

Factors Relevant in Determining Whether Just Cause Exists

The US Merit Systems Protection Board, which decides disciplinary grievances of Federal employees, has identified, and the VLRB has adopted, the following 12 factors, some of which may not be pertinent in every case, as relevant in determining the legitimacy of a particular disciplinary action:

- 1) the nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment including supervisory or fiduciary role, contacts with the public and prominence in the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;

- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for employee's rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in this matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.¹

The VLRB has indicated that not all these factors will be pertinent in every case, and that they will not be uniform in the weight which they will be given or consistent in the direction they lead.² The Board reviews the employer's application of these factors in a particular case. If the employer establishes that management responsibly balanced the relevant factors in a particular case and struck a reasonable balance, its penalty decision will be upheld.³

Although not all of these factors are pertinent in every case, it should be noted that the nature and seriousness of the offense is always significant in discipline cases. The Vermont Supreme Court has indicated that just cause analysis should "center upon the nature of the employee's misconduct."⁴ Also, in deciding whether there is just cause for dismissal, it is appropriate for the VLRB to determine the substantiality of the detriment to the employer's interests.⁵

¹ Douglas, et al., 5 MSPB 313 (1981). Grievance of Colleran and Britt, 6 VLRB 235, 268-269 (1983).

² Grievance of Colleran and Britt, 6 VLRB at 269.

³ Colleran and Britt, 6 VLRB at 235.

⁴ In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. 270, 273 (1989).

⁵ Merrill, 151 Vt. at 273-274.

The Board in a recent decision denied a motion to compel discovery filed by the Vermont State Employees' Association on behalf of a dismissed Military Department employee in which the request was made that the Board order the State to respond to interrogatories and produce documents related to uniformity and consistency of discipline throughout state government and not just limited to the Military Department. In construing the provisions of the collective bargaining agreement relating to discipline of employees, and examining the long-standing practice of the State and VSEA in discipline cases, the Board determined that the State was required to only provide uniformity and consistency of discipline information limited to the department or agency in which discipline was imposed.⁶

The Board and Supreme Court have ruled on the relevant time period for evidence of alleged inconsistent discipline. The Board concluded that evidence of alleged inconsistent discipline is not relevant to the Board's review of an employee's dismissal to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of the employee's dismissal. The Board stated: "Since our duty is to police the exercise of discretion by the employer to ensure the employer considered the relevant factors in each particular case and took actions within tolerable limits of reasonableness, the relevant focus is on management's actions and knowledge at the time the dismissal decision was made."⁷ The Board subsequently relied on the rationale of this holding to generally conclude in another case that evidence was not relevant to the Board's review of an employee's dismissal to the extent that it involved information of which management was unaware at the time of dismissal.⁸

⁶ Grievance of Smith, 33 VLRB 8, 22-31 (2014).

⁷ Appeal of Danforth, 23 VLRB 288, 294-97 (2000); *Affirmed*, 174 Vt. 231, 244-45 (2002). *See also* Grievance of Newton, 23 VLRB 172, 197 (2000).

⁸ Grievance of Rosenberger, 28 VLRB 284, 305-307 (2006).

In several dismissal cases decided by the VLRB, the issue has involved when do “molehills” of misconduct or performance deficiencies become “mountains” sufficient to constitute grounds for dismissal. Instances of repeated conduct insufficient of themselves may accumulate so as to provide just cause for dismissal.⁹

⁹ Grievance of Cook, 3 VLRB 105, 126-127 (1980). Grievance of Gadreault, 8 VLRB 87, 130-135 (1985). Grievance of Merrill, 8 VLRB 259, 286-290 (1986).