The Douglas Factors

The Merit Systems Protection Board in its landmark decision, Douglas vs. Veterans Administration, 5 MSPR 280, established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. These twelve factors are commonly referred to as "Douglas Factors:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee's past disciplinary record;

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

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

(10) the potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

A supervisor is responsible for ensuring that a disciplinary penalty is fair and reasonable. If a penalty is disproportionate to the alleged violation or is unreasonable, it is subject to being reduced or reversed even if the charges would otherwise be sustained. These factors provide valuable assistance to supervisors in making a penalty determination.

Some of these twelve factors may not be pertinent in a particular case. Some factors may weigh in the employee's favor while other factors may constitute aggravating circumstances that support

a harsher penalty. However, it is critical to balance the relevant factors in each individual case and chose a reasonable penalty.

There is no requirement in law, regulation or in "Douglas" that written agency decisions or proposals contain specific, detailed information demonstrating that an agency has considered all of the pertinent mitigating factors in a given case. However, a penalty determination will be entitled to greater deference if the proposal and especially the decision letter contains an evaluation of any mitigating circumstances. It is always better for the Agency to do its own mitigating analysis than to leave it to a third party. In regards to any aggravating factors which may be relied upon to impose an enhanced penalty, these aggravating factors should be included in the proposal notice. This is especially true for prior disciplinary actions. It is only fair to allow the employee to respond to these aggravating factors before a decision is made. Consideration of aggravating factors not communicated to the employee is dangerous and may result in a procedural error and reversal of the disciplinary action.

Factor 1 – Seriousness of the Offense

The reason why this factor is first is simple - it is the most important. In determining the appropriate penalty, a supervisor should consider primarily the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. This Douglas Factor provides some guidance in determining the seriousness of an offense.

In evaluating the seriousness of the misconduct, an offense is more severe if it was intentional rather than inadvertent and if it was frequently repeated rather than being an isolated incident. Misconduct is also considered more severe if it is done maliciously or for personal gain.

The agency's table of penalties provides some distinction regarding the severity of the misconduct. For example, sleeping on duty is a serious offense. However, it is considered more serious as provided in our table of penalties where safety of personnel or property is endangered. Moreover, the seriousness of the offense is increased if the employee is involved in what might be described as "pre-meditated" sleeping on duty. What does that mean? If you discover an employee sleeping away from his/her duty station with the lights off, pillow in hand and blanket over body, this intentional action is much more egregious than an employee who just cannot keep his/her eyes open and falls asleep while on position.

There are other examples in the table of penalties that provide guidance in determining the seriousness of misconduct. Misconduct of a sexual nature is a serious offense. However, the severity is increased when the misconduct involves physical touching or promising benefits in exchange for sexual favors in comparison to telling a sexual joke or making a sexual remark inappropriate to the workplace. Sexual jokes are more serious if made directly to an employee rather than if overheard by an employee. The misconduct is even more grievous if the jokes were repeated after the offender was told that the behavior was offensive.

The relationship of the misconduct to the employee's job duties is another important consideration in determining the seriousness of an offense. Falsification of government documents is a serious offense because it relates to an employee's reliability, veracity, trustworthiness, and ethical conduct. The misconduct is more serious if it relates "to the heart" of an employee's duties and responsibilities. For example, if a Time and Attendance (T&A) Clerk was falsifying his/her time and attendance records and it resulted in more pay or less leave used, this misconduct is very serious. The fact that accurate time and attendance records are a critical

element of the employee's position, coupled with the fact that the misconduct resulted in personal gain, increases the gravity of this offense. The misconduct would be considered even more serious if the falsification was not an isolated incident, but reflected falsification over several pay periods.

The supervisor deciding the appropriate penalty is in the best position to determine the seriousness of the offense and how the misconduct relates to the employees duties, position, and responsibilities. Remember, an offense is more serious if it is intentional, frequently repeated, or committed maliciously, or for personal gain.

Factor 2 – The Employee's Position

This factor recognizes a relationship between the employee's position and the misconduct. Factors considered are the employee's job level and the type of employment which may include a supervisory or fiduciary role, contacts with the public, and prominence of the position.

It is a well-recognized principle that a supervisor occupies a position of trust and responsibility and is held to a higher standard of conduct than non-supervisory employees. The Agency's "Standards of Conduct," ER-4.1 outlines the responsibility for a supervisor to provide positive leadership and serve as a role model for their subordinates by demonstrating a commitment and sense of responsibility to their job and loyalty to the organization. Simply put, the Federal Aviation Administration (FAA) expects a supervisor to serve as a role model and not violate workplace rules. When misconduct occurs by a supervisor it is considered more serious. The Agency's table of penalties recognizes this severity in establishing ranges of penalties for supervisors and non-supervisors for offenses under the Discrimination/EEO/Misconduct of a Sexual Nature category. An employee's supervisory status must be considered in determining the penalty for other offenses as well.

Higher ethical standards are not limited to supervisory positions. Employees who hold law enforcement or security positions are also held to higher ethical standards. Employees of the Internal Revenue Service are held to a higher standard of compliance with Federal tax laws. Employees who exercise discretion in regulating, contracting or otherwise conducting government business with private companies are subject to stricter limits in the areas of gifts, gratuities, and conflicting financial interests regarding the companies with which they conduct official business. And if a member of Congress engages in misconduct…uh, bad example, let's not go there.

An employee's contacts with the public as well as the prominence of his/her position are additional considerations which should be evaluated in relationship with the misconduct. And we must not forget the important element of safety in many of our positions and any misconduct must be weighed against this critical agency mission.

To summarize, the relationship between the employee's misconduct and the employee's position is an important consideration which must be analyzed as part of the penalty determination.

Factor 3 - Prior Discipline

The Douglas criteria are sometimes referred to generally as mitigating factors. The consideration of past discipline, however, is an aggravating factor, i.e. mitigation in reverse.

In order to use prior discipline as a basis to enhance a current penalty, three criteria must be met. First, the employee must have been informed of the action in writing; second, the employee must have been given an opportunity to dispute the action by having it reviewed, on the merits, by an authority different from the one that took the action; and third, the action must be a matter of record. In deciding to use prior discipline, individuals must be aware of the Gregory decision, which held that prior discipline that is the subject of an ongoing appeal may not be used to support an enhanced penalty.

Once you've determined that a prior disciplinary action meets the requirements to be available for use, you will need to decide how much weight to give it. There are two major factors to consider here, temporal proximity (i.e. how recently did the prior discipline occur?) and the similarity of the offense. If the employee was disciplined 6 months ago for essentially the same misconduct as the current offense, a good argument can be made that an extra firm penalty is needed this time to achieve the desired change in behavior. On the other hand, if it's been many years since the prior discipline, it is much more difficult to make a convincing case for an enhanced penalty. We also must be mindful of labor agreements that might contain time limits for considering prior discipline.

The same sort of assessment is needed concerning similarity of the offense. Persistent repetition of similar misconduct is more directly relevant to supporting a more severe disciplinary action. The FAA's Table of Penalties recognizes the use of dissimilar offenses in prior discipline in determining the penalty. The first time an employee is formally disciplined is considered a first offense on the Table of Penalties. Continued misconduct involving subsequent violations of rules and regulations may be considered under the second and third offense columns, even if the misconduct is different from the previous offense(s). However, good judgment must be used to weigh prior discipline when choosing an appropriate penalty to correct the situation.

If prior discipline is going to be used as an aggravating factor, it must be cited in the proposed notice. Non-disciplinary sanctions such as counseling and non-disciplinary instructional material may be relied upon for imposing an enhance penalty and need to be cited as well in the proposed notice.

Factor 4: Length of Service and Prior Work Record

This factor is especially likely to prompt mitigation. An employee's length of service and prior work record must be evaluated and be balanced against the seriousness of the offense. An employee with many years of exemplary service and numerous commendations may deserve to have his/her penalty mitigated. However, the seriousness of the offense and an evaluation of other Douglas Factors may outweigh an employee's positive work record. It is interesting to note that third parties have rejected the argument that long service supports a stiff penalty since the employee arguable should have "known better." So, if someone is thinking about that rationale – forget it!

An interesting dilemma sometimes occurs when an agency justifies a penalty in part due to what it believes is an employee's past poor performance, but the employee's appraisals demonstrate good or excellent performance. In this case, third parties favor relying upon official appraisals and agency contentions to the contrary are provided little weight in determining the reasonableness of the penalty. This is just one more example of the importance of documentation and communication of performance to employees.

Factor 5 – Erosion of Supervisory Confidence

The analysis of this factor involves much more than a supervisor's statement that he/she has lost confidence in the employee. specific evidence/testimony as to why an employee can no longer be trusted is critical. Conclusionary and vague statements do not hold much weight with third parties. It is critical for the agency to articulate a relationship between the misconduct and the employee's position and responsibilities. We need to specifically state why there is an erosion of supervisory confidence. A supervisor cannot just say it, he/she has to prove it.

There is a clear inter-relationship between this factor and Factor 2 – Employee's Position. For example, misconduct by a supervisor will undermine his/her ability to require subordinates to adhere to agency policies and regulations. A Time and Attendance (T&A) clerk falsifying T&A's or the theft of property by an employee entrusted with custody and control of the property, are just two examples in which the misconduct would severely erode supervisory confidence.

Factor 6 – Disparate Treatment - Consistency of Penalty with that Imposed on Other Employees.

This factor is one of the more technically difficult to apply. One of the basic tenets of the administration of "just cause" is the even-handed application of discipline. However, the principle of "like penalties for like offenses" does not require perfect consistency. On the surface, many incidents of misconduct may seem to be similar. However, a thorough investigation and evaluation may lead to a determination that the misconduct was not substantially similar. And even if the circumstances surrounding the misconduct incident may be substantially similar, the penalty imposed may be different based upon an independent evaluation of the other Douglas Factors.

Third parties look at these consistency factors differently. The Merit System Protection Board (MSPB) views "similarly situated" employees as employees working in the same unit and for the same supervisor. Arbitrators tend to look at the "equitable" nature of labor agreements and focus on the importance of treating employees the same.

Remember that consistency of penalty with that imposed on other employees is only one Douglas Factor to apply. However, if the penalty is different for a similar incident of misconduct, specific reasons for the difference in penalty must be articulated.

Factor 7 – Consistency with Agency Penalty Guide

An important aspect of applying this factor is determining which penalty guide applies to the particular employee being disciplined. The new Human Resource Operating Instructions (HROI), Table of Penalties effective August 11, 2000, covers all non-bargaining unit employees and some of the FAA bargaining units. Others continue to be covered by Appendix 1 of FAPM Letter 2635. Coverage is changing as more negotiations are completed so consult your labor relations specialist for assistance in determining which applies to your situation.

The new Table of Penalties is more comprehensive with more described offenses and more specific penalty ranges than the previous guide. If the particular offense at issue is not in the agency penalty guide, you should review the guide for similar, related offenses. Don't force

misconduct into a listed offense unless it accurately fits. Similar offenses can be used to guide penalty selection.

Deviation from the guide is allowed but going beyond or outside the penalty recommended in the table will be closely scrutinized. However, it may be appropriate based upon the facts of a specific case and/or application of other Douglas Factors to impose either a lesser or greater penalty as circumstances dictate. However, remember what they use to say on TV's Hill Street Blues, "Let's be careful out there!"

Factor 8 - Notoriety

Forget the old show business adage "All publicity is good publicity." A high profile agency like the Federal Aviation Administration (FAA) does not need any more media coverage of any employee's misconduct. The notoriety of an offense or its impact on the reputation on the FAA is usually directly related to the seriousness of the misconduct and/or prominence of the employee's position.

This factor is one of the least significant of the Douglas Factors and is usually considered as aggravating. There are certain standards of behavior and conduct expected of FAA employees by our external and internal customers. When these expectations are not met as a result of an employee's misconduct, the reputation of the FAA may be tarnished. In these circumstances, appropriate analysis of this factor may result in considering a more severe penalty.

Factor 9 - Clarity of Notice

How well the FAA informed an employee of the rule that was violated is a factor that may have to be considered in determining the penalty. Breaking an obscure rule will be viewed less harshly than breaking one that is well publicized, and particularly one on which the employee was given specific notice. Non-disciplinary counseling and letters of expectations are methods to communicate what are the requirements of conduct in the workplace. Even with all the turmoil surrounding the Gregory decision consideration may be given to prior disciplinary actions that are currently challenged, not as a second or third action under progressive discipline principles but for the purpose of establishing clear notice.

The Agency's Standards of Conduct (HRPM - ER-4.1 for most employees or FAPM Letter 2635 for those bargaining units where negotiations have not been completed) requires employees to familiarize themselves with these standards as well as the Government-wide Standards of Ethical Conduct for Executive Branch Employees. Supervisors are required to encourage employees to review the Standards of Conduct, and are required to ensure that employees under their supervision review, at least once, the Government-wide Ethical Standards.

Briefings and/or training on the Standards of Conduct to employees can be of assistance in evaluating this factor. Additionally, the new Table of Penalties identified significant changes in the range of penalties for some offenses. For example, FAPM Letter 2635 identified a letter of reprimand to a 5-day suspension for a first offense as the range for fighting or attempting to inflict/inflicting bodily injury to another while on the job or on FAA property. The new Table of Penalties, recognizing concerns over workplace violence, lists a 14-day suspension to removal as the range. Communication of the consequences of an employee's misconduct as viewed under the new Table of Penalties will also be useful in considering the clarity of notice.

Factor – 10 Potential for Rehabilitation

Potential for rehabilitation can be both a major aggravating or mitigating factor. An employee with a significant disciplinary record most likely would have poor potential for rehabilitation. However, an employee with no prior disciplinary record, good prior performance and job dedication would probably have good potential for rehabilitation.

An employee's recognition of a personal problem that may negatively affect conduct weighs favorably in determining an employee's potential for rehabilitation. Willingness to seek counseling assistance through an Employee Assistance Program or any self-help activity to deal, for example, with an anger management problem or a family situation which is negatively affecting attendance are good indicators of a potential for rehabilitation. Simply put, recognizing one has a problem and doing something about it, are factors which may influence mitigation.

Mitigation means sometimes "you have to say you are sorry." Apologizing for misconduct usually helps. Recognizing a mistake and taking responsibility for one's misconduct are factors that are clearly mitigating. An employee's admission of wrongdoing on his/her own also constitutes a mitigating factor and the earlier the better for possible mitigation. There is no guarantee the truth will set an employee free, but it may result in reducing a penalty.

Admitting wrongdoing, showing remorse and contrition, and getting assistance to deal with the misconduct are just several elements which may result in mitigation. Conversely, an employee who never apologized, never admitted an error, is not remorseful, is unrepentant, and has been uncooperative, should not expect much mitigation under this factor.

Factor 11 - Mitigating Circumstances

Unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in an incident are mitigating circumstances which should be reviewed.

Personal problems, which may place an employee under considerable stress may be significant to warrant mitigation. The death of a spouse and a serious illness of family member are "life-shaking" events are examples of such stressors. Specific evidence should be presented how the misconduct was directly related to the personal problems and the subsequent stress.

Evidence that an employee's medical condition played a part in the charged conduct is ordinarily entitled to considerable weight as a significant mitigating factor. An employee who falls asleep in the workplace after taking medication should not have this behavior excused but the use of medication may be a reason for considering mitigation. However, an employee's medical condition may not be sufficient in some cases to outweigh egregious acts of misconduct.

Provocation may be considered in certain incidents, for example a fight in the workplace. An employee who may have been provoked to fight may be due some mitigating consideration for the misconduct than the aggressor.

Factor 12 - Adequacy and Effectiveness of Alternative Sanctions

What needs to be done to deter the conduct in the future by the employee or others? This factor is listed last because this consideration should occur after a thorough analysis of all the other Douglas Factors. Remember, there is only one absolute penalty which can be given without a Douglas analysis – the 30-day suspension required under law for misuse of a government vehicle. All other penalty determinations should undergo thorough reasoning under the Douglas Factors. It is important to note a case was recently lost in another government agency when the deciding official stated the Agency's zero tolerance policy on workplace violence required him to remove the employee from governmental service. He was introduced the "World of Douglas" by way of the Merit Systems Protection Board's decision.

The feasibility of other alternative sanctions can be greatly limited by other Douglas Factors. For example, an employee who has a significant disciplinary record and shows limited potential for rehabilitation should expect the worse. However, demotion to a non-supervisory position instead of a removal may be the appropriate penalty for a supervisor who failed to discharge his/her required supervisory responsibilities but had a good record in non-supervisory positions.

The deciding official must be prepared to support a penalty and communicate why it is the appropriate penalty. Remember, making an example of an employee is not an appropriate result of the disciplinary process. Applying these factors in determining the appropriate penalty is the objective.