BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between	Record of Proceeding
[redacted]	FSGB No. 2014-020
	April 29, 2015
Grievant	**INTERIM DECISION**
and	EXCISED
Department of State	

For the Foreign Service Grievance Board:

Presiding Member:	Warren R. King
Board Members:	William J. Hudson William B. Nance
Special Assistant:	Joseph J. Pastic
Representative for the Grievant:	Sharon Papp, AFSA
Representative for the Department:	Akia F. Roane HR/G
Employee Exclusive Representative:	American Foreign Service Association

CASE SUMMARY

REMANDED: The grievance is granted in part and denied in part. The Board remands the case to the Department to consider an appropriate penalty in view of our decision not to sustain two specifications of one of the two charges.

OVERVIEW

Grievant faces two charges – Lack of Candor and Failure to Follow Regulations – that were leveled against him because of statements he made during a Department investigation about incidents that took place while he was in the U.S. on leave in 2010. He is a Diplomatic Security Special Agent who was admitted to the hospital on two occasions (on consecutive days) after he drank alcohol heavily and took an unknown quantity of prescription medications after he became upset about the breakup of his engagement to be married. The investigation revealed discrepancies between the information grievant gave to investigators and that found in his medical records. Records show that grievant suffers from PTSD and that he had not reported this fact to the Department. The investigation report claims that grievant denied during interviews that he had ever been diagnosed with PTSD or that he was ever in a treatment program to address the condition. His records also show that he had been prescribed several psychiatric medications, and contained no evidence that grievant had reported to the Department either the PTSD diagnosis, or the prescription medicines which are required to be reported under the agency's Deadly Force and Firearms policy. The Department's final decision provided for a 12-day suspension without pay.

Grievant denies the majority of the specifications cited in the charges. He claims to have discussed his PTSD diagnosis in detail with the investigators and avers that he responded candidly to all of the questions posed to him during two DS interviews. He admits that he did not report the prescription medicines, but argues that he was unaware he needed to do so. Grievant also claims that the charges are untimely, having been brought after a very long delay – nearly 2 ½ years after the incidents, and that the delay has prejudiced his ability to present his case. He claims to have been particularly disadvantaged in that he is unable to find witnesses who could corroborate his positions or shed light on the quantity of medications he took prior to the 2010 incidents. He also argues that the proposed penalty, in any case, is overly harsh in light of penalties the Department has imposed for like offenses. He requests that those charges/specifications the Department is unable to establish should be overturned, and the 12-day suspension should be mitigated.

INTERIM DECISION

I. THE GRIEVANCE

The Department has issued a final decision to suspend grievant, a Special Agent with the Bureau of Diplomatic Security of the Department of State (Department, agency), for 12 days on the basis of two charges: 1) Lack of Candor (six specifications); and 2) Failure to Follow Regulations (two specifications). The charges stem from two incidents that occurred in 2010 when grievant was on annual leave in the U.S. Grievant, who suffers from PTSD as a result of an earlier military deployment to Iraq, drank heavily and took a quantity of antidepressants, ending up in a hospital emergency room on two separate occasions (occurring on consecutive days). A subsequent DS investigation determined that he had not been truthful about his previous PTSD diagnosis, his treatment for the condition, or the details of the incident that led to his hospitalization, particularly regarding the quantity of antidepressants he ingested before he was hospitalized. Grievant was also found to have failed to report to the Department the medications he was taking and/or had been prescribed, contrary to requirements under the FAM. It was also determined that grievant had failed to disclose to investigators his involvement in a previous alcohol-related fight to which police had been summoned to intervene. The agency initially issued a 15-day suspension, but as a result of the agency-level grievance it was mitigated to 12-days.

Grievant denies that the majority of the specifications are accurate or supported by the evidence. He claims also that the penalty is unduly harsh, that the disciplinary action is untimely, and that he has been prejudiced by the delay in pursuing the charges against him. Grievant requested and was granted interim relief from the discipline, pending the outcome of his appeal to this Board.

II. BACKGROUND

On November 22, 2010 grievant was treated at the [redacted] for a possible drug overdose combined with the heavy consumption of alcoholic beverages. He was subsequently released after several hours. The following day, he was again treated at the same hospital for intoxication, and after being kept there for 24 hours, he was involuntarily taken to a behavioral health center for further psychiatric assessment. Both incidents apparently occurred because grievant was upset following the termination of his engagement to be married. The charges of Lack of Candor and Failure to Follow Regulations emerged as a result of a DS investigation that took place following the two incidents.

In his interviews with the Office of Professional Responsibility[1] on January 25, 2011 and on March 21, 2011 with the Office of Personnel Security and Suitability (PSS), grievant made some statements that were not corroborated in his previous medical records (which he authorized investigators to review), and others that were contradicted by records retained at the hospital where he was treated in November 2010. Medical records showed that grievant had been diagnosed in 2009 as suffering from Post-Traumatic Stress Disorder (PTSD), that psychiatric medications had been prescribed for the condition, and that there was no record he had ever reported either the diagnosis or the medications to the agency. Grievant reportedly denied during the interviews that he had been diagnosed with PTSD, saying instead that he had been treated for anxiety and panic attacks. He also reported having taken a much lower level of antidepressants during the November 2010 incidents than hospital records show, or that was reported by family members at the time.

[1] Now the Special Investigations Division of Diplomatic Security (DS/ICI/SID)

In addition to disputing the facts of several of the claims made against him in the Report of Investigation (ROI), grievant contends that the delay in bringing charges so long after the incidents took place (the Department's letter of proposed discipline is dated April 24, 2013 – more than 29 months after the incidents) make the claims untimely, and prevents him from locating individuals who could corroborate his claims that other statements in the charges against him are unsupported by the facts.[2] He also argues that the penalty is unduly harsh when compared with those imposed on others for similar offenses.

Following the Department's May 13, 2014 decision letter denying his agency-level grievance, grievant appealed to this Board on May 27, 2014. He filed a Supplemental Submission on October 8, 2014, to which the Department responded on October 28, 2014. Grievant filed his Rebuttal on December 17, 2014, and the ROP was closed the following day.

III. POSITIONS OF THE PARTIES

A. THE DEPARTMENT

The Department claims that grievant failed to respond truthfully during two DS interviews and that he failed to report his use of various prescription medications as required by Department regulations. Specifically, the Department contends that grievant:[3]

- Stated in the January 25, 2011 interview that he took four (4) .5 mg Xanax pills on November 22, 2010 while drinking alcohol, and stated in a March 21, 2011 interview that he took one (1) .5 mg Xanax pill on November 22, 2010**.** ***Medical records and notes***

[2] The ROI was issued April 28, 2011 (grievant received a copy June 6, 2011), but it did not include the transcript of the PSS interview. The PSS transcript was given to grievant on December 12, 2012; grievant filed his agency-level grievance exactly one year later.

[3] In this recitation we first set forth, in regular type, a summary of contentions made by grievant, followed by a summary, in bold type italics, of the Department's responses to those contentions.

from the hospital to which grievant was admitted show that he "took approximately ten (10) .5 mg Xanax" on the day in question.

- When asked in the same January 25, 2011 interview if he had been diagnosed or evaluated as having PTSD prior to the November 2010 incidents, stated that in 2006 he had been told by his doctor that he may have PTSD; but that he had never been formally diagnosed as having PTSD. ***A letter from grievant's primary physician, dated 9/29/2009, states that grievant was diagnosed with PTSD in August 2009.***
- When asked in the same interview whether he had undergone any type of counseling or enrolled in any type of treatment programs for any type of condition to include PTSD, answered in the negative. ***In her August letter (cited above), grievant's primary physician stated that grievant had been "perseverant and cooperative with his treatment….[b]ut we have not been successful in finding the best one for him. He still has significant symptoms that interfere with activities of daily living. I hope that we will achieve our goal with the new treatment …"***
- When asked in the same interview if he had been involved in any other alcohol related incidents, grievant responded that he had not. He also denied having been involved in any fighting, child or spouse abuse or other incidents related to alcohol***. A [redacted] [redacted] article carried a story which identified grievant by name as having been involved in a "drunken brawl" outside a bar in New York City.***
- Grievant acknowledged in both DS interviews that he had been prescribed several psychiatric medications (confirmed by medical records), that he had consumed at least one of the drugs since 2009, and that he did not submit a medical certificate or other documentation of the prescription(s) for Xanax until January 24, 2011; he did not report

any of the other drugs (Zoloft, Buspar, Effexor, Zolpidem, and Lyrica) at all.***12 FAM Exhibit 023 2.5, the Deadly Force and Firearms Policy, requires "a DSS Special Agent who is taking prescription medication to notify his supervisor and submit a medical certificate or other administratively acceptable documentation of the prescription … to the Domestic Programs Division of the Office of Medical Services immediately after beginning the medication."***

The Department argues that grievant has not been unduly prejudiced by the length of disciplinary proceedings. The charges are both serious and required time to thoroughly investigate and consider an appropriate penalty. Moreover, grievant has not demonstrated any harm or prejudice by any delay in the issuance of the proposed discipline. Also, he has not demonstrated any prejudice in his ability to respond to the charges leveled against him, despite his claim of inability to locate witnesses – a claim that the Department judges immaterial to his appeal. The Department argues that its proposed penalty was properly considered, is within the zone of reasonableness, is not unduly punitive, and should be sustained by the Board.

B. THE GRIEVANT

Grievant claims that following his military service in Iraq in 2006, he started having panic attacks and severe anxiety, for which he was prescribed several medications – none of which he says worked very well. His symptoms became worse over time. In 2009 he was diagnosed as having Post Traumatic Stress Disorder (PTSD), and his doctor convinced him that taking a low dosage of Xanax (an antidepressant), on an "as needed" basis, might help. Although this medication, along with others, had been prescribed for him as early as 2006, he claims not to have tried the Xanax earlier and used other prescribed medicines only sporadically. This medication seemed to help, and he continued to take it periodically to help him calm his

anxiety. Grievant avers that he discussed his PTSD diagnosis in considerable detail with the DS investigators, and authorized release of his medical records. He also claims that he responded truthfully when asked whether he had received counseling or had been in a treatment program for PTSD; he contends he had never been in a treatment program for the disorder, and that the medications prescribed were to treat his panic attacks and anxiety.

Regarding the number of (.5mg) Xanax pills he ingested on November 22, 2010, grievant claims that he responded to the best of his knowledge when he told DS investigators that he took four (4) Xanax. He admits he made a terrible mistake that day by drinking too much alcohol after taking the pills. His mother (he was visiting her at the time) became concerned, thinking he had taken as many as ten (10) Xanax pills, and called emergency services. Grievant agreed to go to the hospital, where he was examined and released several hours later. He was contacted the next day by DS agents asking about the incident, which he claims, made him fearful that he might lose his job. He reacted by indulging in more heavy use of alcohol, this time causing other family members to be concerned for his safety; they again called emergency services, and grievant was returned to the same hospital as on the day before, examined, and this time referred to a different facility for a psychiatric assessment. He was released from the second facility after a few hours.

When DS investigators interviewed grievant in January 2011, and PSS investigators met with him two months later, they claimed that grievant lacked candor in his responses about how many Xanax pills he had taken prior to his admission to the hospital on November 22, about when/whether he was diagnosed with PTSD, and whether he had received counseling or been in a PTSD treatment program. Grievant denies he was untruthful. He also denies lack of candor in his response to investigators' questions asking whether he had been involved in previous

alcohol-related incidents. He answered that he had not, failing to report that he was involved in an incident in 2008 that was reported ([redacted]) in a New York newspaper as a "drunken brawl." Grievant claims he was the victim of a brutal attack in 2008, and that he interpreted the question to mean any incident in which he had been drinking or involved in criminal behavior. He concluded that since he had not done either with respect to the incident reported in the newspaper article, he did not need to report it, and he did not.

Grievant admits he did not comply with Department regulations requiring him to report that he had been prescribed psychiatric medications, but claims he was unaware of the policy requiring him to do so. He claims that he was not alone in being unaware of this requirement, as many other DS officers to his knowledge were also unaware of the regulation.

Grievant argues that the Department's decision to suspend him is untimely in that the action was proposed so long after the incidents occurred that his case has been prejudiced by the delay. The Department did not propose to suspend grievant until almost two years after the ROI was released, and he claims that the Department has offered no explanation or justification for the delay – despite his many attempts to determine the status of his case after receiving the ROI. He claims that the delay hurt his case in two specific ways: 1) he is now unable to locate the doctor who admitted him to the hospital on November 22, 2010, and who may be able to shed light on the source of the information that he (grievant) had taken 10 Xanax, and whether the information is correct; and to address the question of proper hospital procedures if in fact it was determined (or suspected) that a patient had taken a large quantity of antidepressants; and 2) grievant also claims that he is now unable to locate potential witnesses who could verify events pertinent to the "drunken brawl" that occurred in New York in 2008.

Finally, grievant contends that the penalty proposed for him is too harsh in light of mitigating factors and the precept of similar penalties for like offenses.

IV. DISCUSSION AND FINDINGS

As this is a discipline case, the Department has the burden to prove by a preponderance of the evidence that the disciplinary action is justified in accordance with Section 905.2 of Volume 22 of the CFR.

A. TIMELINESS

Grievant claims that due to the unexplained delay in bringing this disciplinary action the Department was untimely proposing that he be suspended from the agency for 12 days. The incidents that ultimately led to the two charges occurred in November 2010; yet the Department did not propose disciplinary action until April 24, 2013 – a span of 29 months. DS opened an investigation on November 24, 2010 – immediately following the incidents. The ROI (dated April 28, 2011) was received and provided to grievant on June 6, 2011, but the ROI was incomplete, as it did not include a copy of grievant's PSS interview. The Department notes, but offers no explanation as to why, it did not receive a final version of the ROI – including the PSS interview – until December 12, 2012, the date grievant reports receiving a final copy of the ROI as well. The Department does not explain the 18-month hiatus between receipt of the initial and final versions of the ROI, except to say in its Decision memorandum that the report dealt with serious charges that warranted full consideration of an appropriate penalty. Grievant understandably raises concern about the long unexplained delay.

Nonetheless, this Board agrees with the Department that grievant has not shown that he was harmed or prejudiced by the delay with respect to the November 2010 incidents. Grievant argues that he was unable – in part due to the long delay – to locate the doctor who admitted him

to the hospital on November 22, 2010.[4] Grievant's argument in this respect is that the doctor could have provided information about the source of information concerning how many Xanax pills he took, and he could have addressed the nature of hospital policy in the event a patient had been suspected (as he was) of having taken a large quantity of Xanax.

The Department suggests that grievant's inability to locate the doctor is immaterial, and we agree. First, we have grievant's mother's statement that she believed he had ingested 8 to 10 pills along with a large amount of alcohol. We have the admitting doctor's notes to the same effect. Even if grievant could have located the doctor, given the volume of patients that pass through the emergency wing of a hospital, we think it is unlikely he would have remembered anything more about the case than the information he entered into hospital notes at the time. Concerning this doctor's ability to speak to the issue of hospital policy on such questions (as grievant's Supplemental Submission suggests) about what triggers an admitting physician to decide to use gastric lavage, charcoal ingestion, oxygen support or other medical measures during emergency room situations (none of these were employed in this case), grievant could have gotten insight on those specific questions from other hospital staff or medical personnel. There is no indication in the record that he attempted to do so. Also, it could be argued that grievant's own doctor gave him all the information he needed on this topic, when she stated in her January 28, 2014 letter that overdoses of alprazolam (Xanax) are treated using "…medical measures at the discretion of emergency room doctors." It is unlikely that an interview with the doctor who treated grievant in the emergency room in 2010 would have been able to add much

[4]Grievant reports that he contacted the hospital trying to locate the admitting physician, and was told that he no longer worked there. The record does not indicate any other efforts that grievant made to locate the doctor. For example, he does not indicate whether he tried to "Google" the doctor's name to see if he could find a current location – even though locating a doctor in the U.S. in this manner might be far easier than locating an average person.

insight, even if he had been consulted contemporaneously. Therefore, despite the Department's delay in charging grievant, we conclude that the delay did not prejudice grievant in any material way that harmed his ability to present his case.

B. THE CHARGES

Charge 1: Lack of Candor

Specifications 1 and 2

Despite the responses grievant gave to DS and PR investigators in early 2011 about the number of Xanax pills he took on November 22, 2010, grievant now admits that he was "quite intoxicated" on both days in question and it is possible that he does not recall accurately how many pills he took,[5] or even what he told the treating physician. He concedes that he might possibly have taken more than 4 Xanax pills; he was simply too intoxicated at the time to know for sure. Given grievant's admission in his most recent filing, it is clear to this Board that his level of intoxication was such that rather than declaring during his interviews with DS investigators that he took a specific number of pills, he would have been better served by admitting then that he was unsure of how many Xanax pills he actually took. Instead, it appears that when he told investigators that he ingested four (or one) Xanax pills, he was either guessing how many he might have taken, or he elected to provide a number he believed would not suggest – when considered along with his heavy alcohol intake – that he was trying to harm himself. A candid reply at the time would have been admission to his uncertainty of either how much alcohol he had consumed (which he did admit) or how much prescription medication he had ingested.

We sustain these two specifications.

[5] See Grievant Supplemental Submission, at 7 and Grievant Rebuttal, at 2

Specifications 4 and 5 [6]

Throughout grievant's filings, he clearly is concerned that the label of having been diagnosed with PTSD could jeopardize his career as a law enforcement officer with DS. This concern was apparent in his reaction after he learned that his mother had called 911 on November 22, 2010; again on the following day when he was contacted by DS agents; and even in earlier conversations with his private physician when he made attempts to keep his PTSD diagnosis out of his medical records. This concern is an issue that likely prevents many individuals, including some who serve in the Department, from seeking early-on the specialized help they need, and from which they could almost certainly benefit. Concealment of such a condition can run counter to the broader Department need to know that those officers granted police powers and the authority to carry and use deadly force, are fully up to the task. Law enforcement officers are held to a higher standard, and their integrity and truthfulness on all matters must be impeccable, particularly on issues that might bring into question their ability to perform their duties at the highest levels, and/or affect their abilities to keep themselves and others safe. Grievant was first diagnosed in 2009 as suffering from PTSD, but he chose to talk with DS investigators two years later only about his "panic attacks" and anxiety issues, denying that he had ever been diagnosed with PTSD or that he had been treated for the condition. Grievant's attempts to hide his PTSD diagnosis and subsequent treatment, no matter the reason, are inconsistent with the higher standard to which DS officers must be held.

We sustain these two specifications.

[6] We do not address Specification 3 since it was not sustained during the agency-level grievance process.

Specifications 6 and 7

These two specifications stem from DS investigators identifying a newspaper article that named grievant as "a State Department Agent" who was involved in a "drunken brawl" outside a bar in New York City in 2008.[7] The article speculates that "it may have been testimony about a long night of drinking – by the Agent [grievant] and [the defendant, charged as attacker] – that convinced the judge to toss the case." Grievant asserts that he had not been drinking, but that his assailant was quite intoxicated. The police report of the incident listed grievant as a "victim" and states that there were three witnesses (two friends/acquaintances of victim, and a stranger). The police report does not cite use of alcohol by either party, but it does support grievant's version of events. He is reported as "walking on sidewalk" prior to the incident. The report states that [the defendant] struck the victim "in the face with closed fists causing lacerations pain and swelling and a broken nose," and that the victim was removed from the scene by Emergency Medical Services.

We agree with grievant that he may have had a better chance to locate witnesses who could have addressed questions about his sobriety at the time, had the case been adjudicated more expeditiously. Nonetheless, he was able to find one witness, [redacted], one of the DS agents who was with grievant at the time of the incident. [redacted] statement (provided more than six years after the incident) largely corroborates grievant's description of events. [redacted] claims that grievant remained outside the bar where the incident took place, either to smoke a cigarette or make a phone call, and he did not recall whether grievant had been drinking previously. His recollection of events is also consistent with the police report, citing grievant as

[7] At various places in the ROP, this incident is reported as having occurred in 2009. However, the police report records the incident as having occurred at 3:05am on September 21, 2008. The newspaper article was printed on March 17, 2009.

the victim in an attack by ruffians looking for trouble. He also suggests that grievant's DS supervisor in the [redacted], to which both he and grievant reported at the time, was made aware of the incident.

The Department concludes nonetheless that given his history of excessive alcohol use, grievant's claim that he was not drinking was simply not believable. Regardless of the likelihood that grievant might have been drinking, we have found no credible record evidence that counters his claim that he was not drinking. The police report does not mention alcohol, and a friend who was with him at the time and accompanied him to the police station after the incident made a written statement in which he claims that grievant did not enter the bar in front of which the incident occurred. The friend also claims he does not recall whether grievant had been drinking before they reached that particular location, but he wrote that he was certain neither of them was intoxicated. Only a newspaper article, published some six months later, claimed that "testimony about a long night of drinking" by both the victim and attacker might have had an impact on the judge's decision in the case. None of the testimony is in the ROP. We have only the police report, grievant's statements and a witness statement – none of which show that grievant was drinking. More importantly still, we find credible grievant's statement about how he interpreted DS investigator questions asking about prior incidents. We conclude that a broad question about whether grievant had been involved in any previous "alcohol-related incident" could have permitted a reasonable person to exclude reference to the 2008 incident – since grievant was the victim and not the wrongdoer in the incident. This is all the more a reasonable interpretation if he had reason to believe the incident had been reported to his commanding officer years earlier (to which both he and another DS agent attest), and particularly if he was not drinking when the incident occurred.

We do not sustain Specification 6.

Specification 7 refers to grievant being asked by DS investigators whether he had been involved previously in any other "alcohol related incidents to include fights." Investigators cite the September 2008 "drunken brawl" and argue that grievant should have responded by recalling the incident, but instead, he denied any such previous behavior. The Department concludes that even if he was not drinking prior to the incident, the broad nature of the question and his standing as a law enforcement officer requiring him to be completely forthcoming at all times, should have been sufficient to compel grievant to mention the 2008 incident. He did not, and the investigators cite this as lack of candor. With one witness on record that this incident was reported to the [redacted] shortly after it happened, as with specification 6 above, we can see how an officer might feel that he need not disclose the incident in response to a general question during an investigation of an unrelated incident. As there is no record evidence that he was drinking, despite his history, and the written statement by a witness (albeit submitted years later – but not due to any fault of grievant) that largely tracked grievant's description of events – and no evidence that contradicts grievant's declaration that he was not drinking the night of the incident in New York, we find the lack of candor specification to be unsupported by a preponderance of the evidence. Although we cannot know exactly how the question was phrased, given the broad nature of the question, we find it was not unreasonable for Grievant to have omitted mention of this earlier incident.

We do not sustain Specification 7.

Charge 2: Failure to follow Regulations

Specifications 1 and 2

12 FAM Exhibit 023 2.5, The Deadly force and Firearms Policy requires all DS agents to report to the Department all prescription medication **immediately** [emphasis added] after beginning the medication. Grievant admits that he did not comply with this regulation, claiming that he was unaware of the need to do so. As a law enforcement officer with eight years of experience with the State Department he should have been familiar with agency regulations, particularly those pertaining to use of deadly force. Belatedly, he reported his use of prescription Xanax on November 24, 2011, a full year after DS opened its investigation into his actions. He still had not filed [8] the appropriate report concerning other psychiatric medications he admitted were prescribed for him, some of which he admitted continuing to take since 2006.

We agree with the Department that grievant's failure to report his diagnosis and prescriptions for psychiatric medications are particularly serious for a law enforcement officer, who is authorized to carry a deadly weapon.

We sustain these two specifications.

C. PROPOSED PENALTY

Grievant claimed that a 12-day suspension is overly harsh in light of mitigating factors and the precept of "similar penalties for like offenses"; the Department argues that it is properly considered, within the zone of reasonableness, and not unduly punitive as grievant suggests.

The Department relies on its broad discretion in determining penalties in discipline cases under its jurisdiction. This Board has recognized, as the agency pointed out, the Department's prerogative in this respect in several prior cases. The deciding official at the agency level

[8] As of the date the ROP was closed.

grievance also considered the mitigating factors and gave grievant credit for having no past formal disciplinary record and a satisfactory work history. The deciding official also noted grievant's potential for rehabilitation, while recognizing that grievant clearly was embarrassed by his diagnosis of PTSD, and feared that he might be stigmatized by the label, or that he might even lose his job with the Department.

The Department argued also that it took fully into account all aggravating and mitigating factors, and prepared a Case Comparator Worksheet that revealed no similar cases that presented the same set of circumstances as in grievant's case. Grievant nonetheless cited two cases – identified during discovery – that he believed relevant, for which the employees received much lesser penalties. We agree with the Department's conclusion that the cases cited by grievant do not qualify as comparator cases, and that grievant's reliance on them is misplaced.

In one of the cases (case number not provided in the ROP) [9] that is somewhat similar, an employee faced two charges for Lack of Candor (6 specifications) and Failing to Report Consultation with Mental Health Staff (1 specification). That case involved a DS employee who experienced difficulties with his Foreign Service wife, separated from the marriage, and stalked his then ex-wife to another post. The employee also refused to relinquish his diplomatic passport as requested. The charges stem from his statements to a background investigator about his actions in connection with those events, and the fact that he failed to report on a Standard Form 86 that he had consulted with a mental health professional. The employee was proposed for a five-day suspension for those infractions. The Department did not sustain any of the specifications in Charge 1, and with respect to Charge 2 concluded that the brief consultation he and his wife had with a marriage counselor did not equate to consulting with a mental health

[9] Redacted June 25, 2002 proposal and September 10, 2002 Letter of Admonishment cited as Attachment 9 to Grievant's Supplemental Submission of October 8, 2014.

professional. The Department decided, after consideration, to mitigate the proposed 5-day penalty to a Letter of Admonishment. Although this cited case contains elements somewhat similar to those in the instant case, the Department concluded that the employee did not lack candor as charged, and that he had not been untruthful about a medical condition that could threaten his ability to perform his job or that might jeopardize the safety of others. The Department concluded that grievant's reliance on that case for guidance in the instant case is misplaced. We agree.

Grievant also cited FSGB Case No. 2011-003 (August 23, 2011), in which an employee was initially proposed a 3-day suspension for a single specification of Lack of Candor. The penalty was subsequently mitigated to a Letter of Reprimand, and sustained by this Board on appeal. The employee was charged with failure to disclose to an investigator a telephone call he had received from police less than 7 months earlier, in which he was informed that his fiancée – who had the day before the call surprisingly and abruptly broken off their engagement – had complained to police that he was harassing her and that she did not want him to visit her home again. The Department concluded, and the Board agreed, that given the emotional impact of such an important event it was more than likely than not that the officer had chosen not to inform the investigator of the call, and therefore he had been less than candid in his response to a routine question posed to him during a security update inquiry. We find this case distinguishable from the instant appeal which involves multiple specifications of Lack of Candor, as well as a charge of Failure to Follow Regulations that could impact grievant's ability to perform his duties in accordance with the Department's deadly force and firearms policy.

We also agree with the Department's conclusion that the proposed penalty falls within the realm of reasonableness and is not unduly punitive, based on the charges considered during

the agency level deliberation. However, in light of our decision not to sustain specifications 6 and 7 of Charge 1, we remand the case to the Department for consideration of what penalty it would have assessed had these specifications not been included.

V. INTERIM DECISION

The grievance is granted in part and denied in part. Specifications 6 and 7 of Charge 1 are not sustained. All other specifications of Charge 1 and Charge 2 are sustained. The Board remands the grievance to the Department for reconsideration of what change in penalty is appropriate in view of our findings.

The Board retains jurisdiction over the grievance appeal pending the Department's action that should occur no later than 30 days after receipt of this Decision. The Department should advise the Board of its action promptly after the decision on penalty.

For the Foreign Service Grievance Board:

Warren R. King
Presiding Member

William J. Hudson
Member

William B. Nance
Member