

DEFENDING YOURSELF AGAINST EXCESSIVE DEPARTMENT DISCIPLINE BEFORE STATE AND FEDERAL AGENCIES: THE DOUGLAS FACTORS

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Many law enforcement officers at one time or another unfortunately face disciplinary action by their respective departments, whether they are employed by a federal law enforcement agency or by the District of Columbia Metropolitan Police Department and many other police departments. For these law enforcement officers and supervisors, even minor disciplinary actions can have a profound effect on their law enforcement career, not to mention their finances. Therefore, it is important to know some important facts in attempting to limit career and financial damage associated with disciplinary actions.

The purpose of this article is to provide officers with a general idea of possible defenses to the severity of penalties issued for misconduct. Law enforcement officers should know that if a disciplinary action is proposed against them, that they should be prepared to argue to the supervisor making the final decision in their case that any penalty proposed should be eliminated or reduced based on the Douglas factors.

The Douglas factors come from the case of Douglas v. Veterans Admin., 5 M.S.P.R. 280 305-306 (1981), a U.S. Merit Systems Protection Board case that held that 12 factors can be considered when evaluating possible penalties for a federal employee. The District of Columbia and other jurisdictions have adopted/referred to these mitigating factors in both arbitrations and cases before the D.C. Office of Employee Appeals to District of Columbia employees. Taggart v. MPD, 47 D.C. Reg. 1714 (2000).

When a Chief, Deputy Chief or other supervisor has determined that misconduct is going to be sustained, the next step is to consider how severe a penalty to issue to the officer or supervisor involved. The key to arguing for the lightest penalty possible is to present a full Douglas factors response to the deciding official. I have summarized the 12 factors to give law enforcement officers some idea of potential defenses that can be used, even if actual misconduct charges against them are sustained.

1. The nature and seriousness of the offense, and its relation to your 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 – (How serious was the misconduct, did it happen on more than one occasion, etc.);
2. An employee's job level/type of employment, including any supervisory or fiduciary role, contacts with the public, and the prominence of the position; - (Supervisors and law enforcement officers are generally treated less kind under this Douglas factor and held to a higher standard);
3. The employee's past disciplinary record – (Has this type of misconduct or other misconduct been sustained against the officer before

or does the officer have a clean past disciplinary record? This factor can help or hurt your argument);

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability – (A significant factor in mitigation; be prepared to provide detailed records of your accomplishments, years of service, performance evaluations and awards while with the Department);

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 -- (An important factor that is often a problem for management involving the issue of whether the supervisor can actually continue to trust the officer in his or her current position) (often this issue comes up when a law enforcement officer is left in his or her position while charges are pending and the person is later given a serious penalty; in such a case an officer usually has a strong defense);

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses – (Another important factor where other employees have been found guilty of the same or similar offenses, but given lesser penalties);

7. Consistency of the penalty with any applicable agency table of penalties – (Whether the final penalty is consistent with a Department's published table of penalties-often times you will find that it is not);

8. The notoriety of the offense or its impact upon the reputation of the agency – (Usually considered as an aggravating factor (factor for a stronger penalty) and typically involves misconduct which garners unfavorable media coverage);

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 – (This is an extremely important factor. It is here where an employee can argue that they were never put on proper notice of the rule that they have allegedly violated; for instance if the officer is charged with a violation of a policy that they were never given or is not clear);

10. Potential for the employee's rehabilitation – (This important factor evaluates whether or not the employee overall has a good chance at being rehabilitated – in other words, how has this officer or supervisor acted or performed which can show that the penalty may be too severe given the

circumstances; often times this can come up when the officer has admitted to misconduct prior to the Department discovering it).

11. General mitigating circumstances surrounding the alleged 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 – (A good catch-all factor for other mitigating issues that may exist in an individual case).

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others (i.e. whether lesser penalties would correct any alleged misconduct as good or better than what is proposed).

If a supervisor does not appropriately consider these factors, a disciplinary penalty, such as termination or a serious suspension can be reduced or thrown out on appeal. Often times the firm has had success arguing these mitigating factors, resulting in the reduction of the severity of penalties on appeal.

When these issues arise it is well-advised for the law enforcement officer to contact an attorney immediately for specific legal advice and/or representation. These are only general legal principles and not meant to be interpreted as specific legal advice. Questions regarding specific *Douglas* or *mitigating factors* should be directed to their attorney as individual circumstances require specific legal advice. The author can be reached at jberry@worklaws.com for further information.