

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

**In the Matter Between**

**Grievant**

Record of Proceedings  
**FSGB No. 2002-051**

**And**

Date: December 5, 2003

**Department of State**

**DECISION - EXCISION**

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**For the Foreign Service Grievance Board:**

**Presiding Member:**

Edward J. Reidy

**Board Member:**

**Edward A. Dragon**

**Senior Advisor**

**Shelley E. Johnson**

**Representative for the Grievant:**

Self

**Representative for the Department:**

**Joanne M. Lishman**  
**Director**  
**Grievance Staff**

**Employee Exclusive Representative:**

**American Foreign Service Association**

## OVERVIEW

In this disciplinary action case, grievant, a Senior Foreign Service Officer, appealed the imposition of a ten workday suspension for a series of acts undertaken while serving as a Charge d'Affaires. Grievant was charged with various specifications of permitting unauthorized persons to stay at the Chief of Mission residence (CMR) without notification to the Office of Building Operations(OBO), and misuse of an embassy vehicle and staff resources for visiting friends.

In his appeal, grievant contended that the Department (1) failed to properly consider mitigating factors in reaching its decision to discipline him, (2) failed to establish the reasonableness of the penalty, and (3) did not meet its burden of establishing that the disciplinary action promoted the efficiency of the service.

The grievant presented various arguments against the Department's disciplinary action. Concerning the charges relating to permitting the unauthorized use of the CMR, grievant argued that the only reason for sustaining these particular charges was because he did not inform proper authorities that he authorized the use of the CMR. This requirement to inform OBO is not known throughout the Department. He was unaware of its existence and therefore it was unjust to impose a ten-day suspension for breaking a rule that no one knows about or follows. According to grievant, these specifications boil down to a mere technicality. He argued further that the regulation itself was unclear and could not form the basis for a disciplinary action against him.

Concerning the charge of misuse of an embassy vehicle, grievant acknowledged that he directed the use of the vehicle for visiting friends, but that this was a matter of poor judgment.

The Board sustained the charges as set forth in the Department's initial decision letter, but, concerning the misuse of a government vehicle charge, held that a mandatory statutory requirement of at least a month's suspension was applicable in this case. The Board held that grievant was found to be in violation of the statute, 31 U.S.C. 1349(b), even though he was not specifically charged with violating that law because the facts establish such a violation. This conclusion triggers that statute demanding the agency head to impose the suspension. The Board also held that, on the other hand, were the Department to withdraw the vehicle misuse specification, the Board was of the view that the ten-day suspension would be reasonable in the circumstances.

The Board also directed the Department, in line with Board precedent, that if there is to be a disciplinary letter to be included in grievant's personnel file, that the letter only contain the charges and specifications that were sustained.

Less than six months after [Grievant]'s arrival at post, the Ambassador (#1), was diagnosed with brain cancer and spent much of the next two years receiving medical treatment in the United States. For most of the period from December 1998 to August 2001, grievant served as Chargé d' affaires due to the illness and subsequent death of Ambassador (#1) in November 2000. [Grievant] continued living in the DCM residence, despite the urgings of Ambassador (#1) that he occupy the Chief of Mission Residence (CMR) while (Ambassador #1) was undergoing treatment in the U.S.

A week before his departure from [host country], the post, with EUR approval, authorized grievant and his family to stay in the CMR while the DCM residence was cleaned and made ready for grievant's successor. Before occupying the CMR, grievant, while serving as Chargé d' affaires had allowed several individuals to stay in the CMR: former Ambassador (#1) and his family from June 23 to June 30, 2000; former Ambassador (#2) and his family from July 3 to July 13, 2000; the widow of former Ambassador (#1) and her family in July 2001. Personal friends, the (name) family, were allowed to stay from July 26, 2001 through July 28, 2001 and again from July 31, 2001 until August 4, 2001, the period after which [Grievant] moved into the CMR residence.

On July 30, 2001, an anonymous individual filed a complaint with the Office of Inspector General (OIG) alleging that grievant had allowed friends to stay at the CMR in late July immediately before Grievant's family's departure from Post. After [Grievant]'s departure from post, an OIG team traveled to [host country] to investigate the complaint. During their stay, the team conducted an exhaustive investigation, including not only the original complaint, but also a thorough review of all of grievant's activities during his

three-year tenure. The OIG forwarded its Report of Investigation (ROI) to the Office of Employee Relations on May 15, 2002.

On June 19, 2002, [Grievant] was informed by (name), Director, Office of Employee Relations, Bureau of Human Resources (HR/ER), of the Department's proposal to suspend him for 20 workdays based upon the ROI. The proposal listed four charges:

- Charge 1: Contravention of 6 FAM 725.1-1<sup>2</sup> (four specifications)**
- Charge 2: Issue of Embassy Vehicle and Staff Resources for Visiting Friends (three specifications)**
- Charge 3: Issue of Representation Funds – 3 FAM 3242.1b (two specifications)**
- Charge 4: Issue of Public Office for Private Gain - 5 CFR Part 2635.702 (one specification).**

[Grievant] responded in writing to the notice of proposed discipline on July 10. Additionally, he met with the deciding official, (name), Deputy Assistant Secretary for Human Resources on July 12. Upon review of the record and [Grievant]'s response to the proposal to suspend, in a letter dated July 29, (name) sustained all specifications of Charge 1<sup>3</sup> and Specifications 1 and 3 of Charge 2.<sup>4</sup>

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<sup>2</sup> 6 FAM 725.1-1 provides that "when a COM/PO . . . is transferred and a replacement has not arrived at post, the official residence shall not be occupied unless A/FBO grants specific authorization for such substitute occupancy. The chargé d'affaires may, if he or she deems it in the best interests of the U.S. Government, allow high-level official visitors to occupy the official residence during such periods, informing A/FBO."

<sup>3</sup> Charge 1: Contravention of 6 FAM 725.1-1.

**Specification 1: During your tenure as Charge d' Affaires, Embassy [host country], you allowed former U.S. Ambassador (#2) to [host country] and family to stay at the CMR from July 3 to July 13, 2000. You stated to investigators that Ambassador (#2) was not there on business for the U.S. Government or for Embassy [host country]. The (Ambassador #2) family hosted an event at the CMR, which you approved, and invited thirty guests, including yourself. The (Ambassador #2) family invited a guest to spend the night. You approved access for the guests to enter the CMR and authorized the one overnight guest. You agreed with the investigators that the (Ambassador #2) family would probably not be considered high-level official visitors under Department regulations. You acknowledge that the use of the CMR without proper authorization from the Office of Building Operations (OBO) is in violation of 6 FAM 725.**

The Deputy Assistant Secretary did not sustain Specification 2 of Charge 2 nor did he sustain Charges 3 and 4. These play no role in our decision. After noting mitigating (long career record, no previous record of discipline, in the case of Specifications 1-3 of Charge 1 grievant's contention that the use of the CMR was in the best interests of the U.S., acknowledgment of poor judgment) and aggravating

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Specification 2: During your tenure as Charge d' Affaires, Embassy [host country], you allowed former U.S. Ambassador to [host country] David Hermelin and his family to stay in the CMR from June 23 to June 30, 2000. You stated to investigators that Ambassador (#1) was not there on official business. You agreed with investigators that the Hermelin family would not be considered high-level official visitors under Department regulations. You allowed the use of the CMR without proper authorization from the Office of Building Operations (OBO) in violation of 6 FAM 725.

Specification 3: After the death of Ambassador (#1), you authorized his widow, her daughter, the daughter's husband and grandchildren to stay at the CMR during their visit to [host country] in July 2001.

You agreed with investigators that the widow of Ambassador (#1) and her family would not have been high-level official visitors under Department regulations. You allowed the use of the CMR without proper authorization from the Office of Building Operations (OBO), in violation of 6 FAM 725.

Specification 4: You allowed personal friends, (name), his wife, and two children to stay in the CMR during their visit to [host country]. The (name) arrived in [host country] on July 26, 2001 and stayed in the CMR through July 28, 2001. The (name)s returned to the CMR on July 31, 2001 and remained there until their August 4, 2001 departure. During their stay, the (name)s invited foreign guests for drinks at the CMR. On August 2, 2001, the (name) invited a (foreign country) journalist to spend the night in the CMR. You acknowledged to investigators being aware of these additional visitors. You acknowledged that the (name) were not on official U.S. government business and would not be considered high-level official visitors. You admitted to investigators having made a major misjudgment on the (name)s.

<sup>4</sup> CHARGE 2: Misuse of Embassy Vehicle and Staff Resources for Visiting Friends

Specification 1: As Charge d' Affaires, you requested the Acting Administrative Officer at the time, Ted [name], to have the embassy motor pool transport the (name) family from the airport to the CMR on July 26, 2001. Mr. [name] advised you that this request was not an authorized use of an official vehicle. You admitted to investigators that in retrospect this was a misjudgment.

Specification 3: The (name) family hosted an event at the CMR during which 12 public address speakers were rendered inoperable. The investigation determined that the speakers had been rewired incorrectly by the (name) son. An Embassy [host country] technician spent 10 hours of official time making repairs.

**factors, (name) reviewed the *Douglas* factors,<sup>5</sup> ([Grievant]'s past disciplinary record and whether the actions were intentional or for personal gain) and the evaluation factors mentioned in 3 FAM 4138.<sup>6</sup> Based on these considerations and [Grievant]'s strong career record, the Deputy Assistant Secretary decided to mitigate the proposed penalty to a ten workday suspension.**

On August 23, 2002, [Grievant] filed a grievance with the agency challenging the ten workday suspension. On November 14, the agency denied the grievance, finding that grievant had engaged in the actions with which he was charged and that the evidence did not provide a basis upon which to mitigate the ten-day suspension. Grievant appealed the agency decision to the Board on November 27, and on December 13, initiated discovery.

The Department responded to the discovery request on January 10, 2003. With regard to certain requests, it determined that there was no information available. Regarding others, the Department stated that it had no obligation to provide the information sought, deeming the requests irrelevant, immaterial and redundant. On February 6, [Grievant] filed a Motion to Compel Discovery with the Board. The Department responded on February 27, reiterating the position taken in its January 10 response. [Grievant] submitted a rebuttal on March 11. The Board issued an Order on May 9, directing the Department to respond to certain requests with which the Department complied on May 27. On June 11, grievant submitted a supplemental submission, to which the Department responded on July 18. Grievant submitted a rebuttal on August 20. The record is now closed.

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<sup>5</sup> Court decisions, OPM and Civil Service Commission issuances, and MSPB decisions have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. These are enumerated in *Douglas v. VA*, 5 M.S.P.B. 313 (1981).

<sup>6</sup> This regulation contains an illustrative list of the kinds of conduct that could be grounds for taking disciplinary or separation action against an employee.

### III. POSITIONS OF THE PARTIES

#### **The Grievant**

Grievant's position is summarized from his grievance appeal submissions, his rebuttal to the agency's response to his supplemental submission, and appeal.

#### **Technical nature of violation of 6 FAM 725.1-1**

**Grievant asserts that the Department failed to properly apply the “*Douglas Factors*”<sup>7</sup> regarding the nature and seriousness of the offense in that the deciding official did not consider the technical nature of the violation of the OBO regulation when imposing a ten-day penalty. One of the potentially mitigating factors in discipline cases is the severity of the misconduct alleged. Grievant points out that several courts as well as the Merit Systems Protection Board (MSPB) have rejected unduly harsh discipline proposals where the alleged violation was “trivial” or “technical.”**

Grievant states that the only reason for sustaining Specifications 1-3 under Charge 1 which the deciding official held were in the “best interest of the USG,” was because he did not inform proper authorities that he authorized the use of the CMR. This requirement to inform OBO is not known throughout the Department. He was unaware of

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<sup>7</sup> The nature of the seriousness of the offense, and its relation to the employees duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent or was committed maliciously or for gain, or was frequently repeated.

its existence and therefore it is unjust to impose a ten-day suspension for breaking a rule that no one knows about or follows.

Similarly, Charge 1, Specification 4, which concerns the use of the CMR by a personal friend and his family, was a technical violation for which a ten-day suspension is unwarranted. Grievant states that his decision to occupy the CMR prior to departing post was authorized by post, and his use of the CMR was encouraged by the Department. He believed that his occupancy was legitimate and therefore he could authorize social guests to stay at the CMR. A letter, solicited by OIG from the Department's legal office regarding its opinion of the use of the official residency by visitors, supports his claim that had post contacted OBO the approval would have been granted for him to utilize the residence and that no violation would have been incurred by his friend's presence in the CMR, irrespective of their behavior.

**Grievant admits that while he was unaware of the requirement to clear all stays at the residence with OBO, he nevertheless displayed poor judgment in allowing the (name) to stay at the residence during his absence from post. Nonetheless, this specification, like Specifications 1-3 boils down to a mere technicality - post's failure to seek approval from OBO for his family to move into the residence. Here again he says had he done so, in all likelihood he would have been entitled to have both official and unofficial guests during the period of his authorized occupancy.**

## **Lack of Notice and Clarity**

**Grievant contends that the Department's proposed suspension is inconsistent with another principal articulated in *Douglas*.<sup>8</sup> The proposed penalty did not properly consider the fact that he did not have proper notice of the need to obtain approval from OBO before occupying the CMR and the regulation itself lacks clarity.**

The Board itself has noted that the Department must show that the employee "knew, or should have known", that the actions were impermissible and could lead to discipline, FSGB Case No. 2002-033 (February 11, 2003). The Department cannot meet that burden in his case and in fact dismisses this argument, stating that as a senior member of the Foreign Service, he should know better than to claim ignorance of the requisite provisions of the FAM. Despite the assertions of the Department, the following facts of this case indicate that his ignorance of the requirement to notify and gain OBO approval was reasonable.

First, regarding Charge 1, Specifications 1-3, the Department was made aware of the visits well in advance. When former Ambassador (#2) and Ambassador (#1) requested to stay at the residence, [Grievant] informed the appropriate members of the embassy, the Bureau for Europe (EUR) in the Department, and discussed the visits at his weekly staff meetings. Neither he nor the Administrative Officer and GSO at post knew about the requirements to clear their visit with OBO. Despite these announcements, he was never informed about the requirement by the Department.

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<sup>8</sup> (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

**Second, during his four extended tours as chargé d' affaires in various countries during the past ten years, he stayed in the CMR on several occasions with full knowledge of the Department and without informing OBO. In fact, the Department encouraged him to either stay in the CMR or fully utilize it. At no time was he informed, by the EUR Bureau, that he needed to clear these stays with OBO. It is presumptuous to assume that he should be aware of this requirement and then severely punished for not adhering to it, when the most experienced officers in the Department were unaware of this requirement.**

His experience is not unique. Several other senior officials while assigned to other posts have used the CMR without obtaining OBO approval and without being disciplined. Grievant included submissions from former Ambassadors and a chargé d' affaires who confirmed this point and spoke of others who had used the CMR without clearing the use with OBO. In addition, in response to his discovery request in which he sought information regarding charges d' affaires and other employees who over the past two years had sought permission to occupy the official residence or had informed OBO that an official visitor would be occupying the CMR, the Department could not produce any cases, confirming, he maintains, that this regulation has not been followed by any other chargé d' affaires.

Finally, the Foreign Service Institute's (FSI) Director of Administrative Training confirmed that she was unaware of this requirement. She added that it was not taught in the Ambassadorial and DCM seminars or in any of the courses designed for Administrative officers. In view of this situation FSI updated its curriculum to include the material.

Based on these factors, it is totally unreasonable to assume that he, as chargé d'affaires, should be held accountable for a requirement that the relevant officers at post were unaware of that is, not taught at any level in FSI, has not been followed by any other chargé d'affaires, and has not been monitored by OBO. The deciding official did not address this issue, but merely stated that as a senior official he should set an example for all employees and is held to a high standard of conduct and had the ultimate responsibility to follow the relevant regulations. The fact remains -- he did not know of the regulation nor did the other senior employees he consulted -- and thus the lack of clarity in the rules should have at least been considered as a mitigating factor.

Grievant states that in addition to the lack of notice provided to the members of the Foreign Service, the proposed suspension is inappropriate because the regulation itself is unclear. Focusing on "When a COM/PO or U.S. representative to an international organization is transferred and a replacement has not arrived at post, the official residence shall not be occupied unless OBO grants specific authorization for such substitute occupancy," grievant argues that this language is subject to multiple interpretations. The statement does not assign responsibility for gaining OBO approval to the individual occupying the residence or the chargé d'affaires. The regulation could be interpreted reasonably as creating an additional responsibility for the OBO representative at post (who was fully involved in his occupancy of the CMR) or the Administrative Officer since assigning housing quarters could clearly be construed as an administrative function. In other words, several officials at post were involved in the decision to temporarily occupy the CMR, many of whom would normally deal with OBO regarding the occupancy of USG quarters. Regardless of the interpretation the Board

deems appropriate, this provision lacks sufficient clarity to form the basis for a disciplinary action against him.

#### Similar Penalties for Like Offenses

#### CHARGE 1 (Violation of 6 FAM 725.1-1)

The proposed suspension also violated the concept against administering disparate penalties for similar conduct, articulated in 3 FAM 4374(1) and stated as a mitigating factor in *Douglas*. Pointing to his discovery results, grievant notes that the Department was unable to find cases of prior disciplinary action for violations of 6 FAM 725.1-1; however, as demonstrated in statements previously mentioned, several Ambassadors, Chargés and DCM's have permitted guests to stay in the CMR without obtaining approval or even informing OBO. This indicates that the Department has not disciplined other employees who failed to seek or inform OBO. The Department is singling him out for punishment solely, for engaging in similar unintentional violations of 6 FAM as have other senior Foreign Service employees, flagrantly violating the precept of similar penalties for like offenses articulated in *Douglas* and directed in 3 FAM 4324.3.

#### **CHARGE 2 (Misuse of Embassy Vehicle and Staff Resources for Visiting Friends)**

Regarding Specification 1, Grievant relates that the (name)s arrived in [host country] sick and could not drive directly to his vacation home to accompany his family as planned. He authorized the use of the embassy vehicle, a very old van, as a last resort under very unusual and stressful circumstances. In his defense, he states, as noted by others at post, he had always been extremely judicious and ethical in his use of embassy vehicles and government resources. In this one case he admits to poor judgment and criticizes the Department for not mentioning in its letter that he personally and

immediately reimbursed the government the full costs of the use of the vehicle and the rewiring - amounting to \$177.94. Anyone who has served overseas will readily attest that such incidents are not isolated, and he points to a statement included in the record from Ambassador (#3) who related similar incidents of Ambassadors who used embassy vehicles for the benefit of personal friends. He notes that these Ambassadors were not disciplined for their use of the vehicle.

Regarding Specification 3 - rewiring the public address system, grievant asserts that this was done without his knowledge. As soon as he heard about the incident, he personally paid the full cost of repair. Common sense dictates that the government quarters occupied by members and their guests will sustain damage occasionally. He contends that things have been accidentally broken at the residence before. In those circumstances, rather than disciplining the responsible parties, normally the Department simply requires that the employee reimburse the cost of repairs, as he did. Further, pointing to 6 FAM 762.2-2(b) 2, he asserts that the FAM says nothing about disciplinary action in such cases of damage to government property.

He also believes that numerous other senior officials have misused embassy resources, usually inadvertently, but those responsible have been permitted to reimburse the cost without recourse to discipline. He has been singled out for punishment with regard to these two allegations of misuse of government resources. This harsh imposition of discipline is a departure from the ordinary treatment of property damage and as such violates the precept of similar penalties for like offenses.

Other Mitigating Factors Not Taken Into Account

**Grievant contends that the Department did not take into account his contrition as a mitigating factor. Neither was the fact that he admitted his mistakes taken into account, contrary to the holding in *Phaelfer v. DHHS, 20 M.S.P.R. 159 (1984)*. What should be a mitigating factor, was, instead, considered an aggravating factor. Furthermore, the Department did not take into account mitigating factors amply noted by those officials most aware of his performance at Embassy [host country]. They noted that he never knowingly misused government resources, that he saved the government thousands of dollars by using his personal vehicle in the performance of official functions, that he scrupulously avoided the appearance of assuming Ambassadorial prerogatives, that he tried to faithfully and fully represent U.S. national interests, and that his family and he incurred numerous other uncompensated expenses on behalf of the government.**

#### **Efficiency of the Service**

Grievant also argues that the Department failed to prove that the disciplinary action promotes the efficiency of the Service as required by 3 FAM 4373. "It is difficult to understand," he argues, "the Department's decision to impose discipline for an action that promoted the needs of the Service, by furthering the best interests of the USG. Furthermore, since Mr.(name) concluded that my actions promoted the needs of the Service, I submit the Department has not met its burden to establish that the disciplinary action promotes the efficiency of the Service as required under 3 FAM 4314(9) and 3 FAM 4373."

**Finally, Grievant states that in compliance with FSGB case law the Board should order the Department to eliminate any reference to unsustainable charges and**

**specifications. Allowing unsustained charges of unproven conduct into his personnel file would prejudice any future opportunities as well as potentially affect his current situation and is incompatible with any sense of fairness.**

#### **The Department**

**The Department's position is summarized from its notice of proposed discipline, its final decision and its response to grievant's appeal and supplemental submission.**

#### **Technical nature of violation**

On this issue, the Department states that the deciding official properly applied 6 FAM 725.1-1 in two different ways within Charge 1. In the first three instances he accepted grievant's contentions that on two occasions it had been in the best interests of the government to allow a former Ambassador and family to stay at the CMR; and on one occasion it had been in the best interests of the U.S. to allow the widow and family of a former Ambassador to stay at the CMR after the Ambassador's death. However, grievant was faulted for not having informed A/FBO of these uses of the residence, thus failing to comply with this regulatory requirement of 6 FAM 725.1-1. This failure is not "quite minor."

Specification 4, concerning the occupancy of the resident by personal friends is the most serious of the Charge 1 Specifications and goes beyond the requirement to "inform A/FBO" because the occupants were not high level official visitors in the first place - in contravention of another requirement of 6 FAM 725.1-1. Nor was their stay deemed to be in the best interests of the U.S. In addition the record is clear that the

grievant allowed them to stay in the ambassador's residence when he himself was away from [host country].

The Department disagrees that the issue is merely the technicality of grievant having failed to obtain specific authorization from A/OBO to occupy the CMR after his family vacated the DCM residence. The logic of this argument, it states, is that had he known that he should have needed to obtain specific authorization from OBO, then the status of the (name) would have been guests - a perfectly permissible status - and the fact that they were neither high level visitors nor on official U.S. business would be irrelevant. The Department characterizes this argument as "casuistic," stressing that it totally discounts the basic reality grievant readily admits displaying poor judgment in allowing the family to stay in the residence essentially at the last minute and while he was away on vacation. His admission that he used poor judgment would appear to contradict his argument that this case is only about a "technical violation."

#### **Lack of Notice and Clarity**

The Department insists that grievant's purported ignorance of 6 FAM 725.1-1 is no excuse. Grievant's complaint that the FSI did not educate him about this particular requirement is in its view his attempt to wrongly seek to fault the Department and so absolve himself. It is insignificant that FSI does not micro educate. The fact that he was unaware does not relieve him of the responsibility to inform A/OBO, as is required.

Regarding lack of knowledge by the administrative and general services officer, the Department states that as the most senior official at post, grievant had the ultimate responsibility to follow proper existing regulations, particularly where he initiated the action. Because of his position he is held to a higher standard of conduct and should set

an example for all employees. There is no evidence that 6 FAM was unavailable to grievant. It is hardly an obscure or unavailable source or of marginal relevance to the Foreign Service. As a seasoned senior officer, grievant knows, or should know, better.

Similar Penalties for Like Offenses

### **Charge 1**

**Despite his use of the discovery process grievant has produced no evidence to support his broad claim that numerous other Chargés have allowed guests to stay in the CMR without informing A/FBO and that none has ever been disciplined for contravening 6 FAM 725.1-1. What the record does establish is that the Department is unaware of employees who engaged in the same or similar offenses for which grievant is cited in Charge 1.**

### **Charge 2**

Regarding specification 1 that he utilized the embassy motor pool transport in moving the (name) family from the airport to the CMR, the Department, noting grievant's response that this was a misjudgment and, that he had always been judicious and ethical, points out that he does not refute the specification which the Deciding Official sustained. The Department reaches the same conclusion concerning specification 3 (by improperly allowing the (name) family to reside in the CMR, they made 12 public address speakers inoperable, which had to be repaired by an Embassy [host country] technician). Grievant's defense that he reimbursed the Department does not contradict the charges specified against him. The fact remains that grievant allowed the (name) family (improperly) to reside in the CMR and the derivative fact is that the CMR sustained damages. In short, he engaged in the actions with which he was charged

and the evidence does not provide a basis upon which to mitigate the decision to suspend him for ten days.

As regards grievant's claim that others similarly situated i.e., numerous other senior officials have misused embassy resources inadvertently but have been able to reimburse the cost without recourse to discipline, the Department contends that the record contains no evidence of other employees who engaged in the same or similar offenses for which grievant is cited in Charge 1.

### **Mitigating Factors**

The Department asserts that it did take into account all relevant mitigating factors, including the precepts of similar penalties for like offenses in setting the penalty to be assessed. It points out that after setting forth mitigating factors - (long career with the Department with no previous record of discipline, his contention that with reference to Charge 1, Specifications 1, 2 and 3, that the use of the CMR was in the best interest of the government, his acknowledgment of poor judgment) (name) noted that he reviewed the *Douglas* factors, specifying grievant's past disciplinary record, whether his actions were intentional and for personal gain, and the evaluation factors enumerated in 3 FAM 4138.

## **IV. DISCUSSION AND FINDINGS**

### **The Charges**

Under the Board's regulations, "In grievances over disciplinary actions, the agency has the burden of establishing by a preponderance of the evidence that the disciplinary action was justified . . ." (22 CFR 905.2). This means that the agency must prove: that (a) the grievant committed the offenses of which he is accused: (b) that the offenses impact on the operation of the Department; and, (c) the proposed penalty is

appropriately based. The Board, after carefully reviewing the submissions by the parties and other pertinent documents and regulations, issued a Summary Decision on October 3, 2003, sustaining the charges, holding that the Department carried its burden of establishing by a preponderance of the evidence that disciplinary action is justified. But we remanded the grievance to the Department for reconsideration of the decision to suspend [Grievant] for 10 days because the Department had not taken into account 31 U.S.C. § 1349(b), which provides for the imposition of a mandatory 30-day suspension where an employee willfully uses or authorizes the use of a government vehicle for other than official purposes. This decision expands our earlier Summary Decision.

**Charge 1, Specifications 1-4, concern Grievant's allowing personal friends and members of the foreign service who were not on official business and who would not be considered high-level official visitors to occupy the CMR residence without obtaining authorization from A/OBO as is required by regulation. While Grievant maintains that there were extenuating factors that not only would absolve him of any responsibility but also should have impacted the Department's decision to discipline him in the first place, the fact remains that his own admissions constitute preponderant evidence establishing that Grievant committed the acts for which he is being disciplined under Charge 1.**

**The agency has indicated that the actual use of the residence by former Ambassador #2, Ambassador #1 and later Ambassador #1's widow were not especially serious. But [Grievant] is being faulted for failing to inform A/OBO that these individuals would be using the residence. A failure he concedes. And that failure constitutes a violation of the applicable regulation**

**More serious, in the view of the Department, was allowing personal friends – having no connection with the foreign service – to use the residence. This was an unauthorized use exacerbated by the damage done by the (name) family and subsequent need to use embassy resources to repair the damage. [Grievant] admits also that he should not have allowed his friends to use the residence and they did not act responsibly in using Embassy facilities.**

**Charge 2, Specification 1 alleges [Grievant] misused an embassy vehicle as well as staff resources for the benefit of visiting friends. In explanation of the alleged misuse of staff resources, Grievant concedes that one of his staff did in fact help his visiting friends by making travel and rental car arrangements, and the like, but he says he immediately brought this to a halt once he heard about it. While his explanation may well be a fact in mitigation, there was indeed a misuse of resources as alleged.**

**With respect to the vehicle misuse the assertion is that while Chargé he asked to have the embassy motor pool transport visiting friends from the (host country) airport to the CMR residence. Although specifically advised that this would not be “an authorized use of an official vehicle . . .” he admits in his letter to John Campbell dated July 10, 2002, that he did authorize the use of a government vehicle for personal use. There, he also concedes it was misjudgment. We find, as did (name), that Specifications 1 and 3 of Charge 2 are sustained.**

As to the misuse of the vehicle, Section 1349(b) of Title 31, U.S.C., provides that where it is shown that an officer “who willfully uses or authorizes the use of a passenger motor vehicle . . . owned by . . . the United States Government (except for an official

purpose . . .) . . .shall be suspended without pay by the head of the agency . . .for at least one month . . .” We are keenly aware that the agency did not specifically charge [Grievant] with a violation of section 1349(b). Nor, for that matter, did it charge [Grievant] with a violation of any particular regulation. As will be explained, that becomes important. But it did clearly charge him with misuse of an embassy vehicle.

**In its response to our remand, the Department stated that it deliberately had brought the charge outside 31 U.S.C. 1349(b) to avoid the need to impose the mandatory penalty of that law. For that reason, it has informed us on remand that it plans no change in the penalty already imposed. In so deciding, the Department insists it was adhering to the precedent of the Merit Systems Protection Board (MSPB). (At that, it cited no specific precedent of the MSPB.)**

**Given this response to our order on remand, we, too, have turned to MSPB precedent. We come away with a conclusion different from that of the Department. We first direct attention to *Semans v. Department of the Interior*, 62 M.S.P.R. 502, (1994). In that proceeding, the employee was charged with: (1) Unauthorized Use of a Government Vehicle Assigned to you by a person other than yourself and, (2) Use of the Government Vehicle for four other unauthorized trips. These charges were not, we point out, predicated on an alleged violation of 31 U.S.C. 1349(b). Nor were they predicated on the violation of any specific regulation. Even so, the MSPB went on to say that it “will sustain the closely analogous charge of using a GOV for other than an official purpose upon a showing that the employee acted either with knowledge that the intended use would be characterized as unofficial, or with reckless disregard of whether such use was unofficial.”**

**Pointedly, relevant to our conclusion here is the following ruling in *Semans*:**

An employee who violates the statutory provision against using a GOV for other than an official purpose must be suspended for not less than one month. 31 U.S.C. § 1349(b). Charge 1 in the present appeal is so closely analogous to violation of a section 1349(b) that, for purposes of determining the appropriate penalty, we consider the offenses to be identical. No lesser penalty than a one-month suspension is permitted for a violation of 31 U.S.C. § 1349(b).

*Semans*, we find, stands for the proposition that even where an employee is not directly charged with a violation of 1349(b), the employing agency is obligated to impose the mandatory minimum sentence of 1349(b) if the offense charged and sustained is “so closely analogous” to the language of that statutory provision.

**We find that it is the situation here. The charge sustained against [Grievant] is closely analogous to 1349(b). There can be no doubt that [Grievant] had knowledge that the use to which the vehicle would be put under his direction was unofficial and unauthorized. [name] had cautioned him. Yet [Grievant] persisted. Based upon described precedent, we conclude that the minimum penalty of 30-days is therefore required.**

**At the same time, there is other MSPB precedent of interest to this proceeding and the Department’s discretion in fashioning charges for misconduct. We draw attention to *Campbell v. DHHS*, 40 MSPR 525(1989). In that case, Campbell had been charged with, and found guilty of violating, a particular regulation. A suspension followed. There, the MSPB ruled that there was no obligation for the agency to impose the mandatory 30-day suspension of Section 1349(b) because a specific regulation had been relied upon. That precedent, therefore, defines a circumstance notably different from this case.**

**We also note that the facts of record did not show that [Grievant] literally misused a government-owned vehicle, but did show that he authorized the use of such a vehicle for personal use. Thus, while there is a variance between the wording of the specification and the facts established, we do not find that variance fatal to the action. Section 1349(b) can be violated either by willful misuse, or by the act of willfully authorizing use for unofficial business. And, importantly, [Grievant] has not been misled because he has been able to mount a full defense against the allegation. A notice of charges is sufficient if it apprises the charged employee of the nature of the misconduct “in sufficient details to allow . . .an informed reply.” See e.g., *Brook v. Corrado, et al.*, 999 F.2d 523 (Fed. Cir. 1993).**

Importantly, section 1349(b) is a statute having unique characteristics. Unique in the sense it manifests a Congressional mandate that where the facts demonstrate it has been violated, not only “shall” an offender be suspended, but also that suspension “shall” be for at least one month. No discretion for either the agency, or for us upon appeal, is discernible from that language. We have always recognized, and continue to recognize, that matters of discipline are within the domain of the employing agency. In this context, we believe what should normally prevail in matters of discipline is not this Board’s view, but that of the employing agency. Yet because of Congressional concern over the potential abuse of government passenger vehicles, this particular statute stands apart because of its mandatory nature.

**Of course, in our decision we have not taken total discretion from the Department. It may choose when to prosecute how to prosecute or even to continue to prosecute, a perceived offender. For instance, if the Department wishes to impose**

a penalty less than the mandatory 30-day minimum of 1349(b) it may do so by alleging and sustaining a violation of a regulation. *SSA v. Givens*, 27 M.S.P.R. 300, 362 n.2 (1985).

As to Specification 3 of Charge 2, preponderant evidence, rooted in [Grievant]'s own statements, establishes that the (name) family, while using the CMR with permission given by grievant, damaged 12 public address systems while hosting a party there. Repairs to these speakers took an embassy technician 10 hours to complete. That [Grievant] reimbursed the Government is no defense. Disciplinary action is justified.

The Penalty

We find that the Department has carried the burden of proving the charges and all specifications now in issue – following Campbell's not sustaining Charges 3 and 4. In light of our conclusion above that a minimum penalty of a 30-day suspension is required owing to the statute, we also conclude that would be a reasonable penalty even though the vehicle misuse portion of Charge 1 has been sustained.

Grievant has challenged the reasonableness of the 10-day suspension imposed by citing and alleging the applicability of several factors set forth in *Douglas*. The most salient among them are his claims that the infractions were mere technical violations; the penalty was inconsistent with penalties imposed upon others and; 6 FAM 725.1-1 lacked clarity and thus he did not know that he should have informed OBO before allowing guests to occupy the ambassador's residence.

The agency has stated that it considered all mitigating aspects of Grievant's case, including his long career record, no previous record of discipline, his admissions of

exercising poor judgment, his contention that the use of the residence was in the best interest of the Government and whether the actions were intentional or for personal gain, in deciding to mitigate the initially proposed 20 day suspension down to ten work days. The agency noted in particular, Grievant's strong career record. We conclude relevant mitigating factors were considered by the agency. This, consideration, coupled with the fact that the agency did not sustain all Charges and Specifications, evidently influenced Campbell's decision to mitigate Grievant's penalty to a suspension of but 10 days.

**Regarding similar penalties for like offenses, it appears that Grievant is the first to be disciplined for the charges specified and thus no comparison as envisioned by the regulations and the *Douglas* factors is possible.**

Regarding the corollary contention that he could not be expected to be aware of this regulation when more senior and more experienced officers were not aware of it, the Board notes that the Department adequately addresses this argument in its decision letter and adds that in accordance with FSGB Case No. 98-084 (February 23, 2000), the Board has consistently held that "employees are responsible for knowledge of their agencies' regulations" as those regulations pertain to them. This concept has just recently been reaffirmed in *Fairchild v. U.S. Department of State, et al.*, Civil Action No. 02-0147 (JR), (D.D.C. filed October 16, 2003).

### **Efficiency of the Service**

**In the present case the nexus connecting Grievant's ability to carry out his duties and the charged offenses is clear. Grievant is a senior member of the Foreign Service and was the Chargé d'affaires during the period in question. Instead of**

**acting in accordance with these standards when he knew or should have known what standards were expected of him, grievant contravened regulations and embassy procedures. This conduct affected the performance of others, impacted on the performance of others particularly the Acting Administrative Officer who advised grievant that his request was not an authorized use of an official vehicle, prompted an investigation by OIG and threw into question grievant's judgment. Moreover, the need to repair the damaged speakers was disruptive to the normal functioning of the post.**

The Department has met its burden of proof that [Grievant] engaged in the conduct alleged and that some disciplinary action is justified. We have already ruled that that must be, at a minimum, a 30-day suspension. At the same time, we recognize that the Department has mistakenly found that a suspension of 10 days would be appropriate, thus we conclude that it would not have imposed any penalty more severe than we find it must.

Our conclusion that no more than the mandatory 30-day suspension should be imposed, is manifest from the agency submission of October 23 where it stated it wanted to make the vehicle charge "outside the statute" to retain the right to impose a penalty of less than 30-days. In other words, the agency intent is clear.

But, our decision here to impose a 30-day suspension, is impelled, we find. Section 1349(b) demands that if an employee or officer willfully uses or authorizes the use of a government vehicle for other than official purposes, he "shall be suspended without pay by the head of the agency" for no less than a month. We have found

[Grievant] has been found to be in violation of that provision and this conclusion triggers that statute demanding the agency head to impose the required suspension.<sup>9</sup>

We repeat that as long as the Department has charged [Grievant] with vehicle misuse generally and persists in so doing, and where the facts show that his actions are within the contemplation of Section 1349(b), as we have found, the scope of the suspension must be as are required to direct by law. There is no discretion.

[Grievant] has asked that if there is to be a disciplinary decision letter to be included in his file that, the letter only contain the charges and specifications sustained. Consistent with our precedent, *See e.g.*, FSGB Case No. 99-062 (February 24, 2000), we direct that the decision letter concerning Grievant's suspension refer only to the charge sustained by this Board. As need be, therefore, [Grievant]'s OPF should be amended accordingly.

#### IV. DECISION

##### A.

We direct the Department to suspend Grievant [Grievant] for 30 days. That action must be taken within 20 days of the date of this decision and the Foreign Service Grievance Board must be notified at the same time that has been accomplished.

##### B.

On the other hand, were the Department to withdraw the vehicle misuse specification, we believe that the 10-day suspension imposed would be reasonable in the circumstances of the other offenses we have found sustained, in light of the various mitigating factors and evident agency intent.

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<sup>9</sup> In FSGB Case No. 97-068 (July 23, 1998) an employee was charged, as here, with misuse of a government-owned vehicle. There, the Department recognized that where the facts showed an employee "willfully" authorized the misuse of a government-owned vehicle, a minimum 30-day suspension would be required. The comment of the Department there strengthens our finding here.