

EMPLOYEE RELATIONS

Notes

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Quote of the Month

“People forget how fast you did a job — but they remember how well you did it.”

—Howard Newton

Introduction

Once the decision is made to proceed with disciplinary action, there are several things for a supervisor to consider. In this issue, we will discuss the Process for Taking Disciplinary Action, Douglas Factors - Selecting the Penalty, and Mitigating Factors. Familiarity with the process is helpful in assuring that no surprises develop as an employee grieves or appeals a disciplinary action. Awareness of the following guidelines helps to fully prepare you to meet your responsibilities when taking disciplinary action.

Process for Taking Disciplinary Action

It is of the utmost importance at this stage that coordination be made with the appropriate Employee Relations Specialist responsible for providing advice on these types of personnel matters. Your Employee Relations Specialist will assist you in the following endeavors:

- **W**Assess the problem and determine whether it is performance or conduct related.
 - **W**Determine whether progressive discipline is appropriate.
 - **W**Consider whether drug or alcohol abuse, or both, is contributing to the employee's misconduct. If so, provide the employee reasonable accommodation by referring him to the Employee Assistance Program (EAP) at 1-800-222-0364.
 - **W**Conduct appropriate counseling for petty offenses.
 - **W**Document in writing specific instances of misconduct or counseling, including exact dates of the misconduct and counseling, as well as what the employee was told and how the employee responded.
 - **W**Propose an adverse action against the employee. Make sure
- 1. Nature and seriousness of the offense.** A logical factor to consider is the nature and seriousness of the misconduct. Other related aspects are the relationship to the employee's duties, position, and responsibilities,

there are documents and/or testimony which support the charges.

• **W**When the case of a proposed suspension, demotion or removal, make sure the employee is advised of and receives all procedural rights, including 30-days notice, an opportunity to respond orally and/or in writing, the right to legal representation, and the opportunity to review the evidence upon which the agency is basing its action.

• **W**Consider the relevant Douglas factors when determining the appropriate penalties.

• **W**Make sure there is a nexus between the misconduct and the employee's employment.

• **W**Impose the least severe penalty necessary to promote the efficiency of the service.

• **W**Exhaust all reasonable measures to rehabilitate the employee prior to terminating the employee.

Douglas Factors - Selecting a Penalty

Perhaps the most difficult decision in an adverse action is determining the appropriate penalty for the employee's misconduct. 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. In *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280 (1980), 81 FMSR 7037, the Merit Systems Protection Board (MSPB) listed 12 factors that agencies must balance. 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 choose a reasonable penalty.

including whether the offense was intentional, technical, inadvertent, or was committed maliciously, for gain, or was frequently repeated.

2. Employee's job level and type of employment. A supervisor should consider the employee's job level, type of employment and the prominence of the employee's position. Persons in positions of trust can be held to higher standards. Positions of trust include jobs with fiduciary, law enforcement and public safety and health responsibilities. 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. 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.

3. Employee's past disciplinary record. A supervisor must consider prior discipline as an aggravating factor in justifying a more severe penalty. Three criteria must be met in order to use prior discipline: first, the employee must have been informed in writing of the action; second, the employee must have been given the opportunity to grieve or appeal to a higher authority; and lastly, the action was made a matter of record.

4. Employee's past work record. The length of service and the employee's performance are appropriate factors to consider in assessing the appropriate penalty. When a supervisor committed the offense, the length of the service as a supervisor carries more weight than total service with the agency.

5. Effect of the offense upon the employee's ability to perform at a satisfactory level. Loss of trust in the employee's ability to perform assigned duties in the future may be used to enhance the penalty. Offenses directly related to an employee's duties raise legitimate concerns about their ability to continue to perform those duties. Offenses inconsistent with an employee's supervisory responsibilities call into question his ability to function as a supervisor in the future.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses. Penalties imposed upon similarly-situated employees for similar offenses must be considered. Comparison need only be made among employees who occupy relatively similar positions of trust and responsibility within the same organizational unit.

7. Consistency of the penalty with any applicable agency table of penalties. The supervisor should consult the agency table of penalties in choosing the appropriate discipline. Any deviation from the table of penalties must be supported by a strong, rational justification.

8. The notoriety of the offense. Publicity or even the possibility of publicity that could have a negative impact on the reputation of the agency may result in the imposition of a more severe penalty. However, if the misconduct is not well known, it may be used as a mitigating factor in the employee's favor.

9. The clarity with which the employee was on notice of any rules that were violated by the misconduct. An employee's violation of a little-known and obscure agency policy would be viewed less harshly than an employee's violation of an agency regulation of which he was clearly on notice. Employees are presumed to know the requirements of the law and their agency's rules of conduct.

10. Potential for the employee's rehabilitation. An employee who admits misconduct and shows remorse displays potential for rehabilitation. One who rationalizes his wrongdoing, fails to take responsibility or doesn't show an understanding of why his behavior was wrong is not a good candidate for rehabilitation.

11. Other mitigating circumstances. 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 should be considered.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. There are some instances, particularly for minor types of misconduct, where alternative sanctions may serve as deterrent to the employee not to repeat the same misconduct in the future.

Mitigating Factors

In addition to the Douglas Factors, some other mitigating factors to consider are:

± Temporary disabling conditions.

An employee's effort in seeking treatment for a disabling condition indicates a potential for rehabilitation. Although successful participation in a rehabilitation program is not a guarantee against discipline, it is a factor to be considered.

± Display of contrition: admission of

misconduct. It can help to say you are sorry. Admission of wrongdoing prior to its disclosure through an agency investigation suggests the potential for rehabilitation. An employee's lack of contrition shows there is poor potential for rehabilitation.

± Psychological problems, illness or treatment, job tensions. Severe emotional distress may be a mitigating factor but there must be evidence showing how the misconduct directly related to the alleged mental condition. The employee must show that the impairment has come under control and that there is potential for rehabilitation.

± Disparate penalties. Agencies may not knowingly treat employees differently in a way not justified by the facts. The Agency must establish a legitimate reason for the difference in treatment, either by showing that the offenses in question were not really equivalent, or that mitigating or aggravating factors justified a difference in treatment.

± Staleness of charges. The delay between the offense and action taken for the offense is not a defense absent actual prejudice to the employee. Weigh the staleness of the charge against the prejudice of the employee and the necessity for the delay.

± Bad faith of agency personnel. The proposing official must not influence the deciding official, who must have before him a fair and complete summary of the evidence. The deciding official must consider the animus of the proposing official in determining whether to sustain or mitigate a penalty.

± Improper pressure on the employee. It is inequitable to charge an employee with violating agency regulations when his conduct was at the direction of his supervisor or when the Agency placed pressure on the employee to take an action he otherwise would not.

± Entrapment. While entrapment cannot be asserted as an affirmative defense to a charge of misconduct, evidence of a similar nature can be introduced as a mitigating circumstance in reviewing the reasonableness of the penalty. The issue is whether and to what extent the Agency's actions mitigate the seriousness of the offense.

± Favorable attitude of coworkers. Testimony or statements from coworkers who assert that they either would welcome, or at least not fear, the employee's return to work may be discounted. Often coworkers may not fully understand the factual basis of the charges against the employee.

± Multiplicity and merger of charges.

Agencies may take a single offense and break it down into several constituent components, each component stated as a separate charge.