



# Labor and Employee Relations Newsletter

Labor and Employee Relations News in Brief

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## OFF-DUTY CONDUCT and SOCIAL NETWORKING WEBSITES

*by Quentin Barrett, AHL-100*

This article is the result of an issue that was raised concerning an employee’s comments made on a social networking website (Facebook). Specifically, a Federal Aviation Administration (FAA) employee and his wife (who is not an FAA employee) made disparaging remarks about a colleague’s disability while using Facebook. The comments were made off-duty and on the employee’s personal computer. The employee with the disability became aware of the remarks and reported it to FAA officials.

With the recent explosion in the use of social networking websites such as Facebook, MySpace, and LinkedIn, the case law on such conduct is sparse. The courts are in the early stages of exploring the limits of free speech within social networking websites. Some argue that First Amendment rights are not applicable to social networking technology.

In deciding whether the employee may be disciplined for making the disparaging remarks, the Agency has to consider the balance between the employee’s First Amendment rights versus the civil rights (i.e., the right to a hostile-free work environment) of the disabled employee. Disciplinary action may be taken against an employee ‘only for such cause as will promote the efficiency of the service.’ The most important aspect of taking a disciplinary action against an employee who commits off-duty misconduct is proving a nexus (connection) between the misconduct and the efficiency of the service. The U. S. Merit Systems Protection Board (MSPB) generally recognizes three elements by which an Agency may show a nexus linking an employee's off-duty misconduct with the efficiency of the service:

1. certain egregious circumstances based on the nature and gravity of the misconduct;
2. the misconduct affects the job performance of an employee or his coworkers, or management’s trust and confidence in the employee’s job performance; and
3. the misconduct interfered with or adversely affected the Agency’s mission.

The Agency must prove all three elements. In this scenario, the disparaging remarks could have an effect upon relationships or morale in the workplace, which in turn may adversely impact the Agency’s ability to fulfill its mission with proper efficiency. Also, the employee’s off-duty conduct could be perceived as creating a hostile work environment for the disabled employee. Since there

was a nexus and the employee's off-duty conduct violated an Agency policy, the manager acted properly by addressing it.

If you are confronted with a similar issue, contact your HR LER Specialist for assistance.

### **FAA Factors 7 and 8: The Douglas Saga Continues...**

*by Jeannie Coughaine, ANE-16*

This is the fourth in a series of articles concerning the Douglas Factors, or what we also call the FAA Factors. The previous articles in the series discussed the origin of the Douglas Factors and addressed Factors 1 through 6. In this article we will cover Factors 7 and 8.



**Factor 7 - Consistency with Agency Penalty Guide.** The first step in analyzing this factor is to make sure you are using the correct Table of Penalties. As a Human Resource Operating Instruction (HROI) is released, negotiations are triggered and forestall the implementation for one or more bargaining units. For example, the latest HROI Table of Penalties was effective in 2008. It covers all non-bargaining unit employees and *some* FAA bargaining units, e.g. NATCA. Other bargaining unit employees such as PASS Technical Operations are still covered by the 2000 version of the HROI. Still others, such as PASS Flight Standards, are covered by an earlier version contained in Appendix 1 of Federal Aviation Personnel Manual (FAPM) Letter 2635. Be sure to consult with your HR L/ER Specialist to determine the HROI that applies to your situation.

The current Table of Penalties is more comprehensive than the previous guides with the addition of described offenses and more specific penalty ranges. It still does not contain all possible charges, however. If a particular offense is not in the Table of Penalties, review the guide for similar, related offenses to determine the penalty. Be sure not to force the misconduct into a listed offense unless it accurately fits!

Based upon the facts of the case and your Douglas Factor analysis, circumstances may dictate that a lesser or greater penalty should be imposed. A table of penalties is advisory only, and an Agency can deviate from it based on **exceptional** circumstances. If the penalty is greater, documentation and justification based primarily on aggravating Douglas Factors will be needed. Also, expect that your decision will be closely scrutinized by a third party during any litigation of the case. Similarly, if the penalty is less severe than the range, you will need to document the reasons. Why the need for documentation? If you or another manager has a similar disciplinary action in the future, a comparison of the two cases will need to show how the situations were different.

Both the Court of Claims and the Courts of Appeals have characteristically reviewed penalties only to determine whether they were so disproportionate to the offense as to amount to an abuse of discretion or whether they exceeded the range of sanctions permitted by statute, regulation, or an applicable table of penalties. Arbitrators, however, will often rule on what they think is right. They will focus not only on whether a penalty was too harsh or otherwise arbitrary, but also on whether, in their subjective opinion, the penalty was unreasonable.

**Factor 8 - Notoriety of the Offense or its Impact Upon the Reputation of the Agency**

Publicity, or even the possibility of publicity, that could have a negative impact on the reputation of the Agency may be considered to enhance a penalty. (Forget the old show business adage, "All publicity is good publicity." A high profile Agency like the FAA does not need media coverage of any employee's misconduct.)

The notoriety of an offense or its impact on the reputation of the FAA is usually directly related to the seriousness of the misconduct and/or prominence of the employee's position. This factor is taken into account even when only coworker knowledge is considered, especially if it can be established that the offense makes it difficult for the employee to work with coworkers. (This is not the same as when an employee's misdeeds are the subject of office gossip.) Notoriety may also be a way to establish a nexus for off-duty misconduct.

The MSPB has said an Agency's public reputation is the climate an Agency operates in and takes into consideration what's affecting the Agency at the time. For example, when the U.S. Postal Service had problems with violent behavior and was getting bad press, it was able to defend higher penalties for altercations in the workplace. The same happened in the Department of Defense when it was subjected to bad press for misuse of government credit cards; penalties were increased. The impact of negative publicity also was a factor considered in a penalty determination where a Department of Energy (DOE) employee sent sexually explicit e-mails from his Agency e-mail address to DOE customers. This was at a time when customer relations had already suffered because of a recent 50 percent rate hike and the Agency could not afford further bad publicity. MSPB found the employee's misconduct compromised the public image of the Agency he was supposed to represent.

A word of caution: Be careful with this factor. It is generally one of the least significant of the Douglas Factors and is almost always an aggravating factor. The MSPB has downplayed the effect of publicity where there was no evidence to suggest that an employee's misconduct resulted in any adverse publicity outside the Agency or that the offense had any impact on the reputation of the Agency or the Agency's mission. When notoriety is a consideration, the Agency must prove it with evidence, e.g., newspaper articles, and must be ready to explain why or how the notoriety is a consideration for the Agency.

To learn more about Douglas Factors, see [HRPM Reference Materials - Douglas Factors In-depth](#). Much of the information in this article was taken from that publication.

***REMINDER: The advice your servicing HR Labor/Employee Relations Specialists provide on most issues will depend on the specific facts you present to them. Therefore, when faced with a labor or employee relations issue, we strongly encourage you to consult with these experts before taking any action.***

**Discipline and the Disruptive Employee - Part I**

*by Brad Bingham, ANM-16*

This is the first of two articles on dealing with a disruptive employee -- an issue that all managers face with the modern workforce. Communications between managers and employees are filtered by expectations, life experiences and misunderstanding; desired goals are not the same for managers and employees. Nonetheless, there are some principles that will help deal with the situation.

But before outlining a plan to deal with a disruptive employee, bear in mind there are some basic principles in dealing with personnel problems.

- Look for long-term behavioral change, not a quick fix.
- Dealing with employee behavior is part of the manager's job.
- Rules must make sense if you want employees to follow them.
- Be a model of what you expect.
- Always treat employees with dignity.
- Responsibility is more important than obedience.
- Stop doing ineffective things.
- You can be fair without always having to treat everyone the same.

Dealing with a disruptive employee is a two-prong process. The first prong is prevention; the second is reasoned reaction. Prevention consists of preplanning: defining expectations and setting the ground rules for acceptable workplace behavior. Reasoned reaction is the measured response a manager engages in to bring about a desired change in the employee's behavior.

The Agency's Standards of Conduct policy sets basic guidelines for acceptable behavior. The Agency's policy on employee conduct applies to all employees and is designed to encourage employees to maintain a level of behavior and performance that will promote the efficiency of the Federal service and conform to accepted ethical principles. It also states that an employee's conduct on the job has a direct bearing on the proper and effective accomplishment of official duties and responsibilities. This nexus ties the employee's behavior to their work performance and to the efficiency of Agency operations. Employees are expected to approach their duties in a professional and business-like manner and maintain such an attitude throughout the workday.

The policy states employee must:

*Exercise courtesy and tact at all times in dealing with fellow workers, managers, contract personnel and the public. Employees **must treat everyone with dignity and respect** and support and assist in creating a productive and hospitable work environment. **Employees are obligated to avoid disrespectful, abusive or other inappropriate behavior toward other personnel, management officials and customers.***

Employees should review and acknowledge this policy on an annual basis. This annual review clearly sets the expectations for appropriate behavior long before the manager must deal with disruptive behavior.

Managers need to use the following principles in dealing with or disciplining disruptive employees:

1. Dealing with employee behavior is an important part of managing. Managers should put as much effort into coaching good behavior as they put into managing ongoing operations.
2. Always treat employees with dignity. To treat employees with dignity is to be concerned about, and understanding of, their needs and viewpoints. Ask yourself this question when reacting to employee misbehavior, "How would this strategy affect my dignity if my manager did it to me?"
3. Good discipline must not interfere with employee motivation. Any discipline technique is self-defeating if it reduces motivation to work effectively.
4. Responsibility is more important than obedience. Obedience means "do as you are told." Responsibility means "make the best possible decision."



When considering a reasoned response to bring about a behavioral change, there are four types of consequences to a disruptive behavior: instructional, generic, logical, and conventional. *Instructional* consequences educate and teach employees what appropriate behaviors consist of in the workplace. *Generic* consequences usually take the form of warnings for the employee to change behaviors before a more formal consequence occurs. A *logical* consequence is a consequence that would naturally occur as the result of the misbehavior. *Conventional* disciplinary consequences are usually effective with most employees, unless they are the “really hard to manage” employees that normally require more severe consequences before a behavioral change occurs.

Some basic guidelines for implementing a consequence in response to a disruptive behavior include:

- 1) Always implement a consequence when a rule is broken.
- 2) Select the most appropriate consequence, the reasoned response, to bring about the desired behavioral change.
- 3) State the rule/consequence.
- 4) Be private.
- 5) Do not embarrass the employee.
- 6) Do not get involved in a power struggle.

7) Control your anger.

8) The professional manager always looks for ways to help the employee.

This topic will continue next month with **Discipline and the Disruptive Employee – Part II**.

### **AWS: An Employee Right?**

*by DeWayne Wicks, ASW-16*



In a decision regarding the denial of an employee's request for an alternative work schedule (AWS), the Arbitrator determined the employee should be allowed to work the tour of duty she requested.

The Grievant, an Administrative Coordinator, provided support to a group of approximately 60 employees who install, maintain, repair and certify traffic control equipment. In accordance with the Collective Bargaining Agreement (CBA), employees may voluntarily select an AWS. The Grievant requested to work a four-day/ten hours per day schedule (4/10) with Monday as a regular day off (RDO). This schedule was allowed under the CBA "to the extent operational requirements permit". At the time of the request, the employee worked a 5/4-9 schedule that allowed her to work five days one week and four days the next, giving her one day off each pay period (RDO) in addition to the weekends. Her request to change to a 4/10 schedule would have extended her duty hours by one hour each day and provided her one additional RDO per pay period. The supervisor denied the Grievant's request due to "administrative requirements." The supervisor provided no explanation of the content or meaning of those requirements, or how those requirements would be impacted by this schedule change.

In the arbitration hearing, the Union noted the Grievant previously worked a 4/10 schedule for 2½ years before her then-supervisor placed her on 5/8 schedule (5 days per week, eight hours per day). There were other issues raised during the hearing regarding previous grievances over the same issue, a previous settlement agreement of the same issue, the validity of the current grievance and the language carried over from a previous contract to the present. All of these issues were set aside and the Arbitrator made his determination based upon the evidence presented regarding the subject of the grievance, the 4/10 tour, the Grievant's tour of duty history, and the substance of the decision made by the supervisors to deny the request.

As this was a case regarding the language of the CBA (i.e., a contract case), the Union had the burden of proving the Agency violated the CBA. In this case, the Agency must have met its obligations in accordance with the wording of the CBA. A key determination in this case was the fact the CBA states that AWS "will" be available to employees and can only be denied due to "operational requirements." Therefore, if a manager denied a request for AWS because of an operational determination, the manager must be able to demonstrate what barriers would have been incurred if the employee were to work such a schedule.

This case was complicated further by the fact that the Grievant had been allowed to work various work schedules over a seven-year period with no apparent detriment to the operation. Additionally, the Grievant received acceptable performance ratings and an incentive award during this time. When

the first and second level supervisors attempted to diminish her acceptable performance and the incentive award, the Arbitrator concluded their testimony lacked credibility in regard to both the ability and performance of the Grievant, which served as the basis for denying the 4/10 schedule. Consequently, the Arbitrator sustained the grievance and directed the Agency to return the Grievant to a 4/10 schedule by the next pay period or as soon as agreed by the parties.

The lessons to be learned from this decision are (1) words such as “operational requirements” must be supported by fact and (2) history matters. The documented history of the Grievant’s employment established she had been allowed to work a 4/10 schedule or a similar AWS for years with no adverse effect to her performance or productivity, and no demonstrated detriment to the requirements of those to whom she provided service. Sometimes it is insufficient to say “no” if you have little or no grounds for the denial.

### Significant Case Decisions

Federal Labor Relations Authority (FLRA) Denies Union’s Exceptions to an Arbitrator Award on AWS. In a grievance similar to the one discussed above, the FLRA decided there was no reason to overturn the Arbitrator’s decision to deny a 4/10 AWS to an Aviation Safety Inspector. The Arbitrator ruled the Grievant’s request for a 4/10 schedule was a request to change her tour of duty, which was subject to the Agency’s right to determine the numbers, types and grades of employees assigned to any tour of duty. The Arbitrator said that per the CBA, management has the right to decide it cannot spare an employee from a particular shift (or that it does not want an additional employee on a particular shift), and that decision is essentially not subject to third party review. Since the Agency had the right to disapprove the 4/10 AWS, the Arbitrator denied the grievance. He concluded that although the CBA permits employees to participate in AWS, it does not *guarantee* such participation.



Removal Mitigated to 14-day Suspension. An Electronics Engineer who spent extensive time at remote work sites, requiring a great deal of temporary duty and travel, was fired for: Reason #1, failure to follow instructions; Reason #2, misuse of a Government-issued travel charge card; Reason #3, submission of inaccurate information on Government documents, and Reason #4, lack of candor. The employee grieved the removal, which the Union elevated to arbitration.

In the arbitration, the Union raised several defenses, including: (1) that the Grievant followed his supervisor’s instructions; (2) that he never left the work site early unless required to do so due to weather, equipment failure or shortage of work supplies; (3) that his supervisor approved his travel vouchers knowing that he was being investigated for personal travel on duty time; (4) that the investigator failed to compare the Grievant’s Thursday early departure and Monday returns against his Time and Attendance records; and (5) that the Grievant was truthful with the investigator. The Agency contended, however, that the supervisor’s instructions were clear, but that the Grievant had disregarded them. It also pointed to the Grievant’s admission that he used his Government travel charge card for personal reasons, and his submission of false Time and Attendance records. The Agency argued that the extensive investigation fully documented the Grievant’s misconduct and misrepresentation.

The Arbitrator found inconsistency between the supervisor's instructions and email to the employee, and the supervisor's statement to the investigator. Thus, the Arbitrator could not sustain Reason #1. Similarly, the Arbitrator did not support Reason #4 because the Grievant's responses were based on his understanding of the supervisor's instructions. The Arbitrator also did not sustain Reason #3 because the Arbitrator found the evidence to support the inaccurate information charge insufficient because the investigator failed to review travel on Mondays, and the Thursday travel was inconsistent with the Grievant's understanding of the supervisor's instructions.

The only charge that was sustained was Reason #2, misuse of the Government travel card. As a result, the Arbitrator reduced the removal to a 14-day suspension.

*7-day Suspension Upheld.* The Grievant, a Drug and Alcohol Compliance & Enforcement Inspector, received a notice of a proposed 14-day suspension for: Reason #1, failure to follow instructions, procedures and orders; and Reason #2, unauthorized disclosure of information. In the proposal letter, the employee was charged with emailing an official Letter of Investigation (LOI) to an alleged violator, contrary to Agency policy prohibiting the use of email when sending a LOI. In addition, the employee was charged with divulging information to a company pertaining to an individual who tested positive while at another company, contrary to Agency policy that such information is not to be disclosed to a third party. In consideration of the employee's years of service and her belief the Grievant could improve his conduct, comply with the orders, instructions and procedures, and become a productive member of the team, the manager reduced the action to a 7-day suspension. The employee grieved the suspension and the Union elevated the matter to arbitration.

The Union admitted that although the Grievant did email the LOI, he did so after learning from the company president that he had not received the certified copy of the LOI and asked for an email copy. The Agency record, however, did not match the Grievant's claim that he did mail the LOI. The Arbitrator concluded the Grievant did not send the LOI via certified mail as required by FAA Order, and sustained Reason #1, failure to follow instructions.

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As to Reason #2, the Grievant testified that it was only after being badgered by the company's legal counsel that he divulged that someone had worked on an aircraft part that should not have. The Grievant denied that he disclosed that any person had tested positive on a drug test. The Agency responded that the Grievant's email to his manager about that conversation supported the manager's conclusion that the Grievant had divulged unauthorized information. The Arbitrator credited the Agency's account, and found that Grievant committed Reason #2, unauthorized disclosure of information.

Finally, the Union also contended the manager inaccurately applied many of the Douglas factors by failing to recognize them as mitigating factors in Grievant's favor. The Arbitrator rejected such claim, denied the grievance, and sustained the penalty. He found that the manager discussed the Douglas factors she considered mitigating and reduced the original suspension of 14 days to 7, which was less than the recommended penalty in the Table of Penalties.