

Discipline

Penalties for misconduct need to be fair, not identical

By Herb Levine, *SmartAnswers* Correspondent

If you are like most federal supervisors, disciplining your employees for misconduct is not your favorite duty. But fair, evenhanded discipline is one of your most important responsibilities.

How can you be sure that you are being fair, both in deciding who to discipline and in determining the penalty, and that your decisions will be sustained if the employee appeals?

Robbie Kunreuther, director of Government Personnel Services in Seattle, said he goes with the "reasonable parent" standard. "Does Mom treat every kid exactly the same?" he asks. If she did, she might not be a very competent parent, since different kids have different needs and different problems.

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Are you singling employees out?

Of course, Kunreuther agreed, a supervisor can't exactly say, "I don't care who started it." After all, evidence does matter in discipline. However, the supervisor can respond to the complaint that "everyone was doing it" or "I'm not the only one" just like a parent or like a traffic cop: "But you're the one I caught."

The employee may say, "I know others who've done what I did, and they weren't disciplined." The proper response, Kunreuther said, is "Give me their names." He pointed out that an employee who later files an EEO complaint or grievance will have to provide names if unfair treatment is claimed. Often the requirement stops complaints dead, he said, "by shutting down whiners," as opposed to genuine whistleblowers.

Is the penalty fair?

Once you've decided on discipline you need to propose a penalty, and serious penalties (suspensions of more than 14 days, demotions and removals) are subject to review by the Merit Systems Protection Board.

But there's no need to worry about penalty mitigation on appeal, said William Wiley, a director with the Federal Employment Law Training Group, provided you remember this basic principle: "Once the charges are proved, a manager's reasonable penalty will be sustained as long as the manager properly considered the relevant aggravating and mitigating factors."

That means you have to consider the well-known *Douglas* factors, as determined by the MSPB in *Douglas v. Veterans Administration*, 5 MSPB 313, [81 FMSR 7037](#) (1981).

When it comes to sustaining a penalty, Wiley said, the most important *Douglas* factor by far is "nature and

seriousness of the misconduct," including its consequences to agency operations and mission. Others, such as "potential for rehabilitation," must be considered, but this is overriding.

The classic case is *Dunn v. Air Force*, [104 LRP 25851](#) (MSPB 2004), where the MSPB administrative judge found the agency should not have removed a motor vehicle operator for leaving a Minuteman missile unattended, and mitigated the penalty to a suspension because agency had not considered the potential for rehabilitation implied by almost 30 years of service. The MSPB reversed, finding the seriousness of the misconduct overrode all other considerations.

Nonetheless, it is best to show that you have at least considered all *Douglas* factors. Wiley said supervisors should ask HR to provide them with *Douglas* factor worksheets and instructions.

Although you have considerable leeway on penalty choice, Wiley said, your choice should be one that AJs and board members "can live with." He suggested you ask uninvolved parties for opinions, and consult with HR to get penalties in similar cases in your agency.

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