

## **NOVA Legal Beat: Different Punishments for the Same Misconduct**

Q.

My federal agency has proposed my removal, but I know other people who got away with a 90-day suspension for the same misconduct. Can agencies do that?

A.

Generally, similarly situated employees should not receive disparate penalties for similar misconduct. The penalty previously imposed on similarly situated employees is one of the 12 so-called mitigating “Douglas

factors” that deciding officials should weigh when deciding on discipline. However, not all employees – even those who hold the same title – are similar. Years of experience and prior misconduct could differentiate them. Further, not all types of misconduct – even when the charges go by the same name – are equal. Traditionally, the Merit Systems Protection Board (MSPB)

had held that employees were not deemed similarly situated if they did not share the same supervisor and work unit. Consequently, the Board considered these factors to be “outcome determinative,” it noted in *Joe Lewis Jr. v. Department of Veterans Affairs*

(2010). However, prompted by a U.S. Court of Appeals for the Federal Circuit decision, the Board in *Lewis*

adopted what it called a more “flexible approach” under which employees could be deemed similarly situated even though they did not share the same work unit or supervisor. In fact, the Board in *Rasheed Dennis v. Department of Housing and Urban Development*

(2013) identified factors that are “relevant considerations, but none of them is a threshold requirement or outcome determinative in a disparate penalty analysis.” These factors include:

1. “whether a comparative employee worked in the same organizational unit, had the same supervisor and/or deciding official”;
2. “whether the events occurred relatively closely in time”;
3. “whether the difference in treatment was knowing and intentional”;
4. “whether an agency began levying a more severe penalty for a certain offense without giving notice of a change in policy”;
- and 5. “whether an imposed penalty is appropriate for the sustained charge(s).”

If the employee, with the help of a federal employment law attorney

, manages to establish himself or herself as similarly situated to comparators who received more lenient punishments, the agency then must provide a legitimate explanation for the penalty disparities. Federal employees who are facing discipline for alleged misconduct should immediately contact a federal employment law attorney who can represent them in the agency’s misconduct investigation, reply to proposed discipline, and/or prepare and litigate their MSPB

appeal. Depending on the circumstances, an attorney can show the agency failed to properly

consider penalties meted out to similarly situated comparators, it treated similarly situated employees more leniently, or its explanation for the different penalties is not legitimate. Mathew B. Tully is the founding partner of Tully Rinckey PLLC. Located in Arlington, Va. and Washington, D.C., Tully Rinckey PLLC's attorneys practice criminal defense, matrimonial and family law, federal employment law, and military law. To speak with an attorney, call 703-525-4700 or to learn more visit [fedattorney.com](http://fedattorney.com).