



Federal Aviation
Administration



MANAGER'S GUIDE TO DISCIPLINE

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This Guide was developed by the Human Resource Management Division (HRMD), Southern Region, Labor and Employee Relations Branch, ASO-16. The guide is not intended to replace Human Resource Policy Manual chapters related to workplace conduct and discipline. Please check with your servicing HRMD to ensure you have the most complete and accurate information on related policy and guidance documents to the Standards of Conduct.

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PURPOSE

Taking disciplinary action is not the most pleasant or appealing part of a manager's job. However, taking disciplinary action can be an important tool designed to help managers and managers maintain a productive work environment and an effective and efficient workforce.

Disciplinary action in the Federal Aviation Administration (FAA) is not about punishment, getting retribution, or playing "gotcha." It is about correction and prevention. It is about setting high standards and ensuring your employees comply with them.

Past experiences show that time and effort spent early to correct employee misconduct in the work place is a good investment. Failure to take early corrective action have potential serious consequences including disruption in the workplace, decreased morale and productivity, and the lost of respect for authority. When faced with these two choices, it is clear which the right one is.

When you are disciplining a federal employee with due process rights, appeal rights, and grievance rights, you not only have to do the right thing, you have to do things right.

We trust that this guide will provide you with a better understanding of the FAA's disciplinary process and how to do it right. Refer to your applicable Collective Bargaining Agreement (CBA) and FAA policy documents for specific requirements.

OBJECTIVES

As a manager, you are critical to the success of the FAA. You provide both technical and administrative direction to your employees. You are charged with the oversight of employees in two important areas: job performance and conduct. Performance is the completion of assigned tasks and the achievement of results in specific job duties. Poor performance is a failure to perform the duties of a position at an acceptable level of quantity, quality, or timeliness. In addition to job performance, you expect your employees to behave properly and comply with the written and unwritten rules of the workplace. Misconduct is a failure or refusal to comply with a rule, regulation, or requirement. This guide focuses on misconduct and does not provide any guidance on performance issues.

This guide is written as a reference source for dealing with allegations of misconduct. It will not make you an expert on all the details required to initiate and complete the disciplinary process. However, we hope that it will equip you with the knowledge to deal with disciplinary problems more confidently and completely and enable you to be a better manager. However, it cannot replace the advice, counsel, and guidance of your Labor/Employee Relations (LR/ER) Specialist.

In developing this guide, we have identified several objectives:

- **Identify and understand FAA's discipline process**
This guide will provide you with an outline of disciplinary procedures including due process requirements.
- **Identify and understand the elements of a disciplinary action.**
These three elements include proving the misconduct occurred by preponderant evidence; a nexus between the charge and the efficiency of the service; and the reasonableness of penalty. Each of these elements is discussed in detail in the guide.
- **Identify how to develop evidence needed to determine if disciplinary action is warranted.**
This guide provides information on how to develop the facts necessary to prove that misconduct occurred or did not occur. Helpful hints are provided on how to gather the evidence necessary in investigating an allegation of misconduct.
- **Identify and apply the factors in deciding the penalty.**
Even if you prove your charge, you must be able to show that your penalty was reasonable. Disciplinary penalties are not "pulled out of a hat." It is the result of careful application of relevant aggravating and/or mitigating factors. These factors commonly referred to as "Douglas Factors," will be thoroughly reviewed.
- **Identify and understand the pitfalls to avoid in taking disciplinary action.**
Insights are provided on how to sustain your disciplinary action and provide candid observations on the pitfalls to avoid.

MANAGER'S RESPONSIBILITIES

As a manager, you are responsible for applying the FAA's conduct and discipline program to employees under your supervision. There are specific responsibilities, which you should be familiar with and understand.

Encourage Employees to Review the Standards of Conduct

The Standards of Conduct for most FAA employees can be found in Human Resources Policy Manual (HRPM), ER-4.1. You should contact your LR/ER Specialist to determine which Standards of Conduct is applicable to your employee. A few bargaining unit employees are still under Federal Aviation Personnel Management (FAPM) Letter 2635 dated August 1989, and will be until union negotiations are complete.

FAA's Standards of Conduct outline the workplace rules – the expectation of behavior required in the workplace. Most managers provided briefings when a new Standards of Conduct is issued. Many provide yearly communication; some in conjunction with an employee's annual performance review. The importance of communicating workplace rules is critical in the disciplinary process and cannot be overstated.

Ensure, at Least once, the Standards of Ethical Conduct for Executive Branch Employees, 5 CFR Part 2635 are Reviewed

You are responsible for ensuring that employees under your supervision have reviewed these government-wide ethical standards at least once. These ethical standards are transmitted by FAA Order 3750.7, Ethical Conduct and Financial Disclosure and replaced the 1990 Department of Transportation (DOT) Regulations, 49 CFR Part 99. These government-wide ethical standards include sections on gifts, conflicting financial interests, seeking other employment, misuse of position, and outside activities. Since this is a requirement, you must be able to document that your employees were given an opportunity to review these standards.

Provide Positive Leadership and Serve as a Role Model

As a manager, you serve as role model to your employees by demonstrating a commitment and sense of responsibility to your job and loyalty to the FAA. You are held to a higher standard of behavior than the employees you supervise. With this higher expectation of conduct goes greater consequence when you do not meet these expected standards. Simply stated with all things being equal, a manager would receive a greater "penalty" for his/her failure to comply with a workplace rule than a subordinate would.

Communicate, Embrace, Enforce, and Fully Support all DOT and FAA Regulations, Policies, and Programs

As a manager, you are the “eyes and ears” of the FAA Administrator. You are out there where the “rubber meets the road.” A FAA Administrator can issue all the policy that he/she wants. We can cover the walls of our offices and facilities with policy posters on Sexual Harassment, Model Work Environment, Workplace Violence, etc. However, if managers do not communicate, embrace, enforce, or fully support these policies, the FAA has no policy. You are the key to the disciplinary process and have the most important role in making it work.

FAA'S DISCIPLINARY POLICY

The purpose of a disciplinary action is simple: To maintain an efficient, productive, and orderly work environment. The disciplinary process is corrective not punitive. As a manager, you must set high standards. Managers should not be afraid of setting high standards in work behavior.

Managers need to deal early with misconduct and not allow the behavior to fester in the workplace. Deal with problems early and understand that your role is corrective in nature. At times, a manager may ignore a problem in the workplace, get frustrated, and overreact in determining what disciplinary action to take. A manager cannot close his/her eyes to an employee who is always late and then demand the employee be fired after she is late 20 times. Where was this manager early on when the employee's conduct needed correcting? This situation should have been handled by the administration of progressive discipline. Progressive discipline is the recognition that the minimum action necessary to correct the behavior should be taken. If the behavior does not improve, then disciplinary action should increase in severity. Starting with minor actions and imposing greater penalties for repeated offenses of misconduct is appropriate for minor infractions. Progressive discipline may not be appropriate for serious infractions. In the example of the employee's repeated tardiness, an early counseling session would be appropriate, and if the behavior continued, progressive discipline would have been warranted.

Most employees want to do a good job and willingly abide by the requirements of FAA workplace rules. Fairness to other employees requires that you take effective corrective disciplinary action when circumstances require it.

BURDEN OF PROOF

The first element of a disciplinary case is that the misconduct occurred. In proving that misconduct occurred, “gut” reactions do not work; evidence does. You do not have to be certain that the misconduct occurred. Some managers may be swayed by the criminal burden of proof, “beyond a reasonable doubt” and may not feel comfortable if they are not certain the misconduct occurred.

The “preponderance of evidence” standard of proof applies to agency disciplinary actions. This means that it is more likely true than not true; the employee committed the charged offense. Some people refer to this as the “51% rule.” The preponderance of evidence burden is significantly less than the criminal burden.

In the next section of this guide, you will be provided a number of tools, which will be used in determining if you have met your burden of proof as well as to assist you in resolving conflicting statements and evidence.

CONDUCTING EFFECTIVE DISCIPLINARY INVESTIGATIONS

One of the most important responsibilities of a manager is the investigation of alleged misconduct in the workplace. A thorough and fair investigation is the foundation for taking disciplinary action. If this foundation is not strong with cemented factual information, your case usually crumbles. Disciplinary cases are not usually won or lost based on the skills and abilities of the advocates presenting the case. Most are won or lost much earlier, usually as a result of an effective or ineffective disciplinary investigation. Only after conducting an effective investigative interview, can you decide whether to discipline, whom to discipline, and for what reason(s). The following are some important tips to assist you in conducting your disciplinary investigation.

1. Plan the Investigative Interview

Do not go into an interview unprepared. Have an outline consisting of a list of topics to be discussed. It is also critical to ensure that you develop written questions that must be answered. You do not need to have every question written out. You have to actively listen to what the interviewee says and may have to follow up based upon a response from the interviewee. Come with a plan but have your “eyes and ears” open. You should be familiar with the allegation(s) before the interview. Be familiar as possible with the details of the case and the witnesses’ background and involvement. An investigator should be familiar with written policy, i.e., Standards of Conduct, other agency policy, etc. For example, if the allegation involves conduct of a sexual harassing nature, you should review the agency’s Standards of Conduct and the Accountability Board Order #1100.125A. You might want to determine if and when the employee was briefed and/or trained on the agency’s policy prohibiting sexual harassing behavior in the workplace.

2. Obtain the Rest of the Story

A word from famous radio commentator Paul Harvey, your task as an investigator is to obtain “The Rest of the Story.” Do not be quick to jump to conclusions based upon preliminary information. You must not assume that the allegation is true. Be objective and be prepared to look at the evidence that will disprove as well as prove the allegation(s).

3. Ask Open-Ended Questions

Using open-ended questions permits the witness to provide an overall picture of what happened. Open-ended questions force the interviewee to talk and elaborate on the matter at hand. Use the five W’s as a guideline. It is critical to know the who, what, where, when, and why of a situation in order to develop a complete picture of what occurred. Ask the witness, “What did you observe or hear?” instead of asking, “Did you hear Jim yelling in a loud voice at Fred?” or “Did you observe Betty pointing her finger in Mary’s face”?

Use close-ended questions (yes/no answers) sparingly to confirm factual date. Use follow-up question to develop or confirm details

4. Stick to Facts and Try to Eliminate Opinions or Impressions

Your role is to gather facts and conclusions from the interviewee not opinions. For example, a witness may tell you that an employee was intimidating. What does that mean? Asking the specific question, “Can you tell me specifically what behavior was demonstrated by Mr. Smith that would cause you to be intimidated?” Asking this specific question should illicit specific responses which might include the actual words which were used, voice and mannerisms, hostile looks, yelling above a normal tone, leaning over a person’s desk, standing extremely close to another, putting one’s finger in the face of another, making suggestive gestures such as a karate chop, or slashing of one’s throat, etc.

5. Paint a picture

Have your interviewee clarify words that may have a different meaning to others. Statements that say a person was angry, disruptive, harassing, threatening etc. can have different meanings to different people.

You are attempting to “paint a picture.” You want your witness to tell you what he saw or heard with specificity. For example, you do not want to simply know that an employee was angry. You want to know what he did; what he said; how he said what he said; how close were the parties; and were there any body movements. If so, describe them. If you can find out, you would like to know how red his face was and if veins were bulging from the neck area. Get all important information that paints a picture of what angry really means.

You are not interested in the interviewee’s conclusions but the facts. The job of an investigator is to gather facts. For example, a statement that a subject was sleeping on duty is a conclusion. Have the witness describe what was actually observed. Useful, factual documentation in this incident would include the position of the employee’s eyes, head, hands, and feet; distance between the witness and the employee; responses, or lack thereof to attempted voice contact; the length of time the employee was observed; sounds, if any, emitting from the employee; the employee’s mannerisms and appearance when he finally responded, etc. This description might seem trivial, but specificity of documentation is the foundation for management sustaining a disciplinary actions.

6. Be Inquisitive – Dig and Probe

As an investigator, you are on a relentless journey to find the truth. You must be professional; your position as a manager demands this. However, do not be reluctant to make an evasive witness feel uncomfortable. You do not have to engage in a Detective Andy Sipowicz *N.Y.P.D. Blue* police interrogation. However, the investigation might have to be more probing than a chat with Mr. Rogers in his Neighborhood. It is your job to make it hard for someone to tell anything but the truth.

Do not accept generalities. Trying to communicate with teenagers is dealing with ultimate generalities. Asking your newly licensed teenager where he is going with the family car usually elicits a response like, "I'm going out." Follow-up questions like, "What activities do you have planned with the car tonight", "Who is going to be in the car with you", and "When do you plan on returning the car?" are just a few questions that will provide you more insight on what "going out" really means. Asking probing follow-up questions is a skill needed as a parent and is required of an effective investigator of an alleged workplace incident.

7. Try to corroborate a witness' story

An investigator should ask a witness if her story could be corroborated and how this can be done. Corroboration of one person's story can assist in determining the credibility of a statement.

8. Get a written statement

You have a right as an investigator to obtain a written statement from each witness. Requiring a written statement helps to prevent a witness from changing his story later or conveniently losing his memory as a way of choosing not to get involved. Additionally, a written statement can be used to impeach a witness' credibility. If a witness decided to change her story to favor the employee, you can use it to attack her new story.

DISCIPLINARY INVESTIGATION

Rights and Obligations

Employees are required in an administrative investigation to provide any information requested even if the information is incriminating. In addition to the requirement to cooperate in an investigation, the agency and the investigator have the right to expect complete and truthful answers from all employees during the investigation. Significant disciplinary action up to and including removal may result if an employee does not cooperate in an investigation or provide complete and truthful information.

The only situation in which federal employees have the right to remain silent is when they are being asked about a matter that could potentially render them subject to criminal charges. The right against “self-incrimination” and to remain silent does not exist in a non-criminal disciplinary investigation. Investigations, which may lead to criminal charges, are usually accomplished by a law enforcement component, (i.e. FBI, DOT IG). However, most administrative investigations do not involve criminal issues and employees have no protected right to invoke the Fifth Amendment in these types of investigations.

Bargaining Unit Employees

There are certain rights provided to employees who are members of a bargaining unit. If an employee is within a bargaining unit, has reason to believe the investigation could lead to disciplinary action against him/herself, and requests union representation, the employee has a right to union representation. This representation right is based upon a private sector case, NLRB vs. Weingarten, Inc. 420 U.S. 251 (1975) decided by the Supreme Court. These rights were extended to Federal employees when they were incorporated in the Labor Relations Statute and this right to union representation has four parts:

- 1) Meeting must constitute an “examination”;
- 2) Must be in connection with an “investigation”;
- 3) The employee must reasonably believe that discipline could result against him/herself; and
- 4) The employee must request representation.

Under the Statute, there is only a requirement to provide notice to employees of this “Weingarten” right annually. However, in most of our labor agreements, we have negotiated what can be described as an “expanded Weingarten right.” These labor agreements require that the employee be notified of the subject matter in advance and of his/her right to be accompanied by a union representative if the employee desires. An investigator must be familiar with her labor agreement regarding investigative requirements.

What is the role of a union representative at these investigatory meetings? A union representative at these meeting can do the following:

- 1) Raise relevant facts and issues related to the investigation.
- 2) Clarify questions being asked to ensure the employee understands the question.
- 3) Assist the employee in raising all relevant facts and issues.
- 4) Elicit favorable facts and extenuating circumstances.
- 5) Consult with the employee during the examination.
- 6) Ask questions concerning the matter being discussed.

As you can see, the union's role is not to just sit there "like a potted plant." The union representative has a right to be an active participant in these meetings.

However, as an investigator, you have the right to have the employee answer your questions not the union representative. The union representative cannot disrupt or take control of the meeting but she can be an active participant.

This "Weingarten" right is not a right for an individual to have a representative but the right for the union to be present at the interview. Therefore, a bargaining unit employee has no right to a personal representative from the bargaining unit or a personal attorney. The union not the employee chooses who represents the union's interests at this meeting.

A bargaining unit employee has no right to representation unless the employee is the subject of the investigation and has a reasonable belief that disciplinary action may be taken against him. So, what happens if a bargaining unit employee witness not subject of the investigation asks for a union representative? If this occurs, you may explain the rule to her, and ask if she believes that disciplinary action might be taken against her based upon her statement. Usually after explaining the rule, the witness will drop the request.

If there is no response why the witness believes he needs a representative, you can conduct your investigation without providing a union representative. However providing a union representative might enhance the cooperativeness of the witness, and may result in better communication of information.

Non-Bargaining Employees

An employee who is not in the bargaining unit and subject to a potential disciplinary action does not have a right to an attorney or a personal representative during the investigation. As for a witness who is not in a bargaining unit, there is no obligation to provide a representative.

CREDIBILITY DETERMINATIONS

In order to take disciplinary action, an agency must be able to prove by a preponderance of evidence that the misconduct actually occurred. Remember, preponderance of evidence means that it is more likely the misconduct occurred than not.

In some cases, you may encounter conflicting accounts of an incident. Just because there is one person's word against another does not prevent management from taking disciplinary action. When conflicting information is presented the question, "Who is telling the truth?" may have to be answered. You cannot flip a coin to decide whose story you should believe. In these cases, you may have to make a credibility determination. Credibility means "worthiness of belief." When there are conflicting stories you may have to decide whose story is more believable.

There are some factors, which have been developed to assist you in determining which account is more believable. This criterion is referred to as "Hillen Factors" named after a famous Federal government sexual harassment case. Most arbitrators use these factors or a slight variation of them. Managers who investigate allegations of misconduct and/or take disciplinary action should be familiar with these credibility factors. These factors can be described as weights placed on a scale and the "account" which tips the scale, would be more believable. These seven Hillen Factors will not only help you decide whom to believe, but will assist you in determining the solidity of your case.

1. The Opportunity and Capacity to Observe the Event or Act

Personal knowledge of the event or act at issue is an essential qualification of a witness. This personal knowledge is established by evaluation of the witness' opportunity, as to place, time, proximity, and similar factors to observe the event or act in issue. Not all witnesses are created equal. An arbitration involving a controller who was charged with sleeping on duty provides some insight in evaluating this factor. The arbitrator determined that management's eyewitnesses were in a better position to hear and see what occurred than the grievant's witnesses, who were more than twice the distance away and working in a noisy, dimly lit control room, controlling live traffic.

For example, in evaluating this factor, you may encounter an employee who tells you about a loud disagreement in which vulgar and obscene remarks were made in the presence of other witnesses. It is important to ask the complaining party if the witnesses should have been able to hear the inappropriate remarks based upon their proximity to the alleged incident. At a minimum, you should ask the employee how close each of the purported witnesses were to each other. If a witness is in position to hear something, but testifies he did not hear anything, it tends to indicate that the yelling of vulgar and obscene remarks did not occur. Therefore, it is critical not only to ask what each witness heard, but also to clearly determine if the witness really was close enough to have heard something, and if anything could have interfered with her ability to hear.

2. Character

Sometimes you have to balance the “scale of credibility” by evaluating a witness’ character. Under this factor, certain characteristics or past behavior tend to question the individual’s truthfulness. For example, an employee whose past record included discipline for falsification or providing inaccurate information would clearly be an individual less believable than other employees who have not engaged in such misconduct.

One of the employee’s witnesses during the “sleeping” arbitration noted earlier was an employee whose disciplinary record included a 30-day suspension for criminal conduct. So much for good character!

A poor reputation for truthfulness by an employee would diminish credibility. In evaluating character, you would have to produce evidence, which would show that a witness had not been honest and truthful in the past.

3. Prior Inconsistent Statement

A witness who changes his story is less believable than a witness whose story remains consistent throughout the investigation.

During an investigation, an employee may tell you that he notified two other employees about an alleged incident. In checking this out, you discover that the two employees deny the employee ever mentioned the incident to either one of them. When you follow up with the complaining party, and he tells you maybe he was mistaken, a warning bell should ring in your ear. A significant inconsistency raises the doubt of the credibility of any witness. Therefore, if you discover a significant inconsistency in a statement, it is important to follow up with that employee and explore the reason for the inconsistency.

To ensure that there is no mistake regarding what an employee told an investigator, it is critical to reduce any statement to writing and have the employee sign the statement.

4. Bias

Bias rests on the assumption that certain relationships and circumstances may impair the impartiality of a witness. A witness who is not impartial may consciously or unconsciously shade his testimony for or against another witness or party. A question that must be considered is what benefit would an employee receive which would bias his statement or entice him to lie.

In an arbitration involving a disciplinary action for sexual harassment, the respondent clearly stated that he had an excellent relationship with the reporting party and even worked collaboratively on a project during the morning of the alleged incident. Asking the question why would the relationship “sour” may lead to a likely conclusion that in the same afternoon the respondent sexually harassed the reporting party as alleged.

The investigator needs to find out if there are any “hidden agendas.” You need to ensure that another employee or manager does not have a grudge or an “axe to grind” against the employee or that a group of employees is not “out to get” another employee. To begin you should simply ask an employee who denies an allegation, why another employee(s) would make a false statement against them. As a fact finder, you want to discover if there is any bias during the investigation and not on the witness stand during a third-party hearing.

5. Contradiction by or Consistency with other Evidence

Contradiction is the calling of one or more witnesses who deny the facts asserted by another witness and maintain that the opposite is the truth. Contradiction rests on the inference that if a witness is mistaken about one fact, he may be mistaken about more facts and therefore his testimony is untrustworthy. The contradiction does nothing by itself unless the contradicting witness(es) is believed in preference to the first witness. This is when you must look at other Hillen Factors and weigh the credibility of these contradictory statements.

You may have an allegation that has been described as a threatening incident by a complaining party. The employee may have stated she was scared and threatened by the actions of another employee. In your investigation, you may uncover that several witnesses observed the complaining party laughing and joking with the respondent and other witnesses directly after the incident was alleged to have occurred. In this circumstance, it would be more believable that the threatening behavior by the complaining party did not occur.

Corroboration of one person’s story assists in determining the credibility of a statement even though it may be one person’s word against another. For example, in an egregious sexual harassment incident with no direct witnesses to the alleged misconduct, corroboration may occur when witnesses are able to testify that they saw the complaining party immediately after the incident in tears, shaking, and obviously upset. This observed behavior establishes presence of corroboration, which will assist the manager in determining which story to believe. Contradiction by or consistency with other evidence provides weight in the scale as you evaluate the credibility of all witness statements.

6. Inherent Improbability

This factor can be referred to as the “swallow test.” If the story is hard to swallow, maybe the story is not true. Inherent improbability relies on the likelihood of the event occurring in the matter described in the testimony. If the substance or content of a story does not “ring true” because of bizarre or improbable aspects surrounding the circumstances it is most likely untrue.

You may have an employee tell you that he forgot to include a minor traffic violation on an application, but to forget that he spent 30 days in a county jail - you have to be kidding! People do not forget that they spent 30 days in a county jail no matter how long ago it may have occurred.

Credibility may depend on the consistency of a story with the way common sense suggests things happen in the real world. Look critically at statements that seem “hard to swallow” and dig in and find out if they are worth believing.

7. Demeanor

Demeanor constitutes the carriage, behavior, manner, and appearance of a witness during an investigation. Carriage is the manner of carrying the head and body. Sometimes you can look at someone and tell that she is having a hard time telling the truth. Evasive testimony as well as showing hesitancy in responding to simple questions makes one doubt a witness' credibility. Statements that were clear, convincing, responsive, and spontaneous add to a witness' credibility. A witness who tends to wander from the point, makes poor eye contact, squirms, and fidgets in a way that suggests great unease may raise questions about credibility. Contrastly, a witness who sits still, looks directly at the investigator, listens to what is asked, and gives careful and responsive answers is much more believable.

NEXUS

A disciplinary action can only be taken “for such cause as will promote the efficiency of the service.” To take a disciplinary action, there must be a rational connection or “nexus” between the offense the employee is charged with and the efficiency of the service.

Nexus is almost always automatic involving on-duty misconduct. Committing misconduct on-duty does not promote the efficiency of the service. The FAA functions much better when employees come to work and are not Absence without Leave (AWOL), fighting with co-workers, or refusing to do what they are told. However, nexus is much more difficult to prove when the misconduct occurs off duty. It is critical to work very closely with your LR/ER Specialist so a determination can be made regarding the efficiency of the service standard. At times, the Office of General Counsel should be consulted regarding this evaluation.

It is important to recognize that the FAA has no authority to act as *loco parentis*- to serve as an employee’s parents. The government is supposed to stay out of the private lives of employees. Stated another way, the FAA is not the “morality police”. Nexus can be established if the off duty misconduct has a negative affect an employee’s ability to effectively perform his/her job; ability of other employees to effectively perform their job; and the agency’s ability to effectively discharge its mission.

The agency’s Standards of Conduct states that all employees are responsible for conducting themselves in a manner which will ensure that their activities do not reflect discredit on the federal government or the FAA. However, failure to meet this standard when off duty does not always mandate discipline. You have to be able to show the required nexus. Even instances of criminal conduct do not always establish nexus. This may seem shocking to some and not to others but there are convicted felons working in the federal government. A criminal conviction, by itself, does not establish nexus. What the employee did which resulted in the criminal conviction has to be evaluated. However, there are some criminal behaviors that are so egregious, i.e. murder, where nexus is presumed.

Examples of off-duty misconduct, which have established a nexus in some government agencies, include a customs officer caught smuggling, an immigration officer caught employing illegal aliens, or an IRS employee who fails to complete or falsifies income tax returns. In the FAA, the off-duty misuse of illegal and legal substances for employees in safety-related positions establishes a nexus. Employees who occupy safety-related positions are responsible for the lives and safety of thousands of people. The confidence of the flying public depends upon absolute trust in the integrity of the air traffic system. The off-duty misuse of alcohol/drugs clearly erodes this confidence and is contrary to the agency’s safety mission. That is why the FAA randomly conducts drug tests and requires employees in safety-related positions to report substance abuse arrests.

Over the years, the nexus requirement has evolved. Until the Courts interceded long ago, government agencies removed employees who lived with a person to whom they were not married. As one Court noted the government could not show the employee was less efficient, less diligent, or less devoted to the purpose of the agency and the fulfillment of his duties because the employee lawfully and quietly lived with a woman not his wife.

Another example of how the nexus requirement has evolved is an employee's failure to pay his/her debts. At one time, nexus was established when an employee did not pay his/her just debts. As a result of legislation which permits the garnishment of a Federal government employee's salary, debts are considered personal matters to be worked out between the debtor and the creditor. Nexus determination would most likely be different if the employee's duties involved significant financial management responsibilities. However, it is important to mention that an employee's failure to pay debts as a result of the use of a government credit card establishes a nexus.

There have been several third party litigations involving abhorrent or deviant off-duty behavior by FAA employees. This behavior included sexual molestation, incest with a child, and taking indecent liberties with a child. In each of these cases, a third party decided the employee's ability to make the kind of decisions required by an Air Traffic Control Specialist was not affected by the off-duty misconduct. Therefore, no nexus was established and the disciplinary actions were overturned. However, the nexus requirement would have certainly been met if an employee's job duties included responsibilities such as managing a childcare center, providing Employee Assistance Program services, or providing conduct and discipline advice to managers.

It is important to reiterate that the nexus requirement is one of the most controversial and difficult concepts to understand and apply. These off-duty misconduct cases require very close consultation and coordination with your LR/ER Specialist.

DETERMINING THE APPROPRIATE PENALTY

In a disciplinary case, you first must prove that the misconduct occurred and must also show by a nexus that some disciplinary action is warranted. The third element of a disciplinary case is the imposition of a penalty. In any third-party proceeding, you must show how you arrived at your penalty decision and convince the arbitrator/judge that you made the right selection. To assist you in making the decision several factors have been developed as guidance. These factors are called “Douglas Factors” (also referred to as the FAA Factors) were first communicated by the Merit System Protection Board (MSPB) in its landmark case, *Douglas vs. VA, 5 MSPR 280 (1981)*. These factors have been included in the FAA’s Personnel Management System (PMS) dated March 28, 1996, and Personnel Reform Implementation Bulletin (PRIB) #17. Additionally, the “Douglas Factors” have been incorporated in almost every labor agreement.

These twelve factors may be aggravating, may be mitigating, or may not be relevant in every disciplinary case. An example of an aggravating factor may be prior discipline while a good performance work record may be mitigating. An employee’s potential for rehabilitation may be a mitigating factor if the employee is remorseful and/or contrite and may be an aggravating factor if the employee blames others and does not take responsibility for his/her misconduct. Remember, some of the factors may weigh in the employee’s favor while other factors may constitute aggravating circumstances that support a higher penalty. Additionally, some may not be relevant at all.

Proper application of relevant factors is a key to sustaining a disciplinary penalty. Your penalty determination will be entitled to greater deference if you have balanced relevant aggravating as well as mitigating factors. Aggravating factors should be captured in the proposal. Placement of these aggravating factors in the proposal letter provides the employee an opportunity to respond to this information during the reply process. Failure to provide aggravating factors in the proposal letter, especially prior disciplinary action, is dangerous and may result in your not being able to consider this information in your decision.

Factor 1: Seriousness of Offense

This factor is the most important factor and just happens to be the first factor identified. The other eleven (11) factors are not in any descending order of importance. This factor recognizes the relationship with the offense and the duties, position, and responsibilities of the employee. There are some criteria which have been developed providing assistance in determining the seriousness of the offense. For example, a fight in the workplace is a serious offense. However, a fight occurring between two Air Traffic Controllers on position and controlling live traffic is more serious than a fight in the break room.

Sleeping on duty is another serious offense. It is more serious as provided in our Table of Penalties when the employee occupies a position where safety of personnel or property is endangered. The seriousness of the sleeping on duty offense is increased if the employee is involved in what might be described as “pre-mediated” sleeping on

duty. What does this mean? If you discover an employee sleeping away from his duty station with the lights off, pillow in hand, and blanket over his body, the intentional nature of that conduct is much more egregious than an employee who just cannot keep his eyes open and falls asleep on the job.

The intentional nature of an offense can be distinguished involving an incident involving a sexual remark. If the remark was directed to an employee, this would be more serious than if an employee overheard a remark not directed specifically to an employee. The incident would be more serious if the remarks were repeated after the employee was told to stop. Repeated misconduct is more serious than an isolated incident.

Falsification of Time and Attendance (T&A) records by a T&A clerk provides another example of how this factor is evaluated. Falsification of government documents is a serious offense because it relates to an employee's reliability, veracity, trustworthiness, and conduct. This conduct is very serious since the misconduct relates "to the heart" of this employee's duties and responsibilities. If the T&A clerk was falsifying his/her T&A records and it resulted in more pay or less leave used, this conduct would be more serious since personal gain is received. The conduct would be more serious if the falsification was not an isolated incident but reflected falsification over several pay periods.

Remember in evaluating this factor the offense is more serious if it was intentional rather than inadvertent and if it was frequently repeated rather than being an isolated incident. Additionally, the offense is more serious if it was done maliciously or for personal gain.

Factor 2: The Employee's Position

This factor recognizes the employee's job level and type of employment. As a manager, you should understand that you are held to a higher standard of conduct as a role model to your subordinate employees. The concept of holding a manager to a higher standard of conduct is specifically outlined in the table of penalties under the offense "Discrimination/EEO/Misconduct of a Sexual Nature." However, it must be "factored" for other offenses.

Another example of how this factor can be evaluated may occur if the employee occupies a position of trust. If an employee has custody and control of government property and decides to sell this property on "E-Bay," this misconduct would be considered more serious than if the employee was not the property custodian.

Factor 3: Prior Discipline

Prior discipline is a critical aggravating factor in determining the appropriate penalty. To be considered, the prior discipline must be cited in the proposed notice. There is some discipline which is time barred. After two years, a reprimand cannot be considered as prior discipline. Additionally, some of our labor agreements contain language regarding

the consideration of prior discipline. You should be familiar with your labor agreement language.

Third parties give more weight to the repetition of similar misconduct in supporting a more severe disciplinary action. However, the FAA's Table of Penalties recognizes the use of prior discipline in determining the penalty even if the misconduct you are dealing with is different from the previous offense(s).

Factor 4: Length of Service and Prior Work Record

This factor is especially likely to prompt mitigation. An employee's length of service and prior work record must be evaluated and balanced against other relevant factors. However, the seriousness of the offense and an evaluation of other Douglas Factors may outweigh an employee's positive work record.

At times, a manager may believe that an employee's poor performance should be an aggravating factor. Third parties favor relying upon official appraisals and agency contentions to the contrary provide little weight in determining the reasonableness of the penalty. This is just one more example of the importance of documentation and communication of performance to employees.

Some managers have attempted to argue that the employee's long service should be an aggravating factor. Third parties have rejected the argument that long service supports a stiffer penalty since the employee should have "known better." This interpretation is improper. What it would mean is that the more years an employee had performed at a higher level; one mistake would "hurt" this employee more than an employee with less service. So, if you are thinking about that rationale – forget it!

Factor 5: Erosion of Service Confidence

The analysis of this factor involves much more than a manager's statement that he has lost confidence in the employee. Specific evidence/testimony as to why an employee can no longer be trusted is critical. Conclusionary and vague statements do not hold much weight with third parties. It is critical for a manager to articulate a relationship between the misconduct and the employee's position and responsibilities. You need to specifically state why there is an erosion of managerial confidence. You cannot just say it, you have to prove it!

There is a clear interrelationship between this factor and Factor 2 – Employee's Position. For example, misconduct by a manager will undermine his/her ability to require subordinates to adhere to agency policies and regulations. A T&A clerk falsifying T&A's or the theft of property by an employee entrusted with custody and control of the property are just two examples in which the misconduct would severely erode managerial confidence.

Factor 6: Disparate Treatment – Consistency of Penalty with that Imposed on Other Employees

This factor is one of the more technically difficult to apply. One of the basic tenets of the administration of “just cause” is the even-handed application of discipline. However, the principle of “like penalties for like offenses” does not require perfect consistency. On the surface, many incidents of misconduct may seem to be similar. However, a thorough investigation and evaluation may lead to a determination that the misconduct was not substantially similar. In addition, even if the circumstances surrounding the misconduct incident may be substantially similar, the penalty imposed may be different based upon an independent evaluation of the other Douglas Factors.

Third parties look at these consistency factors differently. The MSPB views “similarly situated” employees as employees working in the same unit and for the same manager. Arbitrators tend to look at the “equitable” nature of labor agreements and focus on the importance of treating employees in the bargaining unit the same.

Remember that consistency of penalty with that imposed on other employees is only one Douglas Factor to apply. However, if the penalty is different for a similar incident of misconduct, specific reasons for the difference in penalty must be articulated.

Factor 7: Consistence with Agency Penalty Guide

An important aspect of applying this factor is determining which penalty guide applies to the particular employee being disciplined. You should communicate with your LR/ER Specialist to determine which area receives operating instructions (HROI) Table of penalties applies to your situation. If particular offense at issue is not in the agency penalty guide, you should review the guide for similar, related offenses. Do not force misconduct into a listed offense unless it accurately fits. Similar offenses can be used to guide penalty selection.

Deviation from the guide is allowed but going beyond or outside the penalty recommended in the table will be closely scrutinized. However, it may be appropriate based upon the facts of a specific case and/or application of other Douglas Factors to impose either a lesser or greater penalty as circumstances dictate. If you are going to go with a greater penalty, be prepared to provide your rationale. However, remember what they use to say on TV’s *Hill Street Blues*, “Let’s be careful out there!”

Factor 8: Notoriety

Forget the old show business adage “All publicity is good publicity.” A high profile agency like the FAA does not need any more media coverage of any employee’s misconduct. The notoriety of an offense or its impact on the reputation on the FAA is usually directly related to the seriousness of the misconduct and/or prominence of the employee’s position.

This factor is one of the least significant Douglas Factors and is usually considered as aggravating. There are certain standards of behavior and conduct expected of FAA

employees by our external and internal customers. When these expectations are not met as a result of an employee's misconduct, the reputation of the FAA may be tarnished. In these circumstances, appropriate analysis of this factor may result in considering a more severe penalty.

Factor 9: Clarity of Notice

How well the FAA informed an employee of the rule/regulation that was violated is a factor that may have to be considered in determining the penalty. If the rule/regulation is not clearly communicated, third parties are sometimes not comfortable enforcing the rule. A briefing on the Standards of Conduct goes a long way in being able to show that your employees knew of a workplace rule.

Non-disciplinary counseling and letters of expectations are methods to communicate what are the requirements of conduct in the workplace. In dealing with an employee who has attendance problems, the issuance of a leave restriction letter outlining the specific procedures he must follow in requesting leave is helpful to show that clearly the employee was on notice of the leave requesting procedures.

Knowledge of operating instructions/work methods as well as other briefings and training an employee has had about the conduct in question is always helpful in showing the employee knew of the expectation/requirement. For example, if an employee has had a briefing on the agency's policy on sexual harassment/sexual misconduct and the Accountability Board, inappropriate conduct of a sexual nature would be considered more serious.

Factor 10: Potential for Rehabilitation

Potential for rehabilitation can be either a major aggravating or mitigating factor. An employee with a significant disciplinary record most likely would have poor potential for rehabilitation. However, an employee with no prior disciplinary record, good prior performance, and job dedication would probably have good potential for rehabilitation.

An employee's recognition of a personal problem that may negatively affect conduct weighs favorably in determining an employee's potential for rehabilitation. Willingness to seek counseling assistance through an Employee Assistance Program or any self-help activity to deal, for example, with an anger management problem or a family situation which is negatively affecting attendance are good indicators of a potential for rehabilitation. Simply put, recognizing one has a problem and doing something about it, are factors which may influence mitigation.

Mitigation means sometimes "you have to say you are sorry." Apologizing for misconduct usually helps. Recognizing a mistake and taking responsibility for one's misconduct are factors that are clearly mitigating. An employee's admission of wrongdoing on his/her own also constitutes a mitigating factor and the earlier the better for possible mitigation. There is no guarantee the truth will set an employee free, but it may result in reducing a penalty.

Admitting wrongdoing, showing remorse and contrition, and getting assistance to deal with the misconduct are just several elements which may result in mitigation. Conversely, an employee who never apologized, never admitted an error, is not remorseful, is unrepentant, and has been uncooperative, should not expect much mitigation under this factor.

Factor 11: Mitigating Circumstances

Unusual job tensions, personality problems, mental impairment, harassment, bad faith, malice, or provocation on the part of others involved in an incident are mitigating circumstances which should be reviewed.

Personal problems, which may place an employee under considerable stress, may be significant to warrant mitigation. The death of a spouse and a serious illness of family member are “life-shaking” events and are examples of such stressors. Specific evidence should be presented showing how the misconduct was directly related to the personal problems and the subsequent stress.

Evidence that an employee’s medical condition played a part in the charged conduct is ordinarily entitled to considerable weight as a significant mitigating factor. An employee who falls asleep in the workplace after taking medication should not have this behavior excused but the use of medication may be a reason for considering mitigation. Provocation may be considered in certain incidents, for example a fight in the workplace. An employee who may have been provoked to fight may be due some mitigating consideration for the misconduct than the aggressor.

Factor 12: Adequacy and Effectiveness of Alternative Sanctions

What needs to be done to deter the conduct in the future by the employee or others? This factor is listed last because this consideration should occur after a thorough analysis of all the other Douglas Factors. Remember, there is only one absolute penalty which can be given without a Douglas analysis that is a, 30-day suspension required under law for misuse of a government vehicle. All other penalty determinations should undergo thorough reasoning under the Douglas Factors. It is important to note a case was recently lost in another government agency when the deciding official stated the agency’s zero tolerance policy on workplace violence required him to remove the employee from government service. He was introduced to the “World of Douglas” by way of a MSPB decision.

The feasibility of other alternative sanctions can be greatly limited by other Douglas Factors. For example, an employee who has a significant disciplinary record and shows limited potential for rehabilitation should expect the worse. However, demotion to a non-managerial position instead of a removal may be the appropriate penalty for a manager who failed to discharge her required managerial responsibilities but had a good record in non-managerial positions.

You, as a manager, must be prepared to support a penalty and communicate why it is the appropriate penalty. Remember, making an example of an employee is not an

appropriate result of the disciplinary process. Applying these Douglas Factors in determining the appropriate penalty is the objective.

A Douglas Factor checklist can be found as an appendix to this guide.

DUE PROCESS

As citizens of the United States of America, we cherish the due process requirements of law. Due process is the basic protection of a person's constitutional rights through established procedures to ensure proper and fair administration of justice. Due process is best defined in one word-fairness.

The essential elements of due process of law are notice, an opportunity to be heard, and the right to defend in an orderly proceeding. It would be simply un-American for a U.S. citizen to be accused without knowing the charges, not having an opportunity to review the evidence, not having a hearing to confront the witnesses, and not having the ability to challenge the proceedings.

The federal government's disciplinary process provides these procedural rights. The employee has a right to advance notice of a proposed action; the right to review the material relied on to support the charges; the right to respond to the proposal; the right of notice of appeal rights, the right to a hearing; and the right to confront and cross-examine witnesses. If disciplinary action was proposed against you, you would expect and want these same protected due process rights.

FRAMING THE CHARGE

In taking disciplinary action, a manager must give an employee a written notice setting forth the specific reasons for the disciplinary action. The reason that the agency is taking disciplinary action is called the charge. It is what the employee did wrong.

It is important to gather factual evidence so you can select the right charge. Why? Third parties, especially the MSPB will hold the agency strictly to the charge(s) it selected. The agency must prove the employee engaged in the misconduct for which he/she was charged. Even if the agency proves another lesser charge during the hearing, the MSPB Administrative Judge will not sustain the lesser charge if the agency did not originally charge the employee with that misconduct. You may be fortunate with an arbitrator adjudicating a disciplinary action who might decide differently. However, charge framing should not be left to chance.

It is important to formulate the charge based upon the facts developed through the investigation. You do not have to “force” misconduct to coincide with a listed offense in the table of penalties. The offenses are just examples of misconduct and are not the only charges you can use. You must find the charge that best fits the facts you developed. Determining the specific charge must be a collaborative effort with your LR/ER Specialist. These Specialists are familiar with the case law on determining an appropriate charge and will assist in the selection of any charge.

An example of the importance of choosing the right charge involves a manager who believes an employee is insubordinate. Some managers have wanted to charge an employee with insubordination and requested a minor corrective action such as a reprimand. If an employee is insubordinate, a much more severe penalty than a reprimand should be the corrective action. Insubordination is a very serious charge and destroys the fabric of the employer-employee relationship. Insubordination is defined as “a willful and intentional refusal to obey an authorized order of a superior officer that the officer is entitled to have obeyed.” The two key words are “order” and “refusal.”

In an insubordination charge, you must prove that an order was given, not simply an instruction or an assignment. You must show that the manager said something like, “I order you to...” or “I direct you to....”

Most of our communications with our subordinates do not reach “the ordering command” level. Additionally to the order given, you must prove that there was a deliberate refusal by the employee not to obey the order. To prove this intent, you most likely would need an oral or written statement that the employee would not obey the order. Failure to follow instructions may be a more appropriate charge, in most instances, recognizing the penalty would be less than for insubordination. However, a corrective penalty is much better than a disciplinary action which is not sustained.

You should also avoid other “intent” charges such as falsification or theft unless you can prove deliberate intent with solid evidence. For example, to sustain a falsification charge, an agency must prove the employee knowingly supplied incorrect, inaccurate,

or erroneous information. Just providing inaccurate information does meet the intent element. In the lead falsification case in the federal government, the FAA's removal decision was reversed when it charged an employee with submitting false information on official government documents when he failed to provide accurate employment information including a firing from prior employment and his quitting a job after being notified that he would be fired. False answers right? However, the Court ruled that since the employee provided accurate information on previous applications to the FAA there was no intent to deceive or mislead the FAA. Therefore, no falsification and no discipline. In this case, providing inaccurate information would have been an appropriate charge instead of falsification.

When framing a charge, you should avoid legal terms. If terms such as "threat" or "assault" are used, you have to provide the legal elements of the charge. Instead, you should follow the "KISS" theory when crafting a charge. Keep It Simple, Manager. Plain English and non-legal terms should be used.

An example, which shows the importance of using plain English when crafting a charge, was an arbitration held regarding a suspension of an employee charged with sexual harassment. The grievant brought pictures of a sexual nature into the workplace and showed the pictures to an employee who asked to see them knowing the sexual explicit nature of the pictures. When a female co-worker who asked to see the pictures testified, she indicated that she made a joke about the pictures and gave them back to the grievant. To meet the definition of sexual harassment even under the FAA's policy, the agency must prove that the conduct was undesirable or offensive and the employee did not solicit the action. In this case, the arbitrator determined that the employee solicited the action by asking to see pictures she knew were inappropriate and her sexual explicit joke, after viewing the pictures, clearly showed that she was not offended by the pictures. Therefore, the arbitrator ruled that the agency did not prove sexual harassment and overturned the suspension. A charge of bringing pictures of a sexual nature into the workplace would have been the proper charge.

It is important to formulate the charge based upon the facts developed through the investigation. You do not have to "force" misconduct to coincide with a listed offense in the table of penalties. The offenses are just examples of misconduct and are not the only charges you can use. You must find the charge that best fits the facts you developed.

Avoid overcharging. Charge only what you can prove. Avoid legalistic charges and stick as much as possible to plain English in communicating to the employee what was done wrong. Framing a charge can be very technical. A manager should always consult and work closely with his/her servicing LR/ER Specialist in determining the charge. A disciplinary case can be won or lost by the selection of the charge.

SPECIFICATION

Every employee not only has the right to know what she is being charged with, but also has the right to know the specifics of the charge. What was done wrong? You cannot tell an employee that he is being disciplined because sometime, somewhere, something was done wrong. That is not the “American” way. The specification has to be in sufficient detail to provide the employee an opportunity to make a reply to the charge(s). The specification to the charge is the factual detail supporting the charge. It is the facts you have developed from your investigation. Essential elements of a specification are the who, what, when, and where? of the charge. The specification communicates to the employee the facts you have developed to prove your charge. At times, managers have simply reiterated in the specification the same words used in the charge. For example, the charge might be abusive language. The specification cannot simply reiterate the employee used abusive language. You must communicate what was actually said with details. For example, what specific words were said? What abusive means to one person may be much different from what it means to another? You have to convince a reasonable third party, that the employee’s language was abusive. Playing on the slogan from the movie *Jerry Maguire*, “Show me the abusive language.”

The length of the specification may vary depending upon the circumstances of the case. For example, a specification to a charge of AWOL could be as simple as: Specifically on [date], you were assigned to work an 8:00 a.m. to 4:30 p.m. shift. You failed to report for duty. You did not request leave and no leave was authorized for your absence. For other offenses, the specification may have to be written in much more detail to communicate to the employee what he did wrong.

In almost all cases, the specification for the disciplinary action is written by a LR/ER Specialist. However, this factual information comes from the information you provided as the result of your investigation. Even though a disciplinary letter may be written by someone else, its development was a result of a collaborative effort. However, you should not forget, it is your letter. You are responsible for its content and will have to defend it throughout any third party grievance/litigation process. Therefore, you must carefully review its content and agree with all the facts stated in the specification.

FORMAL DISCIPLINARY ACTIONS

Formal disciplinary actions involve actions such as a written reprimand; suspension; reduction in grade, band, or pay; and removal. Although the manager is ultimately responsible for what level of discipline is decided, consultation with the servicing Human Resource Management Division (HRMD) is required for formal disciplinary actions. Therefore, a manager cannot decide to take formal disciplinary action without coordination with the servicing HRMD.

Under the agency's Table of Penalties, the first time an employee is formally disciplined is considered a first offense. Therefore, a written admonishment is not considered a prior disciplinary offense in determining a second or third offense.

Letter of Reprimand

A letter of reprimand is a written notice to an employee that his/her conduct is of a serious nature and cannot be condoned or tolerated. Agency regulations and most CBAs do not require an advance notice in issuing a reprimand. You need to check your specific CBA to determine if advance notice is required. As in all cases, your LR/ER Specialist will ensure that any discipline issued will comply with due process requirements. The employee is entitled to file an oral and/or written reply within 15 days from receipt of the reprimand. If an employee makes a reply, the reply must be considered and a decision letter issued. As for all formal disciplinary actions, your servicing HRMD will work with you in developing the letter of reprimand, and if required, a decision regarding the letter of reprimand. If no reply is made within the reply time limits, no other letter is needed. The reprimand will be placed in the employee's Official Personal Folder (OPF) for a period not to exceed two years. If an employee makes a reply, the employee's response will be filed in the OPF along with the reprimand.

Suspension

A suspension places an employee in an involuntary, temporary, non-duty, and non-pay status. It is imposed because of serious or repeated misconduct. A suspension remains a permanent part of the OPF. A decision to impose a suspension should not be taken lightly. A Notification of a Personnel Action (SF-50) for a suspension is a permanent part of the OPF. A manager cannot simply remove this document from an employee's OPF after a period of time as with a written reprimand. Additionally, a suspension may foreclose the granting of an annual performance increase for certain employees.

A proposed notice along with a decision letter must be issued for an employee who is suspended. Suspensions are generally applied in consecutive calendar days regardless of an employee's work schedule. On occasion, deviation may be required for the good of the service. If circumstances warrant such a deviation, the servicing HRMD may grant an exception.

Reduction in grade, band, or pay

Reduction in grade, band, or pay is more serious than a suspension. This action results most often in a far more significant loss of income over an employee's government career than does a suspension. A demotion is an appropriate penalty when the employee's misconduct indicates she can no longer perform at the previous grade, band, or pay level. Most often, these actions are implemented when a manager demonstrates serious misconduct. In these cases, the manager has exhibited she can no longer serve as a role model in the managerial position but may be able to provide productive service in a non-managerial position.

Removal

A removal is the most serious penalty. Removal is management's action to separate an employee from Federal service for such cause as will promote the efficiency of the Federal service. It is sometimes referred by labor relations professionals as "industrial capital punishment." It should be used only when the misconduct is so serious that correction is not in the agency's best interest (i.e. striking of a manager or theft of government property) or when progressive discipline has not corrected an employee's conduct and further action is unlikely to bring about a change in the behavior.

JUST CAUSE STANDARD

Managers are allowed to discipline employees only “for such cause as will promote the efficiency of Federal service.” Taking disciplinary action promotes the efficiency of the Federal service when grounds for the discipline relates either to the employee’s ability to accomplish his/her duties or to some other legitimate government interest. When you discipline an employee, you must show that your disciplinary action helps the FAA function more efficiently.

Many of our FAA labor agreements have incorporated the term “just cause.” Just cause is basically the same as efficiency of the Federal service. Most arbitrators handle both private sector and public sector cases and just cause is the most common standard arbitrators use to judge employer actions. If an agency lacks just cause to discipline an employee, the disciplinary action will be overturned. If there was just cause, the action will be upheld.

There is no exact equation for what just cause means. Two principles that are central to just cause are employed by arbitrators: due process and progressive discipline. There is no agreed upon test for just cause. In the 1960’s, an arbitrator developed a seven question test to provide clarity to the definition of just cause. This test is used in both government and non-government arbitration hearings and is the most comprehensive test of just cause.

The author of the seven test standard believed that a “No” answer to any of the test criteria, resulted in no just cause existing for discipline. This conclusion is not universally accepted by other arbitrators using this test. However, you should strive to ensure that we could answer “Yes” to each of the test questions. Let’s discuss the test in detail.

- 1) Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct? This test focuses on the critical need for management to communicate the rules and potential penalties to employees. Managers should ensure that workplace rules are communicated. Standards of Conduct briefings are an excellent vehicle to ensure that the rules of the workplace are known by our employees. It is recognized that in some circumstances this communication is not necessary because certain offenses are so serious that an employee could be expected to know her conduct is improper and will result in serious discipline. Misconduct such as striking a manager or taking government property falls into this category.
- 2) Was the employer’s rule or managerial order reasonably related to the orderly, efficient, and safe operation of the agency’s business? Workplace rules must be reasonable and not arbitrary or capricious. Arbitrary rules are generally those that are applied without a sensible pattern or

explanation. Capricious rules are those administered for the personal convenience or at the whim of a manager. Arbitrators look at the business need for a workplace rule and if there is not a need, many will conclude the rule, policy, or directive is unreasonable and an insufficient basis for discipline. It is a workplace commandment that employees should obey an order, even if it is unreasonable, and then file a grievance. Limited exceptions include when obeying the order would seriously and immediately jeopardize the employee's personal safety or violate a law.

- 3) Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed a rule or order of management?

In this test, an employee has the right to know the offense he is being charged with and must be given an opportunity to defend his/her behavior. The FAA's requirement of due process with the specification mandate in a discipline letter as well as the opportunity for oral and written replies, will usually allow you to meet this test. This test also stresses the importance of an investigation prior to a disciplinary action.

- 4) Was the employer's investigation conducted fairly and objectively? The investigation must be unbiased. It is critical to obtain the employee's side of the story as well as corroborating witnesses, if there are any.
- 5) At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged? Suspicions, assumptions, and possibilities are not sufficient basis for discipline. The FAA standard of proof is preponderance of evidence-more likely than not the misconduct occurred.
- 6) Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

An employee cannot be singled out for discipline based upon a rule that is not enforced. Selective prosecution is not appropriate. If enforcement has been lax in the past management cannot suddenly reverse course and begin to crack down without first warning employees of its intent.

- 7) Was the degree of discipline administered by the employer reasonably related to a) the seriousness of the employee's proven offense and b) the record of the employee's service?

Appropriate application of the Douglas Factors will allow you to meet this test.

GRIEVANCES AND APPEALS

As a manager, you need to realize that no matter how detailed your facts are or how carefully you have followed the required procedures; there is a strong possibility that your disciplinary action will be challenged through the grievance or appeal process. You cannot take a grievance/appeal personally. These challenges can get a little “nasty” as there may be harsh things said about your decision-making abilities and fairness. Always be professional. This is not the time for trading insults. The challenge will pass and remember, in most cases, you will have to live with the employee after taking your disciplinary action. The less damage that is done to your working relationship during this challenge, the better off you, the employee, and the FAA will be.

Talking about challenges! The FAA has more grievances/appeal processes than almost any other federal government agency. Why? As a result of Human Resource (HR) Reform, the FAA in 1996 established new disciplinary grievance and appeal procedures, which resulted in the removal of MSPB jurisdiction. However, Congress changed its mind and decided in 2000 to reinstate MSPB rights to FAA employees but kept the new appeals right, which were established by the FAA. Therefore, there are more avenues to challenge a disciplinary action than there were before HR Reform. However, do not get too concerned, the employee can only use one of the challenge procedures.

In this guide, we have used the term “disciplinary action” in its generic term – formal action taken to correct the conduct of an employee, such as a reprimand; suspension; reduction in grade, band, or pay; or removal from federal service. However, in determining which specific grievance/appeal process is appropriate for a disciplinary action we must use definitions that are more specific. For example, the more serious type of “disciplinary action” is called an adverse action. Adverse actions refer to suspensions of more than 14 days; reduction in grade, pay, or band; and removal from federal employment. The specific definition of a formal disciplinary action refers to a written reprimand and suspensions of 14 days or less. Even though some of these disciplinary actions can be challenged through the Equal Employment Opportunity (EEO) Commission process, these procedures are not discussed in this guide. Information on these procedures can be obtained through the Civil Rights Office.

Many FAA labor agreement articles on discipline cover informal disciplinary actions such as oral and written admonishments. These informal actions can be challenged through the negotiated grievance procedure. However, we will focus on formal discipline and which grievance/appeal procedure should be used.

Disciplinary Actions

A bargaining unit employee can file a negotiated grievance. Non-bargaining unit employees can file an administrative grievance using the FAA grievance procedure in PRIB #17.

Adverse Actions

A bargaining unit employee can file an appeal to the MSPB, a Guaranteed Fair Treatment (GFT) appeal, or a grievance under the negotiated grievance procedure. An employee can only use one of these procedures. A non-bargaining unit employee can file a MSPB appeal or a GFT appeal.

The chart below provides a description of the grievance/appeal rights for specific discipline.

Disciplinary Action	Grievance and Appeal Rights					
	Bargaining Unit Employee			Non-Bargaining Unit Employee		
	Grievance Under NGP	GFT Appeal	MSPB Appeal	Grievance Under PRIB #17	GFT Appeal	MSPB Appeal
Reprimand to 14-day suspension	√			√		
15-day or more Suspension; Reduction in grade or pay; or Removal	√	√	√		√	√

Merit Systems Protection Board (MSPB) Appeals

The MSPB is an independent quasi-judicial agency where employee disciplinary appeals are adjudicated. As a deciding official for an adverse action, you would testify in an administrative hearing in front of an Administrative Judge.

Administrative Judges are federal government employees who are familiar with the disciplinary rules and regulations as applicable to federal employees. These Judges make initial decisions usually after a hearing, which are not precedential. Cases, which are appealed, are decided by a three-person panel, commonly referred to as the Board who do not hold hearings and decide appeals based upon the established record. The Board's decisions are precedential. The MSPB hearing forum is more legalistic than an arbitration hearing and may be decided by "legal technicalities." For example, if you charge an employee with

an offense you did not prove, such as, falsification, the MSPB would not substitute another charge, which could have been used by the agency but was not such as provided inaccurate information. In this case, the adverse action would be overturned.

If your charge is sustained the Board will review the imposed penalty to determine if it is “reasonable.” The Board gives considerable weight to an agency’s primary discretion in maintaining employee discipline. If you properly evaluated the relevant Douglas Factors, the Board will not “second guess” your penalty determination unless they believe it is not reasonable. This cannot be said for arbitrators. MSPB Judges usually try to get the parties to see if the case can be settled. At times, you will often hear frank and candid conversation about the strengths and weaknesses of the case. A favorable decision for management as a result of litigation is not always certain. At times, any risk can be eliminated by agreeing to settle a case.

However, clearly not every case should be settled. Sometimes a settlement may simply be allowing an employee who was removed to resign. The management representative for the MSPB hearing will work closely with you to determine if settling is a good option.

Guaranteed Fair Treatment (GFT) Appeals

GFT was created under HR Reform as the FAA appeals procedure, which replaced MSPB. This procedure can be used by either bargaining unit or non-bargaining unit employees. Since the reinstatement of MSPB jurisdiction there have been very few appeals filed under GFT. This forum is less legalistic than MSPB. There is no right to discovery or granting of attorney fees as with MSPB. There is a panel who decides the appeal comprised of three persons; one partisan selected by management, one partisan selected by the appellant, and one arbitrator selected by the parties. Specific details on the GFT process can be obtained by reviewing PRIB #17.

Negotiated Grievance Procedure – Arbitration

Every negotiated grievance must have binding arbitration as a final step in resolving grievances. The negotiated grievance procedure can be only used by bargaining unit employees. Arbitrations are harder to characterize than the GFT and MSPB appeal processes. Each one can be so different. However, some generalities can be stated. An arbitrator is selected jointly by management and the union. Arbitrators are not federal government employees. Most are attorneys or professors. An arbitrator dispenses what is sometimes called workplace justice. In making disciplinary decisions, they tend to focus on equity and fairness. In choosing an arbitrator, management will avoid if at all possible, an arbitrator who may be inclined to substitute his/her judgment for the agency’s decision-maker. Management wants an arbitrator not to overturn its disciplinary

decision if it is reasonable. Arbitrators used by the FAA also hear grievances in the private sector.

In the FAA, a panel of arbitrators has been established and these arbitrators have extensive federal government hearing experience.

One of the main differences between the MSPB process and arbitration is that the arbitrator knows almost nothing about the case. In a MSPB appeal, a thorough record is provided to the Judge before the hearing and at least one pre-hearing conference is held. The MSPB Judge knows the case and probably has evaluated the strengths and weakness of each party. The arbitrator is basically coming in “cold.” Therefore, an educational process with an arbitrator is critical in winning the case.

As stated in the MSPB process, there may be extreme pressure placed on the parties to settle the case. You do not usually see this occurring in arbitrations. Why? This may seem presumptuous but an arbitrator gets his/her fee when he hears the case, which includes taking days to decide and write the decision. This does not mean an arbitrator will never try to settle a case. Let’s just say there is much less incentive to do so.

Agency Grievance Procedure

The agency’s grievance procedure is outlined in two documents – the FAA PMS, Chapter III, Paragraph 4 and in PRIB #17, Chapter 2. There are only two stages in this procedure. The main difference between this procedure and the other procedures is that the final decision is made by a FAA manager. There is no review by an outside party and the manager’s decision is final.

YOUR ROLE AS A WITNESS

Defending Your Position

If a grievance eventually goes to arbitration or an appeal goes to the MSPB, you must be prepared to defend your position. As a witness for the FAA, you have a very important job. Your testimony and conduct is vital to the proceedings. You will be under oath and you must tell the truth in response to questions, regardless of whether you may think it will help or hurt either side, or any particular individual. You must be able to explain your position in a logical and detailed fashion to a person who is probably not familiar with your facility/office, program, or if applicable, your particular labor agreement. You must both educate and convince the arbitrator/judge. Your representative at the hearing can only ask questions, you will be required to provide the answers. In most disciplinary cases, the hearing begins with testimony of witnesses called by the agency. The witnesses are asked to swear or affirm to the truthfulness of their testimony. As a witness, you will first be asked questions (direct examination) by the representative for the agency. Then, the grievant/appellant's representative will ask you questions (cross-examination). There may be further redirect or re-cross examination and, at any time during your testimony, the arbitrator/judge may interrupt and pose questions.

In most proceedings, there is a dispute of fact. Your job as a witness is to establish the facts. Your ability to tell the truth and the impressions, which you leave with the arbitrator/judge as an honest and truthful witness is extremely important. The arbitrator/judge must decide who is telling the truth. You must present your testimony in a confident and straightforward manner to convince the arbitrator/judge that the discipline should be sustained.

General Information for Witnesses

- Be truthful.
- Listen and be sure you understand the question before answering. Ask to have a question repeated if it is unclear. Concentrate!
- Dress neatly and be well groomed.
- Be alert-don't slouch, don't sit chin-in-hand, or don't chew gum.
- Speak distinctly and loud enough so that all in the room may hear.
- Give firm and positive answers. Avoid saying, "I think" or "In my opinion."
- If you do not know the answer, say so.
- Do not volunteer information; answer only the question asked. If more information is needed, another question will be asked.
- Be polite and respectful to the arbitrator/judge, opposing counsel, or anyone in the case.
- Keep your temper –stay cool. Do not blow it as a witness.

- Avoid jargon. The arbitrator/judge does not know FAA acronyms or our lingo, so explain. Paint story – make it clear.
- Tell story to arbitrator/judge – generally, look to management representative or opposing counsel only when they are asking you questions.
- Try not to be nervous, you are not on the spot.
- Avoid discussing the case with the grievant/appellant's representative(s).
- Opposing counsel may ask if you have talked with a management representative about your testimony. If this occurs say, "Yes, he [she] told me to tell the truth."

HIRING PROCESS AND PROBATIONARY PERIOD

One of the best ways to avoid workplace misconduct is not to hire “bad” employees in the first place. What do we mean? Working for the FAA is not a right but a privilege. Hiring good employees is our goal. Before an employee is hired, steps should be taken to extensively vouch for an applicant’s past employment. Obtaining information about an employee’s performance and conduct in prior employment are significant indicators of the employee’s success with the FAA. An applicant’s prior recent work experience, which reveals attendance-related issues or problems getting along with co-workers and/or managers, should be closely examined to determine if the applicant should be given an opportunity to work for the FAA.

If an employee is hired it is critical that a thorough evaluation of his/her personal qualities and traits along with performance is conducted during the probationary period. The probationary period is sometimes referred to as the final phase of the selection process. An agency may have interviewed and vouchered an applicant, and believe the applicant may have excellent potential. However, the best indicator of an employee’s success is how the employee performs on the job and complies with workplace rules and regulations. The probationary period provides a critical opportunity to make this assessment. Employees who demonstrate that they will not comply with agency rules and regulations should be removed during their probationary period when there are limited due process and appeal rights.

PITFALLS TO AVOID

In this guide, we have provided information on the disciplinary process which, if followed, will likely result in the sustaining of a disciplinary action. However, all things do not always work out as intended. There are several common errors committed in handling misconduct which most likely result in overturning a disciplinary action.

1. Inconsistent Application of Workplace Rules

The workplace rules found in the agency's Standards of Conduct are applicable to both good and poor performers. Good employees are not permitted to come to work late. Workplace rules are applicable to all employees and must be enforced even-handedly. There may be a tendency to ignore the misconduct of a good employee while wanting to take disciplinary action against the employee who may have some work problems. This mistake often results in a charge of disparate treatment. A manager may decide to correct the two employees differently recognizing that more severe corrective action may be needed for the employee with a poor work record to bring about the behavioral change. As a manager, you cannot ignore one employee's consistent lateness and then want to try to "hammer" another employee guilty of the same offense whose performance may not be as good.

The inconsistent application of workplace rules is sometimes referred to as "selective prosecution." This can also occur when the enforcement of a work rule may have slipped. An example of this may be extended breaks, which have been allowed to occur in the workplace. A manager cannot decide to make an example of the next employee who takes an extended lunch break by taking disciplinary action. It is almost impossible to discipline an employee for an offense that management has openly condoned. Remember, a workplace rule not enforced is not a workplace rule. In this case, most likely, announcement of the enforcement of this policy will have to be communicated to employees. It is important to work closely with your LR/ER Specialist since there may be a bargaining obligation with the union in certain instances.

2. Not Completing a Complete and Thorough Investigation

Remember, the first element of a disciplinary action is proving your charge. You have to prove that more likely than not the misconduct occurred. This burden is not very high compared to the legal "beyond a reasonable doubt" burden. However, it is much more than a "gut" feeling that the misconduct occurred. How do you meet this burden of proof? You meet this burden by obtaining factual evidence. Disciplinary cases are not usually won or lost by the skills of the advocates arguing the case before a third party. The factual evidence developed through a complete and thorough investigation serves as the foundation for

disciplinary action. If the foundation of a building is not complete and thorough, the potential result might be its collapse when faced with strong storms or other environmental disasters.

The same can be said for a disciplinary case. A disciplinary case might collapse under close examination without strong factual evidence as its foundation developed through the conducting a thorough disciplinary investigation.

3. Failure to Take Progressive Discipline

Ignoring a behavior problem and “hoping it will go away” is not what is expected from our managers. Discipline should not be punitive but corrective. Managers must start early in the disciplinary process. In many cases, early counseling might be all that is needed to bring about change in behavior. For example, if an employee is late for work, deal with that issue early and with the lowest possible level of discipline necessary to correct the behavior. It is inappropriate to allow an employee to accumulate numerous instances of tardiness and then attempt removal. A manager’s failure to correct this behavior will most likely result in the discipline being overturned. Third parties recognize the critical responsibility of managers to correct behavior and are not enamored with those who abdicate this important responsibility.

When a manager fails to deal early with misconduct and allows frustration regarding an employee’s misconduct to build up, there is a tendency to want to overreact with the penalty. This “hammer approach” to discipline will almost always get you in trouble. It is easy to fire a Federal employee; it is just hard to keep them fired. What is meant by this statement? Simply, if you, as a manager do not deal with discipline early, fairly, and recognize the principle of progressive discipline, if appropriate, the employee most likely will be returned to work with a great deal of back pay and often with a feeling that an injustice was done against her. Early corrective and progressive discipline, if misconduct continues, makes this scenario less of a reality. When you fail to correct behavior, you communicate to the employee and others in the workplace that you are acquiescing to this behavior. Condoning misconduct may lead to others trying to see what they can get away with. Almost all of our employees are willing to follow workplace rules but want managers to deal with fellow employees who do not. Condoning misconduct will usually get you more misconduct.

4. Timeliness in Taking Disciplinary Action

We have stressed the importance of conducting thorough and complete investigations. You should never rush to judgment in making a disciplinary decision. However, you cannot crawl to a disciplinary decision. Investigations must not only be complete and thorough but also timely. There is a clear element of fairness in a timely investigation. There must be balance between

obtaining detailed factual information and the need to make a disciplinary decision and move on.

Even though the disciplinary process should be as confidential as possible, the reality is that information almost always “gets out.” Employees usually know what is occurring during the disciplinary process and are watching how the situation will be handled. If the disciplinary process takes too long, morale and productivity of your workforce may suffer. Most employees do not want to go by each day with a “cloud of suspicion” over their head. Many will say, “Justice delayed is justice denied.”

As a manager, you want to “memorialize” statements as quickly as possible. Memories fade, sometimes very quickly. Management never wants to answer the question from a third party, “If you thought the misconduct was so serious, why did it take you seven months to propose disciplinary action.”

5. Inadequate Explanation of the Penalty Determination

Do not pay “lip service” to the application of the Douglas Factors. If as a manager you do not recognize the critical importance of applying Douglas Factors, you will definitely get “lip” from the Arbitrator/Judge in reviewing your disciplinary decision. If a third party believes you have not discharged your responsibilities in the disciplinary process by thoroughly applying the relevant Douglas Factors, most are willing to substitute their judgment for yours. However, if you carefully and appropriately apply both relevant aggravating and/or mitigating factors, the third party, in almost every case, will concur with your penalty determination. If you do your job right, you will probably not be second-guessed. If you do not do a good job applying the Douglas Factors, you have given the third party a “license” to determine what the penalty should be.

SUMMARY

Dealing with employee problems is never an easy task. Somehow, the act of directly confronting an employee with a problem is extremely hard, but this is a task that, as a manager, we cannot avoid if we are to have a cohesive and productive work force.

The lack of knowledge of the disciplinary process is one reason for inaction by some managers in dealing with employee misconduct. The purpose of this guide is to provide information to managers on the disciplinary process. By accomplishing this objective, managers should be willing and able to take appropriate disciplinary action when needed. You, as a manager, must realize that you are the one who must deal with a misconduct situation immediately. Do not let it slide. Always remember that it is better to try to deal with minor misconduct in an informal way, but if misconduct persists, you must be prepared to take appropriate formal disciplinary action. Your LR/ER Specialist is always there to assist you.

APPENDIX

FAA (Douglas) Factor Checklist

As a manager with authority to take disciplinary and/or adverse action, you must review and consider all of the following Factors. For those Factors that do not apply, just mark "N/A." Any Factor you find as aggravating must be discussed in the proposal notice so the employee will have an opportunity to reply to that negative Factor. Additionally, after receipt and consideration of an employee's reply, you must address any mitigating Factors raised by the employee.

Below is a checklist which provides a summarization of most of the basic principles of these factors. Your L/ER Specialist can assist you in interpreting these Factors. This checklist may be a useful in determining the "reasonable" penalty.

FACTOR EVALUATION CHECKLIST

Factor 1 – Seriousness of Offense

Aggravating

Mitigating

Neutral

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. *(This factor is one of the most important factors and must be discussed in the proposal notice. Your analysis of this factor goes to the essence of the charge and penalty proposed)*

- A) How does the charged conduct affect the agency's operations and/or mission?
- B) Was the action intentional/deliberate or inadvertent? Explain.
- C) Was it an isolated incident or was conduct repeated? Explain.
- D) Did the employee gain anything from the conduct? What?

Factor 2 – Job Level and Type of Employment

- Aggravating Mitigating Neutral

The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public and prominence of the position.

- A) Is the employee a manager?
- B) Does the person occupy a position trust? How does the employee’s charged conduct related to his/her position of trust?
- C) Does the employee occupy a position of prominence? Explain.

Factor 3 – Prior Misconduct

The employee’s past disciplinary record.

- Aggravating Mitigating Neutral

- A) Does the employee have a prior disciplinary record? What for? When?
- B) Is the prior discipline for similar conduct as the current charge(s)? Explain.
- C) Is the discipline a matter of record?
- D) Is it time-barred, i.e. reprimand over 2 years, contract article?
- E) Is the prior discipline still being challenged? Explain.

Factor 4 – Employee’s Past Work Record

- Aggravating Mitigating Neutral

The employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability. *(This factor is very important. You must consider the employee’s overall performance, awards and years of service. Note: Do not make the mistake to find a lengthy service record as aggravating because the employee should know better. Instead, a lengthy service record is mitigating because the FAA has invested a great amount of time and money into the employee’s development)*

- A) Length of service?
- B) Prior work record? What do appraisals say?
- C) Ability to get along with others?
- D) Dependability

Factor 5 – Erosion of Supervisory Confidence

- Aggravating Mitigating Neutral

The effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisor’s confidence in the employee’s ability to perform assigned duties. *(The level of trust and confidence you have or no longer have plays a big role and seriously impacts the impartial third party. Do not pay just lip service to this factor. Very often a third party will ask the manager during their testimony why their confidence and trust have been affected. Be prepared to give a sincere answer.)*

- A) Is there a loss of trust and confidence? Explain without vague conclusions.
- B) How do job duties relate to a loss of trust and confidence?

___ **Factor 6 – Consistency of penalty**

Aggravating

Mitigating

Neutral

The consistency of the penalty with those imposed upon other employees for the same or similar offenses. *(You must be primarily concerned with how you have previously disciplined others for similar misconduct. Be prepared to justify why you have decided to pursue discipline that may be significantly different. Also, be sure to discuss this factor with your L/ER Specialist who will be familiar with similar misconduct and the typical discipline.)*

A) Is the penalty consistent with that imposed for other employees for similar charges? If not, why??

___ **Factor 7 – Consistency of Penalty with Table of Penalties**

Aggravating

Mitigating

Neutral

Consistency of the penalty with any applicable FAA table of penalties (TOP). *(The TOP is a guide, but refer back to 6.)*

A) Is the charged conduct listed in the Table of Penalties?

B) If not, what offense is most similar?

C) Is the proposal penalty within the range identified in table? If not, why?

___ **Factor 8 – Notoriety**

- Aggravating Mitigating Neutral

The notoriety of the offense or its impact upon the reputation of the FAA.
(This factor is not used often, but if the employee has made the newspaper or other media, you need to include that information in the proposal notice. Remember that customers may be other FAA organizations. So if the behavior has resulted in complaints internal to FAA, it has drawn a notoriety to your organization and should be so addressed.)

- A) Any publicity regarding conduct? What type? Explain.
- B) Any complaints, concerns registered by customers, public, etc.?

___ **Factor 9 – Notice of warning about conduct**

- Aggravating Mitigating Neutral

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.
(This is important. Was the employee aware of the FAA Standards of Conduct and TOP? Are FAA regulations or rules available for review by the employee? Have there been postings, briefings, staff meetings where standards of conduct were discussed or is the offense of such a nature that common sense dictates right from wrong.)

- A) Any non-disciplinary counseling documented? Copies given to employee?
- B) Any briefings/training involving charged violation?
- C) Any general Standards of Conduct briefings? When?
- D) Any letter of expectations provided to the employee about conduct?

___ **Factor 10 – Potential for Rehabilitation**

- Aggravating Mitigating Neutral

Potential for the employee’s rehabilitation. *(This is also an important factor. Is the employee in denial – that is, they do not believe they did anything wrong, are blaming someone else for their misconduct, etc. Or, has the employee accepted responsibility for the misconduct.)*

- A) Early truthful admission?
- B) Remorsefulness/contrition?
- C) Getting assistance with the problem?
- D) Reporting of Misconduct before investigation?

___ **Factor 11 – Mitigating Circumstances**

- Aggravating Mitigating Neutral

Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter. *(An employee may offer information during their reply that may be mitigating, such as, personal crisis which is impacting their judgment, medical issues, etc. Any mitigating information brought forth by the employee must be considered. The decision letter must summarize the employee’s reply and an explanation why you do or do not find their argument persuasive.)*

- A) Personal problems?
- B) Emotional distress?
- C) Medical condition?
- D) Unusual job tensions?
- E) Malice or provocation by others?

___ **Factor 12 – Effectiveness of a lesser sanction**

Aggravating

Mitigating

Neutral

The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *(You must be able to explain why you believe the imposed action is justified and why a lesser penalty would not modify the employee's behavior.)*

A) If removal, why not lesser sanction?

B) Did you consider other alternative sanctions? If not, why? If so, why did you not mitigate?

I hereby certify that I have considered the twelve (12) Factors as indicated above in making my penalty determination

NAME _____

DATE _____