BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant	Record of Proceedings FSGB No. 2008-054
And	September 7, 2010
Department	**DECISION** **EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:	Arline Pacht
Board Members:	James E. Blanford Jeanne L. Schulz
Special Assistant	Joseph Pastic
Representative for the Grievant:	*Pro se*
Representative for the Department:	Joanne M. Lishman Director Grievance Staff
Employee Exclusive Representative:	American Foreign Service Association

CASE SUMMARY

HELD: The Department failed to identify comparator cases on which to base its discipline, did not present a rationale to support the fifteen-day suspension, and failed to address mitigating and aggravating factors adequately in establishing the penalty. The grievance was remanded to the Department for reconsideration of the penalty.

OVERVIEW

Grievant, a Foreign Service Officer of the Department at the FE-MC level, challenged the Department's decision to suspend her for fifteen days without pay for a single security violation.

The Department met its evidentiary burden to prove that the grievant committed the security violation and that the violation had a nexus to the efficiency of the service.

However, the Board found that the Department failed to demonstrate that the Deciding Official gave appropriate consideration to the *Douglas* factors, compared grievant's penalty to penalties imposed in similar cases, or had otherwise carried its burden in justifying a fifteen-day suspension. The Board, therefore, exercised its discretion in remanding this case to afford the agency an opportunity to consider the appropriateness of the penalty in light of the Board's decision.

DECISION

I. THE GRIEVANCE

Grievant, an FE-MC Senior Foreign Service Officer with the Department, appeals the Department's decision to suspend her for fifteen days without pay for a security violation. At the time of the security incident, the grievant was the Director for {country's name} and {city's name} Affairs in the [redacted], a position of significant responsibility in view of the importance of {country name}'s support for U.S. efforts in the region.

While grievant acknowledges that she committed a serious security violation, she asserts that a close analysis of facts and penalties in comparator cases shows that the fifteen-day suspension imposed upon her is unreasonable. She also contends that the Department failed to properly take mitigating circumstances into account.

For relief, she requests that the proposed fifteen-day suspension and letter in her file be rescinded or mitigated. Grievant was granted interim relief both from the suspension and inclusion of the discipline letter in her personnel file.

II. BACKGROUND

On November 2, {year}, grievant left Washington on a flight to {country}via {city}, carrying with her a folder of documents she believed to be unclassified. Preceding hours had been fatiguing and stressful. The night before her {country} flight, the grievant flew back from a conference at CENTCOM[1] with a folder of unclassified conference proceedings. Working throughout the day on November 2, she and her staff assembled additional unclassified documents, all the while wondering whether her travel

[1] United States Central Command with headquarters in Tampa, Florida.

would be canceled due to rising tensions in {city}. When the trip wasn't called off, she rapidly gathered the material from her desk and placed the documents in her carry-on less than an hour before departing. On the last leg of her flight, she placed the folder in the pocket of the seat in front of her, thinking she might review the contents during the flight. Her flight landed in {city} on November 4 and she was on the bus to the terminal when she recalled leaving the folder. The grievant made no special effort to retrieve the folder, believing that, if found, it contained innocuous materials that would be immediately discarded.

On November 6, the Regional Security Officer (RSO) at {city} called grievant to his office and informed her that the folder had been found on the plane and subsequently collected by the Embassy. He then showed the grievant a classified document that was in the folder. On examining the folder, the grievant found two additional classified documents that she gave to the RSO. The Department temporarily suspended the grievant's security clearance but reinstated it on December 21, {year}. On March 6, {year}, some four months after the incident, a brief article[2] appeared in Time Magazine.

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[2] [redacted] By [redacted] Thursday, Mar. 06, [redacted]:
"Four days after [redacted] declared emergency rule last November, a top State Department expert boarded a British Airways flight on her way to [redacted] for urgent strategy talks with U.S. diplomats at the embassy there. The stakes were high: President Bush had just called for [redacted] to hold new elections. In [redacted], the military had begun a violent crackdown against demonstrators. In the diplomat's bag were several classified documents improperly removed from the main State building. One of the intelligence documents was particularly sensitive, says a department official familiar with the incident. "It dealt with longer-term contingencies and scenarios for the state of emergency: how long could it last, what are the pressure points, what are U.S. interests," the official says.
TIME has learned that those classified documents went missing, for a short time at least. A few days after her flight, the diplomat realized she no longer had the documents. As required, she informed diplomatic security. At the same time, British Airways called State and said the airline had found the sensitive materials. The diplomat was recalled and reassigned, and State launched a damage assessment.
The department declined to comment. Its report found no "serious damage to [U.S.] national security."
The diplomat has had her security clearance reinstated. But insiders say the loss of documents was a serious security breach. The U.S., scrambling for leverage at a particularly delicate moment, had potentially shown its hand to [redacted] or one of many political factions trying to overthrow him. Two officials who read the report say it didn't determine who had gained access to the secrets. "One would like

The Department claimed that the article was a matter of concern since it reflected poorly on the agency. On May 19, {year}, {name}, Director of the Office of Employee Relations in the Bureau of Human Resources (HR/ER), proposed to suspend the grievant for twenty days without pay under the provisions of Foreign Affairs Manual (FAM) Volume 3 Section 4300. Based on a November 6, {year} investigative report by the Bureau of Diplomatic Security (DS), {name} charged grievant with failure to safeguard classified material in violation of 12 FAM 534.1 a.[3] and 536.9-5 b.[4] He noted that the U.S. government briefing documents she left on the plane were uncontrolled for two days and were in the hands of at least three foreign nationals. As aggravating factors, {name} cited the grievant's responsibility to set an example as Director of {country} and [redacted], the potential the materials had to damage U.S. relations with {country}, the bad press that resulted for the Department, and grievant's previous security incident in {year}.

[redacted] responded to HR Principal Deputy Assistant Secretary (PDAS) {name} in writing on July 14 and orally on August 19, {year}. She accepted full responsibility for the security violation and expressed her profound regret. In addition to explaining the stress-filled context surrounding her trip, grievant argued that the agency had failed to properly take into account several mitigating factors and had violated the precept of like penalties for similar offenses enunciated in 3 FAM 4374. She also included several letters from senior Agency officials attesting to her record of exemplary service and her

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to believe that only airline officials saw this stuff," a senior U.S. official told TIME, but that "wouldn't be the best assumption to make."

[3] Employees using classified material are responsible for its custody and must take every precaution to prevent deliberate or casual access to it by unauthorized persons.

[4] The classified material must be in the physical possession of the custodian at all times, unless proper storage at a U.S. Government activity or appropriately cleared contractor facility (*i.e.*, continental United States only) is available.

security consciousness. {name} sustained the charge on September 30, {year} but mitigated the proposed suspension to fifteen days.

In her agency-level grievance appeal of October 27, {year}, the grievant again acknowledged her responsibility for a serious security violation but maintained that the proposed penalty was neither appropriate nor proportionate to the alleged offense. She asserted that {name} misconstrued her written and oral submissions and that the agency had proposed far lesser penalties in similar cases. Nevertheless, HR DAS {name}, finding no reason to alter {name}'s decision, upheld it on November 20, {year}.

The grievant appealed the agency's decision to the FSGB on December 5, {year}. She asked for continuation of interim relief and informed the Board that she reserved the right to engage in formal discovery, file a supplemental statement, and request a hearing. On December 23, {year}, grievant filed her first discovery request. Dissatisfied with the agency's response, the grievant filed a Motion to Compel Discovery on February 19, {year}. On April 16, the Board found that only one document was at issue and directed the Department to respond to grievant's request. Following further discovery, the grievant filed her supplemental statement on July 28, {year}. The agency responded on August 26 and grievant provided her final rebuttal on September 17. The ROP was closed on November 30, {year}.

III. POSITIONS OF THE PARTIES

GRIEVANT

The grievant submits that she and the Department largely agree on the facts of the case: she committed a serious security violation; her violation was unintentional; her security record during her 29 year career is otherwise good; national security was not

jeopardized by her violation; and no identifiable damage to U.S.-{country's name} relations resulted from it. She contends, however, that the Department has not met its burden with respect to the penalty imposed. The agency failed to adequately take mitigating facts into account, and worse, misconstrued her attempt to describe mitigating factors as evidence she did not take the incident seriously. The Department did not follow the precept of like penalties for similar offenses and failed to show that no lesser penalty would be appropriate. Grievant points out that {name} stated he reviewed similar cases in deciding whether to sustain the proposed penalty, presumably referring to a case comparisons worksheet provided by the Department identifying two cases as like or similar to grievant's. For the agency to subsequently deny that similar cases exist is contradictory. In one such case (Agency Case No. 2005-0237), a diplomatic courier lost 12 diplomatic pouches overseas. A three-day suspension was proposed that later was mitigated to a letter of reprimand. In the second case (Agency Case No. 2006-002), a confidential draft cable was found at a residence abroad by FSNs. A one-day suspension proposed for that individual was sustained. The grievant asserts that these cases are similar to hers in virtually all important ways, including the crucial concept of underlying behavior. In both cases selected by HR and in the grievant's case, an employee inadvertently lost control of classified documents overseas. In all three cases, the violation took place as the result of error, not an intentional or reckless abuse of security regulations. In all three cases, classified documents were discovered by uncleared foreign nationals and ultimately returned to the custody of the U.S. Government. In each case, DS determined that the classified material had been compromised. The courier lost 12 bags of classified material, including four bags containing Top Secret documents;

whereas grievant left three documents whose highest classification was Secret. Similarly, in FSGB Case No. 2005-042 (February 23, {year}), an individual inadvertently left one Confidential and two Secret documents in a taxicab. Yet, that individual was only proposed for a three-day suspension, subsequently mitigated to two days.

Thus, the grievant observes that her discovery request revealed that a 15-day suspension is extraordinarily rare**;** only once did HR propose a suspension of more than five days in a security-related case in at least the past five years. In this case, after a Foreign Service officer committed seven security incidents, the penalty levied was ten days – still five days less than that HR proposes and ten days less than the suspension originally proposed in her case.

The grievant maintains that the Department committed the following significant errors in reviewing mitigating and aggravating factors:

1. In considering *Douglas* Factor Checklist Item 1, {name} said that, although he found potential for rehabilitation, "[t]he assertion in the employee's written response that her offense is not serious because there is no evidence that U.S.-{country} relations were damaged by her actions is troubling." Grievant states that she never made that statement. Instead, she maintains that the fact she takes the violation very seriously is documented in her behavior, her past record, and in her statements as well as the statements of officials familiar with her attitude toward security matters. In her submission to the deciding official, she merely stated relevant facts that she believed should be considered as mitigating. She comments that any employee charged with an offense surely must be allowed to

put forward relevant, possibly mitigating facts without being accused, *ipso facto*, of not considering the offense to be serious.

2. HR declares that the nature and seriousness of the offense is "the most important Douglas Factor," adding that the documents' potential to seriously embarrass the U.S. government and/or to undermine U.S. foreign policy was the basis for the 15-day suspension. The grievant agrees that the documents were sensitive but, without minimizing the seriousness of her violation, asks, if the compromise of two Secret documents and a Confidential document is a sufficient justification for a 15-day suspension in her case, why was the compromise of much larger numbers of more sensitive documents not the basis for an even greater penalty for the courier? It is true that U.S.-{country's name} relations were sensitive at the time. However, Ambassador {name}, PDAS for [redacted] and grievant's direct supervisor at the time of the violation, stated, "I would note that once the State of Emergency was declared, the document in question mattered very little. *Its sensitivity had dissipated . . . damage was nil*." (emphasis added) The official DS investigation into grievant's violation found that "national security was not jeopardized." Thus, the grievant stresses that not only was national security not damaged, it was not even placed in jeopardy. By the time of her violation, "the document in question mattered very little." Further, more than one and one-half years have passed since the violation, with no evidence of the potential embarrassment having been realized.
3. HR writes, "Supervisors are held to a higher standard of conduct than non-supervisory personnel." The grievant acknowledges that in general, this is true; a

leader should be prepared to accept responsibility for what occurs under her leadership. However, grievant alleges that she does not know how the documents ended up in her unclassified read file. Although others who might have inadvertently placed the documents in the file were junior and acting under her direction, she accepts full responsibility for the incident, regardless of how it came to pass. This does not mean that she should be assigned a higher penalty than a subordinate committing the same violation, since non-supervisory personnel have no lesser responsibility than supervisors to safeguard classified material. Because there is no basis in Department regulations for assigning a higher penalty on the basis of rank, all employees with security clearances have the same obligations.

4. The grievant regrets that her violation created the potential for a press report that could tarnish the Department's reputation. She notes, however, that the three cited comparator cases had that same potential but did not result in 15-day suspensions. She also points out that {name} wrote that no damage resulted from the March {year} Time Magazine article. Moreover, the grievant's discovery request for evidence of damage done to the Department's reputation received a negative response. Although the Department claims that it does not matter who gave the information to *Time Magazine*, the grievant observes that the article, appearing four months after the incident, could only have been leaked by a Department employee who knew the details of her case. The Department itself then confirmed details to the press that would help to identify the grievant. The grievant argues that her inability to control the actions of other Department

employees should not be used as an aggravating factor. In fact, the Agency contributed to the chance the incident would become more widely known by failing to protect grievant's privacy. Rather than use the proper Diplomatic Security or Personnel channel, the Department humiliated the grievant by disseminating her recall and suspension of her clearance in an open-channel, unclassified cable.

5. The grievant also emphasizes that regulations require that a penalty "should be no more severe than sound judgment indicates is required to correct the situation and maintain discipline." (3 FAM 4374) Yet, under this *Douglas* Factor checklist heading, without offering any explanation, {name} commented only that "[a] lighter or alternative sanction for such serious misconduct would be inadequate and ineffective." Grievant asserts that, without some reasoning, this language is merely formulaic. In only one other case in at least the past five years has HR proposed a suspension longer than five days. That case concerns a pattern of seven security incidents, dates from roughly the same time as the grievant's, and the deciding official was DAS {name}, the same deciding official in the present matter. The proposal letter for that case establishes that HR first issued a letter of reprimand; then levied a one-day suspension; afterwards raising it to a five-day suspension. Only when the incidents still continued did HR resort to a ten-day suspension. In justifying the ten-day sanction, the proposal letter states, "apparently, the previous disciplinary actions did not serve to correct your security practices." The grievant observes that this is a fundamentally different

approach than HR took in her case, where, without explanation, a 15-day suspension is proposed for a single security violation.

6. The grievant argues that her violation was an extraordinary anomaly in her otherwise good security record, one that occurred in the course of a day of unparalleled demands and confusion while she was in a state of near exhaustion**.** She asks the Board to take into account her long and honorable career, spent in the most difficult and dangerous assignments, where, more than once, she came close to being killed in the line of duty[5]. The grievant asks the Board to rescind HR's proposed penalty or to replace it with one no greater than those imposed by HR in cases that are similar to her own.

THE DEPARTMENT

Because grievant consistently admitted that she left classified documents on a British Airways flight to {city's name}, the Department states that the only issue before the Board is whether a 15-day penalty is within the zone of reasonableness for the offense. The Department further points out that the Board's role is to determine whether the suspension proposed is a reasonable one; not whether it is the best penalty.

The Department stressed that by far the most important *Douglas* Factor is the "nature and seriousness of the offense." Although neither {name} nor {name} took the position that relations were actually damaged, the Department argues that it need not prove actual damage to USG interests to prove the nature and seriousness of the action and/or to support a particular penalty. Here, grievant removed briefing documents from the Department that discussed extremely sensitive U.S.-{country's name} relations. In its

[5] Early in her career, grievant was commended for bravery for leading a group of trapped cultural center patrons and staff to safety under a white flag. She also received an award for heroism for her work at Embassy {post name} when it was besieged for days and overrun by rebels and outlaws.

August 26, {year} response to the grievant's supplemental submission, the agency argues that even if there was little identifiable damage resulting from the grievant's actions, the agency need not prove actual damage in order to support a particular penalty. If the grievant's misconduct had resulted in a serious compromise of the Department's exercise of its foreign relations with {country's name} or caused widespread ridicule, grievant would have been subject to much more serious disciplinary action, up to and including separation for cause.

Further, the agency contends that because grievant was a senior supervisor and held a prominent position within the Department, {name} very appropriately held her to a higher standard of conduct and found her position to be an aggravating factor.

The Department further alleges that the underlying conduct involved in the two cases cited on the Case Comparison Worksheet (CCW) was dissimilar to grievant's and were provided to the deciding official for context only. Therefore, the Department submits that their inclusion on the CCW does not mean that {name} concluded the cases were similar. The Department maintains that in more recent cases, it has indicated on the CCW that it considers dissimilar cases for context only. However, the fact that the cases were not identified on the CCW as limited to context only does not mean the proposing and deciding officials were led to believe they were similar. Instead, the Agency claims that officials gave them due weight after considering the facts and circumstances of each case.

The Department then distinguished the circumstances and penalty in the grievant's case from those in the cases identified on the CCW. Thus, the Department pointed out that in agency Case No. 2005-0237, the courier was inexperienced and the case did not involve public notoriety. In the second case, the document was found by a

Foreign Service National (embassy employee) and had minimal sensitivity. In FSGB Case No. 2005-042, the cab driver was in the U.S. and returned documents left by the employee approximately one hour later, preventing notoriety. Further, the agency asserts that {name}'s statement that the 15-day penalty is consistent with the table of penalties is accurate. Moreover, the grievant has not identified any cases in which the facts and circumstances are similar to hers and in which the employee received a lesser penalty.

The Department also found that grievant's misconduct, as reported in *Time Magazine*, reflected poorly on the agency and had the potential to damage its reputation, thereby constituting another aggravating factor. Again, the Department observed that grievant was merely fortunate that it did not cause more harm. According to the agency, ultimately, it did not matter who gave the information to *Time Magazine* as no information would have been given absent the grievant's misconduct.

Further, the agency submits that {name} correctly concluded that stress on the day of grievant's departure for {country's name} was high but was not significantly greater than she normally encountered in her position. Moreover, a statement by {name}, and also the grievant's EER, attest to the validity of {name}'s perception that she was the subject of unusually high job tensions. Consequently, the Department submits that employees in high profile, high stress jobs need to take particular precautions to ensure that the protection of classified documents does not take a back seat to the press of daily work.

Moreover, the Department views the grievant's comment that {name}'s conclusion that a lighter penalty would be inadequate and ineffective was "formulaic" as further proof that she fails to fully appreciate the seriousness of her offense.

The Department also maintains that {name} did not err when he found "troubling" grievant's statement in her written response that her offense was not serious. Despite the grievant's claim that she did not make such a statement, the Department asserts that the underlying meaning of her argument was that her security violation was not serious. Therefore, the Department contends it was well within {name}'s discretion to find "troubling" the grievant's failure to fully appreciate the negative impact her security violation could have caused.

Lastly, the agency maintains that while there are no similar cases to use as reference points in the instant matter**,** the deciding official fully considered the relevant *Douglas* Factors in determining the appropriate penalty. Hence, the 15-day suspension is within the zone of reasonableness.

IV. DISCUSSION AND FINDINGS

Board regulations provide that, "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) In order to carry its burden of proof, the Department must prove that the grievant committed the actions with which she is charged; that there is a nexus between those acts and the efficiency of the service; and that the penalty imposed is proportionate to the offense and consistent with penalties imposed for similar offenses.

Grievant accepts responsibility for committing the security violation that is charged in this case and does not dispute that the violation has a nexus to the efficiency of the service. The substance of the grievant's appeal is that the penalty the Department proposed is too severe, that the deciding official did not take mitigating factors

adequately into consideration, and erroneously failed to follow the precept of like penalties for similar offenses.

Comparable Cases/Penalty

Both 3 FAM 4324.3 a[6] and 4374 (1)[7] oblige the Department to consider the consistency of the penalty with those imposed on other employees for similar offenses and with the table of penalties. Surprisingly, the agency claimed in its August 26, {year} response to grievant's supplemental submission that the cases in the CCW were dissimilar to the grievant's and were provided for context only. Significantly, the Proposing and Deciding Officials make no such claim. The agency presented the two cases in the April 9, {year} CCW to the grievant as comparable cases on which the officials relied in determining her penalty. Neither the CCW nor the *Douglas* Factors Checklist contains any indication that the two CCW cases were provided only for context.

Although {name}, the proposing official, was required to, "review prior similar cases within the agency," he failed to acknowledge in his May 19, {year} letter proposing a 20-day suspension, that he had not done so. Nothing in {name}' proposal explains how he used the CCW cases either in context or comparability to reach a 20-day suspension. Subsequently, in apparent contradiction to the agency's claim that there were no discipline cases similar to the grievant's, {name}, the deciding official, asserted that in reducing the penalty to 15 days, he "reviewed . . . similar cases and penalties imposed," but then, failed to cite any. Unless he was referring to the CCW listed cases (cases the

[6] "Before proposing disciplinary action, the proposing official will review prior similar cases within the Agency, in order to foster equity and consistency in the imposition of discipline;"
[7] "The disciplinary action taken should be consistent with the precept of like penalties for similar offenses with mitigating or aggravating circumstances taken into consideration;"

Department now declares were not comparable to the grievant's), the record is unclear as to what similar cases, if any, {name} relied upon to determine the appropriate penalty. Thus, the Department has failed to show that either official considered the consistency of the 20 or 15 day sanction with penalties imposed on other employees as required by 3 FAM 4324.3 and 4374.

The Department submits that "[t]he penalty proposed is consistent with the table of penalties." As a general proposition, this statement is accurate, but provides little guidance in evaluating the reasonableness of the penalty in this case. Any penalty would be consistent since the Table of Penalties refers to 12 FAM 550, which identifies penalties in the case of a security violation ranging from a letter of reprimand, a suspension without pay or termination. (12 FAM 557.3 (2))

Within this range, the agency must justify the penalty it chose. Although required to review similar cases and penalties imposed, the Department now claims it found none. Since security incidents are not uncommon bases for Department discipline, it seems unusual that the agency's files yielded no other cases with underlying conduct similar to the grievant's. Without using comparable cases to establish reasonableness, the agency's remaining rationale for the 15-day suspension, as explained in its August 26, {year} submission, is that the documents had the potential to seriously embarrass the United States. In effect, the agency claims their sensitivity justified the severity of the penalty.

We concur with the Department that degree matters. As noted above, the Department commented that grievant's 15-day penalty would have been considerably more severe if actual damage to U.S. interests had resulted. We agree that misconduct that causes actual harm surely merits a greater penalty than one that creates only potential

harm. Equally, the Board recognizes that levels of sensitivity, classification, and volume of mislaid material, while not the only factors, may also play a role in determining the appropriate penalty. In the grievant's case, the potential for harm stemmed from three documents, two of which were classified as secret, not top secret, and one that was confidential. Moreover, the parties agree that the grievant was unaware that she carried such documents.[8] In the instant case, the parties concur that no concrete damage to U.S.-{country's name} relations occurred as a result of the compromised documents. The issue, then, is the potential harm they might have caused due to their sensitivity. In this regard, we find the expert opinion of Principal Deputy Assistant Secretary for [redacted] {name} to be credible and persuasive. The Department has not refuted his statement that, "once the State of Emergency was declared, the document in question mattered very little. *Its sensitivity had dissipated… damage was nil*." (emphasis added) In light of this unrebutted declaration that immediate circumstances reduced the sensitivity of the documents, the agency failed to establish that it exercised its discretion within tolerable levels of reasonableness to justify a 15-day suspension.

The grievant points out, and the Department does not dispute, that only once in at least the past five years has HR/ER levied a penalty of greater than five days for a security-related offense. As a result of her discovery request, she learned that the single exception was a case involving seven security incidents in which HR thoroughly documented why a lesser punishment than ten days would be inadequate. In the course of the seven security incidents, HR issued a Letter of Reprimand, a one-day suspension, a five-day suspension and, finally, a ten-day suspension, adding, "apparently, the previous

[8] The Douglas Factors Checklist states, "Because she was unaware that she was in possession of classified documents, the employee's transport of the documents and her failure to take them with her when she disembarked from the plane were also unintentional."

disciplinary actions did not serve to correct your security practices." In contrast, HR proposes a 15-day suspension for the grievant's single security violation without providing an adequate explanation of why 15 days is justified and appropriate or why a lesser punishment would be inadequate.

The Department cites FSGB Case No. 2007-022 (March 31, 2008) as a precedent when there are no similar cases to use as a reference point. In that case, the Board affirmed, "[t]he purpose of the precept of "like penalties for similar offenses" is to ensure that both the Department and its employees resolve grievances in a fair and reasonable manner and on a playing field that is leveled by like and similar circumstances, but varied by differences in mitigating and aggravating factors." The CCW itself declares, "[w]hether or not offenses are alike will be based on the similarity of the underlying conduct rather than on how the charge is worded." In FSGB Case No. 2002-052, the Board clarified, "[w]e find that in reasonable scope, 'like cases' may sensibly encompass, at least presumptively, all those in which the nature of the charges is reasonably comparable." With this background in mind, we find that the Department has too narrowly construed what constitutes "like cases." The two cases in the CCW and FSGB Case Number 2005-042 deal with reasonably comparable underlying conduct and can be considered as like cases for penalty considerations.

All four employees, including the grievant, committed security violations by unintentionally losing control of classified documents, all the documents were in the hands of uncleared individuals before being returned, all exposed the Department to potential notoriety and embarrassment. While basically similar in kind, the cases differ somewhat in degree. For instance, the level of employee experience varies. The

sensitivity of the documents involved is higher or lower. Thus, in Agency Case No. 2005-0237, some documents were top secret whereas those in the grievant's possession were secret and confidential. While the grievant's documents were sensitive, the agency has not shown that loss of the courier's 12 bags, four of which contained Top-Secret material, a higher classification than any of those that grievant possessed, did not have potential to cause equal or greater harm and notoriety. Moreover, the grievant was the only employee in these four cases who was unaware that she had classified documents in her possession. In the other cases, the employees knew full well that they had classified documents in their care and were nonetheless negligent in leaving them where they could be found by uncleared persons. We view the carelessness exhibited in those cases as much more serious than grievant's inadvertent exposure of the classified documents she unwittingly carried with her. Yet the penalties in the other cases were considerably lower: a Letter of Reprimand in Case No. 2005-0237 (courier); a one-day suspension in Case No. 2006-002 (cable found by FSNs); and a two-day suspension in FSGB Case No. 2005-002 (taxi). We find that the Department has failed to justify the disparity between the penalties in these reasonably comparable cases and the grievant's. It follows that the agency failed to meet its burden under 3 FAM 4374 (1), that "the disciplinary action taken should be consistent with the precept of like penalties for similar offenses."

***Douglas* Factors**

3 FAM 4374 requires proposing and deciding officials to take into account mitigating and/or aggravating circumstances. The deciding official found mitigating factors in the grievant's acknowledgment of responsibility and her cooperation, her expression of profound regret, her lengthy and distinguished career in hazardous

assignments, her history of securing classified documents, and the numerous statements of support from senior Department officials with whom she worked. We agree with the Department that it appropriately regarded grievant's senior supervisory position and the potential harm that could have resulted from her misconduct as aggravating factors. However, we also agree with the grievant that the agency mishandled other aggravating factors, which we address below.

Seriousness

In assessing *Douglas* Factor 6, {name} found "troubling" the grievant's assertion in her written response that her offense was not serious because there was no evidence that U.S.-{country's name} relations were damaged. In its August 26, {year} submission, the agency went further and argued that while grievant did not make the precise statement {name} attributed to her, it was, in substance, the argument she made.

We agree with the grievant that her actions and statements from the moment she was apprised of her error (and pointed out classified documents the RSO had missed) attest to the seriousness with which she regarded her security violation. We are persuaded that her expressions of regret are credible. Grievant was invited to respond to {name}' suspension proposal and did so, properly including information she thought would be mitigating. A chilling effect might well result if employees could not present relevant, potentially mitigating facts without being accused of minimizing the seriousness of their offense. We find that {name}, at best, misconstrued and misquoted the grievant's letter, thereby ignoring her effort to mitigate and penalizing her unjustly.

***Time Magazine* and Notoriety**

The agency pointed to an article in a March, {year} issue of *Time Magazine* as an aggravating factor in determining the grievant's penalty. We concur with the Department that grievant's actions created the potential for notoriety, just as they created the potential for damage to U.S.-{country's name} relations. The direct source of the article, however, was obviously not grievant, but the individual or individuals who contacted the magazine. The agency believes that it does not matter who gave the information. We disagree. Grievant acknowledged responsibility for the security violation, had her security clearance suspended, and, according to the agency, cooperated with DS. She had a reasonable expectation that her case would be treated in the usual manner as a sensitive personnel matter and her privacy protected. She contends, and the Department does not dispute, that the agency failed to protect her privacy and may thereby have contributed to the article's publication.

Grievant also contends, and the Department does not dispute, that the person or persons who gave the information to the magazine could only have been Department employees. We agree. The article itself indicates that the reporter got information from "insiders," "two officials," and a "senior U.S. official," presumably Department employees. We find that the agency unjustifiably blamed the grievant for the article and placed far more emphasis on this aggravating factor than was warranted.

In sum, this Board finds that the Department failed to establish that the suspension in the instant case is consistent with the precept of similar penalties for like offenses or otherwise carried its burden in justifying a 15-day suspension. Moreover, we find that the Department erred in its analysis of significant mitigating and aggravating circumstances, including giving virtually no weight to the fact that the grievant did not

know that she carried a few documents on the plane, among others, that were either secret or confidential. Based on the penalties in the comparable cases presented in the ROP and on grievant's undisputed assertion that only one dissimilar security incident in the past five years has resulted in a suspension of greater than five days, it would appear that the zone of reasonableness for the grievant's offense would lie between a Letter of Reprimand and a five-day suspension.

The Board, therefore, exercises its discretion in remanding this case to the agency to afford it an opportunity to consider the appropriateness of the penalty in light of the Board's findings with respect to comparable cases and mitigating and aggravating factors. We direct the agency to determine the penalty it believes apposite in light of the Board's findings and issue a revised final agency decision to grievant within 20 days of its receipt of this Decision, setting forth the penalty chosen and the rationale for its selection. If grievant elects to contest the appropriateness of the penalty, she has 15 days from the date of receipt of the agency's revised decision to file any objections with this Board.

V. DECISION

The case is remanded to the Department to review the penalty being imposed consistent with the Board's decision in this case.