

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB Case No. 2015-047

And

August 31, 2016

Department of State

INTERIM DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Harlan F. Rosacker

Jeanne L. Schulz

Special Assistant

Andrew D. Large

Representative for the Grievant:

Pro se

Representative for the Department:

Akia F. Roane
Attorney Adviser, HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

Held – The agency has proved that grievant violated agency guidelines prohibiting use of Government-owned vehicles for personal purposes. However, it has not proved that a five-day suspension is reasonable in comparison to the penalties imposed in cases in which it similarly found that personal use of a Government-owned vehicle was minimal and the misconduct was minor. The case is remanded to the Department for reconsideration of the penalty.

Summary – The Department of State found that grievant, an untenured Diplomatic Security (DS) agent, had misused a Government Vehicle (GOV) while he was on a temporary detail to another agency. Although grievant had signed an agreement with the Department that he would not use a GOV for personal purposes, he drove it twice on one day to an apartment building to pick up packages on behalf of a friend who had once lived there. In both cases he was wearing his State Department badge, and his sidearm was exposed. The Department proposed that he be suspended for 45 days based on two charges. However, after dismissing the charge of Misuse of Diplomatic Security Media and considering mitigating factors, including grievant's lack of willfulness, which would have required a statutory minimum 30-day suspension, the deciding official reduced the penalty to a five-day suspension for Misuse of a Government Vehicle. The Department asserted that the penalty was reasonable and appropriate. Grievant claimed that he was confused over whether his personal use of the GOV was governed by the Department's guidelines or the more liberal policies of the agency to which he was detailed. He also argued that the five-day suspension was much more severe than the Department's penalties in comparable cases. The Board found that the Department had met its burden of proving that grievant had violated its guidelines on personal use of a GOV but had not shown that the penalty imposed was reasonable and appropriate in comparison with other cases where it found the personal use of a GOV minimal and the misconduct minor. The Board remanded the case to the Department for reconsideration of the penalty and appropriate revisions in the decision letter.

DECISION

I. THE GRIEVANCE

Grievant appeals the Department of State's imposition of a five-day suspension for misuse of a government vehicle in picking up packages for a friend while on official duty. He asserts that the penalty is too harsh in comparison to penalties imposed in similar cases.

Grievant requests, as relief, that the Board:

1. Mitigate the discipline to a letter of reprimand.
2. Use its remedial authority to encourage the Department to develop a policy to deal with isolated situations in which an agent's assignment responsibilities are in conflict with DOS policy.
3. Provide any and all other relief deemed appropriate.

II. BACKGROUND

On February 20, 2014, [REDACTED] (grievant), an untenured Diplomatic Security (DS) agent in the Department of State (Department, DOS), was on a temporary detail to the [REDACTED]

[REDACTED]. His duty began at 5:00 am, and he checked out a State Department GOV (government owned vehicle). At approximately 9:45 am, grievant stopped in his GOV at a residential apartment building to pick up boxes for a friend who had once lived there. When he went to the front desk of the building, he was wearing his government-issued full tactical gear and a DS badge. Since the boxes were not available at the time, he returned in his GOV at approximately 2:50 pm on the same day--after he had completed official duty. He was dressed in regular clothing, but was wearing his State Department badge around his neck, and his sidearm was

exposed. Each visit lasted several minutes and diverted him 3/100ths of a mile from his normal route.

Grievant's conduct was described in a DS Report of Investigation (ROI) dated July 7, 2014. On January 29, 2015, the Department proposed that grievant be suspended for 45 calendar days based on two charges -- Charge 1: Misuse of Diplomatic Security Media (two specifications); and Charge 2: Misuse of a Government Vehicle. After considering grievant's written and oral responses, the deciding official did not sustain Charge 1. Based on the dismissal of Charge 1 and his finding that "there was no personal gain, willful intent, or gross misuse of" grievant's GOV, the deciding official mitigated the penalty to a five-day suspension. On June 29, 2015, [REDACTED] filed an agency-level grievance, which the Department denied it in its entirety on October 6. Grievant appealed the decision to the Foreign Service Grievance Board (Board) on October 20, and submitted a Supplemental on March 21, 2016. The Department responded on May 3. Grievant did not file a rebuttal. The Record of Proceedings (ROP) was closed on May 31, 2016.

III. POSITIONS OF THE PARTIES

A. THE AGENCY

The Department contends the ROI establishes that on February 12, 2014, grievant violated the following DS "Policy for Use of Official Vehicles" in pertinent part. He had signed a copy of this policy on August 26, 2013. It specifies:

In compliance with the Bureau of Diplomatic Security Standard Operating Procedures for the use of official vehicles generally to and from home/work (TFU), all personnel must be aware of the responsibilities and conditions for the use of official vehicles prior to operating them.

1. I must have approval of the supervisor.
2. Use must be related to official business.
3. I must maintain a Vehicle Weekly Report.

4. The Weekly Vehicle Report must be submitted weekly to my Unit Vehicle Coordinator.
5. Under no circumstances will car be used for personal business.
6. All Department and Government regulations must be complied with when using the vehicle, unless expressly exempted by appropriate authority.
7. Any unauthorized use of an official vehicle will result in disciplinary action against the employee.
8. I must be able to show the TFU [To and from home/work] will be to U.S. Government's advantage each time it is so used.

The disciplinary deciding official sustained both specifications in Charge 2: Misuse of a Government Vehicle.

Specification 1: The surveillance camera of the residential building at 400 Massachusetts Avenue, Washington, DC, shows at 9:43 am a 2011 Jeep Grand Cherokee, Tag Number [REDACTED] parked in the driveway. . . . You had no official business at this location and used your GOV for personal business.

Specification 2: The surveillance camera of the residential building at 400 Massachusetts Avenue, Washington, DC, shows at 2:28 pm what appears to be a 2011 Jeep Grand Cherokee, parked in the driveway. You had no official business at this location and you used your GOV for personal business.

The Department contends that since grievant has admitted the misconduct, the sole issue on appeal is the appropriateness of his penalty. It notes that the Board has recognized the Department's primary responsibility for disciplining its workforce and that the determination of penalties is largely at its discretion, unless the severity of the discipline imposed appears totally unwarranted. *See* FSGB Case No. 2000-037 (November 3, 2000); FSGB Case No. 2002-029 (December 2, 2002). The Department argues that the Board should sustain the penalty, since it was properly considered, is within the zone of reasonableness, and is not unduly punitive. It contends that in mitigating the proposed 45-day suspension to five days, the deciding official gave full consideration to a wide-range of mitigating and aggravating factors. Thus, it asserts, no further mitigation is warranted. While noting that grievant's misuse of the GOV was minor, was not willful and did not constitute statutory misuse, the deciding official found that the

misconduct did violate the Department's GOV policy and could not be disregarded. The Department contends that other disciplinary decisions grievant cited are not proper case comparators, and that a 5-day suspension without pay is not unduly punitive. Rather, the penalty is appropriate given his misconduct. It asserts that the circumstances in AGS 2011-0417, which grievant has cited, are not comparable to those in his case.

While grievant argues that the [REDACTED] GOV policy would have allowed the use he made of the vehicle assigned to him, the Department points out that he was driving a Department-issued GOV and had agreed explicitly in writing not to use it for personal business. Whether the [REDACTED] GOV policy would have allowed him to use it in the cited instances is immaterial.

B. THE GRIEVANT

Grievant claims that he was confused about whether his use of the GOV was governed by Department policies or those of the [REDACTED], the agency to which he was on detail. He points out that the GOV-use policies of the [REDACTED] are more lenient than those of the Department, reflecting the dangerous environment in which they operate. He contends that strict adherence to the Department's rulings would force him "to do things that would be unsafe from an officer safety perspective, and unrealistic from a task force performance perspective. . . . The reality is that all other federal law enforcement agencies allow for minor deviations with GOV, because it is vital to law enforcement operations." He notes, for example, that a [REDACTED] employee "who is assigned a GOV for official purposes may go no more than 5 miles beyond the direct route of travel between home and work and for no more than 1 hour, to conduct personal business." Grievant contends that the Department has failed to take these policy differences into account as a mitigating factor in considering his penalty.

Since the Department has determined that grievant's offense was a minor deviation without willful misuse, grievant asserts that the five-day suspension is too harsh. He notes that Board precedents and FAM regulations recognize that both mitigating and aggravating circumstances must be taken into account in determining whether a proposed penalty is reasonable and fair. (*See* 3 FAM 4374 and FSGB Case No. 2005-042 (February 23, 2006).) Grievant claims that the deciding official's mitigation of the penalty from a 45- day suspension to a five-day suspension rested solely on his decision to overturn all other allegations and that his failure to properly consider the mitigating factors is a grave violation of FAM and Board precedents. Grievant notes that the grievance deciding official discussed the aggravating factors at length but ignored mitigating factors that would have argued for further reduction in the severity of the penalty.

Grievant points to Department Case No. 2011-0417 as one which is most comparable to his own. In that case, the Department similarly found that a Special Agent's misuse of a GOV was non-willful and reduced the penalty to a letter of admonishment. Grievant asserts that a five-day suspension in his own case is not "like punishment for like cases."

IV. DISCUSSION AND FINDINGS

In appeals of disciplinary action, the burden of proof is on the agency to show by a preponderance of evidence that the disciplinary action it took is justified in accordance with Section 905.2 of Volume 22 of the Code of Federal Regulations. After carefully considering the positions of the parties and comparator cases, the Board finds that the Department has proven that grievant violated agency guidelines prohibiting use of government-owned vehicles for personal purposes. However, the Department has not adequately considered whether a five-day suspension is reasonable in comparison to the penalties imposed in cases where it similarly found

that personal use of a government-owned vehicle was minimal and the misconduct minor. The instant case is remanded to the Department for reconsideration of the penalty and appropriate changes in the decision letter. We find first that the Department has shown by a preponderance of evidence that grievant's conduct in picking up packages for a friend – while on official duty, driving a Department-owned GOV – did violate its regulations prohibiting the use of GOVs for personal purposes and the agreement grievant had signed. We are not persuaded by grievant's argument that, since he was on a temporary detail to the [REDACTED] task force, the Department should have considered his conduct and mitigated the penalty in light of the [REDACTED] more permissive regulations on the use of GOVs for personal purposes. We agree with the Department that grievant was subject to the Department's regulations. He was driving a State Department GOV, and he had signed an agreement that clearly prohibited using such a GOV for personal purposes. If grievant was unclear about which policy governed, he could have asked his supervisor, but he did not do so. He cannot benefit now from his failure to inquire.

We find that the Department's conclusions as to grievant's violations were not unduly rigid. It did not discipline him for having used the GOV for personal purposes or for other deviations that would have been inevitable during any DS agent's long day on duty – *e.g.*, using a GOV while stopping for lunch, getting a cup of coffee, or going to the pharmacy. Rather, it disciplined him for using his GOV to pick up packages for a friend – a personal favor that was in no way related to his official duties or to his own incidental personal needs. We do not agree that this personal favor is akin to stopping for lunch. Nor has grievant offered any evidence to support his assertions that in this instance the [REDACTED] more permissive policies on personal use of GOVs would have been “vital to law enforcement operations” or that adherence to the

Department's restrictions on personal use of GOVs would have been "unsafe from an officer safety perspective, and unrealistic from a task force performance perspective."

While the Board finds that the Department has shown persuasively that disciplinary action is warranted, we conclude that it has not met its burden of showing that a five-day suspension is reasonable in comparison to the penalties imposed in cases in which it had similarly found that personal use of a Government-owned vehicle was minimal and the misconduct was minor.

The Department's disciplinary deciding official stated that he had reduced the penalty from 45 days to five days based on dismissing the charge of Misuse of Diplomatic Security Media and taking mitigating factors into account. He did not break down the extent to which his reduction of the penalty stemmed from the dismissed charge as opposed to his conclusion that there had been no personal gain, willful intent or gross misuse of the GOV.

We find that the bases for identifying comparator cases in the instant disciplinary decision are the remaining charge of Misuse of a Government Vehicle and the deciding official's conclusion that while grievant's misconduct did not reflect good judgment, there had been no personal gain, willful intent, or gross misuse of a GOV on his part. The fact that the penalty had already been reduced significantly – i.e., from 45 days to five days—is irrelevant to setting a penalty based on the remaining charge.¹

Grievant has presented the Department's decision in AGS 2011-0417 as most comparable to his own. In that case, a DS agent, while working on a protective detail, had taken a GOV

¹ Once the deciding official determined that grievant did not willfully misuse a Department-owned GOV, the statutorily required minimum penalty of a 30-day suspension for such a willful violation was no longer applicable and thus cannot be considered in determining an appropriate penalty. Similarly, once the first charge of misusing Diplomatic Security media was dismissed, whatever penalty was proposed for those alleged violations became irrelevant.

home for the evening from work. Grievant claims that the agent who took the GOV home had directly disobeyed a supervisor's order and the advice of his peers, and he notes that there were other issues in the case of that agent that had led to an examination of his fitness for duty. Yet the agent only received a letter of admonishment. In his own case, by contrast, grievant argues that he used the GOV only to pull 15 meters off the street to accomplish an errand, and this deviation would have been allowed under the more liberal [REDACTED] policy. He had an otherwise exemplary performance record, and the conflicts in GOV-use policy should have served as a mitigating factor. Yet the Department decided to suspend him for five days.

The Department avers that grievant's case is distinguishable from AGS 2011-0417, in which an employee had driven a GOV to his home without clear permission but on only one occasion. Grievant here had used a GOV twice for errands unrelated to his duties. The officer in AGS 2011-0417 had not used the GOV for an impermissible personal errand but to drive home because he did not have access to his personal vehicle. The deciding official in that case also found as a mitigating factor that the employee's supervisor may not have answered precisely when he was asked about using the GOV to go home.

We find that grievant was clearly aware of the DOS restrictions, but we note that he apparently did not seek guidance on whether he was under different rules while on detail to the [REDACTED] task force. There is nothing in the record to show that he considered these differences in policy before deciding to pick up the friend's boxes as a favor to her. We conclude that some discipline is justified under the circumstances.

However, we find that the Department has not presented persuasive evidence that the differences between grievant's case and AGS 2011-0417 warrant the imposition of the much more severe penalty of a five-day suspension. Without such an explanation, we cannot

determine whether the Department acted reasonably or whether it has complied with the principle of imposing like penalties for similar offenses.

V. DECISION

In light of our findings, the Board remands this case to the Department for reconsideration of the penalty to be imposed and an explanation of its reasons for reaching such determination. To the extent that the Department revises its previous disciplinary decision, such changes are to be reflected in the decision letter. We further order that the Department notify the Board within 30 days of this interim decision of the actions it has taken. Grievant will have 15 days from receipt of the Department's Decision on remand to file a responsive pleading if he wishes to do so, and the Department may reply within 15 days thereafter.

For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



Harlan F. Rosacker
Member



Jeanne L. Schulz
Member