

Appropriateness of Penalty

By Steve Burt

Michigan State Association of Letter Carriers (MSALC) Director of Education

Appropriateness of Penalty -- The Douglas Factors

In both the grievance process and in MSPB appeals, a vital consideration is whether or not a disciplinary penalty is fair and reasonable. We often find in representation of disciplined letter carriers that the charges are serious and persuasive. For the carrier's job to be saved or the suspension to be reduced, it is often necessary to show that the penalty is excessive. Most such arguments are in the family of mitigating arguments. They plead for a lesser penalty based on consideration of additional, mitigating factors--factors that might justify a reduction of penalty even if management succeeded in proving its charge.

One possible standard for analysis of the fairness of disciplinary penalties is found in a Merit Systems Protection Board precedent, based on a famous Merit Board case, **Curtis Douglas v. Veterans Administration, 5 M.S.P.R. 280 305-306 (1981)**. That decision enumerated possible factors for judges when reviewing fairness of penalty. These considerations are known as the Douglas factors.

When MSPB judges evaluate disciplinary penalties in light of the Douglas factors, they are attempting to ensure that the Agency considered all relevant factors and arrived at a penalty within *tolerable limits of reasonableness*. What this means in terms of policy is that MSPB judges are not inclined to modify penalties out of compassion or sentiment, but only if very significant factors deserve consideration or if the penalty is clearly inappropriate.

The MSPB, in October of 1996, modified their position on mitigation of penalty, in **Joe E. White v. U.S. Postal Service, SL0752950304I (10/8/96)**. Their current position now is that the *maximum reasonable* penalty standard is no longer tenable for reviewing penalties in those cases where fewer than all the charges are sustained. Instead, it found that, in such cases, the Board will apply a *reasonable* penalty standard, where the Board will independently and responsibly balance the relevant Douglas factors to determine a reasonable penalty. The Board did recognize that in many cases this change will have no practical difference, as the penalty under either standard will be the same.

The Douglas Factors

The following excerpts from Curtis Douglas v. Veterans Administration, summarize the Douglas factors as considered by MSPB judges:

Court decisions and OPM and Civil Service Commission issuances have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Without purporting to be exhaustive, those generally recognized as relevant include the following:

- (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.***

Argumentation Issues

Although MSPB decisions are not normally cited for precedent in arbitration cases, the ideas found in the Douglas decision could readily be crafted into arguments in any forum.

Mitigation of penalty arguments are not without some elements of risk. When mitigation arguments presume guilt they harbor the risk that the arbitrator or judge will decide that the employee genuinely is guilty, but not accept the plea that the penalty should be modified. To combat this problem, advocates often introduce mitigation-of-penalty arguments with such statements as: "Even if the grievant acted as

charged, the penalty is excessive because...."

In representation before the Merit Systems Protection Board, my personal practice has been to first argue technical defects under **harmful technical error** headings. Then are pursued arguments contending no just cause, one argument at a time, under **merit argument** headings. Lastly come the mitigation-of-penalty arguments, one by one, under **inappropriateness of penalty** headings. In MSPB cases, which require written submission of defenses, one can even number the arguments of each type (Inappropriateness of Penalty, 1, 2, 3, etc.).

Such well-structured arguments also become much easier to make orally at the hearing. By arguing the three categories as separate issues within the case, the grievant does not have to confess in order to seek relief from the worst of the punishment.

Some advice in presentation: Argue very selectively for mitigation of penalty and never present the entire list of Douglas factors. Make only arguments that improve your case. An ongoing danger is that any of the twelve Douglas factors can be reversed into an argument for maximum punishment if the circumstances fit management's picture better than ours.

For example, if the employee did have prior discipline or was well aware of the violated rule, why give management new angles for later argument? Never give management any form of assistance in perfecting their case. The grievant is in enough jeopardy already. In any form of argumentation or negotiation, if you want to win, present winning arguments.

The Steward's Crucial Role

The above discussion may not seem terribly important to the steward or even the Step 2 designee, but its significance is crucial. For an appropriateness-of-penalty argument to succeed before an arbitrator, its appearance and development is vitally necessary by Step 2 of the grievance procedure.

Why? (1) Either party can argue against admission of new factual evidence or points of argument later in the grievance process; and (2) the credibility of any argument requires that it be sincere and consistent with known facts, not concocted at the last instant after merit arguments have evaporated. Once the grievance has been appealed to Step 3, any deficiencies and contradictions of fact or argument are very difficult to reverse or conceal.

Concluding Remarks

Representing letter carriers in serious trouble need not deteriorate into a begging session. There are many arguments to make in most situations that speak to the worth and potential of the employee as well as to the futility and destructiveness of raw punishment. Such arguments hold no hope of success, however, unless they are thoughtfully developed and presented.

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