stated that she could not remember much about the incident, but, that she was remorseful for her actions. The Deciding Official found however, that the mitigating factors were not sufficient to outweigh the severity of the offense.

As an aggravating factor, the Deciding Official considered that in 2007, the appellant received a 3-day suspension for Absence without Leave (AWOL) and in 2008, she received a 7-day suspension for Failure to Follow Leave Restriction and AWOL. He also considered that she received a 3- day suspension in 2015 for failure to report for duty on time.

The Deciding Official considered that the appellant's conduct caused embarrassment to the Agency when Canadian authorities discovered that TSA had allowed a passenger to bring a firearm onto an airplane.

The Deciding Official stated that the appellant's behavior seriously weakened his confidence in the appellant's trustworthiness and judgment. He stated that he considered the appellant's potential for rehabilitation in choosing a penalty and that based on her prior work history, he found that the appellant is complacent and that her potential for rehabilitation is "little to none." The Deciding Official considered that he is not confident that the appellant will not engage in the same behavior again if she thought it would go undetected. The Deciding Official found that based on the egregious nature of the appellant's actions, he does not believe that the appellant has potential for rehabilitation.

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

The Board found that the appellant's actions on January 26, 2017, to be egregious. The appellant was called over to the x-ray machine to be shown an image that appeared to be a firearm. The x-ray operator thought that it was a firearm and articulated this to the appellant. The appellant then took sole responsibility for determining what the image was. She failed to perform the correct procedures and failed to conduct a thorough search of the passenger's bag to locate the item. The Board also found it aggravating that a foreign government is aware that TSA let a firearm through our security system and onto an airplane. Failing to find a firearm in a passenger's carry-on bag is serious and could have catastrophic consequences. Removal is within both the recommended and aggravated range for the Charge. The Board found that the penalty of removal 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:

DEBRA S ENGEL

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government, ou=Department of Homeland Security, ou=TSA, ou=People, cn=DEBRA S ENGEL, 0.9.2342.19200300.100.1.1=0876087875.TSA
Date: 2017.06.20 22:38:25 -04'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-069

June 30, 2017

Issue: *Negligent Performance of Duties*

OPINION AND DECISION

On April 20, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge: *Negligent Performance of Duties.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Negligent Performance of Duties*, on one specification alleging that on September 15, 2016, at approximately 2:52 p.m., while the appellant was assigned to the duties of the Screening Officer (SO) at the Advanced Imaging Technology (AIT) machine, he failed to appropriately conduct a pat-down and resolve a groin alarm on a male who presented himself for screening.

Management alleged that the appellant was in violation of the procedures outlined in the Screening Checkpoint SOP, Chapter 2.2.C.1 (a-d) and Chapter 2.3. A.3e.2. (a)(3) and TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section 5.D. (7) of MD 1100.73-5 states that employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance.

Management also alleged that the appellant's conduct was in violation of Section 6.B. which states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. Section 6.D. states that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA. Section 6.E. provides that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgement or trustworthiness.

On September 15, 2016, while assigned to the AIT, the Headquarters Evaluation Team (HET) was conducting covert testing at the airport. An HET member conducted a covert test, acting as a passenger (tester). Upon being scanned, the AIT detected an anomaly (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § which needed to be resolved. As the SO, the appellant advised the tester that he had to be rescanned due to the anomaly. The appellant instructed the tester to re-enter the AIT for rescanning. The tester told the appellant that he would rather be patted down. The tester indicated that there was hesitation in the appellant's response and after a moment, he again instructed the tester to re-enter the AIT to be rescanned. The tester stated that he told the appellant to do what he had to do by patting him down because he did not want to go back through the AIT more than he needed to because he travels a lot and did not want to be exposed to anything that it emits. At this point, the appellant advised the tester that he would be conducting a pat-down. However, the appellant failed to resolve the anomaly (b)(3):49 U.S.C. § (b)(3):49 U.S.C. due to his not following the AIT anomaly Resolution procedures outlined in the Screening Checkpoint. By neglecting to perform the procedure as outlined in the Screening Checkpoint SOP, the appellant did not detect (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r)

The appellant received a Notice of Proposed Removal on February 7, 2017, and responded in writing on February 15, 2017. In that response, the appellant asserted that the Deputy Assistant Federal Security Director (DAFSD) failed to supply him with a copy of the statement from the HET team member and his own statement. The statement from the HET member was marked as Security Sensitive Information (SSI) on the Notice of Proposed Removal. The appellant was told to contact the Human Resources (HR) Specialist to review this documentation but failed to do so and failed to inform the HR Specialist that he did not receive a copy of his statement. The appellant also argued that he was never put on a Performance Improvement Plan (PIP) since management alleged that as far back as November 30, 2015, he was not meeting standards. Management argued that the Collective Bargaining Agreement (CBA) indicates that a PIP may be issued but is not required. Management asserted that the appellant was provided on-the-spot remediation after each of the failed Security Screening Effectiveness Observations (SSEO) which is in the spirit of the CBA by addressing the deficiencies as soon as they occur.

Management provided as evidence: Summary of Pre-disciplinary discussion with appellant, dated September 16, 2016; written response to Pre-disciplinary discussion from appellant, dated September 16, 2016; statement from the appellant, dated September 15, 2016; statement from a Supervisory Transportation Security Officer (STSO), dated September 20, 2016, statement from the HET tester, dated September 23, 2016; HET out-brief summary; memo of record from an STSO, dated December 2, 2015; e-mail from a Transportation Security Manager (TSM), dated

December 2, 2015; statement from an STSO, undated; statement from the Training Specialist (TS), undated; Security Screening Effectiveness Observation (SSEO) checklist from December 2, 2015 through January 25, 2016; Online Learning Center (OLC) records of appellant; AIT Training and Remediation Progression and Timeline from December 2015 through June 2016, for appellant; and Closed Circuit Television, dated September 15, 2016.

On appeal, the appellant stated that he did not argue that he failed the HET test on September 15, 2016, but argued that Former Administrator Neffinger has stated that "covert testing is not intended for discipline." He also argued that he used the proper procedures but did miss the item. The appellant argued that he is only disputing the incident that management used against him that occurred on June 21, 2016, and was also deemed by management to be a failure during an HET test. The appellant argued that he allowed a rescan in accordance with the SOP. The appellant argued that of the eight dates that the Deciding Official stated were dates of rehabilitation, four of them are not recorded on his OLC history. In addition, the appellant argued that he has been discriminated against.

Management responded and argued that the removal and the Charge are supported by a preponderance of the evidence. Management argued that the incident on June 21, 2016, was also conducted by the HET team and that these tests are deemed to be pass or fail based on the evaluator's knowledge of the Agency's screening SOPs and the officer's adherence to the applicable section of the SOP during the test. The evaluator deemed the test on June 21, 2016, to be a failure due to the appellant's actions and his not following the SOP. Management argued that if the appellant's assertion that he followed the SOP was accurate, the local management team would have brought this to the HET evaluator's attention and requested that the test not be deemed a fail. However, this was not the case and the appellant did not follow the SOP and negligently performed his duties by directing the HET evaluator to be rescanned by the AIT versus conducting the Alarm Resolution Pat-Down of the sensitive area. In addition, management argued that the June 21, 2016, HET failure was not the event that led to the appellant's termination. Management in good faith attempted to rehabilitate him, however, less than 90 days later, the appellant failed a similar HET test. Management also asserted that the appellant only partially quoted former TSA Administrator Neffinger and left out "assuming that the officer is trying their best." Management argued that the appellant, despite management's attempts to remediate and rehabilitate him, was not trying his best during the HET test on September 15, 2016. In response to the appellant's argument that four of the dates of rehabilitation were not in the OLC, management indicated that these dates were found on the SSEO checklists which were SSI.

Under Management Directive MD 1100.77-1, *OPR Appellate Board*, the Board is not authorized to review and decide allegations of discrimination and harassment based on race, color, religion, sex, national origin, age, disability, sexual orientation, protected genetic information, parental status, and retaliation. If such actions are raised in connection with the adverse action appeal, the Board will only decide, as appropriate, whether management proved the charges by the applicable standard of proof, whether there is a nexus between a legitimate government interest and the matter at issue, and whether the penalty was reasonable.

The Board reviewed TSA MD 1900.8, *TSO Training and Initial Certification Programs*, Section 6.H (5) which states that a TSO who fails an Aviation Screening Assessment Program (ASAP) assessment is to be given remediation per the direction of the ASAP Advantage SOP. The

ASAP Advantage SOP, Section 24.1, states that ASAP Advantage is not to be used as a disciplinary tool. This language goes on to state that ASAP Advantage assessment results may not be used as the basis for corrective, disciplinary, or adverse action. However, if inappropriate behavior or conduct is displayed during the ASAP Advantage assessment process, that inappropriate behavior or conduct may result in corrective, disciplinary or adverse action. It is the responsibility of the appropriate TSA management officials to record and address this type of issue in accordance with TSA policy. Absent any observed inappropriate behavior or conduct, Letters of Counseling, Letters of Reprimand or other disciplinary or adverse actions, are not to be issued as a result of an ASAP Advantage non-detection. On December 22, 2016, the ASAP Advantage SOP was retired in its entirety and replaced with the Security Effectiveness 7-Step Performance Guide and Operational Testing Guide. The language cited above is not in the Security Effectiveness 7-Step Performance Guide. Therefore, management is no longer required to show inappropriate behavior or conduct in order to take disciplinary action during an operational test.

Management was able to show that prior to the HET test performed on September 15, 2016, the appellant was provided numerous remediation efforts on the AIT. These efforts included remediation for the appellant's failure to properly conduct the AIT anomaly resolution on the AIT on November 30, 2015, December 2, 2015, January 11, 2016, January 14, 2016, January 20, 2016, and January 25, 2016. Although the appellant argues that he performed according to the SOP, the record reflects that an HET test performed on June 21, 2016, was almost identical to the test performed on September 15, 2016. The appellant was remediated as a result of that failure, yet less than 90 days later, he also failed to follow the same SOP at the AIT. The tester had to insist twice that he did not want to be rescanned. The appellant's actions on September 15, 2016, were not only a violation of the SOP, but did rise to the level of negligence. The appellant has admitted that he failed to follow the SOP on September 15, 2016. Therefore, the Charge, *Negligent Performance of Duties*, 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 the penalty is too harsh because he has been with TSA for nearly 15 years and has had no disciplinary action in ten years. The appellant questioned management's discussion regarding rehabilitation vs. remediation. He argued that he has never failed any attempts at remediation. He also disputed the Deciding Official's stance that he had no remorse. He stated that by stating "I missed (b)(3):49 anomaly," he takes full responsibility for his actions. The appellant also contested the Training Specialist's attempt to paint a picture of a person that does not care about their job. The appellant also questioned what the mitigating factors were that did not outweigh the aggravating factors and why he did not get a response to this incident until February 7, 2017. The appellant claimed that the delay was to allow management to compile several allegations in the removal process.

Management responded and argued that despite numerous efforts made by management to rehabilitate the appellant and convey the importance of following the Agency's Screening SOPs,

they have no confidence that he will carry out the responsibilities of the TSO position by adhering to SOPs and ensuring the safety of the traveling public. Management argued that they made a good faith effort to rehabilitate. However, the appellant has displayed a callous disregard for following the Agency's Screening SOPs and the safety of the traveling public. Management considered the appellant a risk that they were no longer willing to take or expose to the traveling public. In response to the appellant's argument that management delayed taking the action, management argued that there were no incidents after the September 15, 2016, incident used to remove the appellant. Management argued that one of the penalty factors is "Potential for the employee's rehabilitation" and that this factor was considered. Management argued that the appellant's statement dated September 15, 2016, does not reflect that he took responsibility for his actions. Management asserted that the decision to remove the appellant was based on the totality of the record which included numerous attempts to rehabilitate the appellant.

The Deciding Official considered the nature and seriousness of the misconduct and its relationship to the appellant's duties. The Deciding Official found that the appellant's blatant disregard for Agency polices and failure to adhere to the procedures in the SOPs has led to his negligent performance of his duties and places the traveling public at risk. The Deciding Official also considered that as a TSO, the appellant is held to a high standard of professionalism and is required to uphold and follow all TSA policies and procedures. The Deciding Official noted that as a TSO, the appellant is the frontline defense against potential acts of terrorism and that his misconduct and lack of concern for security undermines the agency's very purpose and mission. In addition, the Deciding Official considered that due to the numerous rehabilitation efforts described in the proposing and removing letter, the appellant was aware or should have been aware that his actions on September 15, 2016, were in violation of the Checkpoint SOP. The Deciding Official considered that the appellant showed no remorse or concern that he was negligent in the execution of his duties and that this action causes great concern as to whether he can be rehabilitated. The Deciding Official noted that the appellant demonstrated a pattern of successful remediation but failed to exercise these procedures properly while working the screening location. The Training Specialist stated that, in her professional opinion, the repeated test failures were not due to lack of knowledge or ability to do the required procedure but are indicative of the appellant's not valuing the importance of conducting screening in accordance with the SOPs and that no additional amount of training would affect the necessary change to ensure that he will follow the required procedures. As an additional aggravating factor, the Deciding Official considered that the appellant received an Unacceptable rating on his FY2016 TOPS Final rating for Performance Goal 1. The Deciding Official also considered that in an incident that occurred on July 11, 2016, the appellant displayed a callous disregard for the seriousness of what could happen as a result of pulling the incorrect bag. The Deciding Official stated that the appellant's actions have caused him to question the appellant's reliability, judgement and trustworthiness and has eroded his confidence in him.

As mitigating factors, the Deciding Official considered that the appellant has been with TSA since October 2002 and had no prior formal discipline. The Deciding Official found however, that the mitigating factors do not outweigh the seriousness of the appellant's misconduct. The Deciding Official indicated that although TSA policy favors progressive discipline, where appropriate, if 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 used Section M.6 of the Table, pertaining to engaging in an activity that seriously undermines security or that could pose a threat or danger to the traveling public. Under M.6, the recommended penalty is a 14-day suspension to removal. The Board found that the Deciding Official weighed both the mitigating and aggravating factors and appropriately determined that the aggravating factors outweighed the mitigating factors. The extraordinary amount of remediation afforded the appellant on the AIT alone is aggravating and management was not required to follow progressive discipline. Removal is in accordance with TSA policy and within the bounds of reasonableness. The penalty decision is SUSTAINED.

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-070

June 28, 2017

Issue: *Failure to Follow Leave Procedures*

OPINION AND DECISION

On April 26, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge: *Failure to Follow Leave Procedures.* 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, *Failure to Follow Leave Procedures,* 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, *Failure to Follow Leave Procedures,* on three specifications. Specification 1 alleged that on January 2, 2017, the appellant was issued a Letter of Sick Leave Restriction. On January 23, 2017, through January 25, 2017, the appellant requested unscheduled sick leave. On January 31, 2017, the appellant provided administratively acceptable documentation to justify her absences; however, the appellant failed to submit medical documentation upon her return to duty, as required by the terms of her leave restrictions.

Specification 2 alleged that on January 2, 2017, the appellant was issued a Letter of Sick Leave Restriction. On February 1 and 2, 2017, the appellant requested unscheduled sick leave. On

February 8, 2017, she provided administratively acceptable documentation to justify her absence; however, she failed to submit medical documentation upon her return to duty, as required by the terms of her leave restriction.

Specification 3 alleged that on January 2, 2017, the appellant was issued a Letter of Sick Leave Restriction. On February 6 and 7, 2017, the appellant requested unscheduled sick leave. Upon the appellant's return to duty, she failed to provide administratively acceptable documentation to support her absences, as required by the terms of her leave restriction.

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

Management supported the Charge with: Memorandum to File from a Supervisory Transportation Security Officer (STSO), dated February 9, 2017; Memorandum to File from an STSO, dated February 15, 2017; statements from the appellant, dated February 8 and February 15, 2017; Work Status Report, dated January 23, 2017, and marked as received by management on January 31, 2017; Work Status Report, dated February 2, 2017, and marked as received by management on February 8, 2017; Requests for Leave or Approved Absence (OPM-71 forms), for February 6 and 7, 2017; WebTA Employee Summaries for pay periods 2017-02 and 2017-03; Airport Management System (AIM) Employee Absence List; and Letter of Sick Leave Restriction, dated December 30, 2016 (issued January 2, 2017).

On January 2, 2017, the appellant was placed on a Sick Leave Restriction (SLR) by an STSO due to absences on the days before or after her regular days off and excessive unscheduled absences. The Letter of Leave Restriction specified that "in every instance that you request sick leave because of sudden illness, regardless of the amount, you must provide me detailed medical documentation." The Letter of Sick Leave Restriction also specified, "this medical documentation must be presented immediately upon your return to duty." The STSO and the appellant signed the Letter of Sick Leave Restriction on January 2, 2017.

The appellant requested unscheduled sick leave January 23 through 25, 2017. She did not provide administratively acceptable medical documentation until January 31, 2017. The Work Status Report in the record, dated January 23, 2017, has a handwritten note on the bottom which states, "Received on 01/31/207 by STSO [name of STSO]." The appellant requested unscheduled sick leave again on February 1 and 2, 2017. The Work Status Report in the record, dated February 2, 2017, has a handwritten note on the bottom which states, "Received on 02/08/2017 by STSO [name of STSO]." The appellant also requested unscheduled sick leave on February 6 and 7, 2017 and failed to provided administratively acceptable medical documentation. There is a Work Status Report in the record, dated February 6, 2017, with a handwritten note on the bottom which states, "3/2 [unknown signature] 1400."

The appellant received a Notice of Proposed Removal on March 20, 2017. The written notice advised the appellant of her right to make an oral and/or written reply within seven days. The appellant submitted a written reply on March 27, 2017.

On appeal, the appellant acknowledged that management issued her a Letter of Sick Leave Restriction on January 2, 2017. She acknowledged that in addition to requiring detailed medical documentation, the SLR directed her to present the medical certificate "immediately upon [her] return to duty." The appellant stated that she requested unscheduled sick leave from January 23, 2017, through January 25, 2017, and that she provided administratively acceptable documentation on January 31, which was accepted. The appellant stated that she requested unscheduled sick leave for February 1 and 2 as well, and that the documentation for those dates was submitted and accepted by a Transportation Security Manager (TSM) on February 5, 2017, which was her first day back after being off duty on February 3-4. The appellant stated that she requested unscheduled sick leave for February 6 and 7 and submitted documentation on or about February 16, 2017. She stated that since the doctor's note was not original, she was asked to submit the original. The appellant stated that soon thereafter she went on annual leave and submitted the original doctor's note upon her return on March 2, 2017, which she stated was accepted by the STSO. The appellant also stated that she is on record apologizing for not immediately turning in her administratively acceptable documentation.

The appellant argued on the three occasions at issue, she turned in her administratively acceptable documentation six days, three days, and nine days after returning to duty. She argued that it was consistent with both the language and intent of Management Directive 1100.63-1, *Absence and Leave*. The appellant cited Section D. (1)(g) of the Handbook to the MD which states that "when administratively acceptable documentation is required, it should be submitted no later than 15 calendar days after the date requested by management . . . generally, the documentation should be submitted no later than 30 calendar days after the date requested." The appellant argued that there are otherwise no restrictions in the Management Directives regarding the deadline for submitting administratively acceptable documentation. The appellant stated that it is true that the SLR required her to submit her documentation "immediately" upon her return to duty, but argued that per the SLR, only a "failure either to properly request leave or to provide the required documents . . . [might] result in the imposition of appropriate disciplinary action, up to and including removal from the Federal service." The appellant argued that she properly requested leave and provided the required documents and thus, by the SLR's own language, disciplining her for submitting documentation soon, but not immediately, after returning to duty is inappropriate.

The appellant argued that the Collective Bargaining Agreement (CBA) and MDs lay out rules for when a leave restriction may be imposed and what a leave restriction may require, but that neither the CBA nor the MDs permit a SLR requirement that requires administratively acceptable documentation be submitted "immediately" upon return.

The appellant also argued that even if the requirement to submit documentation immediately upon return is deemed valid, management established a past practice of allowing her, while on leave restriction, to submit her documentation within a reasonable period of time upon returning to work. She argued that during her original leave restriction issued on November 11, 2014, she would rarely submit her documentation immediately despite the language existing in her SLR. The appellant stated that sometimes she would report directly to her assigned location and would submit the documentation during a break and that sometimes she would submit it within a few days. The appellant argued that management always accepted the documentation and gave her

no reason to believe that submitting it a few days later was unacceptable and worthy of discipline.

The appellant argued that for these reasons, management has not proven any misconduct by preponderant evidence.

Management responded and argued that the appellant acknowledged that she was subject to a letter of sick leave restriction that required her to submit medical documentation immediately upon her return from unscheduled sick leave and that she admits that she did not submit medical documentation immediately upon her return to duty on the three occasions specified in the charge. Management argued that her admission, along with the evidence of record, proves the charge.

Management argued that the Letter of Sick Leave Restriction is a separate direction from management that is enforceable independent of the Absence and Leave policy. Management argued that by its nature, an SLR imposes requirements on the use of sick leave that are more restrictive than the Absence and Leave policy.

With regard to the appellant's argument that the leave restriction letter states that "only" failure to properly request leave or provide the required documents could lead to discipline, management argued that the appellant mischaracterized the language of the SLR. Management argued that it does not state that only these actions may lead to discipline.

Management further argued that there is no evidence in the record to support the appellant's contention that management has a practice of failing to enforce leave restrictions.

The appellant responded to management's reply and argued that she only admitted that her submission of administratively acceptable documentation was not immediate in two of the three specifications. She argued that her documentation for the second specification was submitted on February 5, her first day of work following her regular days off on February 3 and 4, 2017.

The appellant continued to argue that the fact that the documentation relating to the first and third specifications was submitted soon but not immediately after her return to duty is not grounds for discipline. She argued that the requirement is not authorized by TSA policy and that management gave her zero notice that failing to follow it could lead to discipline. The appellant also argued that management failed to recognize that its authority to issue SLRs is created and limited by the CBA and the provisions of TSA MD 1100.63-1. She argued that an SLR is a separate direction from management that is enforceable only when the requirements within it are authorized by the CBA or the Absence and Leave policy. The appellant further argued that the SLR itself mentions only two instances where discipline may arise as a result of the appellant's failure to abide by its requirements: "failure either to properly request leave or to provide the required documents." She argued that no other warnings were provided and that it is undisputed that she provided the required documents. The appellant argued that by removing her for not immediately submitting her documentation, management has retroactively created a third condition upon which discipline may be based.

With regard to management's response that there is no evidence in the record to support her contention that management has a practice of failing to enforce leave restrictions, she argued that

the absence of evidence is the evidence of the situation. She argued that she rarely submitted her documentation immediately while on previous leave restrictions, and that there is no evidence that she was ever disciplined for that reason. The appellant argued that this established a past practice of lenience regarding the timing of submissions.

With regard to the Charge, the Board finds that the appellant signed the Letter of Sick Leave Restriction on January 2, 2017, which includes the requirement to provide medical documentation for unscheduled absences immediately upon return to duty. The SLR advised the appellant of her right to grieve the SLR. There is no evidence that the appellant grieved the SLR, which implies an understanding of, and agreement with, the terms of the SLR by the appellant. In addition, the appellant was placed on a SLR on November 11, 2014, which was grieved by the appellant. The language at issue here was part of the November 2014 SLR, however, the appellant did not grieve this section of the SLR. This same language was carried through to an amended SLR, dated March 10, 2015.

The Section of the MD cited by the appellant in her appeal does not address employees who are on a Sick Leave Restriction; the appellant cited Section D. 1. (g) of the Handbook to MD 1100.63-1 which refers to General Information regarding Sick Leave. The content of Letters of Leave Restriction is covered in the TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section C, (2) (a). Additionally, the appellant is unable to show that management had an accepted practice of not enforcing the conditions of her sick leave restriction in the past. The appellant had just entered into the SLR in question on January 2, 2017. The appellant's prior sick leave restriction was entered into on March 10, 2015.

With regard to specification 1, the Board found that the evidence in the record, including the WebTA summary, AIM Employee Absence List and Letter of Sick Leave Restriction, along with the appellant's admission, are preponderant evidence that the appellant requested unscheduled sick leave January 23 through 25, 2017, and failed to immediately turn in medical documentation upon her return to duty per the instructions in her SLR. Therefore, specification 1 is SUSTAINED.

With regard to specification 2, the Board finds that although the appellant stated that she turned in medical documentation after her February 1 and 2, 2017, absences on February 5, 2017, the medical documentation in the record has a handwritten notation made by an STSO on the bottom of the document stating that it was received on February 8, 2017. The type of notation is consistent with the notation made by the STSO on the medical documentation received on January 31, 2017. The Board finds that the WebTA summary, AIM Employee Absence List, Letter of Sick Leave Restriction and Work Status Report are preponderant evidence to support that the appellant failed to turn in medical documentation immediately upon her return to duty. Therefore, specification 2 is SUSTAINED.

With regard to specification 3, the Board finds that the evidence in the record, including the WebTA summary, OPM-71 forms, AIM Employee Absence List, along with the appellant's admission that she did not provide medical documentation immediately upon her return to duty, are preponderant evidence that the appellant requested unscheduled sick leave on February 6 and 7, 2017, and failed to provided administratively acceptable documentation to support her absences as required by her leave restriction.

Having sustained the specifications, the Charge, *Failure to Follow Leave Procedures*, 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 has failed to prove that removal is reasonable and promotes the efficiency of the service. She argued that it is undisputed that she properly requested unscheduled sick leave and that she submitted administratively acceptable documentation on each and every occasion. She argued that the offense is simply that she did not immediately submit documentation upon her return to duty. The appellant argued that removing someone from Federal service over such a "quibble," when the purpose of an SLR is to ensure that the employee is not abusing sick leave, is patently unreasonable and for the same reason does not promote the efficiency of the service.

The appellant stated that while removal may be warranted in the Aggravated Penalty Range of section A.5 of the Table, she argued that such discipline lies on the outer bounds of penalties and does not fairly reflect the offense in this case. The appellant argued that a penalty in the Mitigated or Recommended Penalty Ranges would properly recognize that the only alleged misconduct in this case concerns the speed with which the administratively acceptable documentation was submitted.

Management responded and argued that removal is appropriate based on the appellant's disciplinary history and the determination that further attempts to correct her behavior would be futile. Management argued that the appellant displays a lack of rehabilitative potential in her appeal, when she states that she rarely, if ever, followed direction in previous leave restrictions to submit medical documentation immediately upon her return. Management noted that the appellant argued that this justified her failure to do so in this case and that the appellant believes she does not need to comply with requirements that are not, in her view, consistently enforced. Management argued that they cannot, nor should they be required to, rely on an employee with this mindset to carry out security duties.

The appellant responded and argued that she does not argue that her previous actions justify her current actions, but that management's actions – i.e. never disciplining or even counseling an employee for submitting medical documentation soon but not immediately upon return – created a past practice and made that practice permissible. The appellant argued that such evidence is clearly relevant to a Douglas factors analysis, since management is directed to consider "the clarity with which the employee was on notice of any rules violated in committing the offense or had been warned about the conduct in question. The appellant argued that she is not justifying her actions but that she is arguing that removal is an "astoundingly unreasonable penalty" in light of all of the relevant factors.

The appellant also argued that management's rehabilitation argument is completely inconsistent with its argument that there is no evidence in the record to support her contention that

management has a practice of failing to enforce leave restrictions. She argued that if management enforced the immediacy requirement in the past, as management claims, it follows that either she received discipline in the past for not submitting documentation immediately, which she stated is not the case, or that she always submitted her documentation immediately. She argued that if the latter is true, then the rehabilitation argument made by management is not based in fact.

The Deciding Official considered the serious nature of the appellant's misconduct and its relationship to her employment with TSA and her role as a TSO. He considered that the appellant's failure to follow established leave procedures undermines management's confidence in her reliability. The Deciding Official considered that the appellant was on clear notice that she was required to provide administratively acceptable medical documentation immediately upon her return to duty as stated in her SLR. The Deciding Official noted that while two prior Letters of Leave Restriction relied on by the Proposing Official were deemed contrary to the CBA, that determination had nothing to do with the provision requiring the appellant to bring acceptable medical documentation for unscheduled sick leave immediately upon her return to duty. The Deciding Official considered therefore, that the previous Letters of Leave Restriction served as valid notice of the requirement. He also considered that the appellant's current SLR provided the same notice. He considered that the appellant's SLR is a corrective action to ensure that her leave usage is legitimate. The Deciding Official considered that the appellant's failure to follow the procedure required by the SLR – that she bring medical documentation immediately upon her return to duty – undermined the corrective action.

The Deciding Official considered the appellant's disciplinary history. He noted that on January 22, 2014, she received a 3-day suspension for possession of a personal electronic device while on duty, inappropriate comments and failure to follow instructions and that on April 15, 2015, she received a 14-day suspension for inattention to duty, failure to follow instructions and failure to follow standard operating procedures. The Deciding Official considered that through those actions, the appellant was placed on notice that any future misconduct could result in more severe disciplinary action, up to and including removal from Federal service.

The Deciding Official considered as a potential mitigating factor that the appellant has been a TSO for over five years and that she had satisfactory performance. He found however, that the appellant's service the last three years have been marked by recurrent misconduct without improvement. The Deciding Official found that management made a reasonable and sufficient attempt to correct the appellant's behavior through disciplinary and corrective actions without success and that further attempts would be futile. The Deciding Official found that based on the appellant's repeated violations of TSA policy in the face of recurrent discipline, the appellant has no potential for rehabilitation.

Under Section A. 5 of the Table, pertaining to Failure to Follow Leave Procedures, the recommended penalty range is 2-day to 10-day suspension and the aggravated penalty range is an 11-day suspension to removal. The Table states under A.5 that when on leave restriction, penalties may be in the Aggravated Penalty Range. The Deciding Official stated that based on the appellant's disciplinary history, he applied the Aggravated Penalty Range. He considered that the appellant's continued failure to follow TSA policy and procedures resulted in a total loss of confidence in the appellant's potential for rehabilitation.

The Board finds that while the appellant's prior discipline is not related to attendance, there is a connection to her failure to follow the leave procedures as outlined in her SLR, as it shows a continued pattern of failure to follow instructions. The Board finds that given the appellant's prior discipline and the fact that she was on a leave restriction, management had the right to consider a penalty in the Aggravated Penalty Range. The Board finds that, albeit harsh, management's decision to remove the appellant 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:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-071

June 23, 2017

Issue: *Failure to Follow Instruction*

OPINION AND DECISION

On May 11, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge, *Failure to Follow Instruction*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence in the record. Management based the Charge, *Failure to Follow Instruction*, on one specification alleging that on January 4, 2017, the appellant was interviewed by a Special Agent (SA) with the Office of Inspection (OOI) regarding the placement of a sign that read "RIP" on an employee's backpack. The SA instructed the appellant not to discuss the interview with anyone to protect the integrity of the investigation and had the appellant sign a non-disclosure agreement as a part of the interview process. As stated in the audio recorded interview, after leaving the interview, the appellant sent a text message to a TSO to alert the TSO that she had told investigators that the TSO had placed the sign on the backpack. The TSO was interviewed immediately after the appellant.

On March 20, 2017, the appellant was re-interviewed by the SA and she admitted to violating the Non-Disclosure Agreement by sending a text message to the TSO who was a subject of the

investigation. In the appellant's written statement, she stated, "I sent [the TSO] a message the same day I was interviewed because I was scared of what was going to happen . . . I text [the TSO]. I told her that I was going to get blamed so I had to tell them, that [the TSO] put the note on the backpack . . . She did it to be funny & a joke."

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

On January 4, 2017, the appellant was interviewed by a Special Agent from OOI regarding an incident involving the placement of a sign that read "RIP" on another employee's backpack. During the interview the appellant was told not to discuss the investigation and signed a non-disclosure agreement. After the appellant's interview, she sent a text message to the TSO responsible for placing the sign on the backpack advising the TSO that the appellant told the Special Agent that the TSO had done it. The TSO was interviewed immediately after the appellant on January 4, 2017.

In a follow up interview with the Special Agent on March 20, 2017, the appellant admitted that she sent the text to the TSO. The appellant provided written answers to questions presented to her during the March 20, 2017, follow-up interview with OOI. The written statement was included as part of the Report of Investigation (ROI). The appellant was asked "Did you violate the non-disclosure agreement you signed on January 4, 2017?" to which the appellant answered, "I sent [the TSO] a message the same day I was interviewed because I was scared of what was going to happen." The appellant was asked, "Did you text, email or talk to [the TSO] or anyone else prior to our interview with her in violation of the non-disclosure agreement?" to which the appellant replied, "I text [the TSO]." The appellant was also asked, "Did you say 'I told you what I told them before you went in the meeting'? What else was discussed?" to which the appellant replied, "I told her that I was going to get blamed so I had to tell them, that [the TSO] put the note on the backpack."

The appellant was issued a Notice of Proposed Removal (NOPR) on April 27 2017. The NOPR advised the appellant of her right to make an oral and/or written reply within seven (7) calendar days of her receipt of the proposal. On May 1, 2017, the appellant requested an extension until May 8, 2017, which was approved. On May 3, 2017, the appellant submitted a written response.

Management provided as evidence: ROI, dated April 17, 2017 (including the appellant's statements, dated January 4, 2017 and March 20, 2017 and a Non-Disclosure Agreement signed by the appellant on January 4, 2017) and the appellant's Online Learning Center (OLC) History report.

On appeal, the appellant stated that on December 23, 2016, she witnessed her coworker and friend place a sign reading "RIP" on the bag of another officer. The appellant stated that she did not report the incident because she considered it a prank between friends. The appellant stated that the incident, which happened in the break room, did not occur while she was conducting screening

duties and happened at the very beginning of her shift before both her shift-briefing and before she conducted any screening. The appellant stated that at the time she and the TSO who placed the sign on the other officer's bag were friends who occasionally socialized outside of work.

The appellant stated that on January 4, 2017, she was interviewed by OOI and that during the interview she told investigators that her friend, the TSO, had placed the RIP sign on the other TSO's bag. The appellant stated that toward the end of the interview she signed a form with the heading, "Non-Disclosure Agreement." The appellant stated that the Non-Disclosure Agreement states, in relevant part, "I will not disclose or release any information provided to me, pursuant to the interview, without proper authority or authorization." The appellant also stated that during the interview she was told not to talk to anyone about the interview.

The appellant stated that she was very uncomfortable during the interview as she had never been questioned by Federal agents during an official investigation into alleged misconduct. The appellant stated that she was "an emotional mess," and that she cried during the interview. The appellant stated that she had to write a statement implicating her friend in alleged misconduct and that she felt she had betrayed her friend.

The appellant stated that after the January 4, 2017, interview, she sent a text message to her friend, the TSO, expressing her emotional state after having complied with the investigator's request to provide a statement about the TSO. The appellant stated that the exact text message was not in the record. She also stated that she did not send the message immediately after leaving the interview. The appellant stated that another TSO drove her back to the airport terminal after the interview and that sometime after the TSO dropped her off, she sent the text message to her friend. The appellant argued that there is nothing in the record that establishes when the message was sent or the exact contents of the message. The appellant also argued that there is no evidence in the record that suggests her friend, the TSO, read or received any text messages from her prior to being interviewed for the investigation. The appellant noted that management stated that there is no way to tell for sure if the TSO received the message from the appellant prior to the interview and she argued that management did not provide evidence that the TSO was ever asked if she read the message or if the TSO was asked to share the contents of the text message. The appellant further argued that there is no evidence that she had any intent to thwart or interfere with any investigation by sending the text to her friend.

The appellant stated that on March 20, 2017, she was interviewed again by OOI and presented with a February 14, 2017, text message and asked if she had sent it to the TSO on January 4, 2017. The appellant stated that she answered truthfully that she had sent a text to the TSO.

Management did not respond to the appellant's appeal.

With regard to the Charge, the Board found that the appellant admitted to violating the Non-Disclosure Agreement in the interview with OOI and the accompanying written statement on March 20, 2017. The appellant also admitted that she was told in her January 4, 2017, interview with OOI not to talk to anyone about the interview. The Board found that the appellant failed to follow instructions when she sent a text to the TSO who was the subject of the investigation after her own interview regarding the investigation. Whether the TSO received or read the appellant's text message before the interview is irrelevant, as the fact of the matter is that the appellant sent a text to the TSO to warn her about what she had stated during her own interview regarding the

investigation. The Board found that there is preponderance evidence in the record that the appellant failed to follow instructions. Therefore, the Charge, *Failure to Follow Instruction*, is SUSTAINED.

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

On appeal, the appellant argued that management did not properly apply the Table to the specified misconduct in accordance with the ROI. The appellant argued that while management charged her with Failure to Follow Instructions under F.2 of the Table; she believes that D.2 under Failure or Refusal to Follow Instructions more accurately reflects the specified misconduct. The appellant argued that the ROI found that she violated D.2. The appellant argued that management does not have preponderant evidence under F.2. She noted that the nature of the offense under F.2 of the Table of Penalties reads, "Interfering with an official inquiry, investigation, or administrative or adjudicatory proceeding." She argued that the plain meaning of the language indicates that actual interference is required for the Charge. The appellant argued that there is no evidence that she actually interfered with an official investigation or that she intended to interfere with any investigation. The appellant argued that there is nothing in the record, including the ROI, that even suggests that she wanted to interfere with the investigation. She argued that management has not produced the actual text that she sent to the TSO on January 4, 2017. She argued that the record does not reflect whether the TSO was even asked about the January 4, 2017, text message or when she received it or what its contents were. The appellant argued that the only evidence in the record that reflects her intent is her affidavit and a text message from February 14, 2017. She stated that the affidavit illustrates that she sent the text message while in an emotionally difficult place. The appellant argued that in her affidavit, she swore under penalty of law that she sent the January 4, 2017, text because she was sorry that she had done something that was going to hurt her friend and because she was scared. She argued that her response was a perfectly normal and human response to a terrifying situation and that it was a response that had nothing to do with screening duties or protecting the traveling public. The appellant argued that her February 14, 2017, text message corroborates her affidavit and that there is nothing in the text message that even alludes to an attempt to interfere with the investigation.

The appellant argued that D.2 is a more appropriate charge because it does not require showing that anything happened as a result of the failure to follow instructions in contrast to F.2 which requires showing interference with the investigation. The appellant argued that by its plain meaning, D.2 only requires preponderant evidence that she did not follow instructions. She stated that she admitted that she was instructed not to speak with anyone and that she did text the TSO after having received this instruction.

The appellant argued that prior Board decisions support her argument that a showing of actual and/or intended interference is necessary for a charge under F.2. The decisions cited by the appellant have completely different facts from the facts in the present case and do not show that actual and/or intended interference is necessary for a charge under F.2.

The appellant argued that removal is not reasonable. She argued that the subject of the investigation only received a 14-day suspension for both placing the RIP sign on the TSO's backpack and for

lacking candor. The appellant argued that the whole matter that set off the investigation was a prank between two friends and she was caught in the middle. The appellant also reiterated that neither the December 23, 2016, incident nor the charge against her have anything to do with screening activities or protecting the traveling public.

In considering the penalty factors, the appellant argued that the alleged offense is not so serious in nature as to warrant removal or an aggravated penalty. She argued that the penalty determination factors weigh in favor of a mitigated penalty. She argued that the investigation itself did not involve any allegation that the TSO responsible for placing the sign on the backpack intentionally hurt anyone or sought to in any way to endanger the traveling public. She also argued that management did not show that she actually interfered with the investigation and that the ROI does not support such an allegation. The appellant further argued that there is no evidence to suggest that she intended to impede the investigation. She argued that she did not gain or stand to gain from the text message she sent and that she did not sent the text message maliciously. The appellant argued that she did not intend to violate the Non-Disclosure Agreement. She argued that she simply sent a text to her friend, while in a troubled emotional state, and that she admitted that she should not have done it. She argued that management did not show how her alleged misconduct in any way affects TSA's ability to carry out its mission. The appellant argued that the fact that she is not a supervisor should also be a mitigating or neutral factor. She argued that the three Letters of Reprimand cited as aggravating factors are unrelated to the present charge and are a very low form of discipline and therefore, should not be a significant aggravating factor.

The appellant also argued that the NOPR inaccurately considered her past work record. She argued that her performance appraisal rating for 2016 and her Mid-Year Progress Review both indicate a very competent and dedicated employee. She also listed numerous awards she received and detail assignments and collateral duties for which she had volunteered. She argued that her solid work history should be considered a mitigating factor.

The appellant argued that management never met with her to discuss the alleged misconduct prior to the issuance of the NOPR and therefore, she was not given an opportunity to admit wrong-doing or express remorse. She noted that the Deciding Official stated that the appellant could have expressed remorse to the investigators but argued that the investigators were not TSA management and were not her supervisors. She argued that the investigators were not interested in contrition and she stated that they could have asked her if she was remorseful had they wanted to do so. She stated that she is remorseful and that she did not mean to interfere with any official investigation. The appellant admitted that she should not have texted the TSO. She stated that she would never make the same mistake again and that she now realizes that no matter what, she is not supposed to text, call, or speak to anyone about any ongoing investigations. She argued that management did not consider the mitigating factor that she was extremely emotional at the time she sent the text to the TSO. She noted that both her affidavit and the affidavit of another TSO contained in the ROI illustrate that she "was a mess", that she had been crying and that she was scared. The appellant argued that she had never been questioned before and that she was scared for herself and her friend. She argued that it was within the context of fear and a sense of having betrayed her friend that she sent the text to the TSO. The appellant further argued that the text messages relied upon by management show that she was experiencing tension at work and that she felt like she was being harassed and targeted. She argued that the altered emotional state in which she sent the text to the TSO on January 4, 2016, should be considered as a mitigating factor. The appellant argued that the penalty is not reasonable.

In determining the penalty, the Deciding Official considered that the offense is serious in nature, as sharing information with other witnesses or the subject of the investigation during an investigative process has the strong potential to impact the outcome of that investigation. The Deciding Official considered that there is no burden of proof required on the part of management to show that the investigation was actually impeded. The Deciding Official considered that in addition to the Non-Disclosure Agreement, the appellant was provided further oral instructions by the Special Agents not to discuss anything pertaining to the investigation. The Deciding Official considered that the appellant completely disregarded that direction fifteen minutes after the completion of the interview by texting the TSO and sharing information that was discussed in the meeting. The Deciding Official found that the appellant's actions were deliberate to alert the TSO to the conversation that she had with OOI, and that the text message was in direct conflict with the direction that had just been given to her by the agents. The Deciding Official considered the appellant's emotional state that was described in the appellant's response but found that it does not negate the clear expectation and requirement for the appellant to follow instructions. The Deciding Official also considered that the case was deemed important enough to be handled outside of the local airport by Special Agents from OOI. He considered that the appellant was placed under oath and required to sign a document agreeing not to discuss information pursuant to the interview and the Non-Disclosure Agreement. The Deciding Official considered that the appellant should have known that the consequences of violating the direction would be serious.

The Deciding Official considered that as a full-time TSO, the appellant is expected to adhere to all TSA rules, regulations, policies and directives. He considered that as a TSO, the appellant is held to a high standard and that performing screening duties of the traveling public requires that the agency and management has the utmost faith and confidence in the appellant, her integrity, and her ability to do the right thing.

As an aggravating factor, the Deciding Official considered that the appellant has three recent Letters of Reprimand (LOR); November 18, 2016, for Inattention to Duty, September 6, 2016 for Inattention to Duty, and February 2, 2017, for Failure to Report Inappropriate Conduct. The Deciding Official noted that while the appellant argued in her response to the Notice of Proposed Removal that the LORs are low level discipline, they are still formal discipline and that having three formal discipline actions within a six-month period is not a mitigating factor. The Deciding Official stated that he considered it an aggravating factor whether the actions are related to the current incident or not.

As mitigating factors, the Deciding Official considered the appellant's employment with TSA since April 26, 2009 and her dependable attendance. He found it aggravating however, that the appellant's past work record includes several instances of lack of attention to detail and that she had issues getting along with her fellow workers. The Deciding Official considered the awards the appellant received and her performance scores but found that those achievements do not negate the seriousness of the offense or restore trust in the appellant. The Deciding Official stated that the appellant's offense caused management to lose confidence in her ability to perform her duties with integrity and the ability to do the right thing. The Deciding Official considered that the appellant is in a position of public trust and that her direct violation of the Non-Disclosure Agreement demonstrated that her loyalty is to protect herself and her friends and not to follow instructions as given.

The Deciding Official also considered the clarity with which the appellant was on notice of the rules violated and noted that on June 15, 2016, the appellant acknowledged that she read MD 1100.73-5 which placed her on notice of the expectation to follow instructions. Additionally, the Deciding Official considered that the appellant's prior disciplinary actions placed her on notice that further misconduct may lead to more severe disciplinary action, up to and including removal from TSA. Further, the Deciding Official considered that that Non-Disclosure Agreement warned the appellant that violation of the Non-Disclosure Agreement could result in disciplinary action.

The Deciding Official considered the affidavit the appellant provided with her response that indicates that she is remorseful regarding what happened but noted that her regret was not expressed until she was issued the Notice of Proposed Removal. The Deciding Official considered that up until that point she had not expressed remorse or accepted responsibility for her actions. The Deciding Official stated that management has no confidence in the appellant's ability to be rehabilitated.

Section F.2 of the Table, which pertains to Failure to Follow Instruction, has a recommended penalty of removal and an aggravated penalty of removal.

The Board determined that F.2 is the appropriate section of the Table. The suggested Charge or Section of the Table in the ROI does not dictate management's discretion as to the proper Charge. F.2 specifically addresses the situation as it cites failure to follow instruction related to releasing information regarding an official inquiry or proceeding when one knows or should know not to do so. F.2 does not require proof of interference or an intent to interfere with an investigation. The appellant was fully aware when she entered the meeting with the Special Agents from OOI and signed the Non-Disclosure Agreement that she was being interviewed as part of an official inquiry. In addition to signing the Non-Disclosure Agreement, the appellant admitted that the agents told her not to talk about the investigation. She knowingly failed to follow instructions. The facts of the previous Board cases cited by the appellant in her appeal are not the same; in this case, the appellant released information, about the investigation, via text, to the subject of the investigation, immediately after her interview despite written and verbal instructions not to do so. The recommended penalty under F.2 is removal. Therefore, 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:

DEBRA S ENGEL

Digitally signed by DEBRA S ENGEL
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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)
Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-074

June 29, 2017

Issue: *Failure to Maintain Certification*

OPINION AND DECISION

On May 8, 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 Required Certification*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management supported the Charge with one specification. The specification alleged that on November 30, 2016, the appellant failed to successfully qualify for the Annual Proficiency Review (APR) Image Mastery Assessment (IMA), thus failing to maintain her checkpoint screening certification.

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 9, 2016, and failed. The appellant completed required remediation conducted by a Security Training Instructor (STI) on November 15, 2016. The appellant was then tested again on November 16, 2016, and failed. On November 27, 2017, the appellant's seventh scheduled working day following her second attempt, she failed to report for duty. The appellant was approved for sick leave on November 28 and 29, 2016. On November 29, 2016, the appellant sent an email to a Training Specialist (TS) notifying her that she was out sick. On November 30, 2016, the appellant received remediation by an STI and was administered her third assessment. The appellant failed to qualify on her third assessment.

The appellant was issued a Notice of Proposed Removal (NOPR) on March 2, 2017. The NOPR advised the appellant of her right to make an oral and/or written reply within seven (7) calendar days of her receipt of the proposal. The appellant met with the Deciding Official and gave an oral reply on March 13, 2017.

Management provided as evidence: Online Learning Center (OLC) IMA Failure Documentation, dated November 9, 2016, November 16, 2016, and November 30, 2016; APR Technical Proficiency Assessment Remediation Acknowledgment-IMA forms, dated November 15, 2016, and November 30, 2016; Letters of Remediation and Re-Assessment Acknowledgment, dated November 15, 2016, and November 30, 2016; Kronos attendance documentation; Airport Information Management (AIM) system documentation showing approved leave for November 28 and 29, 2016; and email from the appellant to a TS, dated November 29, 2016.

On appeal, the appellant argued that there were numerous procedural due process violations, as well as procedural irregularities, which she argued violated the mandatory agency protocols and/or management directives. The appellant argued that she was not certified, immediately prior to the first test administration on November 9, 2016, because she had previously been out of work in excess of 15 days from June 16 to July 10, 2016. She argued that management should have recognized that there was a lack of pertinent training for her and that therefore, she should have been placed in an appropriate return-to-duty training status.

The appellant argued that she was ill during the week of the third administration of the test and that management compelled her not to request an extension of time exceeding seven days, although her condition undoubtedly had an impact on her examination performance.

The appellant argued that the remedial instructors had only begun to perform remediation functions and that they were not proficient in image recognition duties. She further argued that the equipment was not properly updated for the administration of the test; that practice sessions were not available with the new software and that consequently, remediation sessions were not constructive in assisting her to prepare for a re-test.

The appellant also argued that she had been told by management, as of January 18, 2017, that she would be retrained and ultimately retained by the agency, but that management proceeded to issue the NOPR in March, thereby subjecting her to double jeopardy as the same allegations which she stated were "to be put to rest," were subsequently reinstated.

Additionally, the appellant argued that ATSA does not specifically state how competence is to be measured and that the APR was modified in calendar year 2017 and that scoring of the tests was changed without notice. She also alleged that the remediation file was not documented properly and therefore, she was not properly prepared to take the second test.

The appellant stated that she had passed a threat test and achieved success on a Blue Team Regulatory test on August 15, 2016, and noted that she was sent a congratulatory email by management for passing the test. She also stated that she exhibited promise in meeting prior certification requirements and argued that her superior personnel record should be counted as a mitigating factor.

The appellant also cited an Office of Security Operations (OSO) communication which clarified the Playbook Standard Operating Procedures and argued that she was not returned to her normal functioning area, for one full day, every 14 days to retain certification.

Management did not reply to the appellant's appeal.

The Board finds that the appellant was not subject to double jeopardy as she was never formally charged because the initial action was rescinded. The Board finds that while the appellant claimed that she was off in excess of 15 days in June and July, she continued working after the absence and was not tested until November and it was the appellant's responsibility to request return-to-duty training at the time of her return, if training was warranted. The Board finds that the appellant was certified at the time of her November assessments. Additionally, the Board finds that the appellant gave no specific details or evidence of the alleged remediation deficiencies or failure to follow the OSO communication therefore, the Board gave no merit to the appellant's allegations.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the IMA on November 9, 2016, November 16, 2016, and November 30, 2016. The Board also found that on November 15, 2016, prior to her first IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form acknowledging that she accepted the opportunity for self-study and indicating that she received remediation in accordance with the APR program and policy requirements and that she was ready to take the IMA reassessment. On November 30, 2016, prior to her second IMA reassessment, the appellant signed

the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form declining to participate in self-study, that she received remediation in accordance with the APR program and policy requirements, and that she was ready to take the IMA reassessment. The Board finds that the appellant was properly assessed and remediated in accordance with the 2016 APR User's Guidance. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is failure to maintain required certification and certification is a condition of continued employment as a TSO.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Supervisory Transportation Security Officer
Appellant,

V.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-075

June 30, 2017

Issue: *Failure to Maintain Certification*

OPINION AND DECISION

On May 4, 2017, management removed the appellant from her position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Required Certification.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management supported the Charge with one specification. The specification alleged that on November 10, 2016, the appellant failed to successfully qualify for the Annual Proficiency Review (APR) Image Mastery Assessment (IMA), thus failing to maintain her checkpoint screening certification.

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 October 27, 2016, and failed. The appellant completed required remediation conducted by a Security Training Instructor (STI) on November 1, 2016. The appellant was then tested again on November 2, 2016, and failed. On November 10, 2017, the appellant received remediation by an STI and was administered her third assessment. The appellant failed to qualify on her third assessment.

The appellant was issued a Notice of Proposed Removal (NOPR) on March 2, 2017. The NOPR advised the appellant of her right to make an oral and/or written reply within seven (7) calendar days of her receipt of the proposal. A written reply was received by management on March 7, 2017.

Management provided as evidence: Online Learning Center (OLC) IMA Failure Documentation, dated October 27, 2016, November 2, 2016, and November 10, 2016; APR Technical Proficiency Assessment Remediation Acknowledgment-IMA forms, dated November 1, 2016, and November 10, 2016; Letters of Remediation and Re-Assessment Acknowledgment, dated November 1, 2016, and November 10, 2016; and Kronos attendance documentation.

On appeal, the appellant argued that there were classroom disruptions during the first and second test. The appellant provided statements from other employees indicating that there was a disruption on the test taken on November 2, 2016. The appellant also questioned why her test scores were not visible at the time of the testing. She also argued that the STI that administered her first and second test was the same person that she gave a low TOPS rating to. The appellant alleged that the training department was under investigation several weeks after she took her test and that one of the STIs reported that a fellow STI had changed a test score and that the STI who administered her test score was being investigated. The appellant also alleged that her remediation was less than an hour.

In addition, the appellant argued that she had less than 30 hours on the x-ray in a year's period and was not given the same opportunities as fellow supervisors that failed for the second time. The appellant argued that she was told that she would be "retained and retrained," and would keep her employment with TSA. The appellant also alleged that she attempted to become single function

and was told that there were not enough female supervisors at the checkpoint but since that time over 20 female supervisors were promoted.

Management did not reply to the appellant's appeal.

The Board finds that the appellant was not subject to double jeopardy as she was never formally charged because the initial action was rescinded. The Deciding Official acknowledged that there was an investigation into scores but the results revealed that scores are sent automatically from the testing system to the Online Learning Center (OLC) record of the tested employees. The Deciding Official also indicated that the automatic system was down on the day in question and the scores had to be manually entered into the OLC and that the appellant's score was correct. Since scores are automatically entered into the system, except for this one day, the Board gave no merit to these arguments and to the argument that the appellant had given a low TOPS rating to the STI. The record clearly shows that the appellant received a minimum of one hour of remediation. The Board is unable to address the appellant's argument concerning her attempt to become single function but the argument is not germane to the issue as to whether she passed the APR for IMA.

In light of the appellant's argument regarding insufficient x-ray time and a distraction during the testing process, the Board issued an order to management, dated June 28, 2017, requiring management to submit the appellant's TIP logs for the month of October. The submission clearly shows that the appellant had x-ray time and thus was certified as an x-ray operator and available for testing. In addition, the appellant signed a certification statement, dated October 27, 2016, which states that she has been performing all Checkpoint screening functions every 14 days in accordance with MD 1900.8. In response to the order, management acknowledged that there were other failures on the day of the distraction. However, this is not proof that there was a distraction or if there had been, that the distraction was the cause of the failures. The Board considered all of the arguments made by the appellant but found no merit to any of the arguments.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the IMA on October 27, 2016, November 2, 2016, and November 10, 2016. The Board also found that on November 1, 2016, prior to her first IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form declining to participate in self-study, that she received remediation in accordance with the APR program and policy requirements, and that she was ready to take the IMA reassessment. On November 10, 2016, prior to her second IMA reassessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment-IMA form declining to participate in self-study, that she received remediation in accordance with the APR program and policy requirements, and that she was ready to take the IMA reassessment. The Board finds that the appellant was properly assessed and remediated in accordance with the 2016 APR User's Guidance. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is failure to maintain required certification and certification is a condition of continued employment as a TSO.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer,
Appellant,

DOCKET NUMBER
OAB—17-078

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

June 16, 2017

Issue: *Jurisdiction (Termination in Trial Period)*

OPINION AND DECISION

On June 7, 2017, TSA management terminated the appellant's employment as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DISMISSES the appeal.

The appellant filed an appeal on June 15, 2017. Based on TSA Management Directive 1100.31, *Trial Periods*, management terminated the appellant during her trial period. The appellant commenced employment as a TSO on December 11, 2016. The preponderance of evidence indicates that the appellant was subject to a two-year trial period pursuant to Section 6.A (2) of the MD, and was still serving in her two-year trial period at the time of her termination. The **Note** to Section 7.B (1) of the MD provides that "[a]n employee who is terminated during his or her basic trial period does not have appeal, grievance, or peer review rights with regard to this termination."

Based on the foregoing facts, the Board lacks authority to decide the appellant's appeal because she was, at the time of termination, serving in a trial period.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

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

DOCKET NUMBER
OAB—17-082

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Respondent.

June 23, 2017

Issue: *Jurisdiction (Letter of Reprimand)*

OPINION AND DECISION

The appellant petitions for review of the respondent's decision to issue him a Letter of Reprimand (LOR) relative to his position as a Master Transportation Security Officer (MTSO) with the Transportation Security Administration (TSA). For the reasons stated below, the appeal is DISMISSED.

BACKGROUND

On May 26, 2017, TSA management issued the appellant, an MSTO, an LOR. On or about June 22, 2017, the appellant appealed his LOR to the TSA Office of Professional Responsibility Appellate Board (Board).

ANALYSIS AND FINDINGS

The Board has jurisdiction to review certain disciplinary actions involving TSOs.[1] Actions covered include suspensions of more than fourteen (14) days, indefinite suspensions, involuntary demotions for performance/conduct, furloughs of any length, and removals. Suspensions of fourteen (14) days or less, to include Letters of Reprimand, are not covered, and are not within the Board's jurisdiction to review.

Conclusion. The Board lacks authority to decide the appellant's appeal because he received an LOR. The proper avenue to contest his LOR was through the grievance procedures set forth in Human Capital Management Policy 771-4, *National Resolution Center.*

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

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Debra S. Engel
Chair
OPR Appellate Board