The rules for determining the penalty, and the ability of MSPB to review that penalty, depend on the statute being used by the agency to authorize the adverse action. As instructed by the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), MSPB has no role in evaluating an agency's chosen penalty for a case proven under chapter 43 of title 5 (the chapter for demotions and removals based upon failure in a critical performance element).[63]

The language of chapter 75 (the chapter for taking actions to protect the efficiency of the service, which can include performance or conduct cases) does not explicitly provide that MSPB will determine if the penalty is reasonable under the circumstances of the case. However, prior to the enactment of the Civil Service Reform Act of 1978 (CSRA), the Board's adjudicatory functions were performed by the Civil Service Commission (CSC). The CSC reviewed the reasonableness of penalties. After enactment of the CSRA, the Board concluded that it was expected to assess penalties as its predecessor agency had done.[64]

The Board examined past court rulings and CSC decisions regarding penalties and then summarized them into twelve (12) factors that it would look at to determine if a penalty was unreasonable. These factors are collectively known as the *Douglas* factors for the case that articulated them and they are still in use today.[65] "It is well established that the Board's jurisdiction [for chapter 75 cases] includes the authority to review the agency's penalty determination using the factors articulated in *Douglas v. Veterans Administration*."[66]

The *Douglas* factors are:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> (2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

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[63] *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1567 (Fed. Cir. 1985). Additionally, the Board cannot review the reasonableness of a penalty that is set by law. *See, e.g., Semans v. Department of the Interior*, 62 M.S.P.R. 502, 508 (1994) (holding that because 31 U.S.C. § 1349(b) requires a suspension of not less than one month for the use of a Government vehicle for other than an official purpose, and the appellant's actions were closely analogous, it would be "inappropriate" for the Board to scrutinize whether the agency's penalty of a 30-day suspension was warranted).

[64] "It cannot be doubted, and no one disputes, that the Civil Service Commission was vested with and exercised authority to mitigate penalties imposed by employing agencies. Nor can it be doubted that the federal courts have regarded that authority as properly within the Commission's power." *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 290 (1981).

[65] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

[66] *Archuleta v. Hopper*, 786 F.3d 1340, 1352 (Fed. Cir. 2015). *See U.S. Postal Service v. Gregory,* 534 U.S. 1, 5 (2001) (noting that "the agency bears the burden of proving its charge by a preponderance of the evidence" and that, "[u]nder the Board's settled procedures, this requires proving not only that the misconduct actually occurred, but also that the penalty assessed was reasonable in relation to it"); *Lachance v. Devall*, 178 F.3d 1246, 1256 (Fed. Cir. 1999) (holding that "the Board inherited mitigation authority in misconduct actions from the old Civil Service Commission").

> (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 where violated in committing the offense, or had been warned about the conduct in question;
>
> (10) Potential for the employee's rehabilitation;
>
> (11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
>
> (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.[67]

When applying these factors, the "determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency. The Board's role is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance."[68] Instead, the question is whether "managerial judgment has been properly exercised within the tolerable limits of reasonableness."[69]

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[67] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981).

[68] *Norris v. Securities and Exchange Commission*, 675 F.3d 1349, 1355 (Fed. Cir. 2012) (internal citations and punctuation omitted).

[69] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981).

The Federal Circuit has instructed that:

> When the Board sustains all of an agency's charges the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. When the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated either in its final decision or during proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges.[70]

The Federal Circuit, interpreting decisions by the U.S. Supreme Court, has also held that, as a matter of due process, in actions taken under 5 U.S.C. § 7513, the agency must notify the employee of the factors it will consider regarding the penalty and provide the employee with the opportunity to respond.[71] As explained in our article, *Agency Officials' Substantive and Procedural Errors and How to Fix Them*, because this is a matter of constitutional due process rights, an agency's failure to provide notice and a meaningful opportunity to respond regarding the penalty is a violation of the employee's substantive rights. A chapter 75 action with such a violation must be canceled, although the agency will be free to start over and take a constitutionally correct action.[72]

[70] *Lachance v. Devall,* 178 F.3d 1246, 1260 (Fed. Cir. 1999); *see Gaines v. Department of the Air Force*, 94 M.S.P.R. 527, ¶ 8 (2003); *Zayer v. Department of Veterans Affairs*, 90 M.S.P.R. 51, ¶ 8 (2001).

[71] *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1282 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999).

[72] *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999).