

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{Grievants}
Grievants

and

Department of State

Record of Proceedings
FSGB No. 2010-015

September 12, 2012

DECISION

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

James E. Blanford
Lois E. Hartman

Special Assistant:

Joseph Pastic

Representative for the Grievants:

Pro se

Representative for the Department:

Melinda Chandler
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The Board concluded that the grievants' request for an internal administrative review of a debt is not an election of remedies that precludes the filing of a grievance. The Board also concluded that grievants shipped a large amount of wood flooring, doors and door frames, which were not properly includable in their household effects (HHE) and that, therefore, they are bound to pay the cost of packing, shipping, trucking and storing the items, notwithstanding the fact that the wood was destroyed after it was forfeited in a judicial forfeiture action. The Board lastly concluded that the agency did not abuse its discretion in denying a waiver of the debt because evidence showed grievants were at "fault."

OVERVIEW

Grievants are the former GSO and FMO at Embassy {post} who in {yr1} purchased more than sixty-six hundred pounds of wood flooring, doors and doorframes before leaving post for their onward assignment. Grievants included the wood items with their household effects (HHE) which resulted in the wood being specially crated in {post}, shipped to the U.S. and trucked and stored at U.S. government expense. When the wood was discovered in grievants' HHE in the U.S., the State Department determined that it was "construction material," or unauthorized HHE. The Department therefore billed grievants for the cost of transporting it.

The wood was eventually inspected by the U.S. Department of Agriculture and found to be an endangered species that could not legally be imported into the U.S. without a Certificate of Origin or unless it was properly part of HHE. The USDA initiated a forfeiture action that resulted in the wood being confiscated and destroyed.

In response to debt notices, grievants requested an internal administrative review of the debt by the Department of State. The Department completed the review as well as a requested reconsideration, finding that the wood products were unauthorized HHE; that the debt was due; and that the revised amount of the debt was properly calculated. Grievants then appealed to this Board. The Department argued that the Board is without jurisdiction to decide the grievance because grievants made a prior election of remedies when they requested the administrative review. On the merits, the Department argued that the wood is not includable in HHE and the revised debt amount was properly calculated. Grievants argued that this Board has jurisdiction to hear the grievance because they did not knowingly or intentionally elect an administrative review as a remedy. Rather, they claimed they merely asked the Department to review its calculations, without intending to foreclose a grievance option. Grievants also argued that at the time the wood was shipped, it was not excluded by regulation from HHE. They also claim that they are being treated differently from others who shipped similar wood products from {post}. They also challenged the amount of the debt on numerous grounds, including: a claim that the amount is excessive in violation of the 8th Amendment of the U.S. Constitution; that they were misled by the estimated cost of shipping stated on their travel orders; and that the cost of transporting the wood should have been calculated differently. Grievants asked that if this Board determines that the debt is due, then it should either waive it or reduce it to a reasonable amount.

The Board determined that it does have jurisdiction to decide the instant grievance because, although grievants did request an internal administrative review of the debt, this request does not preclude the filing of a grievance under applicable regulations. On the merits, the Board determined that the debt is due because the quantity of wood products shipped makes the shipment excludable from HHE and because grievants failed to prove that the debt was miscalculated. The Board also determined that it does not have jurisdiction to grant or deny a waiver of the debt and that because grievants were at “fault,” the Department did not abuse its discretion in denying a waiver of the debt.

DECISION

I. GRIEVANCE

In May 2010, {names} (grievants) appealed a decision by the Department of State (Department, agency) to disallow a portion of their Household Effects (HHE) (5 gross tons of wood flooring, doors and door frames)¹ which resulted in a debt of \$15,012.69 owed by grievants to the Department. In the course of the proceedings, the Department raised the issue of jurisdiction, claiming that the Foreign Service Grievance Board (FSGB, Board) does not have jurisdiction to review a debt determination by the agency following an internal administrative review (IAR) because grievants allegedly made an exclusive election of remedies when they requested the review.² On the merits, the agency argues that the debt is proper and justified. This decision addresses both the issue of jurisdiction and the merits of the grievance.

II. BACKGROUND

{Names} (grievants) were assigned as the Financial Management Officer (FMO) and General Services Officer (GSO) respectively in {post} until the fall of {yr1} . When they were preparing to leave this post for an onward assignment, grievants purchased a quantity of wood flooring, doors and door frames and arranged to have it crated and shipped to the U.S. along with their HHE. The wood products were packed in {post} in seven specially made crates, shipped to Miami, Florida, trucked to Virginia and stored there along with their other property. After receiving the items in storage in October {yr1}, the government storage contractor notified the Department in November {yr1} that the materials did not appear to be usual household items. In

¹ The wood items were weighed in {post} and reweighed by the storage company. The net weight of the wood was approximately 6645 pounds. The gross weight was over 10,000 pounds, including the packing materials and crates. We note that there were several pallets of wood floor tiles, 5 internal doors and door frames, a 6'6" x 6'6" garage door, a solid wood exterior door, and an entry door. See Attachment 8 of the Original Grievance.

² In its grievance decision, the agency referenced Section 1109 (a) (1) of the Foreign Service Act, 22 U.S. Code § 4109 (a) (1), stating that grievants did not have a grievable matter since they had previously requested an internal administrative review of their debt. Nevertheless, the agency proceeded to review the grievance on the merits and denied it.

December {yr1}, a Department of State inspector examined the wood, questioned whether it was properly includable as household effects and ordered that it be held until there was a resolution of the cost of shipping and storing it. All remaining property was released to grievants in December.

Because the wood had been described as furniture on the inventory, it was not originally inspected by either U.S. Customs or the U.S. Department of Agriculture (USDA) when it entered the U.S. Once the wood items were discovered, the Department notified both agencies in order for them to determine whether it had been brought into the country consistent with entry requirements. The Department asked grievants to provide a Certificate of Origin for the wood, but grievants advised that they had not secured one. The Department then decided in early 2007 to move the wood to a Customs warehouse to enable further inspection by the two agencies.

In July 2007, after the wood was inspected, USDA notified grievants that it intended to pursue a forfeiture of the wood because it was a species that was on an International Endangered Species list and had been imported without a required Certificate of Origin. In September 2007, the USDA seized the wood and initiated a judicial forfeiture action in the United States District Court for the Eastern District of Virginia.³ On November 24, 2008, the District Court judge issued a Memorandum Order granting summary judgment to the U.S. government, finding that the wood had been illegally imported without the required certificate of origin and that the wood did not constitute a household effect, which would exempt it from the certificate of origin requirement.

³ Grievants were not charged for storage of the wood after it was formally seized in September 2007. In addition, the judge in the forfeiture case released the wood to the grievants, allowing them to store it at their expense, during the litigation. See, Grievants' Supplemental Submission at p. 14. Grievants stated that they stored the wood in a "private hangar . . . they own at [an airstrip] in . . . Virginia." See, interview of {grievant} by the Office of the Inspector General (OIG) Attachment 10 to the Agency's Response to Grievants' Supplemental Submission (A: Response), at p. 3.

In the interim, grievants received notices in January 2007 that the excess cost of shipping the wood products was \$27,005.55. They were invited to consider submitting a request for a waiver of these charges to the Department's Exceptions Committee.⁴ Grievants declined to pursue this option. On July 15, 2008, they received formal notices of indebtedness from the Department's Accounts Receivable Division in which they were informed that the total combined debt due was \$24,566.36. Additional notices were sent to grievants from Global Financial Services (GFS) advising them that they must pay the debt within 120 days or risk being charged interest at the rate of three percent on the outstanding balance as well as a penalty of six percent.

Grievants immediately requested that Deputy Assistant Secretary (DAS) Millette provide them with documentation for the debt. They thereafter requested that DAS Millette review the debt. Millette responded with a letter, dated December 18, 2008, acknowledging receipt of the request for an "administrative review" of the debt. Again, in a letter dated January 6, 2009, Millette confirmed that he was in the process of conducting an "internal administrative review under the provision of 22 CFR 34.9." Grievants then submitted separate statements of their reasons for contesting the debt. DAS Millette issued a written decision on September 25, 2009 in which he reduced the amount of the debt to \$18,751.98, but determined that grievants owed it. He also denied their request for a waiver of the debt. Later, at their request, Millette reconsidered his determination and affirmed his decision and calculation. However, in a letter dated October 4, 2010, Millette further reduced the debt to the amount now claimed (\$15,012.69) on the ground that further investigation justified the reduction.

The {grievants} filed a grievance with the agency on May 7, 2010, which the agency denied on April 22, 2010 on the ground that grievants had elected an exclusive remedy when

⁴ See 14 FAM 514 and 518.

they requested the administrative review of the debt. The instant grievance appeal was filed on May 12, 2010. The parties then engaged in discovery over a period of eighteen months. In the Department's response to the grievants' supplemental submission, it claimed that the Board was without jurisdiction for the same reason it gave in its decision. Grievants responded and the Record of Proceedings was closed on February 6, 2012.

In their appeal, grievants request the following relief:

- Interim relief;
- a ruling that the shipment was allowable HHE under regulations in effect at the time;
- a waiver of the debt;
- an order requiring them to pay only a "reasonable amount" based on market pricing; attorney's fees and expenses; and
- all other appropriate relief.

III. POSITIONS OF THE PARTIES

THE DEPARTMENT

JURISDICTION

The agency argues that grievants elected to pursue an internal administrative review (IAR) of their debt with GFS and therefore the Board does not have jurisdiction to consider the same issues in this grievance. The agency cites Section 1109 (a) (1) of the Foreign Service Act (FSA), 22 U.S. Code 4139 (a) (1), that provides:

A grievant may not file a grievance with the Board if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief be provided under another provision of law, regulation, or Executive order ... and the matter has been carried to final decision under such provisions on its merits or is still under consideration.

The Department also cites 4 FAM 493.4 as follows:

- (a) If a debtor wishes to contest the existence or amount of the debt, he or she may request an internal administrative review of the debt. . . .
- (b) Domestically, the Deputy Assistant Secretary for Global Financial Services or his or her designee shall conduct internal administrative reviews under 22 CFR 34.9. No one who was involved in the initial debt

determination may be designated to conduct an internal administrative review.

The Department argues that because grievants requested an IAR under 22 CFR 34.9, which was carried to a final decision on its merits, they are precluded from having their debt issue also reviewed by this Board. The agency cites FSGB Case No. 1999-001 (August 4, 1999) as precedent for its position.

In response to grievants' claim that they did not intend, and were unaware, that their request for assistance would be treated as a formal request for an IAR, the agency points out that in several documents sent to grievants by DAS Millette, he referenced "your request for an internal administrative review." In a letter to grievants dated January 8, 2009, DAS Millette reiterated: "As I stated in my letter of December 18, 2008, we are in the process of complying with your request for an internal administrative review, under the provisions of 22 CFR § 34.9." The Department also claims that all of the issues raised by grievants, including how the debt was calculated, financial and contractual arrangements between the Department and its vendors and the alleged mismanagement of the shipping process were considered and resolved in the IAR and may therefore not be reviewed again in a grievance process before this Board.

MERITS

The Department argues that the wood products included in grievants' HHE were "construction materials" within the meaning of 14 FAM 611.5 and, therefore, grievants are obligated to pay for their transportation. The Department also argues that Millette's decision was reinforced in the forfeiture case when the federal judge also found that the wood did not fit the definition of HHE. The judge stated in part:

Under no conceivable or appropriate definition could enough hardwood flooring to cover a single-family home be considered reasonably necessary or appropriate for any Government employee returning from a tour of duty from abroad....

* * *

...the Court holds that under no reasonable, plain or ordinary interpretation of the term household effects does several tons of uninstalled hardwood flooring qualify as a household effect.

In further support of its position, the Department references FSGB case No. 2009-041, in which this Board ruled that an employee had failed to carry his burden of proving that 44 boxes of marble tiles, weighing 5871 pounds, were not construction materials, within the meaning of the FAM and that he was therefore responsible for the cost of packing and shipping the tiles.

The Department rejects grievants' argument that they relied on the advice and approval of post management officers, including the Ambassador, that their wood purchase qualified as HHE. The Department contends that grievants failed to inquire of the one person in the agency qualified to give them a definitive answer. According to the Department, Ann Gibson, Chief of the Transportation Operations Branch, is the expert on the issue of what is properly includable in HHE. Ms. Gibson stated that her office has a long-standing policy that flooring, windows and doors constitute construction materials and, therefore, may not be shipped as HHE.

Mr. Millette also rejected grievants' claim that they detrimentally relied on authorization for the shipment by the Chief of Mission. Mr. Millette stated:

I do not find any evidence that shipment of several tons of uninstalled hardwood flooring was expressly authorized by the Chief of Mission. Even if there were, I also found that there is no authority for a Chief of Mission to make an exception to Department regulations prohibiting shipment of construction materials in HHE.

Grievants also argue that they sought and received authorization from the Management Officer at post to include the wood and wood products in their HHE. Mr. Millette found there was no such authorization and grievants concede that they did not reveal to the Management Officer the quantity of wood they intended to ship. Further, Mr. Millette found that grievants, as GSO

FMO, should have known that the quantity of wood they were shipping was improper under Department regulations.

In response to grievants' claim that they are being treated disparately because others have shipped similar materials in their HHE, Mr. Millette stated in a letter dated November 16, 2009:

Whether or not others may have contravened Department regulations is not a consideration in determining the basis and amount of your debt...nor does the possibility that others may have violated Department regulations change the fact that you were at fault in this matter and therefore ineligible for a waiver of your indebtedness....

As for grievants' dispute about what transportation contracts were let by the Department and how the debt was calculated, the Department states: "The Board does not have the authority to second guess the business practices of the Department's vendors or the Department's negotiation of its financial arrangements with the vendors." The burden is on the grievants to prove that the Department violated a statute or regulation in the manner in which it contracted to transport their HHE.

THE GRIEVANTS

JURISDICTION

Grievants argue that the Board has jurisdiction to decide this grievance because they never elected to pursue an IAR under 22 CFR 34.9. The original collection notice from GFS informed them that they could request a review of their debt, but there was no mention of 22 CFR 34.9. They contend that when they requested to see the documents that were used to support the collection notice, they only received a spreadsheet from GFS; they received none of the documents used to determine the amount of their debt. They then asked for a review by DAS Millette only as a means of getting those documents. They claim that they were not aware of 22

CFR 34.9 or its purported exclusive remedial effect and they did not knowingly elect such an exclusive remedy.

Grievants also allege that they have raised other grievable issues, including harm caused by “misleading” information contained in their travel orders and a violation of their right to equal treatment under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

MERITS

Grievants claim that their “decorative floor finishes and interior doors” are not construction material because they are not “cordwood” as defined in 14 FAM 611.5. They argue that certain elements are essential to the construction of a building, including floors and walls, but that floors are generally made of concrete or load-bearing, reinforced lumber. They argue that the wood flooring that they purchased comprised a decorative floor covering, the same as carpeting or tiles. Because their flooring was a decorative covering and not a load-bearing reinforced lumber, grievants insist that it is not construction material and therefore could be included in their HHE. Grievants point out that when they departed {post} in {yr1}, there was no definition of building or construction materials in the regulations and no guidance from the travel and transportation office. Grievants also argue that their wood products were not in “commercial quantities.” The American Foreign Service Association (AFSA) joined them in arguing that the wood products were intended for personal use and not for resale and, therefore, were not commercial goods.

Grievants claim that they did their due diligence when they researched the regulations to determine if the wood floor tiles were allowable as HHE. They state that they are not experts in HHE and they “properly relied on the expertise of Embassy {post} management.” In addition,

they relied on the Department's transportation contractor in {post} that advised them that the wood flooring was includable in their HHE.

Grievants also claim they received authorization from the Ambassador and the management counselor to include the wood tiles in their HHE. The management counselor at post, Paula Bravo, wrote: "post management allowed for these materials to be shipped as these were regarded as finished products which could be used as furnishings in privately-owned homes." Grievants contend that under federal case law, a person's belief that his/her conduct is lawful is a positive defense if "the statement [upon which they relied] is an official interpretation by a public official responsible for administration, interpretation, or enforcement; and the reliance is otherwise reasonable." In other words, they claim that they detrimentally relied on the assurances of post management in shipping the wood.

Grievants also state that two colleagues at post, another tandem couple, obtained approval from post management to ship hardwood flooring as part of their HHE earlier in {yr1}. In addition, one other Foreign Service officer, who departed post before grievants, made similar purchases and shipped the items with post approval. They claim that the Department has not issued collection bills to any of these individuals. Thus, they claim that they are being treated disparately.

Grievants also challenge the amount of their debt, claiming that it far exceeds market costs and is unreasonable. Even though their debt was reduced to \$15,012.69, grievants claim that this greatly exceeds the market cost of shipping a container from {post} to the Washington, D.C. area. They state that they sought and received estimates from transportation vendors that "were very much in line with the estimates on our travel authorization; that is, \$2251 per HHE shipment of 7,200 lbs. net (or \$4502 for 14,400 lbs. net)." Grievants point out that they were

very attentive to cost considerations and would not have considered purchasing the wood flooring if they had known that the shipping costs were prohibitive. Grievants questioned the cost figures on their travel authorizations and verified with staff in Washington, D.C. that these figures represented average actual costs for the shipment of HHE from {post} to the U.S. Before consigning their effects, grievants checked the estimated shipping costs of their {post} purchases by obtaining estimates from two independent sources. The estimates they received were similar to the estimates on their travel authorizations.

Grievants challenge the agency's transportation logistics. They argue that shipping HHE through Miami, rather than direct to Baltimore, added significantly to the cost of trucking their goods overland. They also argue that once the HHE was stored, they should not be charged for the storage after it was seized by the government.

Grievants also ask that if the Board finds that the wood is construction material and therefore not eligible HHE, that they be granted a waiver under 5 USC § 5584. They claim that they were without fault and that collection of the outstanding debt would be against equity and good conscience. They argue, alternatively, that if a waiver is not deemed appropriate, that they be required to reimburse no more than a reasonable market rate of \$3500 or the amount on their travel authorization of \$2251.

Lastly, grievants claim that the Department may be retaliating against them because of a grievance {grievant} filed in 2002.

IV. DISCUSSION AND FINDINGS

JURISDICTION

The issue before the Board is whether Section 1109(a)(1) of the FSA, 22 U.S. Code §4139(a)(1), precludes grievants from pursuing the instant appeal based on the undisputed fact

that they have already had the debt calculation and their waiver request reviewed in a comprehensive internal administrative review. Section 1109 (a) (1) of the FSA reads:

A grievant may not file a grievance with the Board if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief be provided under another provision of law, regulation, or Executive order, other than under section 1214 or 1221 of title 5, United States Code, and the matter has been carried to final decision under such provision on its merits or is still under consideration.

The agency argues that the plain reading of this provision means that since grievants formally requested an IAR prior to filing this grievance and since the administrative review has been carried to a final decision on its merits, they are therefore precluded from filing this grievance.

The agency cites as precedent FSGB Case No. 1999-001 (August 4, 1999), in which we held that we did not have jurisdiction to review an agency and GAO decision to collect salary overpayments made to a rehired annuitant.⁵ After reviewing this case, we conclude that it is inapposite on the issue of the effect of an IAR request. Instead, 1999-001 concerned a retired employee who contested an agency's denial of a request for a waiver of indebtedness. We further find that it is not dispositive of the waiver issue, since the Board has subsequently clarified its role with respect to waivers in the cases cited below. We therefore conclude that the cited case is not good authority for the issues presented here and decline to follow it in this case.

Since the decision issued in FSGB Case No 1999-001, this Board has decided a number of waiver cases, including, FSGB Case No. 2006-046 (November 7, 2007) and FSGB Case Nos. 2006-29, 30, 31, 32, 33 (July 28, 2008). In the latter cases, in an order dated August 23, 2009, this Board held:

⁵ The cited case was brought by a retiree of the United States Agency for International Development (USAID); however, under 5 U.S.C. § 5584, the Government Accountability Office had authority to grant a waiver of the salary overpayment. While the case was pending, the law changed giving USAID authority to determine waivers for its annuitants and employees.

Although the Department is correct that there is no entitlement to the waiver itself, grievants are entitled to an appropriate application of the statutory standards for granting or denying such waivers. Under 22 U.S.C. 4131(a) (1) (B), the Board's authority includes jurisdiction over "other alleged violation, misinterpretation, or misapplication of applicable laws, regulations, or published policy affecting the terms or conditions of the employment or career status of the members" The Board has reviewed the Department's application of the statutory authority to grant waivers in the past. (See FSGB Case No. 1982-106, July 18, 1983.)

We concluded that we had jurisdiction to review the agency's determination of the waiver issue.

In the instant case, we similarly conclude that grievants are entitled to a Board review of the agency's decision to impose the debt and to deny a waiver of that debt. We find the reasoning of several decisions of the Federal Labor Relations Authority instructive and persuasive. In 32 F.L.R.A. 721; 1988 FLRA LEXIS 285; 32 FLRA No. 105, July 22, 1988 the Authority concluded:

Until the proceedings required by section 5514(a)(2) [of the Debt Collection Act] have resulted in a final decision on the alleged debt or until the proceedings have been waived by the employee, the employee has no "complaint" concerning the employee's employment. Consequently, until the proceedings required by section 5514 are completed or waived, there is no grievance under section 7103(a)(9) of the Statute. (Citations omitted).

If the proposed procedures resulted in a finding that a unit employee was indebted and led to authorization of collection proceedings, a complaint by the employee about the indebtedness would constitute a "grievance." The grievance would be covered by the negotiated grievance procedure, unless excluded by the parties. Nothing in the Act, including the provision for a final decision by a hearing officer, precludes a grievance over a determination of indebtedness or limits the authority of an arbitrator to review such a determination. (Citations omitted).

In 53 F.L.R.A. 1320; 1998 FLRA LEXIS 34; 53 FLRA No. 115, February 19, 1998, the FLRA confirmed its earlier decisions⁶, and added:

[W]here the exclusivity of an appeals procedure concerning certain challenges to an agency's conditions of employment decision is not established by the plain wording of a law, or its accompanying legislative history, the Authority has found

⁶ See also, 33 F.L.R.A. 691; 1988 FLRA LEXIS 458; 33 FLRA No. 84 October 31, 1988 and 32 F.L.R.A. 721; 1988 FLRA LEXIS 285; 32 FLRA No. 105 July 22, 1988.

that the negotiated grievance process is available. For example, the Authority held that nothing in the Debt Collection Act of 1982, 5 U.S.C. § 5514, including the provision for a "final decision" by a hearing officer, precludes a grievance over a determination of indebtedness or limits the authority of an arbitrator to review such a determination.

In the instant grievance, the agency has provided no evidence that Congress intended that the IAR process be the exclusive means for determining the indebtedness of agency employees. Indeed, until the IAR is completed, employees may not know whether and how they disagree with the agency. That is, they do not have a "complaint" or grievance until the final decision has been made after an internal administrative review. Therefore, this grievance did not become ripe until the agency concluded its IAR and review of its own procedures.

This Board reached a similar conclusion in FSGB Case No. 1998-091 (August 6, 1999) and in FSGB Case No 2009-041 (August 11, 2010). In both cases, the agency conducted "final agency reviews" under 22 CFR § 34.9 that concluded that the employees owed a debt, plus interest, penalties, and administrative charges. Grievants in both cases appealed the final agency decisions to this Board, which explicitly found, without challenge from the agency, that we had jurisdiction to consider the grievance appeals.⁷ In 1998-091, the agency acknowledged that the employee was entitled to appeal the final agency review decision by the financial services office to this Board. Although the case was decided on other jurisdictional grounds, the Board observed that hearing procedures exist under 22 CFR 34.19 and 34.20.⁸ If a hearing is requested

⁷ In recent years, this Board has considered a number of cases involving both IARs and waivers of indebtedness. FSGB Case No. 2009-041 (August 11, 2010) and FSGB Case No. 2008-010 (August 28, 2009) involved employees who grieved notices of indebtedness after receiving IARs. In each of these cases, the Department did not challenge the employees' right to file a grievance. Likewise, in FSGB Case No. 2011-045 (Order April 9, 2012), an employee alleged that she requested and received an internal review of her indebtedness and the Department did not raise a jurisdictional issue on appeal to this Board. The agency provides no explanation of why it did not challenge jurisdiction in the cited grievance appeals based on completed IARs, but does so in the present appeal.

⁸ See also 5 U.S.C. § 5514 that provides:

prior to initiating any proceedings . . . to collect any indebtedness of an individual, the head of the agency holding the debt or his designee, shall provide the individual with— . . .

(D) an opportunity for a hearing on the determination of the agency concerning the existence or the amount of the debt . . . A hearing under subparagraph (D) may not be conducted by an

under these regulations, it is the hearing request, not the request for an IAR, that creates the jurisdictional issue and forces an election of remedies.⁹

Section 1109 of the FSA permits an employee to choose between filing a grievance appeal and seeking a remedy in another forum, if both the FSGB and the other body would both have jurisdiction over the matter. However, the employee cannot elect to pursue both remedies. Section 1109 (a) (1) provides that if the grievant has previously “formally requested” a decision under another statute, regulation, or executive order, and a final decision has been made or is under consideration, the employee may not then file a grievance appeal with the Board. In this instance, although we find that grievants knowingly requested an IAR, this process did no more than determine the amount of the debt and whether there would be a waiver. As we found in FSGB Case No. 1998-091, *supra*, we conclude that an IAR is not the kind of statutory or regulatory proceeding that will preclude jurisdiction of this Board under the election of remedies provision. Rather, it is, by definition, an internal process by which the grievance is established.

The Foreign Service Act of 1980, as amended, explicitly recognizes the right of Foreign Service employees to bargain collectively and establishes the Foreign Service Grievance Board to hear grievances that are not resolved under procedures negotiated between the Department and the employee representative. The IAR is one of the procedures negotiated between the

individual under the supervision or control of the head of the agency, except that nothing in this sentence shall be construed to prohibit the appointment of an administrative law judge.

22 CFR § 34.19 states that an employee whose salary is to be offset by an agency in order to collect a debt may request a hearing. In addition, 22 CFR § 34.20 reads:

(a) If an employee timely files a request for a hearing under §34.19, STATE shall select the time, date, and location of the hearing.

(b) Hearings shall be conducted by a hearing official not under the control or authority of STATE.

⁹ See, 22 U.S.C. § 4139(a)(2):

If a grievant is not prohibited from filing a grievance under paragraph (1), the grievant may file with the Board a grievance which is also eligible for consideration, resolution, and relief under chapter 12 of title 5, United States Code, or a regulation or Executive order other than under this chapter. An election of remedies under this subsection shall be final upon the acceptance of jurisdiction by the Board.

Department and the employee union. We conclude that grievants' request for an IAR is not a request for a separate remedy as contemplated under Section 1109. Because grievants are members of the Foreign Service, they are entitled to grieve the final debt calculation established by the Department as reviewed during the IAR. After the debt decision is finalized, grievants may choose to have their grievance resolved by us, although we are not the only forum in which they might have filed.¹⁰ Having made their election to file a grievance with this Board, they are precluded from seeking a remedy in a different proceeding on the same matters.

THE MERITS

A. In General

In all grievances other than those involving discipline, grievants have the burden of proving by preponderant evidence that the grievance is meritorious. 22 CFR 905. In reaching a decision, we must address whether or not the wood flooring and wood parts are allowable as HHE and whether the {grievants} are liable for the cost of transporting them. We begin with a finding that the wood flooring, doors and doorframes are not household effects under the applicable regulations.

B. The Wood Items Are Not Includable In Grievants' HHE

14 FAM 611.2 and 612.3(b) are the general provisions that authorize the Department to pay for the transportation of Foreign Service officers' household effects.¹¹ In {yr1}, when

¹⁰ Grievants have been notified that their salaries could be offset if the debt is not resolved. Thus, they might have elected to request an external hearing "conducted by a hearing official not under the supervision or control of STATE" to challenge any potential offset of their salaries. Such a hearing, however, would now be precluded by our exercise of jurisdiction in this grievance appeal.

¹¹ 14 FAM 611.2 provides:

Section 901 of the Foreign Service Act 1980 (22 U.S.C. § 4081), as amended, authorizes the Secretary to pay the transportation expenses of members of the Service and their families, including certain costs or expenses incurred for:

- (1) Transporting the furniture and household and personal effects of a member of the Service (and of his or her family) to successive posts of duty;

grievants shipped the wood in question in this case, the FAM defined “Household Effects” as follows:

Household effects shipments may include furniture and household and personal items for the use of an employee and authorized family members. . . . Boats, aircraft, animals, birds, pets and plants, construction materials, and any items in commercial quantities are not considered household effects and may not be shipped at U.S. Government expense.

See, 6 FAM 161.4 (revised 1997). 6 FAM 116.4 (revised 1999) stated that HHE may not include “construction materials.” In {yr1}, the FAM did not include a definition of construction materials. Thus, grievants did not have the benefit of the current definition, enacted in 2008, that specifically excludes wood flooring from HHE.¹²

The FAM has always included a provision that “employees are responsible for any . . . costs which are not authorized by laws and regulations governing the shipment of effects.” See, 14 FAM 612.3 (former 6 FAM 162.3). Thus, grievants were on notice that if they shipped unauthorized items in their HHE, they would be responsible for payment of all costs associated with the transportation of such items.

In FSGB Case No. 2009-041, this Board held that the benefit of having the U.S. government pay for the transportation of Foreign Service officers’ household items is subject to certain restrictions, including the fact that the government controls the pack out of the property

(2) Packing and unpacking, transporting to and from a place of storage, and storing the furniture and household effects of a member of the Service (and of his or her family).

¹² In October 2008, 14 FAM 511.3 was revised to include a definition of construction materials as: Items of a nature and in volumes that would normally be used to construct or renovate a portion of a dwelling, or to construct a product exceeding the size of an ordinary item of furniture for personal use. Examples of construction materials include: wooden planks, boards, ceiling tiles, floor tiles or flooring, roofing materials, windows or doors or framing thereof, masonry, bricks, blocks, cement, sand, paneling, drywall boards, or hardware (e.g., nails) in volumes greater than would normally be used in an ordinary household workshop. Those materials that are part of artwork or crafts in total weight of less than 200 pounds may be regarded as household effects as determined by inspection as required. Construction materials are not authorized for transport or storage as part of an employee’s household effects (HHE) shipment. (See 14 FAM 611.5.) Employees or GSOs who are in doubt whether items qualify as HHE should contact the Office of Logistics Management (A/LM) in advance of making the shipment.

and what vendors pack, ship, truck and store the property. 14 FAM 614. In addition, the government sets a total weight limit on how much property can be shipped at its expense. 14 FAM 611.6 and 14 FAM 613.1(a). The government also restricts what items it will transport on behalf of its employees. These restrictions exclude construction materials and commercial quantities of any item. 6 FAM 116.4, 161.4.

We held in 2009-041:

Construction materials are those items, such as wood, cement, bricks, stones, flooring, wallboard, doors and windows, etc., that are “essential” to the erection of a structure or building. We find that 44 boxes of marble tiles fit this definition of construction materials. That is, the tiles could be used to construct a floor or a part of a structure . . . that [is an] essential element in the erection of a structure or building. Thus, even a general dictionary definition of construction materials should have put grievant on notice that the quantity of marble tiles that he purchased was of a nature and in volume to be considered construction materials excludable from HHE

In the instant case, we come to the same conclusion, i.e., that over three net tons of wood flooring, doors and doorframes, including nine interior doors, one garage door, one exterior door and numerous pallets of both floor boards and parquet floor tiles, are construction materials that are excludable from HHE.

In the forfeiture case involving this same wood, Judge Gerald Bruce Lee reached a similar result after an exhaustive analysis. Although it is true that Judge Lee was not required to determine whether the wood in this instance was construction material under 14 FAM 611.5, he was presented with the question whether the wood was an endangered species for which there was no Certificate of Origin and that was not part of HHE.¹³ If, the wood items were properly considered part of grievants’ HHE, it would have been exempt from forfeiture.

¹³ The regulation at issue in the forfeiture case was 50 CFR § 23.15 (2007) that read in part:
(e) Household effects. You do not need a CITES [Convention on International Trade in Endangered Species of Wild Fauna and Flora] document to import, export or re-export any legally acquired specimen of

After reviewing many of the same arguments made by grievants here, Judge Lee concluded:

Claimants advocate a liberal construction of household effects that would permit people returning to the United States from abroad to import multiple tons of an endangered species without regulation, to enjoy the special treatment afforded household effects. . . . [S]uch an interpretation would undermine the objectives of the statute. The purpose of the statute is conservation. It is easy to see how the drafters created an exemption for household effects based presumably on the assumption that eligible items would be sufficiently insignificant to contribute to the depletion of the resources sought to be protected. However, were each individual returning to the United States permitted to bring several tons of an endangered or threatened species with them completely free of government oversight, regulation, or tracking, it is obvious that such a broad interpretation could easily lead to the depletion of these resources that the statute was explicitly designed to prevent.

* * *

Under no conceivable or appropriate definition could enough hardwood flooring to cover a single-family home be considered reasonably necessary or appropriate for any Government employee returning from a tour of duty abroad. . . . [A]n ordinary interpretation would be that the statute was designed to allow people returning home from abroad to bring back the items that comprised their home while living abroad, so as to transfer their household from one place to another. Such items might include pots, pans, dishes, linens, sofas, chairs, beds, dressers small items of furniture like coffee and end tables, and artwork to name a few. The Court cannot fathom that Claimants would have considered the installed parquet flooring in their domicile in Panama so essential to their household that they would have contemplated tearing out all of the flooring and bringing it back with them[. A]nd similarly, the Court holds that under no reasonable, plain, or ordinary interpretation of the term household effects does several tons of *uninstalled* hardwood flooring qualify as a household effect.

See, *United States of America v. 1866.75 Board Feet and 11 Doors and Casings, More or Less of Dipteryx Panamensis Imported from Nicaragua*, Case No. 1:07cv 1100 (November 24, 2008) at pp. 17-19. (Emphasis in original).¹⁴

a CITES species that is part of a shipment of your household effects when moving your residence to or from the United States, if all of the following conditions [not relevant here] are met[.]

¹⁴ The forfeiture decision was affirmed on appeal. See, 2009 U.S. App LEXIS 20939 (September 22, 2009).

The State Department Exceptions Committee has ruled similarly in two different cases that 5500 pounds of ceramic tiles and 2900 pounds of teakwood were construction materials and not household effects.¹⁵ In one ruling, the Committee stated on July 10, 2003:

The Committee on Exceptions . . . has determined that a shipment of 5,500 lbs of ceramic tiles is a quantity that exceeds the limits of what can be considered as household and personal items and would directly contradict 6 FAM 161.4 and the Department's current policy and definition of HHE. *Id.*

Although certainly not controlling on the question presented, we find the rulings of the Exceptions Committee to be instructive.¹⁶

C. Grievants Do Not Prove That They Were Authorized To Ship The Wood As HHE

Grievants claim that they relied on post management specifically authorizing them to ship the wood products as part of their HHE. In support of this claim, they cite an email, dated January 18, {yr2}, from the management counselor at post, Paula Bravo, to Ann Gibson, Chief of Transportation Operations Branch for Transportation and Travel Management. Ms. Bravo wrote:

Regarding the {grievants}' HHE shipment, {grievant} approached me in July or August {yr1} before packing out to ask about including parquet floor tiles and wood doors/frames to use in their residence. I indicated that as long as they had the weight allowance and it was for their personal residence, I did not see any problem with this provided the wood had been properly treated to comply with U.S. regulations. At the time, {grievant} indicated this was the case as they had the weight allowance and they were planning to ship finished products. *We did not talk about quantities.*

* * *

Post management allowed for these materials to be shipped as these were regarded as finished products, which could be used as furnishings in privately-owned homes. Post believes the aforementioned are neither construction

¹⁵ See Attachment 5 of A: Response. Grievants claim that the second of these cases was settled and has no precedential value.

¹⁶ For the reasons stated in 2009-041, we distinguish the case relied upon by grievants in *In re Ira C. A. Peet*, GSBCA 15294-RELO (July 26, 2000). In the *Peet* case, the Board of Contract Appeals did not address the question, what is properly includable in an employee's HHE? Instead, the Board decided only whether an IRS employee was obliged to pay for the excessive weight of more than 9000 pounds of marble floor tiles. The issue whether the tiles were properly HHE was neither raised nor decided.

materials nor items in commercial quantities which according [to] the 14 FAM 611.5 are the ones that are not considered household effects.

(Emphasis added.) But, in an earlier email dated December 12, {yr1}, this same management counselor wrote:

When {grievant} was planning her pack out she asked me if she could ship some wood and/or wood-related items. . . to be used in the house she was planning to build. I told her I didn't think it would be a problem provided the wood was properly treated, but *thinking it would be some small amount. Never did she mention the large amount that she was shipping.*

(Emphasis added.)

Grievants also claim that they had permission from the Ambassador at post to ship their wood items as HHE. However, the ROP does not include any contemporaneous communications from the Ambassador at or near the time the wood was shipped; only emails from him after the wood was held for inspection. For example, in October {yr2}, the Ambassador wrote to the USDA, “. . . Doesn't CITES [Convention on International Trade in Endangered Species of Wild Fauna and Flora] specifically exempt household effects from certificate of origin requirements?? The shipment in question was the household effects of one of our employees.” (Emphasis in original.)

We note that {grievant} admitted in an interview with the Office of the Inspector General (OIG) that he never disclosed to the management counselor or the Ambassador what quantity of wood was to be shipped. The draft of the OIG interview states:

During the research of the best cost effective way to ship the purchased wood, the {grievants} reviewed their travel orders to obtain a cost if the wood was shipped by the government. They did not directly ask any Embassy employee or DoS official what the cost would be to ship the large amount of wood they had purchased and they did not tell anyone that they had already purchased wood flooring and doors. Additionally, *they never told any Embassy officials how much wood they intended to ship within their HHE. {grievant} did not discuss their*

*HHE shipment directly with the Ambassador or receive his permission to ship the wood purchased in their HHE.*¹⁷

(Emphasis added.)

Ann Gibson, Chief of Transportation Operations Branch for Transportation and Travel

Management stated that her office

has long interpreted the term [HHE] to exclude, among other things, items of a nature and in volumes that would normally be used to construct or renovate a portion of a dwelling. Examples of construction materials would typically include wooden planks, boards, ceiling tiles, floor tiles or flooring, roofing materials, windows or doors or framing thereof, masonry, bricks, blocks, cement, sand, paneling, and drywall boards.

Under 14 FAM 611.6a, Ms. Gibson's office is one of two authorities (including HR/EX) in the Department responsible for what may and may not be transported as HHE. 14 FAM 611.6 states:

a. The Director, Transportation and Travel Management Division (A/LM/OPS/TTM), and/or HR/EX as the Department's authority for appeal are authorized to deny the use of U.S. Government services and facilities in circumstances involving unusual boxing, crating, shipping, storage, and handling costs associated with personal effects and requested by the employee; or in cases when an item cannot be shipped in any normal way, such as when it does not fit in standard approved shipping containers.

* * *

d. The Director, Transportation and Travel Management Division (A/LM/OPS/TTM) for State; Human Resources Manager, USFCS/OIO/OFHR for Commerce; or Chief, FA/AS/TT for USAID, will determine the extent to which these services can be denied. In such cases, employees retain the right to normal legal and administrative appeals.

Ms. Gibson advised that she had been consulted by {grievant} on other matters when {grievant} was the GSO. Thus, it appears that {grievant} was aware of Ms. Gibson's position and expertise.

Grievants present nothing to suggest that the management counselor at post, or even the Ambassador, had authority over the issue of what they could properly transport as HHE.

¹⁷ See Attachment 10 to the A: Response at p.2.

Grievants also do not present any evidence that the approval of either the management counselor or the Ambassador could legally override the authority expressly given in the FAM to Ms. Gibson's office. Moreover, as GSO at post, {grievant} knew, or should have been aware, of the proper authorities for resolving the question whether she and her husband could ship this quantity of wood products as part of their HHE.¹⁸ We therefore conclude that grievants were not entitled to rely on the uninformed advice from the management counselor at post or the Ambassador regarding whether they could properly ship the wood items at issue. As we stated in 2009-041,

[Grievant] was not entitled to rely on this advice [from a GSO staffer]. The very purpose of the FAM is to provide notice to employees of what is and is not permitted as HHE. Grievant cannot evade his responsibility to review applicable HHE regulations by inquiring of someone whose responsibilities do not include determining appropriate HHE. Despite grievant's allegation, the unnamed GSO staff person was not shown to be an agency "expert" on HHE. Grievant, thus, followed the GSO employee's advice at his own peril.

The same is even more true here, given {grievant}'s position at post and her familiarity with Ann Gibson. Grievants are in no position to argue that they should have been able to rely on the advice of a management counselor rather than ask the known expert. In the end, we recognize that the 2006 regulations excluded construction materials from HHE without defining what constitutes construction materials. Nonetheless, we conclude, based on Ms. Gibson's statement of agency policy, the rulings of the Exceptions Committee, the reasoning of the judge in the companion forfeiture case and our own precedents, that the wood flooring, doors and doorframes at issue here were construction materials and, therefore, not includable as HHE.

D. Grievants Do Not Prove That They Detrimentially Relied on Cost Estimates in their Travel Orders

¹⁸ We find unpersuasive {grievant}'s argument that her duties involved primarily procurement, leasing and supervision of the Facilities Maintenance officer, while the Assistant GSO was primarily responsible for Customs and Shipping. The fact remains that {grievant} held the position responsible for knowing whom to consult on the issues of HHE.

Grievants argue that they were misled by the very low estimates of the cost of shipping their HHE contained in their travel orders. However, the record reveals that {grievant}, in particular, repeatedly requested a revision of the travel order estimates based on her research on the cost of shipping the amount of HHE that she and her husband had. She communicated with Ruben Torres, of the Bureau of Human Resources, on August 02, {yr1}, asking:

1. HHE - In looking at the amounts budgeted in the t.a., I noticed that the amount included for HHE shipment is far, far too low. The amount authorized for 7200 lbs (net) of HHE is \$2251.44 (The same figure is used on my husband's travel authorization - . . .) The figure should be roughly \$12,000. . . . The pack-out and exportation of 7200 lbs of HHE . . . is currently costing about \$4500. Then there are shipping costs of about \$3500 and transportation charges from Miami to Washington of approximately another \$4000.

* * *

I calculate that my travel authorization . . . is underfunded by approximately \$10,000.¹⁹

Clearly, grievants were aware of the actual cost to ship their HHE quantity and cannot claim that they detrimentally relied on the cost estimates in their travel authorizations. According to the agency, "These internal budget estimates are the same for all employees and are in no way intended to anticipate the actual cost of an individual employee's HHE."²⁰ The travel orders themselves read: "Costs reflected on these travel orders are standard estimates used internally for budgeting purposes. They are not to be used as a basis for cost-constructive travel and/or any shipments." (THO-091, 093). We find that grievants' experiences as GSO and FMO, their training as accountants, their research and a plain reading of the travel orders themselves put them on sufficient notice that the cost estimates in their orders were not intended to be relied upon should they be required to reimburse the agency for the cost of shipping their HHE. Their own communications on the subject belie any finding of detrimental reliance. In addition, since

¹⁹ See, Attachment 9 to A: Response at p. 3.

²⁰ See, A: Response at p. 18.

grievants claim that they shipped the wood believing it was authorized HHE, there would have been no reason to rely at all on the cost estimate on the travel orders or their research findings about the actual costs.

E. Grievants Do Not Prove That They Were Treated Disparately

We are unpersuaded by grievants' claims that they were treated differently than other employees at the same post. They argue that others at the post included wood products with their HHE without being billed for the transportation. They allege that a tandem couple and one other employee shipped "similar purchases in similar quantities" as part of their HHE. The evidence suggests, however, that the quantity of wood products transported by the tandem couple was substantially smaller than the amount in this instance. Indeed, the tandem couple specifically denied grievants' statement that they shipped over 3600 pounds of wood items as part of their HHE. The couple stated that they shipped "parts of a table, an unassembled hutch and some notched wood flooring." The agency also notes that as GSO at post, {grievant} was responsible for flagging this unauthorized HHE when the tandem couple left post. In addition, the agency asserts, it is currently reviewing its records of this couple's transportation of wood items for possible violations of agency regulations.

As for the other employee who allegedly shipped wood from the same post, the Department argues that he left the agency in 2005 and, therefore, it is difficult to determine the nature, quantity and weight of items that were transported on his behalf.

We find that grievants have not offered sufficient proof that they have been treated disparately from similarly situated employees. They do not establish that anyone shipped a similar quantity or weight of similar items. In particular, they do not establish that the others shipped wood that was subject to forfeiture. Grievants' claim that the agency's attempt to collect

this debt denies them equal protection of the laws under the 14th Amendment of the U.S. Constitution is misplaced.²¹

We lastly conclude that even if other employees succeeded in transporting unauthorized HHE without having to reimburse the agency, this would not excuse grievants' conduct or exempt them from this debt. The agency has no duty to ignore a violation of regulations based on others having escaped detection.

F. Grievants Do Not Prove Retaliation

Grievants mention, almost in passing, that they believe that the debt collection in this case is motivated by a desire to retaliate against {grievant} for having filed suit against the agency approximately ten years ago.²² They assert that {grievant} filed a disability discrimination claim, a Privacy Act claim and a grievance with the agency in 2003 and 2004 and that the current effort to collect this debt is a continuing "vendetta" against her. Grievants say no more than "retaliation against employees is illegal" and they prove nothing. They do not assert who it is in the agency with the "vendetta" or whether the individuals who ultimately calculated and reviewed this debt were even aware of {grievant}'s earlier claims.²³ Essentially, this claim fails because it is no more than a bare allegation unsupported by sufficient evidence.²⁴

²¹ The Fourteenth Amendment states: "No *state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. It clearly does not apply to actions by the Department of State." (Emphasis added.)

²² In his January 9, 2009 submission to DAS Millette during the administrative review of the debt, {grievant} claims on p. 13 (THO-249) that he and his wife have been subjected to a two-year "vendetta" because {grievant} filed a disability discrimination claim and a "Privacy Act Violation" "seven years ago."

²³ Grievants claim that Ms. June Johnson, Chief of the Accounts Receivable Division of GFS intentionally overstated the amount of the debt when she first issued the bill for \$21,000. {Grievant} claimed in her submission in support of her request for an administrative review (THO-316) that "[T]he only credible explanation for the attempt on the part of Ms. Johnston to 'overcollect' from us can be summarized in a single word: **retaliation**. I will not burden you, Mr. Millette with details . . ." It appears that whatever motivation Ms. Johnston had/has toward grievants has been overtaken by decisions by Mr. Millette and the HR Grievance staff. Grievants do not allege that Millette or any of the grievance staff members has a "vendetta" against them, or was in any way influenced by Ms. Johnston. In the end, the original bill from Ms. Johnston has been revised downward more than once. Thus, the initial bill and Ms. Johnston's motivation seem to be irrelevant. (Emphasis in original).

G. The Debt Calculation Is Proper

Grievants argue that the agency erred in charging them based on gross weight of the wood items, rather than net weight, and that they should have been charged based on volume, rather than weight for the shipping portion of the transportation. They claim that they should not be obliged to pay for the services of contractors with whom they had no agency relationship. They also complain that the cost of shipping the wood would have been lower if the Department had shipped it directly to Baltimore (near where they were going), rather than to Miami, Florida. They challenge the use of a U.S. flag vessel, suggesting that this may have increased the cost. Grievants also complain that they are being charged for shipping their HHE in two ocean liner containers, when it allegedly would have fit into one. They then challenge the cost of trucking the wood to Baltimore from Miami, asserting that a “minimum charge” was applied twice to their wood shipments. They lastly argue that they should not be charged for the storage of the wood before it was seized by USDA because the Department was not their agent.

The Department responds to each of these claims in detail. Based upon our review of the responses, as well as the numerous documents provided in the ROP, we conclude that all of the charges for each transportation carrier were properly calculated. Indeed, in several instances, errors were made in grievants’ favor and they were given the benefit of every lower or better formula for calculating the charges.

²⁴ Attached to his submission in support of his request for an administrative review filed by {grievant} to DAS Millette (THO-283) there is an “expert witness report” prepared by {grievant} psychiatrist, Brian Crowley, M.D. In the report, dated October 30, 2004, Dr. Crowley recited a history that included the following: In June 2001, {grievant} filed a complaint about hostile treatment she allegedly received from the Chief Financial Officer. Then, on September 25, 2001, two weeks after the September 11 attacks, {grievant} suffered a subarachnoid brain hemorrhage. Notwithstanding her neurologist’s advice to avoid additional stress, the Department investigated whether {grievant} was having an affair with “the boss.” {Grievant} was cleared of all charges. She was, however, removed from her position when she had the brain hemorrhage and had difficulties securing a financial management position in the Department.

{Grievant} claimed that she was the victim of discrimination by the Bureau of European Affairs when it denied her application for an assignment in Frankfurt. {Grievant} claimed that she has suffered “severe anxiety attacks” in 2002. {Grievant} was serving in {post} at the time the expert report was drafted.

In general, besides the weight of the wood, it appears that the principal reason for many of the costs in this case was the fact that the wood was unusual in size and would not fit into standard crates, or lift vans. In order to pack the wood items, special lift vans had to be built which were significantly larger than standard size.²⁵ Thus, the cost of packing the wood was increased by the cost of building the special sized crates and the costs of shipping and trucking the wood were also increased.

On the question of gross weight vs. net weight, the agency agreed that it should have charged grievants based on the net weight of the wood. It therefore, recalculated the debt due using the proper weight allowances. Both parties agree that the net weight of the wood was determined by the storage company, JK Storage, shortly after it discovered the wood in grievants' HHE. Therefore, instead of being charged on the basis of over 10,000 gross pounds, the debt was recalculated based on approximately 6645 net pounds.²⁶

To the extent that grievants argue that they should not be required to pay the debt because they had no agency relationship with the transportation vendors, we note that there is no such requirement. The purpose of 14 FAM 612.3 is to put Foreign Service employees on notice that if they are found to have shipped items that are not authorized, they are responsible for reimbursing the costs associated with moving those items. A requirement of an agency relationship between the employee and each vendor would make the HHE transportation system wholly unworkable and 14 FAM 612.3 unenforceable.

²⁵ Under 14 FAM 614.9, a standard lift van, should not exceed eight feet in length, six feet 10 inches in height, and six feet in width. [96"x82"x72"]. These measurements are necessary for proper and safe handling of lift vans at piers and warehouses. The limitations ensure that lift vans fit into steamship containers wherever this service is provided by the ocean carrier.

The lengths of grievants' seven lift vans containing the wood were 138", 127(3 crates)", 111", 107" and 105". See, Agency Response to Order: Motion to Compel at p. THO 613-14.

²⁶ See, reconsideration letter from DAS Millette to grievants, dated October 4, 2010 in which Millette agrees to recalculate the costs of packing the wood based on net weight. Attachment 4 to A: Response.

When the containers were shipped by Crowley Liner Services, the odd-sized containers did not fit into one container. Grievants argue that the total volume of their containers would have fit into one twenty foot container, but, again, because their crates were not standard sizes, the shipping company could not fit them into one container. Thus, grievants were charged the cost of two containers. In addition, although the agency was charged by volume by the shipper, it seeks reimbursement based on net weight. This is standard agency practice and was explained in an online message to employees on the Department's website. The Office of Logistics Management created a message concerning how HHE is calculated, called: "The Sounding Board/PCS Weight Allowance." In a message, dated August 28, 2009, Steven Hartman, Director of Logistics Operations/Office of Logistics Management, addressed a question frequently asked by employees regarding why the Department bills employees for the weight of their HHE even when a shipper bills by volume. He explained:

There is a recurring suggestion that transfer entitlements for personal effects should be based on cube instead of weight, or that the traveler should be provided with a standard 20' sea container and be allowed to ship anything that fits in it.

Why the Department uses Weight instead of Volume

- The irregular shape of HHE creates a lot of dead space (cube) in lift vans and in sea containers that cannot be used, and under the current system, the employee is not penalized by that reality because his/her entitlement is based on net weight and not cube.
- The Department has, through an evolutionary process, found a balance and flexibility between requirements and entitlements that can be applied to posts in every corner of the globe. Using the current method, an HHE shipment can be handled by warehouses, trucks, ships, planes, or any combination of those modes.
- Net weight is the standard measurement for pricing services by the moving and storage industry and for managing government entitlements.
- Commercial companies charge by hundred-weight for both ground transportation and storage of HHE. They also charge by hundred-weight for HHE trucked to the port or shipped door-to-door. It is true that ocean carriers usually charge by cube or unit container, but that is only for part of the overall services you require.

- Weight is determined by a calibrated scale, which produces a certified weight ticket and protects the employee from exaggerated charges. . .
- The Department has partnered with GSA and other government agencies to ensure that technical requirements and rate solicitations are consistent with best commercial practices (including the use of weights for cost determinations).
- Basing the entitlement on cube would create an opportunity for a packing company to use larger cartons than necessary to make more money on the packing charges. Exaggerated sizes would increase the cost of the shipment throughout the transportation and delivery process.²⁷

The agency stated in the reconsideration letter from DAS Millette that it used a formula to convert the government bill of lading it received from the shipping company from volume to weight, separating the authorized HHE from the wood by weight. The calculation of the ocean portion of the bill was again reduced using this formula.²⁸

The Department explained that it shipped the HHE through the port of Miami, rather than directly to Baltimore, as part of its contract obligation to secure the best rates for all of its shipments. Grievants do not argue that this method of arranging and contracting for ocean shipping of HHE violated any statute, regulation or policy. Their suggestions about alternative routes and methods of shipping their goods do not present a grievable claim.

Grievants also cannot demonstrate that the agency should have shipped their HHE on a non-U.S. flag vessel. Under 14 FAM 611.2, the government must transport employees' household effects on U.S. flag vessels. It states:

- a. Section 901 of the Foreign Service Act 1980 (22 U.S.C. 4081), as amended, authorizes the Secretary to pay the transportation expenses of members of the Service and their families, including certain costs or expenses incurred for:
 - (1) Transporting the furniture and household and personal effects of a member of the Service (and of his or her family) to successive posts of duty; . . .
- d. Use of U.S.-flag vessels for transporting household goods and/or personal effects of U.S. Government employees:
 - (1) 46 U.S.C. 1241(a) - Section 901(a) of the Merchant Marine Act of

²⁷ See Attachment 3 to A: Response at p. 15 of 23;
http://soundingboard.state.gov/2009/07/pcs_weight_allowance.php.

²⁸ See Agency Response to Order: Motion To Compel at pp. 10-11 and Attachment 4 to A: Response.

1936 - Transportation in American Vessels of Government Personnel and Certain Cargoes²⁹

Thus, whether or not use of a U.S. flag vessel resulted in an increased cost to grievants, which they do not prove, they do not demonstrate that there was a necessity to use a ship under a foreign flag.

Grievants claim that they are being charged double for trucking the wood. They claim that the trucking company, ABF Trucking, charged a “capacity minimum charge” for 20,000 pounds of HHE twice, but the combined total gross weight of their total HHE was 23,879 pounds. A review of the documents, reveals, that the non-standard lift vans would not fit into a single freight container. The trucking company loaded 8 of 9 lift vans belonging to {grievant} and 7 of {grievant}'s lift vans onto the first 28 foot double trailer at a discounted rate. The remaining lift vans were loaded onto a second 28 foot double trailer. By consolidating the two shipments onto the first truck, grievants received the maximum benefit of the discount available to them. The agency then charged each grievant his and her pro rata share of the total on the consolidated truck.³⁰ Indeed, the agency used a different formula to calculate the cost of trucking the HHE, because the applicable formula used for shipping it would have resulted in an increased cost. Grievants, therefore, benefitted from the agency's method of calculating the trucking costs. In addition, the Department discovered that ABF erred in undercharging {grievant} for a fuel surcharge. The agency did not seek to collect the underpayment from grievants. These adjustments account for the number of reductions in the amount billed.

²⁹ Section 901 of the Merchant Marine Act of 1936 was amended in 1954 at 46 U.S.C. §55302 (a) and provides: In General. - An officer or employee of the United States Government traveling by sea on official business overseas or to or from a territory or possession of the United States shall travel and transport personal effects on a vessel documented under the laws of the United States if such a vessel is available, unless the necessity of the mission requires the use of a foreign vessel.

See also, 14 FAM 611.3.

³⁰ See, Agency Response to Order: Motion to Compel at pp. 4-9.

As the agency argues, the U.S. Government is not required to dictate to its carriers what kind, type, or size of equipment should be used in any instance. “[A]s long as the shipment is within stated limits, and the shipment is transported safely and in a timely manner from the origin to the destination,” no more is required. This Board does not have jurisdiction to review the contracting practices of the Department with its transportation vendors. Moreover, grievants do not demonstrate that the method for calculating the cost of trucking their goods violated a law, rule or regulation. In FSGB Case No. 2011-010 (June 16, 2011), we stated: “The Board has no jurisdiction over matters that deal with management practices, policy concerns or other systemic matters, as opposed to allegations of specific harm to the individual grievant.” See also, FSGB Case No. 1997-094 (May 19, 1998).

Lastly, grievants challenge the storage costs at J.K. Storage in Virginia from October 2006 to September {yr2}. But, the documents again reveal that grievants were only charged for the cost of storing the wood from the time it arrived at J.K. Storage to when it was seized by USDA.³¹ The FAM requires that they pay for all aspects of handling unauthorized HHE. This would therefore include the time the wood was stored while the agency was attempting to determine whether it was authorized or not.

We conclude that each of the costs of transporting the wood products has been carefully calculated and reviewed numerous times. Each calculation appears to have been done consistent with agency policy and practice. None has been shown to be erroneous as of the last calculation. Grievants offer no more than alternative suggestions for how their goods might have been transported for lower costs. Their alternatives, however, fail in some instances to comply with regulations and fail to take into account that the agency must contract in a way to be able to

³¹ See email from Ann Gibson to McElhiney & Anders of the Financial Oversight and Quality Assurance Division, dated June 17, 2009, attached at Tab 13 of A: Response (THO-173).

move the household effects of all of its employees worldwide. Grievants' alternative theories do not prove their grievance claims. Moreover, despite their assertion that the total debt is excessive and in violation of the Eight Amendment of the Constitution,³² we are satisfied that it is reasonable and that grievants owe it.

H. Grievants Are Not Entitled To A Waiver of the Debt

5 U.S.C. § 5584 provides:

- (a) A claim of the United States against a person arising out of . . . transportation or relocation expenses and allowances, to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part by--
 - (1) the authorized official;
 - (2) the head of the agency . . . ; or
 - (3) the Director of the Administrative Office of the United States Courts
- (b) The authorized official or the head of the agency, as the case may be, may not exercise his authority under this section to waive any claim--
 - (1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim.

We do not find procedural error in the agency's exercise of its discretion in deciding that the debt should not be waived. The evidence supports the agency's determination that grievants are at "fault," meaning they "knew or should have known through the exercise of due diligence that an error existed, but failed to take corrective action." 22 CFR § 34.18 (b)(ii). Grievants knew or should have known that the quantity of wood flooring and doors, especially of an endangered species, could not be shipped lawfully among their HHE. A single call to Travel and Transportation Management would have clarified what grievants claim they did not know. Also,

³² Grievants' Eighth Amendment claim is somewhat reckless. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The action at issue here is the Department's effort to collect a debt. The debt is not a fine. It has nothing to do with the forfeiture of the wood. Thus, the Eighth Amendment is irrelevant to this case. Moreover, the fact that the wood was forfeited and grievants have to pay for the unauthorized transportation of it is not cruel or unusual punishment. The forfeiture and debt collection are two separate processes, during which grievants received considerable due process. We note that the Eighth Amendment claim was raised and decided against grievants in the forfeiture case.

both grievants' positions put them on notice of who the HHE experts were. It does not appear that Mr. Millette abused his discretion when he denied the waiver or that collection of this debt is against equity or good conscience.

V. DECISION

1. The Board finds that an internal administrative review of a debt is not an election of remedies that precludes the filing of a grievance. The agency's request to dismiss the grievance as beyond the jurisdiction of the Board is denied.
2. Grievants have not met their burden of proving that they do not owe the debt or that it should be waived or reduced. The grievance is denied in its entirety.