

Discipline: Just Cause, and the Douglas Factors

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Statutory Protection in Disciplinary Actions

As a result of AFGE's activism when it was framed, the Federal Labor-Management Relations Statute limits the power of the government's management officials to impose disciplinary actions at will. 5 U.S.C. 7503 and 5 U.S.C. 7513 permit management to impose disciplinary adverse actions "only for such cause as will promote the efficiency of the service." They also describe employees' rights and the procedure management must follow.

Just Cause for Disciplinary Actions

Unorganized workers can be fired at the employer's whim, but historically union contracts have limited employers' rights to impose discipline arbitrarily. Article 23, Section 7 of our contract states, "Employees will be the subject of disciplinary action only for just cause." This clause gives us more protection than a casual reading might suggest. What constitutes just cause is not left to management's interpretation. Though the concept of just cause is not codified into law, long years of arbitration decisions in both the public and the private sectors have resulted in an informal definition generally accepted by arbitrators dealing with labor disputes. Historically just cause for discipline has been found not to exist unless the following seven conditions apply:

1. The employee must have been given advance warning of the rule and the possible penalty for breaking it.

Notice can be either actual or constructive.

- Grievants get actual notice when someone actually tells them about the rule, reads a warning or gives it to them in writing.
- Grievants get constructive notice when they should have known about the rules and its consequences. For example, if the rule was in the employee handbook given to the grievant the first day of employment or posted in a place where employees know to look for rules management has given constructive notice. A grievant is also regarded as having constructive notice when an offense— such as theft or assault — is so obviously wrong that anyone with common sense would know that it is against the rules. Notice of the penalty may still be needed.

2. The rule or order the employee violated must be reasonable.

- Is the purpose for the rule related to the efficient and safe operation of the business or agency?

- Was the rule reasonably applied?
- Even if it does have a business purpose, does the rule violate the contract or past practice?
- Does it constitute an extreme change without apparent need?
- Does it result in extreme and unnecessary hardship to an identifiable group of employees?

3. The employer must have made an effort to discover whether the employee did, in fact, violate the rule. Before discipline was imposed, did management

- Investigate both sides of the story?
- Check for evidence that could have cleared the grievant?

4. The employer's investigation must have been conducted fairly and objectively.

- Was the investigation conducted by someone with a personal interest in the outcome? For example, was the investigator a supervisor involved in the incident?
- Was the investigation reviewed by an independent official at a higher level? (Rubber stamping is not enough. Did the higher level official question the grievant and potential witnesses or makes some other kind of inquiry?)
- Was the grievant hurt by the inadequacy or bias of the investigation?
 - a. Was evidence lost?
 - b. Did management rush to justice and then continue on just to save face?
 - c. Was an entire area left unexplored that might have put the case in a different light?

5. There must be substantial evidence of the employee's guilt.

- How substantial is it?
- How much evidence is there?
- Does the evidence cover all the significant points?
- Does it appear reliable or is it contradictory or untrustworthy in some way?

6. The employer must have applied both the rule and the penalty without bias

- Have others guilty of the same offense gone unpunished?
- If others have been given lighter penalties for the same or similar offense,
 - a. Could differences in work records explain the difference in punishments?
 - b. Were the circumstances different?
 - c. Is there any other reason the offenses should be regarded differently?

7. The penalty must be reasonably related to the seriousness of the employee's offence and record of past service.

- Are there mitigating circumstances that make the punishment unjust? For example, did management fail to do a proper investigation, ignore some other responsibility, or actually cause the problem? Did the grievant have little choice but to break the rule?
- Did management consider the Douglas factors in determining the penalty?

Origin of the Douglas Factors

Management officials cannot rely on their own arbitrary opinions of whether a penalty is reasonable. In 1981, in a precedent-setting case, the Merit Systems Protection Board developed a set of criteria that management must consider in deciding what penalty is appropriate for an employee's misconduct. The case was Curtis Douglas v. Veterans Administration, 5 M.S.P.R. 280 305–306 (1981), so these criteria are now known as the "Douglas factors."

The Civil Service Reform Act guarantees employees the right to appeal removals, suspensions of more than fourteen days, demotions, and furloughs of thirty days or less to the Merit Systems Protection Board. If management officials cannot show that they considered the Douglas factors when taking an adverse action against an employee, the MSPB is likely to overturn their penalty and impose a fairer one. Throughout the federal government, management officials are advised to prepare a statement outlining each factor applying to specific disciplinary actions and what effect it has had on their decision. Both the memorandum of proposal and the decision about the penalty now ordinarily refer to relevant Douglas factors.

Furthermore, the Douglas factors are so concisely written and so clearly reasonable that arbitrators in the federal sector routinely adopt them as their standards of fairness in disciplinary cases, even when the penalties involved are too minor to be appealed to the MSPB. So widely respected has this list become that arbitrators have even been known to use the Douglas factors in decisions in the American private sector in the U.S. and even in labor disciplinary hearings in other countries.

The 12 Douglas Factors

(This is an exact quotation from the MSPB decision.)

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 the applicable agency table of penalties (which are not to be applied mechanically so that other factors are ignored);
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 questions;
10. Potential for 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.

Arbitrators' Decisions

Despite the contract, when arbitrators believe an employee deserves the discipline they often allow some penalty, even when several of the seven factors of just cause were not met. They sometimes uphold severe penalties even when they conclude that management officials considered the Douglas factors only after arbitration was invoked. Nevertheless, an advocate would be well advised to make a careful point-by-point outline of management's failures in these areas. Sometimes the just cause defense will result in a ruling that the employee must be made whole. At very least, combined with a review of how the Douglas factors apply to a grievant's case, it should help get the union's advocate get the penalty reduced.