Bad Press Aggravates Agencies and Penalty Decisions

By Mathew B. TullyWhile it remains unclear whether or how any IRS employees will be disciplined for their use of words such as “Tea Party” and other inappropriate criteria to identify tax-exempt applications for review, two things are clear. One is the IRS scandal has left the agency with a black eye. The other is there is strong demand on Capitol Hill for heads to roll. And thanks to the U.S. Merit System Protection Board’s so-called “Douglas Factors,” which deciding officials must consider when doling out discipline, one may lead to the other.Following the release of the Treasury Inspector General for Tax Administration’s report on a Cincinnati-based IRS Determinations Unit’s use of politically sensitive criteria when identifying cases for review, President Barack Obama said the IRS “must apply the law in a fair and impartial way, and its employees must act with utmost integrity.” He added it appeared “some…employees failed that test.” He also directed the Department of the Treasury’s secretary to “hold those responsible for these failures accountable.”As the MSPB noted in Carl L. Baker v. Department of Health and Human Services

(1989), agencies can remove or demote an employee for giving it a black eye, so long as his or her misconduct violates agency standards prohibiting “conduct adversely affecting the confidence of the public in the integrity of the government.”

Regardless of what IRS deciding officials charge employees with for the “failures” referenced by the president, the negative publicity their actions have brought onto the agency could establish an aggravating circumstance for penalty selection.The notoriety of the offense or its impact upon the reputation of the agency is one of 12 factors the MSPB laid out in Curtis Douglas v. Veterans Administration

(1981) that supervisors must consider when deciding on an appropriate penalty; hence, the name “Douglas Factors.” First, to be clear, an employee’s misconduct does not have to end up on the front page of newspapers to be notorious and adversely impact the reputation of his or her agency.For example, in Stephen J. Chandler v. Department of Homeland Security

(2011), an MSPB administrative judge affirmed the removal of a federal air marshal. The judge agreed with the agency that misuse of a government credit card is “a severe offense that damages the reputation of the agency and affects the agency’s relationship with the credit card’s issuing institution, JP Morgan Chase.” An administrative judge, likewise, in Pauline J. Azure-Feuvray v. Department of the Interior

(2006) affirmed the 30-day suspension of a social worker whose voicing of conspiracy theories at a meeting “negatively impacted the agency’s reputation and working relationship with the [Indian Health Service].”Intra-governmental reputation damage can also qualify as an aggravating factor. For example, in Charles

Walker v. Department of Homeland Security

(2013), the administrative judge agreed with a border patrol agent’s first-level supervisor that the charges of unauthorized removal of evidence and making false statements negatively affected the reputation of the agency. This adverse impact was attributed to “the possibility of a grand jury investigation, and the agency’s relationships with other federal agencies are affected when one of its agents is making false statements to other federal agents.”Although the notoriety of the offense or its impact upon the reputation of the agency is only one of 12 Douglas Factors, it can carry significant weight. For example, Leonard J. Marotta v. Department of Health and Human Services

(1987) involved a field representative who was suspended for 40 days. The agency charged him with sexually harassing two Supplement Security Income beneficiaries and conduct adversely affecting the confidence of the public in the integrity of the government. The employee challenged the reasonableness of his suspension. Finding that the employee’s misconduct affected his supervisors’ confidence in his ability to perform his duties and that the offense adversely impacted on the agency’s reputation, the Board said “these factors outweigh the appellant’s evidence of good character and his previous disciplinary and employment records.” It sustained the employee’s suspension.In the past, IRS workers have managed to avoid severe penalties for misconduct because, in part, it did not mar the agency’s reputation. In Anita L. Brown v. Department of the Treasury

(2002), the agency proposed removing an IRS supervisory tax technician who accessed a subordinate’s tax account information via an Integrated Data Retrieval System (IDRS). The employee appealed her removal, claiming her penalty was unreasonably harsh in lieu of mitigating circumstances. While acknowledging the agency’s zero-tolerance policy on IDRS abuse and the seriousness of the offense, the MSPB also noted the employee’s 27 years of discipline-free government service, her cooperativeness in the agency investigation, and the fact that it was an isolated incident that was not malicious or for personal gain. There was also a lack of evidence showing any “adverse publicity outside the agency or that the offense had any impact on the reputation of the agency.” Ultimately, the Board mitigated the removal to a demotion.With headlines screaming “Criticism of IRS

grows amid allegations of targeting beyond Tea Party” and “25 Tea Party Groups File Suit Against the IRS,” it may not be difficult for the IRS to prove the notoriety of the offense and damage to the agency’s reputation. However, relevant Douglas Factors need to balanced

. Federal employees should consult with a federal employment law attorney to ensure their agency does not get away with wrongfully tilting the scale in its favor when deciding on a penalty for misconduct.