

The Douglas Factor Defense for Federal Employees

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At Berry & Berry, PLLC, our attorneys represent federal employees in various types of federal agency disciplinary and adverse actions. Generally, one of the most important areas in defending a federal employee in these types of cases involves arguing the application of the Douglas Factors in attempting to mitigate (or reduce) disciplinary penalties issued in a case. The Douglas factors are also referred to as mitigating factors. These factors are used to argue that disciplinary charges for federal employees, even if true, should still result in a lower penalty than the one proposed.

The Douglas factors originate from the case of *Douglas v. VA*, 5 MSPR 280, 5 MSPB 313 (1981). In that case, the Merit Systems Protection Board (MSPB) set forth 12 factors that should be considered when evaluating the reasonableness of a disciplinary penalty for a federal employee. When our firm prepares an appeal to the MSPB for a client or in a case before a deciding official at the proposal stage it is important to set forth any and all mitigating factors that might be applicable to a federal employee's case. Douglas factors can be used as mitigating or aggravating factors so it is important to fully understand the application of both types of legal arguments.

The following is a list of 12 Douglas factors that must be taken into consideration and explanations as to how they can apply to federal employee cases.

THE 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, technical, or inadvertent; was committed maliciously or for gain; or was frequently repeated.

This Douglas factor generally refers to the connection between the seriousness of the allegation and the position that a federal employee holds. For example, an allegation of dishonesty would be treated more seriously, under this Douglas factor, for a federal employee that holds a law enforcement position. This Douglas factor also looks at whether an allegation is part of a pattern of similar conduct (repeat offense) and whether the actions at issue were intentional or a mistake. Generally, this factor tends to be used more by a federal agency to aggravate (increase) the proposed disciplinary penalty.

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

This Douglas factor is not one of the more commonly cited Douglas factors. It is more often used to attempt to aggravate a disciplinary penalty. For example, a federal agency may attempt to use the particular position that a federal employee holds (e.g., high level supervisor such as Senior Executive Service [SES]) or type of position (e.g., law enforcement)

as an aggravating factor.

(3) The employee's past disciplinary record.

Use of a federal employee's past disciplinary record is one of the more commonly cited Douglas factors. This factor is generally used for purposes of mitigation unless an employee has a past similar disciplinary action. Generally, however, this Douglas factor is argued for the purposes of arguing for a less severe penalty. For instance, if the federal employee at issue has worked for the federal agency involved for 30 years, and has never received prior discipline during that time this can be used to attempt to reduce the proposed discipline. For example, one could argue that given the lack of prior discipline that a proposed removal should be mitigated to a suspension action.

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

This Douglas factor is one of the most often used arguments our firm uses in support of mitigation of a disciplinary penalty. Generally, this argument is used by a federal employee to support a reduction in penalty based on their good record of service to their agency (e.g. past performance). For instance, in the disciplinary cases that we handle we might attempt to seek mitigation of a proposed disciplinary penalty by arguing that an employee's outstanding performance (e.g., performance ratings, commendations/awards and letters from supervisors/co-workers) during their years of service support a reduction in a disciplinary penalty. It is important to support this Douglas factor with significant documentary evidence (e.g., copies of performance records, letters of commendation, positive letters about performance by supervisors or members of the public, cash or performance awards, declarations or affidavits of supervisors).

(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.

Loss of supervisory confidence as a Douglas factor is typically used by Federal agencies in serious disciplinary / adverse actions to issue a more serious disciplinary penalty. This Douglas factor can be extremely helpful for purposes of mitigation where a federal employee has continued to work successfully in their normal position (i.e., not placed in light duty or administrative leave), over an extended period of time, after the underlying allegation has occurred. The argument for mitigation here is that the federal employee continued to work in their normal position while the investigation was ongoing. The argument in this type of case would be that the Agency has not truly lost confidence in the federal employee's ability to perform their duties.

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

This Douglas factor comes into play when the Agency picks and chooses different penalties

for similar level federal employees. Usually the root cause of different treatment in terms of disciplinary penalties tends to be favoritism by the Agency between different federal employees. However, it is important to argue this Douglas factor where a prior federal employee case of a similar nature resulted in a lower disciplinary penalty. For example, in this type of case we would argue that you cannot issue a light penalty (e.g., 7-day suspension) for one federal employee and propose a 60-day suspension for another employee where the nature of the alleged conduct is so similar.

(7) Consistency of the penalty with any applicable agency table of penalties.

Federal agencies may attempt to base a proposed or final penalty based on an agency's table of penalties. A federal agency's table of penalties is typically a table with lists of individual offenses and the ranges of possible penalties for such offenses. Generally, the ranges of penalties are fairly broad (e.g., Letter of Reprimand to Proposed Removal). We generally find that it is important to actually make sure that a proposed disciplinary action or a sustained final penalty has been listed appropriately under the agency's table of penalties. On occasion, we have found that the agency has not followed their table of penalties or has listed the misconduct under the wrong offense in their table.

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

This Douglas factor generally involves how much the public has been advised of a federal employee's alleged misconduct. Typically, this factor is used by an agency to support an increase in the proposed disciplinary penalty. Generally, this factor comes into play when an employee's alleged misconduct has been reported by the media (press or television). We have also seen federal agencies use this Douglas factor to aggravate disciplinary penalties where other agencies (federal, state, local) have become aware of a federal employee's misconduct, arguing that the employee's actions have caused the federal agency's reputation to somehow become tarnished. It is important to rebut these issues in a Douglas factor defense.

(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 Douglas factor is important and we use this argument in our representation of federal employees. In particular, the "lack of clarity" argument refers to the rules governing the underlying allegations at issue. Typically, a federal employee will be proposed for disciplinary action in a case based on a violation of a particular agency rule. It is often the case that a federal employee has been charged with a violation of agency rules but has not been properly trained with respect to these rules or regulations. As a result, in defense cases our firm attempts to argue that the lack of clarity as to these rules warrants a reduction in a disciplinary penalty. For example, we might argue that the lack of a clear agency policy on computer usage should result in mitigation of a penalty for an employee that has been charged with misuse of a government computer.

(10) The potential for the employee's rehabilitation.

The potential for an employee's rehabilitation is an important Douglas factor for a federal employee, especially in cases of proposed removal. While some federal agencies attempt to use this Douglas factor in an effort to attempt to increase a federal employee's disciplinary penalty, we have found that this factor is extremely helpful for purposes of a reduction in the employee's penalty. For instance, if an employee has committed misconduct but fully discloses his or her actions prior to an investigator finding out about the misconduct, this can be deemed to be a significant mitigating factor. Or in another case, if an employee has continued to work in their position over the course of a long period of time after the allegations are under investigation, this shows that the Agency continues to have trust in the employee and that the employee has continued to perform well despite the initial allegation. We argue this factor, in most cases, to attempt to reduce a proposed removal to a lower form of disciplinary action.

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

This Douglas factor tends to be a general mitigation factor that can incorporate many different types of arguments for mitigating a penalty. If a mitigation argument does not fit under the other 11 Douglas factors, it can, in most instances, be argued here. We often use this Douglas factor to illustrate personality conflicts in issuing proposed discipline by the proposing official or harassment by others in the workplace which led to the proposed discipline against a federal employee. Other times, when there are medical issues related to the offense we can use this argument to attempt to mitigate the proposed penalty. Some federal employees have successfully argued for mitigation where stress or an anxiety condition contributed to the disciplinary misconduct issues.

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

While not used that often by federal agencies in their final decisions, this Douglas factor can and should be argued in significant disciplinary cases (e.g., proposed removals or significant suspension cases). We have argued, in cases for federal employees, that a different penalty (i.e., other than the one proposed by an agency) is more than adequate in a certain case and still serve the same disciplinary purpose as a more steep penalty. For instance, we have argued that instead of removing a federal employee that they should instead receive a suspension. For example, where a federal employee has been placed in an unpaid suspension over the course of several months while an investigation was pending, we would argue that this should be considered as part of the penalty served so that the ultimate penalty issued should be reduced. For this Douglas factor there are a number of ways in which to argue that a reduced penalty would serve the same purpose as something more serious (e.g. removal). The key to doing so is to fully argue the rationale behind this argument before the agency involved or the MSPB.

CONCLUSION

The Douglas factors are critical for federal employees facing a pending disciplinary action or for those at the MSPB on appeal. As a result, it is very important for a federal employee to argue all applicable Douglas factors, and provide documentary evidence (e.g. affidavits, performance ratings, SF-50s, letters of commendation) for the record. Douglas factor issues vary significantly from case to case and federal employees should consult with an attorney who is knowledgeable about these issues prior to responding to a proposed disciplinary action or filing an appeal with the MSPB.

Berry & Berry, PLLC represents federal employees in these types of federal employment matters and can be contacted at (703) 668-0070 or www.berrylegal.com to arrange for an initial consultation regarding Douglas factor and other federal employment issues.

Attorneys

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Practice Areas

Federal Adverse and Disciplinary Actions