Douglas Factors

Overview

Perhaps the most difficult decision in an adverse action is determining the appropriate penalty for the employee's misconduct. On appeal, the Merit Systems Protection Board consistently points out that it will not disturb an agency's choice of penalty unless it is clearly beyond the bounds of reasonableness. A review of the case law since the board's decision in *Douglas v. Veterans Administration*, 81 FMSR 7037, 5 MSPR 280 (MSPB 1981), tells a somewhat different story.

In *Douglas*, the MSPB listed 12 factors that agencies must balance. However, it didn't assign weights to these factors, and to make things more confusing, it frequently reminds us that not all factors will be relevant to every set of circumstances. It is clear that the board views the seriousness of the offense as the most important consideration. However, beyond that we aren't quite sure whether, for example, an employee's expression of remorse for his misconduct should be given more weight than his past disciplinary record. What we can say for sure is that an agency's thorough explanation for its balancing of the relevant factors, in its decision letter, testimony, and other submissions can have a significant impact on the board's ruling.

This Quick Start Guide covers the following Key Points:

Key Points

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A Guide to Merit Systems Protection Board Law and Practice* (Dewey Publishing Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

The *Douglas* factors

- ***Broida:*** The responsibility is clearly on the agency to set the penalty, and the agency's determination will not be disturbed by the MSPB unless the penalty is unreasonable. To earn that deference, the agency theoretically must pay its dues. Those dues consist of adherence to the commandments of *Douglas v. Veterans Administration*, 81 FMSR 7037, 5 MSPR 280 (MSPB 1981). *Broida Guide to MSPB Law*: *Douglas* Standards; Decision to Reflect Consideration of Mitigating Factors or MSPB Imposes Maximum Reasonable Penalty.
- In deciding on a penalty, an agency must consider the relevant *Douglas* factors, which include:
    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 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. 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.

Douglas v. Veterans Administration, 81 FMSR 7037, 5 MSPR 280 (MSPB 1981).

- Not all 12 *Douglas* factors will apply in every case. The relevant factors must be balanced in each case to arrive at the appropriate penalty. *Gartner v. Department of the Army*, 107 LRP 2661, 104 MSPR 463 (MSPB 2007); *Batten, Jr. v. U.S. Postal Service*, 106 LRP 13637, 101 MSPR 222 (MSPB 2006).
- ***Broida:*** Some agencies use checklists that enumerate the *Douglas* factors. Deciding officials tick off the various points that they have considered, or provide narrative descriptions of what they have considered as to various potential points of mitigation, and they then sign the forms. The forms become part of the adverse action record that is placed before the MSPB. *Broida Guide to MSPB Law*: Articulation of Relevant Factors; By the Agency; Decision Notice.

Factor: Nature and seriousness

- The seriousness of the appellant's offense is always one of the most important factors considered by the MSPB in assessing the reasonableness of an agency's penalty determination. *Schoemer v. Department of the Army*, 99 FMSR 5137, 81 MSPR 363 (MSPB 1999); *Rosenberg v. Department of Transportation*, 107 LRP 15378, 105 MSPR 130 (MSPB 2007).
- The MSPB places primary importance upon the nature and seriousness of an offense, and its relation to an appellant's duties, position and responsibilities. *Gartner v. Department of the Army*, 107 LRP 2661, 104 MSPR 463 (MSPB 2007); *Batten, Jr. v. U.S. Postal Service*, 106 LRP 13637, 101 MSPR 222 (MSPB 2006).
- Serious misconduct can outweigh an employee's good performance, length of service, and lack of prior discipline. *Von Muller v. Department of Energy*, 106 LRP 9274, 101 MSPR 91 (MSPB 2006).
- If the misconduct is serious enough, mistakes by the agency in the application of other *Douglas* factors, such as relying on matters affecting the penalty without including them in the proposal notice or failing to seriously consider the adequacy of a lesser penalty, may be overlooked. *Von Muller v. Department of Energy*, 106 LRP 9274, 101 MSPR 91 (MSPB 2006); *Wiley v. U.S. Postal Service*, 106 LRP 41624, 102 MSPR 535 (MSPB 2006).

Case examples

- Spending an excessive amount of work time using the Internet for personal use, and the presence of sexually explicit material on the hard drive of his government-issued computer raised concerns about the appellant's ability to function as an effective supervisor. The sustained specifications evinced serious misconduct, particularly for a supervisor whose duties and responsibilities included serving as a role model for employees and enforcing rules against computer misuse and access to sexually explicit materials. *Martin v. Department of Transportation*, 106 LRP 48679, 103 MSPR 153 (MSPB 2006).
- An appellant left a meeting regarding his alleged sexual harassment of a female supervisor, and he allegedly said in the presence of two coworkers that he felt like "getting [his] gun and shooting up the place." He also allegedly stated to another employee, "I am not going to let some woman make me lose my job and I feel like killing her." The MSPB found the statements made by the appellant to be very serious, especially in light of the climate in which the agency operates. *Wiley v. U.S. Postal Service*, 106 LRP 41624, 102 MSPR 535 (MSPB 2006).
- The MSPB found that a postmaster's improper accounting practices were serious and intentional. The agency also had the right to expect a higher standard of conduct from a supervisor than a nonsupervisory employee. *Stack v. U.S. Postal Service*, 106 LRP 23221, 101 MSPR 487 (MSPB 2006).
- An economic development account executive sent sexually explicit e-mails from his agency e-mail address, in some cases to constituents with whom he developed relationships on behalf of the agency. The MSPB found that the appellant's serious misconduct compromised the public image of the agency he was supposed to represent and removal was reasonable under the circumstances. *Von Muller v. Department of Energy*, 106 LRP 9274, 101 MSPR 91 (MSPB 2006).

Factor: Employee's job

- Agencies are entitled to hold supervisors to a higher standard of conduct than nonsupervisors because they occupy positions of trust and responsibility. *Martin v. Department of Transportation*, 106 LRP 48679, 103 MSPR 153 (MSPB 2006).
- Individuals in positions of substantial responsibility and trust can be held to a higher standard of conduct than other federal employees. *Ferguson v. Office of Personnel Management*, 105 LRP 54397, 100 MSPR 347 (MSPB 2005).
- Positions of trust include jobs with supervisory, law enforcement and fiduciary responsibilities. *Ferguson v. Office of Personnel Management*, 105 LRP 54397, 100 MSPR 347 (MSPB 2005); *Jones v. Department of Justice*, 104 LRP 57856, 98 MSPR 86 (MSPB 2004); *Fischer v. Department of the Treasury*, 104 LRP 45199, 97 MSPR 546 (MSPB 2004); *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- When a supervisor engages in misconduct that reflects adversely on his reliability, veracity, trustworthiness and ethical conduct, legitimate concerns are raised about his trustworthiness, particularly in light of his position of responsibility as a supervisor. *Leatherbury v. Department of the Army*, 107 LRP 20063, 105 MSPR 405 (MSPB 2007).
- An agency's loss of confidence in an employee's integrity as a supervisor supports demotion to a nonsupervisory position. *Hornbuckle v. Department of the Army*, 90 FMSR 5297, 45 MSPR 50 (MSPB 1990).

Case examples

- Spending an excessive amount of work time using the Internet for personal use and the presence of sexually explicit material on the hard drive of his government-issued computer raised concerns about the appellant's ability to function as an effective

supervisor. The sustained specifications evinced serious misconduct, particularly for a supervisor whose duties and responsibilities included serving as a role model for employees and enforcing rules against computer misuse and access to sexually explicit materials. *Martin v. Department of Transportation*, 106 LRP 48679, 103 MSPR 153 (MSPB 2006).

- The MSPB found that a postmaster's improper accounting practices were serious and intentional. The agency also had the right to expect a higher standard of conduct from a supervisor than a nonsupervisory employee. *Stack v. U.S. Postal Service*, 106 LRP 23221, 101 MSPR 487 (MSPB 2006).

Factor: Past disciplinary record

- ***Broida:*** Agencies often seek to justify adverse action on the basis of current charges coupled with references to past discipline imposed against the employee. The use of past discipline is mitigation in reverse. Past discipline is an aggravating factor, and it can make a significant difference in a case. *Broida Guide to MSPB Law*: Agency Consideration of Past Discipline.
- A lack of a prior disciplinary record is a significant mitigating factor. *Wentz v. U.S. Postal Service*, 102 FMSR 5155, 91 MSPR 176 (MSPB 2002).
- When an appellant has a past disciplinary record involving behavior similar to the current offense, he has been put on notice that such behavior will not be tolerated by the agency. *Zwagil v. General Services Administration*, 106 LRP 47305, 103 MSPR 63 (MSPB 2006); *Murry v. General Services Administration*, 103 LRP 33706, 93 MSPR 554 (MSPB 2003).
- An agency cannot rely on an employee's past disciplinary record to prove current misconduct. The past record can only be considered with regard to the reasonableness of the penalty for presently sustained charges. *Raines v. U.S. Postal Service*, 86 FMSR 5375, 32 MSPR 56 (MSPB 1986).
- When an agency relies on past discipline to support the disciplinary action that is on appeal, the MSPB will review the past discipline to determine whether: 1) the employee was informed of the action in writing; 2) the employee had an opportunity to have the action reviewed, on the merits, by an authority different from the one that took the action; and 3) the action was made a matter of record. If those three criteria are met, the board will discount the past discipline only if it is left with a definite and firm conviction that a mistake has been committed. *Bolling v. Department of the Air Force*, 81 FMSR 5580, 9 MSPR 335 (MSPB 1981); *Rosenberg v. Department of Transportation*, 107 LRP 15378, 105 MSPR 130 (MSPB 2007).
- *Bolling* review is required only where the appellant has actually challenged the validity of his prior discipline on appeal. *Holland v. Department of Defense*, 99 FMSR 5374, 83 MSPR 317 (MSPB 1999); *Rosenberg v. Department of Transportation*, 107 LRP 15378, 105 MSPR 130 (MSPB 2007).
- It is improper for an agency to rely on the appellant's past disciplinary record where it was not cited in either the notice of proposed removal or in the decision notice and was mentioned for the first time when the agency's proposing and deciding officials testified that they relied on the prior offense in determining the penalty. *Lentine v. Department of the Treasury*, 103 LRP 46061, 94 MSPR 676 (MSPB 2003).
- The MSPB will not consider prior discipline that has been overturned in grievance proceedings at the time of board review. *Jones v. U.S. Postal Service*, 109 LRP 17969, 110 MSPR 674 (MSPB 2009).
- An agency cannot cite disciplinary actions that have expired in accordance with agency regulations or a collective bargaining agreement. *Whitmore v. Department of the Navy*, 87 FMSR 5413, 34 MSPR 137 (MSPB 1987).
- Prior disciplinary actions may be cited even if they involved offenses unrelated to the current charges. *Slaughter v. Department of Agriculture*, 93 FMSR 5039, 56 MSPR 349 (MSPB 1993).

- When considering prior discipline, if the nature of the earlier misconduct is not similar to the misconduct involved in the current charge, the weight of the prior discipline is significantly diminished in the determination of a proper penalty. *Skates v. Department of the Army*, 96 FMSR 5027, 69 MSPR 366 (MSPB 1996).
- The MSPB can review independently prior disciplinary actions pending in grievance proceedings when reviewing termination and other serious disciplinary actions. *U.S. Postal Service v. Gregory*, 102 FMSR 7004, 122 S. Ct. 431 (U.S. 2001).

Case examples

  - A prior disciplinary record consisting of a letter of admonishment for misconduct helped support a demotion penalty. *Martin v. Department of Transportation*, 106 LRP 48679, 103 MSPR 153 (MSPB 2006).
  - A prior disciplinary record that included a seven-day suspension for alleged absence without leave helped show that a removal penalty was reasonable. *Starks v. Department of the Army*, 103 LRP 39435, 94 MSPR 95 (MSPB 2003).
  - An employee was removed for insubordination involving disrespect, insolence, and like behavior to her supervisor. She was previously counseled about her sarcastic and disrespectful behavior and warned that such behavior would not be tolerated in the workplace. She also was suspended for 30 days for abusive, discourteous and disruptive behavior in the presence of supervisors and coworkers. The MSPB found that because she had a past disciplinary record involving similar behavior, she was put on notice that such behavior would not be tolerated by the agency. *Murry v. General Services Administration*, 103 LRP 33706, 93 MSPR 554 (MSPB 2003).

Factor: Past work record

- Performance records and years of service can be significant mitigating factors. *Jackson and White v. Department of the Army*, 105 LRP 45028, 99 MSPR 604 (MSPB 2005).
- When the offense involves supervisory misconduct, an excellent work record weighs in favor of retaining the appellant in the workforce, but less weight will be accorded to this factor in determining whether his demotion to a nonsupervisory position is unreasonable. *Hornbuckle v. Department of the Army*, 90 FMSR 5297, 45 MSPR 50 (MSPB 1990).
- Disciplinary actions or additional misconduct occurring after the issuance of the adverse action proposal may not be cited as a past disciplinary record, but may be used to show an overall poor work record. *Wigen v. U.S. Postal Service*, 93 FMSR 5278, 58 MSPR 381 (MSPB 1993).
- An agency's promotion of an employee or allowing him to perform his duties for an extended period of time after learning of his misconduct can indicate that his overall work record outweighs the seriousness of the offense. *Hovanec v. Department of the Interior*, 95 FMSR 5156, 67 MSPR 340 (MSPB 1995).
- Better-than-satisfactory performance ratings, numerous annual performance awards, and occasional special act awards are mitigating factors, but they do not outweigh the seriousness of the offense. *Suarez v. Department of Housing and Urban Development*, 104 LRP 25889, 96 MSPR 213 (MSPB 2004).

Case example

  - An appellant's 29 years of service creditable for retirement (26 of which were with the agency) and his superior work record were outweighed by the seriousness of his misconduct and the fact that he continued to engage in the misconduct despite being warned about it repeatedly. *Lentine v. Department of the Treasury*, 103 LRP 46061, 94 MSPR 676 (MSPB 2003).

Factor: Ability to perform in the future

- When a supervisor engages in misconduct that reflects adversely on his reliability, veracity, trustworthiness and ethical conduct, legitimate concerns are raised about his trustworthiness, particularly in light of his position of responsibility as a supervisor. *Leatherbury v. Department of the Army*, 107 LRP 20063, 105 MSPR 405 (MSPB 2007).
- An employee's lack of candor is a serious offense that strikes at the heart of the employer-employee relationship. *Jackson and White v. Department of the Army*, 105 LRP 45028, 99 MSPR 604 (MSPB 2005).
- Offenses inconsistent with an employee's supervisory responsibilities call into question his ability to function as a supervisor in the future. *Hanna v. Department of Labor*, 98 FMSR 5413, 80 MSPR 294 (MSPB 1998).

Case example

  - Where an appellant had the responsibility to review the employment documents and security investigative forms completed by other applicants and employees, falsification of his own employment documents and security investigative forms adversely affected his credibility to the extent that the agency could not continue to have trust in his integrity and honesty. The MSPB upheld the removal penalty. *Forma v. Department of Justice*, 93 FMSR 5139, 57 MSPR 97 (MSPB 1993).

Factor: Consistency with other penalties

- An agency cannot knowingly and intentionally treat similarly situated employees differently. *Fearon v. Department of Labor*, 105 LRP 41646, 99 MSPR 428 (MSPB 2005).
- For purposes of disparate penalty analysis, an appellant is no longer required to prove such factors about a comparator employee as being in the same work unit, having the same supervisor, and having the same proposing or deciding official to establish that the comparator was similarly situated. Now, there must be enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly situated employees differently. The MSPB will not have hard and fast rules regarding the "outcome determinative" nature of these factors. *Lewis v. Department of Veterans Affairs*, 110 LRP 31478 (MSPB 2010), *citing Williams v. Social Security Administration*, 109 LRP 70875, 586 F.3d 1365 (Fed. Cir. 2009).
- ***Broida:*** The MSPB has long held that mathematical rigidity or perfect consistency in discipline is not necessary. *Broida Guide to MSPB Law*: Degree of Consistency Required, *citing Filson v. Federal Aviation Administration*, 81 FMSR 5378, 7 MSPR 125 (MSPB 1981).
- If an agency decides to begin levying a more severe penalty for a certain offense, it must give notice of the change in policy. *Fearon v. Department of Labor*, 105 LRP 41646, 99 MSPR 428 (MSPB 2005).
- Where the punishment is appropriate to the seriousness of an employee's offense, an allegation of disparate penalties is not a basis for reversal or mitigation of the penalty. *Jackson and White v. Department of the Army*, 105 LRP 45028, 99 MSPR 604 (MSPB 2005).
- An agency may refute a charge of disparate treatment by establishing 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. *Parker v. Department of the Navy*, 91 FMSR 5554, 50 MSPR 343 (MSPB 1991).

Factor: Consistency with table of penalties

- An agency's departure from its table of penalties is permissible if the agency: 1) is not required by statute or regulation to follow the table; and 2) has not stated that it intends to be bound by the table. *Farrell v. Department of the Interior*, 102 LRP 40110, 314 F.3d 584 (Fed. Cir. 2002); *Rosado v. Department of Homeland Security*, 107 LRP 45264 (Fed. Cir. 2007, *unpublished*).

- An agency may take a more severe action than suggested in the table of penalties for a first offense if the employee has a record of prior, unrelated offenses. *Villela v. Department of the Air Force*, 84 FMSR 7010, 727 F.2d 1574 (Fed. Cir. 1984).
- An agency should not apply its table of penalties so rigidly as to ignore other *Douglas* factors. *Douglas v. Veterans Administration*, 81 FMSR 7037, 5 MSPR 280 (MSPB 1981).
- An agency's table of penalties is only one factor to be considered in assessing the reasonableness of a penalty. This is especially true where the agency has described the table of penalties as a guide that does not replace supervisory judgment or require specific penalties, but instead provides a general framework within which supervisors may exercise sound judgment in dealing with particular circumstances. *Phillips v. Department of the Interior*, 103 LRP 46073, 95 MSPR 21 (MSPB 2003).

Case example

- Although an agency's table of penalties could be interpreted to mean that removal is ordinarily not imposed for a first drug offense, the table is only one factor to be considered in determining the appropriateness of the penalty, and deviation from the table is permissible where the circumstances of the case so justify. Deviation from the table might be appropriate where: 1) an employee frequently works without supervision and is privy to sensitive intelligence and information impacting the agency's mission and national security; 2) the consequences of the employee's lapse are serious and far-reaching; 3) the employee is a law enforcement officer, who is held to a higher standard of conduct than other employees; 4) the employee's misconduct, by its nature, strikes at the core of his former position. *Zazueta v. Department of Justice*, 103 LRP 46095, 94 MSPR 493 (MSPB 2003).

Factor: Notoriety and impact

- Publicity or even the possibility of publicity that could have a negative impact on the reputation of the agency is a factor that may be considered to enhance a penalty. *Eilertson v. Department of the Navy*, 84 FMSR 5781, 23 MSPR 152 (MSPB 1984); *Rotolo v. Merit Systems Protection Board*, 81 FMSR 7064, 636 F.2d 6 (1st Cir. 1980); *Velez II v. Department of Homeland Security*, 106 LRP 29266, 101 MSPR 650 (MSPB 2006).

Case examples

- The substantial amount of negative publicity that resulted from a supervisory border patrol agent failing to ensure that subordinate border patrol agents ran an FBI National Crime Information Center criminal records check prior to releasing an illegal alien apprehended at the Mexico-U.S. border was a factor to be considered in making the penalty determination. *Velez II v. Department of Homeland Security*, 106 LRP 29266, 101 MSPR 650 (MSPB 2006).
- The impact of negative publicity was a factor to be considered in a penalty determination where an employee sent sexually explicit e-mails from his agency e-mail address, in some cases to constituents with whom he had developed relationships on behalf of the agency, and the misconduct occurred at a time when customer relations had already suffered as a result of a recent 50 percent rate hike, and the agency could not afford further bad publicity. The employee's misconduct compromised the public image of the agency he was supposed to represent. *Von Muller v. Department of Energy*, 106 LRP 9274, 101 MSPR 91 (MSPB 2006).
- The MSPB downplayed the effect of publicity where the board found no evidence suggesting that an employee's misconduct resulted in any adverse publicity outside the agency or that the offense had any impact on the reputation of the agency or the agency's mission. *Brown v. Department of the Treasury*, 102 FMSR 5136, 91 MSPR 60 (MSPB 2002).

Factor: Clarity of notice

- While lack of notice of the rules to be followed can be a mitigating factor, an agency is under no obligation to warn employees about behavior they should know is improper. *Flanagan v. Department of the Army*, 90 FMSR 5210, 44 MSPR 378 (MSPB 1990).
- Training on agency policies constitutes notice of expected behavior. *Morrison v. National Aeronautics and Space Administration*, 94 FMSR 5595, 65 MSPR 348 (MSPB 1994); *Batts v. Department of the Interior*, 106 LRP 29252, 102 MSPR 27 (MSPB 2006).
- An appellant is on notice that she is not to engage in dishonest and unethical actions when the critical duties listed in her core personnel document require her to exhibit honesty and integrity in the federal workplace. *Gebhardt v. Department of the Air Force*, 105 LRP 30288, 99 MSPR 49 (MSPB 2005).
- When an appellant receives multiple express warnings concerning deficiencies in his behavior, he is on notice that his behavior is not acceptable. *Pinegar v. Federal Election Commission*, 107 LRP 30185, 105 MSPR 677 (MSPB 2007).
- When an appellant has a past disciplinary record involving behavior similar to the current offense, he has been put on notice that such behavior will not be tolerated by the agency. *Zwagil v. General Services Administration*, 106 LRP 47305, 103 MSPR 63 (MSPB 2006); *Murry v. General Services Administration*, 103 LRP 33706, 93 MSPR 554 (MSPB 2003).
- An agency must give notice to an employee when previously condoned activity is no longer condoned, giving the employee the opportunity to conform to any new rules. *Crane v. Department of the Air Force*, 107 LRP 37325 (Fed. Cir. 2007, *unpublished*).

Case examples

  - An appellant was on notice that refusal to report for duty when on call could lead to removal because he was warned of this when such a refusal to report was the basis of an earlier suspension. *Walker v. Department of the Army*, 106 LRP 41622, 102 MSPR 474 (MSPB 2006).
  - An appellant who was removed for continued misconduct was clearly on notice, through quarterly counseling sessions, that he was only entitled to two 15-minute breaks and a 30-minute lunch break; that he should avoid excessive breaks; and that he should avoid "loafing" on the job. *Williams v. Department of the Army*, 106 LRP 34576, 102 MSPR 280 (MSPB 2006).
  - Suspensions which were taken for misconduct similar to the current offenses specifically put the appellant on notice that further misconduct could result in the issuance of even more severe disciplinary action. *Alaniz v. U.S. Postal Service*, 105 LRP 43000, 100 MSPR 105 (MSPB 2005).

Factor: Potential for rehabilitation

- An employee who has served an agency for a substantial period of time without prior discipline, has a good work ethic, and immediately reports an incident of misconduct and takes responsibility for his actions shows a good potential for rehabilitation. *Wentz v. U.S. Postal Service*, 102 FMSR 5155, 91 MSPR 176 (MSPB 2002).
- An appellant seeking treatment for medical problems that contributed to his misconduct demonstrates good potential for rehabilitation. *Vitanza v. U.S. Postal Service*, 101 FMSR 5371, 89 MSPR 319 (MSPB 2001).
- Seeking help from an employee assistance program helps demonstrate rehabilitative potential. *Negron v. Department of Justice*, 104 LRP 9940, 95 MSPR 561 (MSPB 2004).
- An employee's admission of his misconduct and his expression of remorse show his rehabilitative potential and constitute a significant mitigating factor when he voluntarily notifies an agency of his

wrongdoing, prior to the agency's initiating an investigation into the misconduct. *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).

- Even a good potential for rehabilitation does not outweigh an agency's legitimate concern as to an appellant's ability to perform his duties and the effect of his conduct upon the efficiency of the service. *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- Where an employee's admission of misconduct and expression of remorse do not come until after the agency conducts its investigation, the employee's apology is entitled to little or no mitigating weight. *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- Continued misconduct by an employee in spite of notice that further misconduct could result in the issuance of even more severe disciplinary action demonstrates a poor potential for rehabilitation. *Alaniz v. U.S. Postal Service*, 105 LRP 43000 100 MSPR 105 (MSPB 2005).
- When assessing an employee's potential for rehabilitation, a deciding official can consider the fact that the employee refused to take responsibility for her actions and made false statements in response to the notice of proposed removal. *Talavera v. Agency for International Development*, 107 LRP 1753, 104 MSPR 445 (MSPB 2007).
- An employee's inability or unwillingness to improve his conduct despite having been disciplined for prior misconduct shows poor potential for rehabilitation. *Walker v. Department of the Army*, 106 LRP 41622, 102 MSPR 474 (MSPB 2006); *Williams v. Department of the Army*, 106 LRP 34576, 102 MSPR 280 (MSPB 2006).
- Lack of rehabilitative potential is a significant aggravating factor that can outweigh mitigating factors when the employee is a supervisor who fails to follow agency instructions and provides the agency with inconsistent explanations of his circumstances. *Jones v. Department of Justice*, 104 LRP 57856, 98 MSPR 86 (MSPB 2004).
- An appellant's refusal to acknowledge that she has done anything wrong reflects very poorly on her potential for rehabilitation. *Grubb v. Department of the Interior*, 104 LRP 30780, 96 MSPR 377 (MSPB 2004).
- It is reasonable for an agency to take the position that evidence of an employee's temporary improvement in behavior does not necessarily signal the potential for permanent rehabilitation because employees who are "under surveillance" could be expected to alter their behavior only for as long as they think necessary. *Levinsky v. Department of Justice*, 105 LRP 45030, 99 MSPR 574 (MSPB 2005).

Case examples

  - An appellant's potential for rehabilitation was questionable where his conduct was serious and prolonged, he posted material on his Web site that demonstrated a deep-seated antipathy toward his colleagues and supervisors, and he did not fully acknowledge his wrongdoing or the gravity of his misconduct. *Winters v. Department of the Navy*, 107 LRP 38427 (Fed. Cir. 2007, *unpublished*).
  - The MSPB determined that an appellant's long-term potential for rehabilitation was somewhat uncertain, finding that the agency's doubts about the significance of his apparent efforts to modify his behavior were reasonable. The appellant had been warned on previous occasions that his profanity and his comments regarding various nationalities could be regarded as offensive, and any effect these warnings may have had was only temporary. *Levinsky v. Department of Justice*, 105 LRP 45030, 99 MSPR 574 (MSPB 2005).
  - An appellant showed poor rehabilitation potential where he unhesitatingly violated fundamental principles of honesty, failed to understand the severity of his misconduct or to accept responsibility for his actions, engaged in gamesmanship, and skirted culpability at his oral reply, and his actions reflected a lack of remorse. *Simmons v. Department of the Air Force*, 105 LRP 30308, 99 MSPR 28 (MSPB 2005).

- An appellant exhibited little potential for rehabilitation based upon the failure of prior discipline and the mediation process to prevent the misconduct at issue, as well as his refusal to acknowledge the inappropriateness of his conduct. *Beaudoin v. Department of Veterans Affairs*, 105 LRP 41637, 99 MSPR 489 (MSPB 2005).

Factor: Mitigating circumstances

- An appellant's failure to bring a mitigating factor to an agency's attention does not prohibit an administrative judge from considering that factor. Such failure merely affects the weight of the factor. *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- An alleged medical condition will be entitled to considerable weight as a mitigating factor only where it played a part in the charged conduct. *Sherlock v. General Services Administration*, 106 LRP 55402, 103 MSPR 352 (MSPB 2006).
- Job-related tensions and stress can be mitigating factors. *Brown v. Department of the Army*, 104 LRP 27036, 96 MSPR 232 (MSPB 2004); *Franklin v. Department of Justice*, 96 FMSR 5308, 71 MSPR 583 (MSPB 1996).
- Where the MSPB sustains a charge of involvement with a controlled substance on duty, stress or personal problems experienced by the appellant generally should not be considered as a mitigating or relevant factor in determining the reasonableness of an agency's penalty selection, absent a reasoned explanation of the relationship between the appellant's personal circumstances and the charged misconduct, and without further addressing the question of whether the appellant expressed remorse for the misconduct and otherwise demonstrated a potential for rehabilitation. *Zazueta v. Department of Justice*, 103 LRP 46095, 94 MSPR 493 (MSPB 2003).
- The absence of intent by an appellant to engage in the sustained misconduct is a mitigating factor. *Fernandez v. Department of Agriculture*, 103 LRP 46032, 95 MSPR 63 (MSPB 2003).
- An appellant's use of a prescription drug that played a part in the charged misconduct can be a substantial mitigating factor. *Wentz v. U.S. Postal Service*, 102 FMSR 5155, 91 MSPR 176 (MSPB 2002).
- When mental impairment or illness is reasonably substantiated, and is shown to be related to the ground of removal, this must be taken into account when taking an adverse action against an employee. *Malloy v. U.S. Postal Service*, 109 LRP 52969 (Fed. Cir. 2009).
- Emotional problems, depression and stress can be mitigating factors, but there must be some evidence showing the problems contributed to the misconduct. *Wynne v. Department of Veterans Affairs*, 97 FMSR 5244, 75 MSPR 127 (MSPB 1997); *Stuhlmacher v. U.S. Postal Service*, 101 FMSR 5347, 89 MSPR 272 (MSPB 2001).
- A deciding official's possible predisposition against an employee can be a mitigating factor. *Eichner v. U.S. Postal Service*, 99 FMSR 5351, 83 MSPR 202 (MSPB 1999); *House v. U.S. Postal Service*, 98 FMSR 5384, 80 MSPR 138 (MSPB 1998).
- Evidence that supervisors engaged in a concerted effort to get rid of an employee can be a mitigating factor. *House v. U.S. Postal Service*, 98 FMSR 5384, 80 MSPR 138 (MSPB 1998).
- The fact that an employee's misconduct involved one continuing incident rather than a pattern or practice of insubordination, and that she disobeyed an order to continue helping a customer, are mitigating factors in determining a penalty for insubordination. *Cardwell v. Veterans Administration*, 86 FMSR 5357, 32 MSPR 1 (MSPB 1986).

Factor: Availability of alternative sanctions

- An agency does not have to prove that the greater penalty it imposed was necessary to promote the efficiency of the service when it was free to choose a lesser penalty. It only has to show that it considered the relevant factors and that the penalty was reasonable. *Lewis v. Bureau of Engraving and Printing*, 85 FMSR 5508, 29 MSPR 447 (MSPB 1985).

- Continued misconduct by an employee in spite of notice that further misconduct could result in the issuance of even more severe disciplinary action suggests that a lesser penalty would be unlikely to deter future misconduct. *Alaniz v. U.S. Postal Service*, 105 LRP 43000, 100 MSPR 105 (MSPB 2005).
- Exemplary punishment, where the motivation for choosing a penalty is to make an example of the appellant to other employees, is generally contrary to the *Douglas* factors. Although one of the *Douglas* factors to be considered is the adequacy and effectiveness of alternative sanctions to deter similar conduct in the future by the employee or others, an agency cannot decide to make an example of an appellant irrespective of the other *Douglas* factors. *Blake v. Department of Justice*, 99 FMSR 5107, 81 MSPR 394 (MSPB 1999); *Harper v. Department of the Air Force*, 94 FMSR 5150, 61 MSPR 446 (MSPB 1994).
- If an employee is capable of performing the duties of a vacant lower-graded position, the administrative judge can consider this fact in determining whether the penalty of removal, as opposed to reassignment to a position within the employee's medical restrictions, falls within the tolerable limits of reasonableness. *Marshall-Carter v. Department of Veterans Affairs*, 103 LRP 46065, 94 MSPR 518 (MSPB 2003).

Case example

  - An agency had no reason to believe that a penalty other than removal would be sufficient to alter an employee's behavior where: 1) the employee was previously counseled about her sarcastic and disrespectful behavior and warned that such behavior would not be tolerated in the workplace; 2) the employee was suspended for 30 days for abusive, discourteous, and disruptive behavior in the presence of supervisors and coworkers; 3) the penalty of removal was consistent with the agency's penalty guide; and 4) the employee showed no remorse for the misconduct and took no responsibility for it. *Murry v. General Services Administration*, 103 LRP 33706, 93 MSPR 554 (MSPB 2003).

Other Resources

- Use *Douglas* memorandum or checklist in all disciplinary actions
- Reasonable Penalties for Misconduct Chart
- Quick Start Guide: Nexus
- Quick Start Guide: Penalties and Mitigation
- Checklist Plus+: Apply *Douglas* Factors in Penalty Determination
- *Broida Guide to MSPB Law*: Nexus and Mitigation
- MSPB Charges and Penalties, A Charging Manual

Please share your experience and expertise. Forward any suggested additions or changes to this or other Quick Start Guides to *QSGeditor@lrp.com*.