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IN FOCUS

MSPB Moves Away from *Douglas* Factors in Misconduct Cases

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The Merit Systems Protection Board (MSPB or "the Board") issued a final rule entitled, "Determining the Appropriate Penalty for Federal Employees Charged with Misconduct," which became effective on October 5, 2026. The rule amends MSPB regulations governing penalty determinations in federal employee misconduct cases. Prior to the amendments, the Board historically had used 12 factors, known as the *Douglas* factors, established by the MSPB's precedential decision, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), to determine whether a misconduct penalty is reasonable. The recent amendments depart from the *Douglas* factors and adopt a "totality of the circumstances" test for evaluating the reasonableness of penalties in adverse actions.

This In Focus summarizes the statutory background underlying personnel actions taken against federal employees for misconduct, contrasts the test from *Douglas* with the MSPB final rule, and provides considerations for Congress.

Statutory Requirements for Addressing Misconduct by Federal Employees

Federal employees are generally covered by statutory protections beyond those that are usually applied to private sector employees, including more robust procedures for removal or demotion. Although the applicable laws differ among parts of the civil service, the primary statutory framework governing the federal workforce is the Civil Service Reform Act of 1978 (CSRA). When an agency takes adverse actions, such as removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs, against most federal employees, Subchapter II of Chapter 75, Title 5, *U.S. Code*, prescribes the right to notice of such actions and the right to appeal such actions to the MSPB. If a covered federal employee challenges an adverse action based on misconduct before the MSPB, the agency employer must prove by a preponderance of the evidence that the charged misconduct occurred, that the agency's adverse action was taken to promote the efficiency of the service, and that the penalty was reasonable. A final decision by the MSPB can be appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).

The notice and appeal rights in Subchapter II of Chapter 75 are generally available to competitive service and some excepted service employees who satisfy specified durational requirements. These rights are not available to employees in positions that have a "confidential, policy-determining, policy-making or policy-advocating character," such as those in the Schedule C and Schedule Policy/Career positions of the excepted service, or other categories of civil service employment such as the Senior Executive Service. Various protections in the CSRA are also inapplicable to certain positions and agencies in the federal government, such as components of the intelligence community.

Douglas v. Veterans Administration Factors

While an employing agency may take an adverse action against an employee to address misconduct, the imposed penalty must be reasonable. Generally, the MSPB has authority to review, and mitigate, when warranted, the agency's penalty determination on appeal. In *Douglas v. Veterans Administration*, the MSPB reviewed the removals of several career employees from the competitive service due to job-related misconduct, and identified twelve non-exhaustive factors to consider:

1. the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities;
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. the 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.

Since the decision in *Douglas*, the MSPB has applied the above factors when considering the reasonableness of an employing agency's penalty for misconduct. On review, the Federal Circuit has regularly required the use of the *Douglas* factors and vacated Board decisions that failed to properly consider them.

MSPB 2026 Final Rule

According to the preamble to the 2026 final rule, the MSPB will "no longer require" consideration of the *Douglas* factors in every case reviewing the reasonableness of penalties in

misconduct-based adverse action appeals. Instead, "[t]he Board will review a penalty only to determine whether it is within the tolerable limits of reasonableness in light of the charges sustained . . . based upon the totality of the circumstances relating to the efficiency of the service, on a case-by-case basis." This totality-of-the-circumstances test applies to appeals filed on or after the effective date of October 5, 2026.

The Board highlights two related rationales for departing from the framework in *Douglas*: the lack of flexibility in applying the factors and the process costs imposed in addressing them. Regarding the former, the preamble states a need "to return the Board's review of agency-selected penalties to the standard Congress enacted and to correct the drift . . . toward a rigid and mechanistic application of the framework announced in *Douglas*[.]" Although the *Douglas* decision itself articulated that not every factor will be pertinent in every case, and further cautioned that "the relevant factors are not to be evaluated mechanistically by any preordained formula," the preamble argues that *Douglas* created a "perceived obligation" to apply the factors inflexibly. The Board further contends that this perception imposed unintentional and reoccurring costs on parties and the Board, including "standardized worksheets treated as legally compulsory; penalty appeals litigated as audits of whether each factor was recited and adequately weighted; and a checklist-centered practice[.]" In support of this contention, the Board cites comments from federal agencies that recounted "factor-by-factor documentation" to insulate adverse action cases. The preamble acknowledges disagreement with other commentators who had disputed accounts of an inflexible framework as anecdotal and "an unsupported stereotype."

The final rule also "codifies" at 5 C.F.R. § 1201.56(b)(3) the framework for MSPB penalty determinations as articulated in *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). These regulatory provisions instruct the Board that the agency's choice of penalty is entitled to "substantial deference," and that the Board will review a penalty only to determine whether it is "within the tolerable limits of reasonableness" based on the totality of the circumstances. If the Board finds that a penalty exceeds these limits, or if an agency's charge against the employee is not sustained, the final rule instructs the Board to only mitigate the agency's original penalty to the maximum reasonable penalty, absent an articulated desire by the employer to impose a lesser penalty. The Board may "accord the agency an opportunity to institute a lesser penalty" if the agency did not indicate what the mitigated penalty should be. If the Board sustains all the employing agency's charges and finds that the penalty is within the tolerable limits of reasonableness, then the Board must sustain the agency's action.

Several Members of Congress submitted a joint comment to the proposed rule arguing that it "would weaken longstanding civil service protections that promote merit-based employment, due process and the recruitment and retention of skilled workers," and that a factorless test "could allow agencies to ignore important mitigating factors and more easily remove skilled workers with strong rehabilitation potential from critical industries," such as civilian employment at facilities with national security missions. Other comments voiced similar concerns, reflecting on potential impacts a vague or standardless rule and limited discretion may have on the efficacy and independence of the Board's review process. The preamble responds to the Members' comment and similar comments, maintaining that a totality-of-the-circumstances test is not standardless and that the considerations identified in *Douglas* could still be raised by the parties and the Board when relevant. The Board also emphasizes that an agency employer "continues to bear the burden of proving the reasonableness of its penalty by preponderant evidence; and the Board retains, and has codified, its authority to mitigate penalties that exceed the tolerable limits of reasonableness."

Some other comments had voiced concern with the Board undergoing rulemaking to overrule a Board decision that has been repeatedly confirmed by controlling precedent. These commenters argued that the Board may not eliminate the *Douglas* factors through rulemaking because the Federal Circuit has adopted *Douglas* in decisions that the Board is obligated to follow. In response, the Board makes three arguments. First, the Board emphasizes that the *Douglas* factors, though confirmed by the Federal Circuit, were the creation of the MSPB. Second, the Board argues that the change taking place through agency rulemaking rather than adjudication should insulate it from criticism construing the change as an adjudicatory departure from circuit precedent. Third, the preamble recognizes that the Board's application of the rule in decisions "will be subject to judicial review under 5 U.S.C. § 7703," implying that the Federal Circuit could impose different requirements on review.

Considerations for Congress

Congress has codified procedures and rights applicable to the imposition of penalties for competitive service employees, including the notice and appeal rights in Subchapter II of Chapter 75 of Title 5 discussed above. If it wishes, Congress can further amend Title 5 to require the MSPB to apply the *Douglas* factors in reviewing penalties. Alternatively, Congress could codify the MSPB final rule and require the Board to judge whether the agency's penalty is "within the tolerable limits of reasonableness in light of the totality of the circumstances." Congress could also create a different test for the MSPB to apply or choose not to act. Similarly, Congress may consider amending or codifying the regulations in the new 5 C.F.R. § 1201.56(b)(3) or may defer to the final rule.

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