

## Conduct and Discipline

Hello NWP Reps and Members;

Welcome to LR Chronicles number 28. When the Agency alleges some form of wrong-doing by an employee, they must conduct a full and complete investigation to ensure that the alleged wrong-doing was actually committed. Should the outcome of the investigation result in a positive determination, the Agency is then responsible for determining what, if any, corrective action is necessary to remedy the problem. When considering any discipline imposed upon an employee, it is important to understand the framework for the review of any such Agency action. The FAA is required to only take disciplinary or adverse actions against an employee when such action will promote the efficiency of the service. Thus, the FAA must prove by a preponderance of the evidence that the discipline imposed against an employee is necessary to promote the efficiency of the service.

To guide this assessment, the Merit Systems Protection Board (MSPB) and the Federal courts have an established body of law interpreting the efficiency of the service standard. For an Agency to sustain an adverse action based on alleged employee misconduct, it must prove by a preponderance of the evidence each of the following three (3) elements which Federal courts and the MSPB have interpreted the efficiency of the service standard to embody:

1. That the employee actually committed all the elements of the alleged misconduct;
2. That there is sufficient nexus (connection) between the misconduct and the efficiency of the service to sustain the adverse action; and
3. That the particular penalty imposed has been appropriately chosen for the specific conduct involved and is based on a consideration of the factors relevant to promotion of service efficiency.

### Efficiency of the Service Concept:

A disciplinary/adverse action may ONLY be taken for "such cause as will promote the efficiency of the service." This is captured in our CBA in Article 10, Section 3, which states *"disciplinary/adverse actions shall not be taken against an employee except for such cause as will promote the efficiency of the service. Any action taken by the Agency shall be supported by a preponderance of the evidence."* In addition, it is a Prohibited Personnel Practice for an agency to take an action based on conduct that does not adversely affect the performance of the employee or the performance of others. Thus, the Agency must prove that any disciplinary or adverse action for misconduct was taken to promote the efficiency of the service. Among the activities that have been held to constitute appropriate grounds for adverse actions are:

- Lying about qualifications on pre-employment documents;

- Falsification of government documents
- Threatening supervisors
- Violations of the standards of conduct
- Gambling on government property
- Abuse of leave
- Misuse of a government vehicle.

This is only a partial list of grounds that may qualify. A disciplinary or adverse action promotes the efficiency of the service if the grounds for the action relate to either an employee's failure to accomplish his/her duties satisfactorily, or to some other legitimate government interest.

The requirement that disciplinary/adverse actions be taken only for "such cause as will promote the efficiency of the service" has been interpreted to mean that when the disciplinary/adverse action is based on off duty conduct, the Agency must particularly show a "nexus" (connection) between the conduct and the efficiency of the service. This is also captured in our CBA in Article 4, Section 2, which states *"An employee's off-the-job conduct shall not result in disciplinary action, unless such conduct hampers his/her effectiveness as an employee or affects the public's confidence in the Agency."*

In establishing the existence of a nexus, an agency need not present proof of a direct effect on the employee's job performance if the employee's conduct is adverse to the agency's mission. The MSPB has found that the statutory requirement to show that an agency's action promotes the efficiency of the service obligates the agency to prove by a preponderance of the evidence that there is a nexus between the off-duty misconduct and the employee's job. The Board has held that under ordinary circumstances the agency will be obligated to produce, at the employees hearing, evidence which tends to connect the employee's misconduct to the efficiency of the service.

When the Agency contemplates any corrective action or discipline, it relies upon its own directives and guidance. Specifically, the Agency relies upon their own FAA Order. It is a Human Resources Policy Manual (HRPM), entitled "ER-4.1, Standards of Conduct." This HRPM outlines the acceptable and unacceptable conduct of FAA employees. ER-4.1 covers, among other things:

- Employee Responsibilities;
- Safeguarding and use of information;
- Use of Federal equipment, property and personnel;
- Observing Safety regulations;
- Unauthorized absence and tardiness;
- Defamatory or irresponsible statements;

- Workplace violence; and
- Alcohol and Drugs.

In addition to ER-4.1, there is a Human Resources Operating Instruction (HROI) entitled “Table of Penalties (TOP).” This HROI outlines suggested penalties for a wide range of offenses. Additionally, it outlines an increasing severity of penalties based on whether or not the alleged offending action is a first, second, or third offense from a particular employee. For example, an offense of “unexcused tardiness” ranges in severity from a:

- “reprimand to a 5-day suspension” for a first offense;
- “5-day to 10-day suspension” for a second offense;
- “10-day suspension to removal” for a third offense.

There is one very important point to keep in mind regarding the table of penalties. It is only intended to be used as a guide. Management officials are given great leeway in determining an appropriate penalty for a specific alleged offense. The following is an excerpt from the table of penalties:

*“The listed offenses and suggested penalties are provided as guidance. This TOP is not designed to cover every possible offense. Managers may initiate disciplinary measures, up to and including removal, for offenses not listed. Where a range of penalties is listed, a manager may select the penalty, including the most severe penalty, which is believed warranted. When describing a charge, care should be exercised to cite only those portions or phrases of the offense that apply. For instance, offense number 5 of this TOP is “failure or delay in carrying out orders.” Do not charge the employee with failure and delay if the employee only delayed in accomplishing a task. The charge must be accurately described and the supporting specification must be specific and supportive of the charge.”*

Additionally, NATCA and the Agency have elected to negotiate a procedure that covers what is contained within ER-4.1 and the table of penalties. This procedure is contained within Article 10, Section 13 of our collective bargaining agreement. *“Although not exhaustive, the Agency's table of penalties should be used, when applicable, as a guide to determine an appropriate penalty. If applicable, appropriate penalties for offenses unlisted in the table of penalties may be derived by comparing the nature and seriousness of the offense to those listed in the table, the employee's previous history of discipline, and other relevant factors in each individual case. In assessing penalties, consideration will be given to the length of time that has elapsed from the date of any previous offense. As a general guide, a two (2) year time frame should be used in determining freshness.”*

In addition to ER-4.1, and the table of penalties, the Agency must also comply with our collective bargaining agreement (CBA) as well as a few very important decisions articulated by 3<sup>rd</sup> parties. Two of those decisions in particular are the “Douglas Factors,” articulated by the Merit Systems Protection Board (MSPB) in a landmark case entitled “Douglas v. the Veterans Administration,” and a 1966 Arbitration decision that came to be known as the “Just Cause Concept.”

## **Collective Bargaining Agreement:**

Article 10 of our CBA covers the process to be followed by the Agency when it contemplates the issuance of a disciplinary or an adverse action. By definition, a disciplinary action covers any action taken by the Agency up to and including a suspension of fourteen (14) days. This includes oral and written admonishments, as well as written reprimands. An adverse action covers any action taken by the Agency to suspend an employee for more than fourteen (14) days, up to and including termination. An adverse action also includes a reduction in grade or pay, as well as furloughs of thirty (30) days or less for reasons other than a lapse in Congressional appropriations. Such adverse actions are also within the domain of the MSPB. As such, it is important to note that all FAA employees have a statutory right to pursue a remedy through the MSPB's processes in lieu of the grievance procedure. An employee CANNOT, however, pursue a claim through both avenues.

**NOTE\*** This Article does NOT apply to the removal of probationary employees!

The NATCA representative that is representing an employee in a disciplinary/adverse action, MUST become familiar with the inner workings of Article 10 in order to ensure the Agency fully follows this negotiated process. As an overview:

### **Section 5:** *(Does not apply to oral and written admonishments or written reprimands)*

- The Agency must give written notice to the employee proposing a disciplinary/adverse action;
- This written notice must be a minimum of thirty (30) days prior to the action taking affect, as provided for in 5 USC 7513(b)(1);
- The notice must state the specific reason for the action;
- The employee has an opportunity to reply to the notice both orally and in writing within fifteen (15) days from the date the employee receives the notice;
- If the action the Agency is taking is under the "crime provision" as per 5 USC 7513(b), then the employee has a reasonable amount of time to reply, but not less than seven (7) days.
- The employee's representative, as designated by the Union, may participate in the oral reply;
- The Agency MUST consider the employee's reply;
- Then the Agency shall give the employee a written decision concerning the action that they proposed.

### **Section 6:** *(This section is part and parcel to Section 5 and covers actions that involve reductions in grade or pay, or removal for unacceptable performance)*

- The requirements of Section 5 also apply to this Section;
- If the Agency's decision is to sustain the removal or downgrade, the decision letter MUST specify the instances of unacceptable performance;

- The final decision MUST be concurred with by a management official that is in a higher position than the management official who proposed the action;
- The final decision may ONLY be based on those instances of unacceptable performance which occurred within one (1) year prior to the date of the written notice.

**Section 7:** *(Applies to written reprimands)*

- No advance notice is required for the issuance of a reprimand;
- The reprimand must state the specific reason for the action;
- The employee may present an oral or written reply, within fifteen (15) days of receipt of the reprimand;
- If the reprimand is sustained, a copy of it, along with the employee's written reply, will be placed in the employee's official personnel folder.

**Section 10:** *(Union representation for employee reply and amount of time authorized)*

- Up to sixteen (16) hours in cases involving removal, reduction in grade or pay, furloughs of thirty (30) days or less (for reasons other than a lapse in Congressional appropriations), or suspensions of more than fourteen (14) days;
- Up to eight (8) hours in all other cases;
- Union representative receives official time;
- Employee receives duty time;
- All times may be extended by the Agency upon request.

The FAA cannot administer the processes for disciplinary and adverse actions in a vacuum; recognized legal precedent must also inform any Agency action. One of these decisions was promulgated by the MSPB and has been directly incorporated into the Parties' CBA. Article 10, section 14 requires that "*in making its determination that disciplinary/adverse action is necessary and when determining the appropriateness of a penalty, the Agency shall consider the factors as outlined in **Douglas v. Veterans Administration**, 5 MSPB 313 (1981).*" Basically, the decision in *Douglas* states that agencies must consider a set of twelve (12) factors, in determining an appropriate penalty to a disciplinary or adverse action. When NATCA incorporated *Douglas* into the contract language covering disciplinary and adverse actions, the Union expanded the level of protection provided to employees. Under the principles established in *Douglas*, only adverse actions (an agency action that involves a penalty greater than a fourteen (14) day suspension) are subject to the twelve factors. NATCA's CBA requires the application of the twelve *Douglas* factors to *any* discipline. Thus, even a one-day suspension is subject to the scrutiny of the *Douglas* factors.

The "Douglas Factors" as outlined in 5 MSPB 313 are:

- 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 roles, contacts with the public, and prominence of the position.
- 3) The employee's 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 the supervisor's 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 offense.
- 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 they 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 offenses such as unusual job tensions, personality problems, mental impairment, harassment, bad faith, malice, or provocation on the part of others involved in the matter.
- 12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Any discipline imposed by the Agency must withstand the scrutiny of “The Seven Tests of Just Cause.” This “Just Cause” standard was articulated in a decision by Arbitrator Carroll Daugherty. Arbitrator Daugherty’s award, often referred to as the “Daugherty Decision,” established a single standard to determine if the disciplinary/adverse action of an employee can be upheld as a “just cause” action. *Enterprise Wire Co. and Enterprise Independent Union, 46 LA 359 (1966)*. This 1966 decision has been widely accepted by all third parties that decide cases, such as the FLRA, the MSPB, arbitrators and Courts of law.

In the Seven Tests of Just Cause, an agency MUST be able to answer YES to ALL of the following seven questions:

1. Notice: Did the Employer give, to the employee, forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. Reasonable Rule or Order: Was the Employer's rule or managerial order reasonably related to
  - (a) the orderly, efficient, and safe operation of the Employer's business; and

- (b) the performance that the Employer might properly expect of the employee?
3. Investigation: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
  4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively?
  5. Proof: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
  6. Equal Treatment: Has the Employer applied its rules, orders and penalties even-handedly, without discrimination to all employees?
  7. Penalty: Was the degree of discipline administered by the Employer in a case reasonably related to:
    - (a) the seriousness of the employee's proven offense, and
    - (b) the record of the employee in his service with the Employer?

The efficiency of the service standard and the just cause doctrine come into play at every phase of the discipline process. Ultimately, the Agency's actions will be reviewed by a third party and any discipline imposed must meet these standards. However, a thorough understanding of the Agency's burden, when disciplining employees, will benefit representatives prior to such third party review. These elements will come into play when reviewing the information relied upon by the Agency, providing a response to the proposed discipline, and filing a grievance over any imposed discipline.

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