

## **Part 2. Factors to Consider in Penalty Determination (Douglas Factors)**

(From DOI's Handbook)

After the supervisor has determined that there is sufficient basis for taking action and has framed a charge or charges fully supported by the available evidence, he/she must choose the specific penalty. At this point, it is wise to give full consideration to all remedies that have any likelihood of success in resolving the problem, whether they are disciplinary or nondisciplinary, formal or informal.

Normally, the management officials most familiar with the circumstances of the case (often the employees' first-line supervisor) and agency policy are in the best position to decide the appropriate penalty for a particular charge, although it is essential to confer with an employee relations specialist and SOL attorney at this stage. In making its selection of an appropriate penalty, management must exercise responsible judgement, to ensure that the penalty is proportional to the offense.

### **a. Selecting the Penalty**

In selecting a penalty, management should take into account all of the specific circumstances of the case including any mitigating factors. Deciding officials should ensure, to the extent possible, that employees who commit similar offenses are treated consistently. In Curtis Douglas v. Veterans Administration, 5 M.S.P.R. 280 (Douglas), however, the MSPB specified a number of factors that agencies should consider when deciding on appropriate penalties. Application of these factors to individuals, even those who have committed similar offenses, may result in differing penalties. Thus, agencies should avoid a mechanistic approach to penalty determination and conduct a thorough analysis of the Douglas factors for each individual charged with misconduct. The Douglas factors include:

- (1) The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities;
- (2) The employee's job level and type of employment, including supervisory or fiduciary role;
- (3) Any past disciplinary record;
- (4) The past work record, including length of service, performance, ability to get along with fellow employees, and dependability;
- (5) The effect of the reasons for action on the employee's ability to perform satisfactorily and on supervisors' confidence;
- (6) Consistency of the penalty with those imposed on 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 on the agency's reputation;
- (9) The clarity with which the employee was on notice of any rules violated in committing the offense or had been warned about the conduct in question;
- (10) Any potential for rehabilitation;
- (11) Mitigating circumstances surrounding the offense; and
- (12) The adequacy and efficacy of alternative sanctions to deter such conduct in the future by the employee or others.

There is no requirement that management demonstrate it has considered all potential mitigating or aggravating factors before selecting its penalty. However, the penalty may be questioned if there are demonstrably relevant issues it does not address. MSPB case law suggests that it is wise for agencies to cite the factors they considered in penalty selection in both the proposal and decision letters. Therefore, the proposing official should address each Douglas factor and specifically cite and discuss those which are particularly relevant to penalty selection, and address any relevant mitigating factors. Including this information in the proposal will also enable the employee to prepare and present any statement(s) he/she may wish regarding the charge(s), the Douglas factor analysis and the proposed penalty. In the decision letter, the deciding official should reference the Douglas factor analysis as developed by the proposing official and the employee's statement, if any, before presenting his/her judgement on the factors and why they do (or do not) support the proposed penalty.

Management should not interpret the last Douglas factor as an indication that they may choose a particular penalty primarily for its value as an example or warning to other employees, since third parties (such as MSPB, ~ Arbitrators, o~ EEOC, etc.) generally do not accept this as a sole basis for penalty selection.