

[DATE]

[Name of Deciding Official]
Supervisory Transportation Security Officer
Transportation Security Administration
[Airport]
[Airport Address Line 1]
[Airport Address Line 2]

Subject: Alisa Smith, Transportation Security Officer (Code)
Notice or Proposed 30 Day Suspension [Date]

Dear [Deciding Official]:

On behalf of TSO Alisa Smith, please accept this letter as a response to the December 20, 2011, Notice of Proposed Thirty (30) Day Suspension (Proposal) prepared by [Name of ADAFSD], Acting Deputy Assistant Federal Security Director (DFSD). The Proposal alleges a single charge of “driving while under the influence.” TSO Smith has granted the American Federation of Government Employees (AFGE) the right to file a response on his behalf.

TSO Smith respectfully requests that the suspension be rescinded and removed from her record. The suspension of TSO Smith should be rescinded because: 1) the alleged misconduct is not supported by a preponderance of the evidence; 2) Management improperly considered the mitigating factors surrounding this proposed removal; 3) and removal for the alleged misconduct fails to adhere to TSA’s policy of progressive discipline

I. STATEMENT OF FACTS

TSO Smith has been employed as a TSO since approximately [Date of Employment at TSA]. In her [number of years] with TSA, TSO Smith has been a successful employee well-liked by her peers. TSO Smith has never received a disciplinary action prior to this proposed suspension.

On January 12, 2020, at approximately 12:00am TSO Smith was driving down Linden St when she was pulled over by Fake Town Police. TSO Smith complied with the police officer’s instructions, exited her vehicle, and was given a field sobriety test. Upon failing to successfully complete the test, TSO Smith was placed under arrest and charged with Driving While Under the Influence. TSO Smith was taken into custody by Fake Town Police and released the next morning.

Immediately after arriving at work on January 13, 2020, TSO Smith reported her arrest to her supervisor and denied being intoxicated at the time of her arrest. A breathalyzer examination was never administered on TSO Smith and TSO Smith has pleaded innocent to the charges against her. A trial has been scheduled on March 12, 2020, at Fake Town Superior Court for the criminal charges. TSO Smith was issued the Notice of Proposed Suspension that is the subject of this Response on [Date].

II. MANAGEMENT'S DISCIPLINARY ACTION LACKS LEGAL SUFFICIENCY BECAUSE THEY HAVE FAILED TO SUPPORT THEIR ALLEGATIONS BY A PREPONDERANCE OF EVIDENCE

TSA Handbook to MD Number 1100.75-3, § A (10) states that any disciplinary action imposed must be legally sufficient. A disciplinary action is legally sufficient only if: 1) the alleged unacceptable conduct is proven by a preponderance of the evidence; 2) a nexus exists between a legitimate government interest and the alleged misconduct; and 3) the penalty is reasonable. Preponderance of the evidence is defined as “[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.” *See Meier v. Department of Interior* 3 M.S.P.R. 247, 256 (1980).

Throughout her entire tenure at TSA, TSO Smith has been completely forthcoming and honest, and has never been disciplined in the past. TSO Smith informed her supervisor of her arrest as soon as possible after being released by Fake Town police. TSO Smith denies being intoxicated when she was arrested and is currently contesting the charges against her. Management's sole basis for the charge against TSO Smith is based on a Fake Town Police report obtained after her January 12, 2020, arrest. Because TSO Smith was never administered a breathalyzer exam, the report does not contain a record of her blood alcohol level at the time of the arrest. Additionally, Management failed to consider TSO Smith's version of the events in its proposal. Moreover, TSO Smith has plead innocent to the charges against her, and has yet to be convicted of committing a DUI offense. Therefore, Management has failed to prove by a preponderance of evidence that TSO Smith has committed a DUI offense.

III. MANAGEMENT FAILED TO FOLLOW PROGRESSIVE DISCIPLINE IN ASSESSING TSO SMITH'S PROPOSED PENALTY AND THEREBY VIOLATED TSA POLICY— MD NUMBER 1100.75-3

In addition to failing to prove the charges against TSO Smith by a preponderance of the evidence, Management's proposed disciplinary action is unjustified because it failed to follow progressive discipline. *Assuming Arguendo* Management can prove the charge against TSO Smith a 30 day Suspension is unwarranted.

In addressing performance and conduct problems, Management must follow progressive discipline. TSA MD No. 1100.75-3 § (6) (G) states that “TSA will take progressively more severe action until the unacceptable performance or conduct is corrected, or the employee is removed.” Furthermore, TSA MD No. 1100.75-3 § (6) (G) states that progressive discipline

utilizes, “the process of using the least severe form of action that may be used to correct a deficiency.” Finally, TSA MD 1100.75-4, Addressing DUI and DWI Offenses, explicitly states that Management should only “issue a Letter of Reprimand to the employee, excluding law enforcement officers, after obtaining evidence that the employee has committed his or her first Alcohol Related Offense as a TSA employee.”

In this instance, Management failed to use the least severe form of action to correct the misconduct and failed to properly consider TSO Smith’s performance record. This is the first time TSO Smith has been charged with misconduct, and the first time she has been charged with an alcohol related offense. Pursuant to TSA’s DUI and DWI policy, TSO Smith should only be reprimanded for a first offense. Management should also have considered TSO Smith’s impeccable disciplinary and performance record during her nine years at TSA. A more appropriate penalty under progressive discipline would thus be a letter of counseling, or a letter of reprimand.

IV. THE PROPOSING OFFICIAL INCORRECTLY ANALYZED THE AGGRAVATING AND MITIGATING FACTORS IN DETERMINING THE APPROPRIATENESS OF TSO SMITH’S LETTER OF REPRIMAND

TSA Handbook to MD 1100.75-3 §F(2) directs TSA managers to consider the following twelve aggravating and mitigating factors in determining the appropriateness of an agency’s penalty: 1) the nature and seriousness of the offense; 2) the employee’s job level and type of employment; 3) the employee’s past disciplinary history; 4) the employee’s past work record; 5) the effect of the offense on the employee’s ability to perform at a satisfactory level; 6) the consistency of the penalty with those imposed upon other employees; 7) the consistency of the penalty with those imposed upon similarly situated employees; 8) the notoriety of the offense on the agency’s reputation; 9) the clarity of the employee’s notice of performance expectations; 10) the potential for the employee’s rehabilitation; 11) the mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, etc.; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

An analysis of the aggravating and mitigating factors demonstrates that the proposed penalty in the instant case is excessive. TSO Smith has yet to be convicted of the offense that she is being charged with, and denies having been intoxicated when she was arrested.

Furthermore, if convicted, this would be TSO Smith’s first alcohol related offense. TSO Smith has a spotless driving record and has never been charged with an alcohol related offense in the [number of years] she has been driving. Finally, even though she is currently contesting the criminal charges against her, TSO Smith has shown the potential for rehabilitation by volunteering to enroll in an alcohol awareness program.

V. CONCLUSION

Based on the foregoing reasons, it is respectfully requested that the Proposed 30 Day Suspension be rescinded and that any reference to this disciplinary action be permanently removed from TSO Smith's personnel records. Management's proposed disciplinary action is legally insufficient because: 1) the alleged misconduct is not supported by a preponderance of the evidence; 2) the proposal fails to adhere to TSA's policy of progressive discipline; and 3) Management improperly considered the aggravating and mitigating factors surrounding this proposed suspension. TSO Smith looks forward to a favorable resolution to this matter. Please do not hesitate to contact me to discuss the issues contained herein.

Respectfully,

[Name]
[AFGE Local Officer]
[Address]