

# **PROGRESSIVE DISCIPLINE AND TABLES OF PENALTIES IN PENALTY DETERMINATION FOR FEDERAL EMPLOYEES**

## **Overview**

One of the most important determinations for Federal sector managers in taking a disciplinary action for employee misconduct is selecting an appropriate penalty. Federal agencies should manage their workforces effectively, which involves the appropriate use of discipline, when addressing employee misconduct. Managers should take discipline that is reasonable and proportionate to the misconduct.

This guidance informs agency human resources offices, managers, and supervisors of some of the pitfalls associated with two practices agencies sometimes adopt in connection with the penalty selection process -- progressive discipline and tables of penalties. It is the administration's policy that supervisors and deciding officials should not be required to use progressive discipline, and that the penalty for an instance of misconduct should be tailored to the facts and circumstances, not drawn from a table of penalties. Each employee's work performance and disciplinary history is unique, and disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. It is important to emphasize the use of progressive discipline and tables of penalties is not mandated by statute, U.S. Office of Personnel Management (OPM) regulations, or case law. If your agency uses these practices, it is because your agency, in its exclusive discretion, has made an independent decision to adopt them. OPM believes that it is best for agencies to calibrate discipline to the unique facts and circumstances of each case, which is consistent with the flexibility afforded agencies under the "efficiency of the service" standard for imposing discipline contained in the Civil Service Reform Act. You should consult with your human resources office, however, to determine which tools are currently applicable to your agency.

This guidance focuses on non-Senior Executive Service (SES) Federal employees who meet the definition of "employee" in sections 7501 and 7511 of title 5 of the United States (U.S.) Code. For employees who are members of bargaining units, negotiated agreements with the applicable labor unions may contain time limits or other procedures and requirements that should be followed when taking action regarding bargaining unit employees, but these procedures must be consistent with the requirements of title 5, U.S. Code. If such agreements are not consistent with title 5, they are unenforceable.

The Federal Service Labor-Management Relations Statute (the Statute<sup>1</sup>) establishes management rights,<sup>2</sup> i.e., matters over which agencies are prohibited from substantively negotiating with labor unions. Management's statutory rights to suspend, remove, reduce in grade or pay, or otherwise discipline employees are included in these prohibited subjects of bargaining.<sup>3</sup> OPM strongly encourages agencies to review existing collective bargaining agreements (CBAs) to identify any provisions which conflict with these statutory rights and, whenever practical and appropriate, take steps to eliminate any conflicting provisions. Agencies should also avoid adopting any contract provisions in future collective bargaining that interfere with the exercise of management's statutory rights.

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<sup>1</sup> 5 United States Code (U.S.C.), Chapter 71.

<sup>2</sup> 5 U.S.C. §7106(a).

<sup>3</sup> 5 U.S.C. §7106(a)(2)(A).

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### **Efficiency of the Service Standard and Penalty Selection**

Chapter 75 of title 5 of the U.S. Code specifies the procedures that agencies must follow when taking adverse actions, i.e., suspensions, demotions, reductions in pay or grade, and removals, for acts of employee misconduct. An agency may take an adverse action against an employee only “for such cause as will promote the *efficiency of the service*.”<sup>4</sup> (Emphasis supplied). *Efficiency of the service* is a term of art. The U.S. Merit Systems Protection Board (MSPB or the Board), the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), and the United States Supreme Court have breathed meaning into the standard through the issuance of decisions construing it. (See, e.g., *Arnett v. Kennedy*, 416 U.S. 124 (1974), which upheld the efficiency-of-the-service standard against a challenge that it was unconstitutionally vague. Also see *Meehan v. Macy*, 129 U.S. App. D.C. 217, 230, 392 F.2d 822, 835 (1968), modified, 138 U.S. App. D.C. 38, 425 F.2d 469, aff’d en banc, 138 U.S. App. D.C. 41, 425 F.2d 472 (1969), which recognized the essential fairness of the broad and general removal standard for “cause” and the impracticability of greater specificity.) Such reasons could include, but are not limited to, misconduct. For example, an adverse action may also be used to remove an employee who is not performing at an acceptable level.

There is no general statutory definition of misconduct. By establishing rules in terms of the *efficiency of the service* and the types of actions that will require specific procedures, Congress provided managers with maximum flexibility to pursue adverse actions whenever it would promote the efficiency of the service, whether the underlying impetus was a conduct issue, a failure to perform, or something else. Chapter 75 “provides that all-encompassing umbrella” for addressing conduct and performance-related issues.<sup>5</sup>

There are various considerations pertinent in determining an appropriate penalty. First and foremost, penalties should be tailored to the facts and circumstances of each case. Penalties should also be reasonably consistent with the discipline applied to similarly situated employees in the same work unit, with the same supervisor, and who were subject to the same standards governing discipline. See *Miskill v. Social Security Administration*, 863 F.3d 1379 (2017). In other words, where the charges and the circumstances surrounding the charged behavior are substantially similar for two employees, and there are no considerations that would warrant treating them differently, the penalties should be comparable.

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 when the charges are sustained. The Board’s decision in *Douglas v. U.S. Department of Veterans Administration*,<sup>6</sup> outlines factors to be taken into consideration whenever a disciplinary action is contemplated. The *Douglas* factors is a non-exhaustive list of criteria that supervisors must consider in determining an appropriate penalty for an act of employee misconduct. The Board will not disturb an agency’s penalty if it is the maximum

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<sup>4</sup> 5 U.S.C. §§ 7503(a) and 7513(a). The *efficiency of the service* standard is not applicable to actions taken against the SES in accordance with 5 U.S.C. § 7543. However, this guidance on progressive discipline and tables of penalties is generally applicable to the SES.

<sup>5</sup> *Lovshin v. U.S. Department of Navy*, 767 F.2d 826, 843 (1985).

<sup>6</sup> *Douglas v. U.S. Department of Veterans Affairs*, 5 M.S.P.R. 280 (1981).

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reasonable penalty. If more than one charge has been levelled, and the agency specifies the penalty for each, then even if the Board sustains fewer than all of the charges, the Board will likely uphold the agency's penalty choice unless it is deemed to be unreasonable. If the agency has not so specified, the Board is more likely to mitigate the penalty to what it concludes is the maximum reasonable penalty. (See *Lachance v. Devall*, 178 F.3d 1246 (1999).

### **Progressive Discipline**

The adoption of a progressive discipline approach constitutes an agency's exclusive choice to impose the least serious disciplinary or adverse action applicable to correct the issue or misconduct, with penalties imposed at an escalating level for subsequent offenses. Agency policy should not require or permit supervisors and deciding officials to use progressive discipline as a default rule or benchmark when determining the appropriate penalty. Rather, each employee's work performance and disciplinary history is unique, and disciplinary action should be tailored to the specific facts and circumstances of each individual employee's situation. As an example of assessing the appropriate penalty, suspension should not be a substitute for removal for circumstances in which removal would be appropriate.

Progressive discipline is not defined in statute or regulation. Rather, its provenance is in the private sector, where processes are generally less bound by statutory procedures and decisional law interpreting such procedures. In the Federal sector, statutes, regulations, and decisional law interpreting statutes and regulations govern. The *Douglas* factors, see 5 M.S.P.R. 280 (1981), provide an adequate and useful template for arriving at reasonable penalty determinations. The supervisor should also weigh any relevant aggravating and mitigating factors that may be relevant, such as the nature and severity of the offense, the employee's disciplinary record and years of service, the employee's potential for rehabilitation, and applicable agency penalty guidelines. When taking disciplinary action, agencies have discretion to take into account an employee's disciplinary record and past work record, including all past misconduct, not only similar past misconduct.

With regard to collective bargaining on the topic of progressive discipline, Federal Labor Relations Authority (FLRA) precedent has consistently and, in our view, correctly ruled that proposals that require the adoption of progressive discipline restricting management's decision as to the appropriate disciplinary penalty to impose under the circumstances of each case are nonnegotiable because they directly interfere with management's statutory right to discipline and limit an agency's right to choose disciplinary penalties.<sup>7</sup> Agency negotiators are encouraged to consult with legal counsel and labor relations concerning questions relating to negotiability of any union proposals received in collective bargaining.

### **Tables of Penalties**

#### **No Requirement for a Table of Penalties**

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<sup>7</sup> *NTEU v. Treasury, Customs Service*, 46 FLRA 696, 769 (1992).

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A table of penalties is a non-exhaustive list of common infractions along with a suggested range of penalties for each infraction.

As noted above, a table of penalties is not required by statute, OPM regulations, or case law. Indeed, as discussed earlier, not all adverse actions are disciplinary or punitive in nature. Furloughs are one example of this. Where tables of penalties exist, they are established at an agency's exclusive discretion. Any table of penalties that is in use should establish at the outset that it is mere guidance and not an exclusive or exhaustive source of such guidance. Indeed, an agency has sufficient flexibility to address misconduct appropriately *without* a table of penalties and to determine the appropriate penalty for each instance of misconduct. Specifically, supervisors should rely on the *Douglas* factors to propose and effectuate appropriate penalties for employee misconduct. Without purporting to be exhaustive, the MSPB has articulated that the 12 *Douglas* factors set forth those factors which are generally recognized as relevant to selection of an appropriate penalty.

FLRA case law has established that proposals that would require incorporation of a table of penalties into a CBA or require management to use a table of penalties, thereby restricting the range of penalties prescribed for specific offenses and require penalties within a certain range, are nonnegotiable.<sup>8</sup> Such proposals unduly restrict management's statutory right to suspend, remove or otherwise discipline, and management's exercise of discretion in determining appropriate corrective action to address employee misconduct.<sup>9</sup> Agency negotiators are encouraged to consult with legal counsel and labor relations offices concerning questions relating to negotiability of any union proposals received in collective bargaining.

### **Agency Discretion in Managing Its Workforce**

Both the Court of Appeals for the Federal Circuit and the MSPB have held that the Board's role in determining reasonableness of penalties must accord proper deference to the agency's primary discretion in managing its workforce. An agency must have sufficient flexibility to consider mitigating and aggravating factors when considering discipline for misconduct. Given these considerations, the disadvantages of instituting a table of penalties are manifold. One risk of having an agency table of penalties is that the manager may apply it inflexibly so as to impair consideration of other factors relevant to the individual case. If such a table is utilized, notwithstanding our cautions, a table of penalties should be used only as a guide as it may not effectively address all situations. In fact, it is unlikely that a table of penalties can be comprehensive given the scope of misconduct that can possibly occur.

A table of penalties does not and should not replace supervisory judgment nor should supervisors rely on this tool instead of using their best judgment, given the totality of the circumstances. It is vital that supervisors use independent judgment, take appropriate steps in gathering facts, and conduct a thorough analysis to decide the appropriate penalty. There is no substitute for management judgment. Mere "surface" consistency should be avoided, and tables of penalties should not be applied so inflexibly as to impair consideration of other factors relevant to the

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<sup>8</sup> *New York State Nurses Association v. VA Bronx Medical Center*, 30 FLRA 706,733 (1987).

<sup>9</sup> *NAGE Local R4-45 v. Navy Resale and Service Support Office*, 40 FLRA 56, 59 (1991).

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individual case. In light of MSPB precedent, relying on the 12 *Douglas* factors gives an agency the best chance of successfully defending its penalty if the agency's decision is formally challenged.

### **A Table of Penalties is An Additional Condition When Defending Agency Actions**

A table of penalties may create additional obstacles to an agency's ability to defend actions taken to address misconduct. Although the MSPB has never held that an agency is required to have a table of penalties,<sup>10</sup> if an agency does adopt a table of penalties, the agency must consider it when determining a penalty for misconduct, because consistency with an agency's table of penalties (if there is one) is one of the *Douglas* factors. 5 M.S.P.R. at 330-331 (factor (7)). Therefore, the MSPB, in a number of cases, has placed a burden on the agency to justify why it exceeded its penalty guidelines in a particular case. See, e.g., *Basquez v. Dep't of the Air Force*, 48 M.S.P.R. 215, 219 (1991); *Williams v. Dep't of the Air Force*, 32 M.S.P.R. 347, 349-50 (1987); *Stead v. Dep't of Army*, 27 M.S.P.R. 630, 634 (1985); *Harris v. Department of the Navy*, 15 M.S.P.R. 464 (1983). The MSPB has also relied on an agency's range of penalties for a particular offense to determine the "maximum" reasonable penalty that may be imposed for that offense. See, e.g., *Doherty v. Dep't of Transportation*, 11 M.S.P.B. 526 (1982). On the other hand, the Board has, in other instances, reminded the agency that its table of penalties is merely a guideline when the MSPB mitigates a penalty imposed by the agency that is within the range provided in the table of the penalties. See, e.g., *Carson v. Veterans Administration*, 29 M.S.P.R. 631, 634 (1986); *Jensen v. Dep't of Agriculture, U.S. Forest Service*, 18 M.S.P.R. 555 (1984); *Schultz v. Dep't of Navy*, 8 M.S.P.B. 249 (1981); *McNeill v. Veterans Administration*, 7 M.S.P.B. 369 (1981)). Thus, an unintended consequence of maintaining a table of penalties is that it may be given undue weight, i.e., relied upon by the MSPB to define what is reasonable, and invoked to undermine the agency's flexibility and judgment in specific cases. Even efforts to draft an exhaustive table of penalties in order to preserve agency flexibility in this environment could still never contemplate every conceivable situation.

### **Any Legal Elements of Charge Labels in a Table of Penalties Must be Proved**

A table of penalties encourages the practice of attaching a specific label to an act of misconduct, whereas the MSPB has pointed out the pitfalls of attaching labels to various offenses. As stated on the MSPB website, an agency "is required to state the reasons for the proposed adverse action in sufficient detail to allow the employee to make an informed reply . . . but nothing in law or regulation requires an agency to affix a label to a charge of misconduct. If an agency so chooses, it may simply describe actions that constitute misbehavior in a narrative form, and have its discipline sustained if the efficiency of the service suffers because of the misconduct." However, the MSPB also notes that, if an agency puts a label on a type of misconduct, the agency must then prove the elements that would make up the legal definition of such a charge, if there are any. This can lead to reversals of adverse actions by the MSPB on extremely technical grounds. For example, if an agency charges an employee with "theft" based on the table of penalties, the agency may be required to prove the employee's subjective intent to deprive the owner of the property permanently; not just that the employee took something that was not his even if the

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<sup>10</sup>E.g., *Robb v. U.S. Department of Defense*, 77 M.S.P.R. 130, 137 (1997).

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narrative describing the charge places the employee on notice that he is not being charged with intent to deprive permanently. (See *Nazelrod v. Department of Justice*, 4 MSPR 461 (1992) which held that when an agency bases a charge on a criminal offense, such as theft in this case, it is required to prove elements of the criminal offense.) Further, a table of penalties will discourage agencies from leveling charges that are not named in the table even if they are the charges best tailored to the employee's conduct. No matter how much agencies attempt to tutor managers in the proper use of tables of penalties, many will resort to them as a crutch instead of thinking clearly and independently about the facts and circumstances underlying the particular facts of each case. Simply put, tables of penalties promote lazy thinking instead of hands on, thoughtful management.

### **Considerations for Agency Negotiators and Agency Heads**

OPM urges agencies to be diligent during negotiations in ensuring application of current Federal law when determining if proposals involving progressive discipline or tables of penalties constitute "procedures" or "appropriate arrangements" in accordance with the Statute.<sup>11</sup> More specifically, when determining the negotiability of a proposal and/or whether or not the agency has a duty to bargain over a proposal, agency negotiators should strongly consider formally challenging negotiability where applicable and, and shift the burden to the union<sup>12</sup> to demonstrate that the proposal is, in fact, a negotiable "procedure"<sup>13</sup> or "appropriate arrangement."<sup>14</sup> Unsupported, bare assertions of negotiability are not sufficient to establish negotiability in the context of negotiability proceedings.<sup>15</sup> Additionally, as stated above, agency negotiators should examine whether or not the proposal impermissibly interferes with the exercise of a statutory management right. Or to avoid these knotty labor-law questions, an agency may elect in its sole discretion not to resort to progressive discipline or tables of penalties at all.

OPM also urges agencies to be diligent during agency head review<sup>16</sup> in ensuring application of current law and ensuring rejection of any unlawful provision(s) involving progressive discipline or tables of penalties that do not constitute "procedures" or "appropriate arrangements" under the Statute.<sup>17</sup> The head of agency (or designee) responsible for final approval of a CBA should disapprove any provision(s) which establish and dictate criteria for taking disciplinary action, such as placing a contractual burden on the agency to justify its decision to suspend an employee beyond that required by procedures contained in law and regulation. Furthermore, agencies must be diligent in ensuring the completion of agency head review in accordance with any applicable contractual provisions and within statutory deadlines.<sup>18</sup>

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<sup>11</sup> 5 U.S.C. §§7106(b)(2) and (3).

<sup>12</sup> 5 CFR 2424.25(c)(1)(ii) and (iii).

<sup>13</sup> *Patent Office Prof'l Ass'n v. Fed. Labor Relations Auth.*, 26 F.3d 1148, 1155 (D.C. Cir. 1994).

<sup>14</sup> *AFGE Local 1770 v. U.S. Army HQ*, 34 FLRA 903 (1990).

<sup>15</sup> *AFGE Local 2058 v. U.S. Department of Interior*, 68 FLRA 676, 678-79 (2015).

<sup>16</sup> 5 U.S.C. §7114(c).

<sup>17</sup> 5 U.S.C. §§7106(b)(2) and (3).

<sup>18</sup> 5 U.S.C. §7114(c)(2).

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### **Conclusion**

Neither progressive discipline nor a table of penalties is required by statute, OPM regulations, or case law. In fact, agencies should be aware that progressive discipline and tables of penalties can create restrictions or impose conditions that go well beyond the requirements proscribed by law and regulation and interfere with an agency's ability to address misconduct effectively. Primary discretion has been entrusted to agency management to determine an appropriate penalty for employee misconduct in light of all the circumstances. Progressive discipline and tables of penalties do not and should not replace supervisory judgment, and managers may not rely on these tools extensively as a replacement for managers using their best judgment given the totality of the facts and circumstances. It is vital that supervisors use independent judgment, take appropriate steps in gathering facts, and conduct a thorough analysis to decide the appropriate penalty. In doing so, supervisors will address misconduct in a manner that has the greatest potential to avert additional harm to the efficiency of the service.