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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

[Docket ID: OPM-2025-0012]

RIN 3124-AA35

Determining the Appropriate Penalty for Federal Employees Charged With Misconduct

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or Board) is issuing a final rule amending its regulations governing the Board's review of the reasonableness of an agency's chosen penalty in misconduct-based adverse actions appealed to the Board. Under the final rule, the Board will no longer require consideration of the 12 factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), in every case. Instead, the Board will evaluate whether the agency's penalty is within the tolerable limits of reasonableness in light of the totality of the circumstances, determined on a case-by-case basis.

DATES: *Effective date*: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: The amendments made by this rule apply to appeals filed with the Board on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Appeals pending before the Board on the effective date will be adjudicated under the framework in effect when they were filed.

FOR FURTHER INFORMATION CONTACT: Gina K. Grippando, Clerk of the Board, by email at mspb@mspb.gov or by telephone at (202) 653-7200.

SUPPLEMENTARY INFORMATION:

I. Overview and Scope of This Final Rule

On July 2, 2026, the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB or Board) published a joint notice of proposed rulemaking, Promoting Employee Accountability, 91 FR 40444 (July 2, 2026) (the NPRM). The NPRM contained two distinct sets of proposals issued under two distinct grants of statutory authority: OPM proposed amendments to 5 CFR parts 412, 432, 715, and 752 (RIN 3206-AO91), and the Board proposed amendments to its own appellate procedures at 5 CFR 1201.56 (RIN 3124-AA35). The NPRM stated that, after consideration of comments, "the agencies may issue a joint final rule or each agency may finalize its respective proposals in separate final rules." 91 FR at 40444. The Board is issuing this final rule under the title "Determining the Appropriate Penalty for Federal Employees Charged With Misconduct ," which reflects the subject and scope of the Board-only amendments finalized in this document.

The comment period closed on August 3, 2026. Approximately 676 unique comments were received on the joint docket from organizations and individuals, including labor organizations, associations of federal employees, managers, executives, and retirees, organizations of practitioners, policy and good-government organizations, current and former civil servants, and individual members of the public. Of these, 43 comments were attributed to individual commenters who indicated on their comment submission that their comment represented more than 1 submission. The Board has reviewed and considered all comments received.

Many commenters urged that the proposed rule be withdrawn or rescinded in whole or in principal part (for example, commenters 0337, 0391, 0427, 0430, 0439, 0492, 0554, 0628, 0629, 0634, 0642, 0644, 0647, 0654, 0656, 0667, 0676). Several commenters expressed strong support for the proposed rule as a whole (for example, commenters 0612, 0623, 0630, 0631, 0664), including two Federal executive departments (commenters 0612, 0623), a Federal employee, in his individual capacity, with experience in management-side labor and employee relations (Commenter 0630), and an individual Federal employee who submitted an arbitration award for the record (Commenter 0631). Additional commenters likewise expressed support for the proposed rule or for particular elements of it (commenters 0006, 0031, 0301, 0350, 0352, 0359, 0387, 0395, 0405, 0406, 0417, 0424, 0429, 0434, 0437, 0489, 0545, 0584, 0585, 0586, 0587, 0588, 0591, 0613, 0614, 0615, and 0627), including several whose submissions are discussed in Section VII. Other commenters did not oppose reform as such but urged specific revisions to preserve clear, reviewable standards and realistic procedures (for example, commenters 0293, 0431, 0435, 0509, 0524, 0538, 0558, 0562, 0570, 0625, 0626, 0636, 0657, 0658, 0666, 0675).

The Board also received several hundred briefer submissions from individual commenters — current and former Federal employees, including supervisors, in their personal capacities; veterans; and members of the public — including many substantially similar or identical form-letter submissions. The Board has reviewed and considered each of these submissions and, consistent with ordinary practice, responds to them by subject in this document rather than individually. Many commenters (for example, 0005, 0009, 0017, 0019, and 0052) expressed general opposition to the proposed rule or urged its withdrawal without raising distinct arguments directed to the Board's amendments; the Board declines to withdraw its proposal for the reasons stated throughout this preamble. Many other commenters (for example, 0007, 0008, 0011, 0018, 0020, and 0021) urged that the *Douglas* factors be retained in whole or in part, or argued that a totality-of-the-circumstances standard will produce vague, inconsistent, subjective, or politicized penalty decisions; those comments are addressed in Sections IV.1, IV.2, IV.14, IX.1, and IX.5. Workforce and retention concerns are addressed in Section IV.17.

Many commenters (for example, 0033, 0051, 0109, 0115, 0116, 0123, and 0124) argued that the existing framework is workable, that no need for the change has been demonstrated, or that the rule will increase rather than decrease litigation and cost; those comments are addressed in Sections IV.7, IX.1, and IX.3. Comments addressed exclusively to OPM's proposed amendments — including comments concerning performance improvement periods, response times, employee representatives and official time, settlement agreements, abandonment of position, and agency tables of penalties (commenters 0002, 0029, 0034, 0035, 0041, 0077, and 0078, for example)— are outside the scope of this final rule and are referred to OPM, as discussed in Section III. Finally, several submissions consisted in whole or in part of attached files (commenters 0307, 0321, 0422, 0495, 0539, 0560, 0567, 0568, 0582, 0607, and 0650); the attachments are part of the rulemaking record and have been considered, and arguments in them directed to the Board's amendments are addressed by subject in this preamble.

The Board acknowledges the full range of views expressed. The Board has considered every comment to the extent it bears on the Board's amendments to part 1201. For the reasons stated in the NPRM and elaborated below, the Board declines to withdraw its proposal and is finalizing the amendments to 5 CFR 1201.56, with the applicability statement set forth in the DATES section of this document and the preamble clarifications discussed in Sections VIII and IX.

Because the docket was joint, many comments addressed OPM's proposals, the Board's proposal, or both. In this document, the Board finalizes only its own proposal: the amendments to 5 CFR 1201.56. OPM's proposed amendments to parts 412, 432, 715, and 752 are not finalized in this document. OPM is finalizing its proposals separately and responds in its own final rule to comments directed to those proposals and to the interaction of those proposals with other OPM rulemakings.

As finalized, the rule provides that, in an appeal of an action taken under 5 U.S.C. chapter 75 in which the Board sustains the charged conduct, the Board will evaluate whether the agency's chosen penalty is within the tolerable limits of reasonableness in light of the totality of the circumstances, determined on a case-by-case basis, with no particular set of enumerated factors required to be addressed in every case. The rule further codifies the framework, consistent with *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999), governing when the Board will sustain an agency's penalty, mitigate to the maximum reasonable penalty, or afford the agency an opportunity to institute a lesser penalty. As stated in the NPRM, nothing in this rule alters the longstanding due process requirement that an agency intending to rely upon aggravating factors as a basis for its penalty must include those factors in the advance notice of the proposed action so the employee has a fair opportunity to respond, on pain of reversal on constitutional due process grounds. 91 FR at 40455.

II. Length of Comment Period

Several commenters asked that the comment period be extended. Commenter 0656 requested a 60-day extension, stating that the proposed changes are substantial and that affected employees may not have had a full opportunity to consider and prepare comments. Commenter 0647 argued that a 30-day comment period is “not an adequate comment period for a proposed rule of this magnitude”; that the Executive orders governing regulatory planning contemplate comment periods of at least 60 days in most cases; that judicial decisions treat 60 days as a more reasonable minimum for complex rules; and that the NPRM’s detailed solicitation of reliance-interest information could not reasonably be answered within the period provided.

Commenter 0647 urged that, if the proposal is not withdrawn, the comment period be reopened for no fewer than 60 additional days. Commenter 0430 likewise requested a 60-day extension, citing the length of the joint rule as filed, the number of parts of title 5 of the Code of Federal Regulations it amends, the size of the affected workforce, and the volume of the docket as of late July 2026. Commenter 0439, an individual federal employee commenting in their personal capacity, requested, in the alternative to withdrawal of the rule, that the comment period be extended by at least 60 days, citing the rule’s length and scope and the size of the workforce it affects. Commenter 0391 objected that the comment period ran just 32 days, from July 2 to August 3, 2026, shorter than the 60-day period it stated OPM has itself previously described as its standard practice for comment periods of this kind, and expressed concern that the compressed timeline would limit public scrutiny of the proposal. Commenters 0496, 0595, 0658, 0671, 0673, and 0674 likewise requested a 60-day extension of the comment period or objected that the 32-day period provided was insufficient for a rulemaking of this scope.

The Board declines to reopen or extend the comment period. The Administrative Procedure Act does not prescribe a minimum comment period; it requires a meaningful opportunity to participate, and the period provided here — July 2 through August 3, 2026 — afforded that opportunity with respect to the Board's proposal, which presented a single, clearly framed issue: the standard the Board will apply in reviewing the reasonableness of agency-selected penalties, together with codification of existing mitigation case law.

The Executive order provisions commenters cite do not alter that conclusion. Executive Order 12866 provides that each agency "should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." E.O. 12866, sec. 6(a)(1), 58 FR 51735, 51740 (Oct. 4, 1993). Executive Order 13563 similarly directs that, "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." E.O. 13563, sec. 2(b), 76 FR 3821, 3821-22 (Jan. 21, 2011).

Three features of these provisions defeat the commenters' reliance on them. First, their operative terms are permissive — "should," "in most cases," "generally," "[t]o the extent feasible" — and thus contemplate that comment periods shorter than 60 days will sometimes be appropriate. This is such a case: the Board's proposal presented a single, discrete question of adjudicatory methodology, fully framed in the NPRM, on which meaningful comment did not require a longer period. Second, both Executive orders are directions for the internal management of the executive branch's regulatory process, and each expressly disclaims the creation of any right or benefit, substantive or procedural, enforceable at law by a party against the United States. E.O. 12866, sec. 10; E.O. 13563, sec. 7(d). Third, the Executive orders' 60-day guidance is addressed to the general run of rulemakings, many of which impose primary-conduct obligations on regulated parties; it does not purport to establish a minimum for every rule regardless of scope, and it does not convert the 32-day period provided here into a procedural violation.

Nor do the cited judicial decisions establish a 60-day floor. The principal decision commenters cite, *Petry v. Block*, 737 F.2d 1193, 1202 (D.C. Cir. 1984), described a 60-day period as a more reasonable minimum for complex rules while nonetheless upholding the rule there at issue, which had been adopted after a comment period far shorter than the one provided here; it establishes no categorical floor, and the complexity concern it reflects is answered by the discrete scope of the Board's proposal.

The depth and quality of the submissions received refute the suggestion that interested parties lacked a meaningful opportunity to comment: the record includes, among other things, a multi-part legal analysis marshaling four decades of the Board's own annual-report statistics (commenter 0647), detailed treatments of the Board's statutory authority and Federal Circuit precedent (commenters 0427, 0629, 0634), and extensive discussions of reliance interests responding directly to the NPRM's solicitation (commenters 0634, 0629, 0647). Commenter 0430's own submission — a comprehensive analysis addressing the Board's proposal section by section and answering in full the Board's request for factor-by-factor comment — further confirms that the period afforded a meaningful opportunity to comment on the Board's proposal. The same is true of the submissions of commenters 0439 and 0391, each of which addresses the Board's penalty-review proposal in substance within the period provided. The same is true of the additional extension requests: commenters 0496, 0658, and 0674, among others, accompanied their requests with detailed substantive analyses of the Board's proposal, further confirming that the period provided was adequate for meaningful comment on the discrete question the Board presented.

III. Comments Outside the Scope of This Final Rule

A substantial share of the comments received addressed OPM's proposed amendments rather than the Board's. OPM responds to them in its separate final rule. The Board expresses no view here on OPM's proposals. The Board notes, however, one point of intersection addressed by several commenters and answered in Section IV below: commenters argued that the combined effect of the Board's revised penalty-review standard and OPM's proposed elimination of penalty tables and narrowing of comparators would remove multiple consistency safeguards at once. The Board responds to that argument in Sections IV.2, IV.8, and IV.9 as it bears on the Board's own rule.

Several commenters situated this rulemaking within other pending or recent rulemakings. Commenter 0636 reiterated its opposition to the exclusion of employees in Schedule Policy/Career positions from adverse-action appeal rights. Commenter 0616 likewise objected to the treatment of Schedule Policy/Career employees in OPM's proposed rule and argued that the combined effect of this rulemaking and other executive actions will politicize the career civil service, and commenter 0028 raised similar objections concerning Schedule Policy/Career positions, nondisclosure requirements, and other pending rulemakings. Commenters 0644, 0427, and 0625 argued that this rulemaking cannot be evaluated in isolation from other OPM rules — concerning suitability action appeals, probationary and trial-period appeals, and reduction-in-force appeals — that reassign categories of review from the Board to OPM.

Commenter 0391 likewise urged that this proposal be evaluated together with other pending personnel proposals — including a separate OPM proposal concerning nondisclosure agreements — and with other personnel actions taken by the administration, rather than in isolation, and that any final rule account for their combined effect on employees' practical ability to report wrongdoing without fear of swift, thinly justified removal. Commenter 0427 further argued that the transfers of adjudication authority effected by those rulemakings are unconstitutional absent congressional reorganization authority.

The exclusion of Schedule Policy/Career positions from coverage, and the suitability, probationary, and reduction-in-force appeal rulemakings, are OPM rulemakings conducted under OPM's authorities and separate RINs and dockets; comments concerning them are referred to

OPM and, where applicable, to the dockets for those rulemakings. The nondisclosure-agreement proposal identified by Commenter 0391 is likewise a separate OPM request for comment concerning the proposed creation of a new Optional Form, in a separate docket, and comments concerning it are referred to that docket; the concern that the combined effect of this rule and other actions will impair employees' practical ability to report wrongdoing is addressed in Section IV.2.

This rule does not remove, narrow, or transfer any category of Board jurisdiction. This final rule does not alter which actions are appealable to the Board, who may appeal, the agency's burden of proof under 5 U.S.C. 7701(c), the availability of affirmative defenses under 5 U.S.C. 7701(c)(2), or the availability of judicial review under 5 U.S.C. 7703. It addresses one thing: the analytic standard the Board will apply in reviewing the reasonableness of a penalty in appeals properly before it. Employees retain the same forum, the same procedural rights before the Board, and the same access to judicial review after this rule as before it. The constitutional transfer argument advanced by Commenter 0427 is addressed in Section VI, because as applied to this rule its premise is mistaken: this rule transfers nothing. The Board separately notes that its statutory oversight functions with respect to OPM regulations, including its duty under 5 U.S.C. 1204(a)(4) and 1204(f) to review OPM rules and to report on whether their implementation would require any employee to commit a prohibited personnel practice, are unaffected by this rulemaking, as discussed further in Section VI.

Finally, this rule does not alter veterans' preference rights or the appeal rights afforded by the Veterans Employment Opportunities Act: in response to Commenter 0524, the Board confirms that nothing in this rule diminishes any procedural or appeal right of veteran employees, and that service-related circumstances, including disabilities and accommodation needs, remain cognizable under the totality of the circumstances wherever the record makes them material. In response to Commenter 0478's observation concerning the recurrence of the phrase "sole and exclusive discretion" in the proposed regulatory text, the Board notes that the provisions containing that phrase are OPM's proposed amendments, which are not finalized in this document; the phrase does not appear in the Board's regulatory text.

IV. Retirement of the Mandatory *Douglas* Framework and Adoption of Totality-of-the-Circumstances Review

Consistent with the organization of this document, comments directed to the evidentiary basis and need for the Board's change, to reliance interests and transition, and to regulatory alternatives are addressed in the Regulatory Analysis in Section IX: the need-related comments in the Statement of Need (Section IX.1), the comments proposing alternatives in Regulatory Alternatives (Section IX.5), and the reliance and transition comments in Reliance Interests and Transition (Section IX.6). The remaining comments on the Board's amendments are addressed in this section and in Sections V through VII.

IV.1. Whether the Totality-of-the-Circumstances Standard Is Vague or Standardless

Comment: Many commenters argued that a totality-of-the-circumstances standard under which no particular set of factors must be considered in every case is vague, standardless, or an invitation to arbitrary decision-making.

Commenter 0626 argued that an undefined totality approach risks replacing a predictable analytical framework with a largely subjective inquiry. Commenter 0636 argued that the answer to a framework that has become too rigid is a clearer framework, not the absence of one. Commenter 0628 argued that agencies and employees will be forced to await the Board's ad hoc analysis before knowing whether a penalty was reasonable, making the process more subjective, less fair, and slower. Commenter 0634 argued that a totality inquiry needs criteria to identify what belongs in the totality, and predicted that managers and administrative judges will either recreate *Douglas* under different labels or proceed without a shared method. Commenter 0427 argued that the proposed test releases decisionmakers and adjudicators from any analytical methodology and would permit rulings based on nearly anything, and that the NPRM overstates the risk that decisions are overturned for failing to discuss every factor, citing Federal Circuit decisions holding that neither the Board nor agencies commit reversible error by not expressly addressing all twelve factors.

Commenter 0647 argued that the proposed standard lacks a defining principle and will leave agencies and the Board in an analytical vacuum, citing precedent that the Board need only consider the relevant factors and that mitigation is warranted only where the agency failed to weigh the relevant factors or the penalty clearly exceeded the bounds of reasonableness. Commenter 0435 argued that a totality test measured only against the tolerable limits of reasonableness is likely to produce less consistency and more successful litigation challenges because it removes the shared vocabulary agencies and the Board have used for decades. Commenter 0654 argued that removing the enumerated factors in favor of an undefined discretionary standard makes the outcome of penalty review less predictable for the employee preparing a defense, less consistent across similarly situated employees, and correspondingly harder to challenge on appeal, even though the nominal right of Board review is retained.

Commenter 0391 argued that the rule replaces a structured, judicially tested disciplinary framework with a vague standard under which managers will no longer be required to walk through a specific list explaining why removal, rather than a warning or a suspension, was the right decision, making it much harder for an employee or a reviewing body to argue that the punishment did not fit the offense. Commenter 0337 argued that the *Douglas* factors currently require deciding officials to consider the employee's length of service, past performance, disciplinary history, rehabilitation potential, and consistency with penalties imposed on others, and that without those required considerations there are fewer checks on subjective management decisions, making it easier to justify removal rather than corrective action. Commenter 0642, a letter from six Members of Congress, argued that these consistent standards have for nearly five decades, across administrations of both parties, provided fairness to federal workers facing accusations of misconduct, and that requiring agencies to rely instead on an arbitrary, case-by-case examination under which no particular factors must be considered in every case could allow agencies to ignore important mitigating factors and more easily remove skilled workers with strong rehabilitation potential from critical industries. Commenter 0439 argued that each of the twelve factors exists because a recurring unfairness — an unproven claim of seriousness, a penalty inconsistent with what a coworker received for the same conduct, discipline imposed for violating a rule no one ever explained — needed a specific answer, and that, in the commenter's words, "a standard that requires nothing in particular protects nothing in particular."

Numerous additional commenters raised substantially similar objections to the asserted vagueness or subjectivity of the totality standard (see Section I), and several added distinct variations. Commenters 0293, 0294, 0295, and 0297 argued that "a vague standard is not a flexible standard when only one party (the agency) controls the underlying record." Commenter 0537 asked for greater protection against false allegations. Commenter 0487 argued that annual performance appraisals lose their point if an employee's documented work record need not be considered in setting a penalty, and commenter 0669 argued that the enumerated factors ensure consideration of the government's own investment in an employee's training and development. Commenter 0431, a Federal supervisor, commenting in his personal capacity, urged retention of all twelve factors on the ground that a standard under which no particular set of factors must be considered gives employees no assurance that anything in particular will count.

Response: The Board does not agree that the standard adopted in this final rule is standardless, and it takes this opportunity to state precisely what the rule does and does not do.

What the rule does not do: It does not declare any consideration irrelevant. Under the totality of the circumstances, the considerations identified in *Douglas* — the nature and seriousness of the offense; the employee's position and responsibilities; the employee's disciplinary and work record; the effect of the offense on the employee's ability to perform and on supervisory confidence; the consistency of the penalty with penalties imposed on similarly situated employees; the clarity of notice; the potential for rehabilitation; mitigating circumstances; and the adequacy of alternative sanctions — remain available to the parties and to the Board wherever they are material to the reasonableness of the penalty in the case at hand. Parties remain free to raise them; absent direction otherwise from OPM, deciding officials remain free to address them; and the Board and its administrative judges will weigh relevant record evidence bearing on them.

What ends is the treatment of the twelve factors as a compulsory analytic code: the expectation that every factor be recited in every case, the litigation of penalty appeals as audits of factor-recitation, and any premise that an otherwise reasonable penalty may be disturbed because a decision letter or an initial decision did not march through an enumerated list.

What the rule does: It anchors penalty review where Congress placed it. The operative standards are statutory and regulatory, not open-ended: the action must be taken "only for such cause as will promote the efficiency of the service," 5 U.S.C. 7513(a); the agency bears the burden of proving its case, including the reasonableness of its penalty, by a preponderance of the evidence, 5 U.S.C. 7701(c)(1)(B); the Board may not sustain a decision that resulted from harmful procedural error, was based on a prohibited personnel practice, or was not in accordance with law, 5 U.S.C. 7701(c)(2); and the Board's inquiry, now codified in § 1201.56, is whether the penalty is within the tolerable limits of reasonableness — the formulation drawn from *Douglas* itself, 5 M.S.P.R. at 306 — in light of the totality of the circumstances established by the whole record.

Board decisions applying this standard will continue to be reasoned, grounded in record evidence, and subject to review by the federal courts under 5 U.S.C. 7703(c) for arbitrariness, capriciousness, abuse of discretion, legal error, procedural error, and lack of substantial evidence. A body of published precedent applying the codified standard will continue to develop and to guide agencies, employees, and practitioners, exactly as Board and court precedent have always done. Far from releasing adjudicators to rule on the basis of nearly anything, the codified standard binds them to the whole record and to reasoned, reviewable decision-making.

The authorities invoked by commenters 0427 and 0647 — holding that only relevant factors need be considered, that failure to expressly address every factor is not reversible error, and that mitigation is warranted only where the agency failed to weigh the relevant factors or the penalty clearly exceeded the bounds of reasonableness — establish that the twelve factors were never mandatory in every particular. The final rule preserves both aspects of that settled law: the obligation to weigh relevant, material considerations continues under the totality standard, and the mitigation trigger the Board is codifying — a penalty outside the tolerable limits of reasonableness — is the same trigger those decisions articulate. What those authorities also demonstrate, however, is that the mandatory twelve-factor framing adds nothing of substance to the law commenters describe; retiring the framing therefore sacrifices nothing of substance either.

The Board also rejects the premise that predictability resided in the factor list. *Douglas* itself was explicit that the factors were nonexhaustive, that not every factor is pertinent in every case, and that the factors carry no prescribed weights; the Federal Circuit reiterated the same in *Nagel v. Department of Health & Human Services*, 707 F.2d 1384 (Fed. Cir. 1983). A framework that prescribes neither which factors govern a given case nor how they are to be weighed does not supply the consistency commenters attribute to it.

What it supplied in practice, as the Board has observed, was a template for recitation. The final rule replaces recitation with the substantive question, and — for the first time — places the operative review standard and the *Devall* mitigation framework in the Board's regulations, where all parties can find them. That is a gain in transparency, not a loss. Finally, as to the prediction that the process will become slower because reasonableness will be determined case by case: penalty reasonableness has always been determined case by case. *Douglas* commanded exactly that, cautioning against acting automatically on the basis of generalizations unrelated to the individual situation. 5 M.S.P.R. at 303. The Board expects the rule to reduce, not increase, adjudicatory burden, by eliminating a layer of satellite litigation over whether each factor was recited and weighted, and by focusing the parties' evidence and argument on the considerations actually material to the case.

The arguments of commenters 0654, 0391, 0337, 0642, and 0439 are answered by the same points. Every consideration those commenters identify — length of service, past performance and disciplinary record, rehabilitation potential, consistency with the penalties imposed on similarly situated employees, notice of the rule violated, and mitigating circumstances — remains relevant and cognizable under the totality of the circumstances wherever the record makes it material, and a penalty determination that ignores material record evidence bearing on those considerations risks being mitigated or reversed as not within the tolerable limits of reasonableness.

The additional variations of commentary on this theme are answered by the same architecture. As to the asymmetry-of-the-record argument pressed by commenters 0293, 0294, 0295, and 0297: the agency bears the burden of proving the reasonableness of its penalty on the whole record, and the Board's procedures afford appellants discovery of agency records and evidence, 5 CFR 1201.71 through 1201.85, so the record against which reasonableness is judged is not within the agency's unilateral control. As to Commenter 0537: penalty review under section 1201.56(b)(3) operates only on charges the agency has proven by a preponderance of the evidence; an allegation the agency cannot prove supports no penalty at all. As to Commenters 0487 and 0669: an employee's documented performance record and the government's investment in the employee's training and development are precisely the kinds of circumstances that may remain relevant and cognizable under the totality of the circumstances Commenter 0431's objection restates the premise, addressed above and in Section IV.14, that protections exist only if enumerated; however, the codified standard preserves the substance of each protection through the burden of proof, the due-process notice obligation, and the whole-record requirement.

IV.2. Consistency, Merit System Principles, and the Detection of Disparate or Politicized Treatment

Comment: Commenter 0636 argued that consistency and uniformity are themselves merit-system values, citing the requirement of fair and equitable treatment in 5 U.S.C. 2301(b)(2), and that a standard under which no factors need be considered makes it substantially harder to detect and correct disparate treatment — and correspondingly easier for arbitrary, inconsistent, or pretextual actions to survive review. Commenter 0634 argued that the Board's change, combined with OPM's proposed prohibition of penalty tables and narrowing of comparators, would remove guideposts on both sides of the appeal and invite variation based on the identity of the supervisor or employee. Commenter 0656 argued the change substantially increases the likelihood that Merit System Principles are violated. Commenter 0435 emphasized that a structured penalty analysis particularly protects career executives, who are visible and at times subject to pressures unrelated to the quality of their work, against penalties that are disproportionate or that could appear to have been imposed for reasons other than the efficiency of the service.

Commenter 0625 expressed concern that reducing codified frameworks, at the same time other administration actions are increasing the potential for political influence over personnel decisions, makes it more likely that discipline and removal decisions will be driven by favoritism or politics rather than documented performance and due process. Commenter 0654 argued that the cumulative effect of the proposed changes carries a heightened risk of chilling protected activity, including whistleblowing and equal employment opportunity complaints; cited a 2020 Government Accountability Office report finding that employees who filed whistleblower disclosures or retaliation complaints were terminated at higher rates than the federal workforce generally; and argued that where the standard governing penalty review becomes less structured and harder to test against fixed considerations, an employee who suspects that a proposed adverse action is retaliatory in substance faces a correspondingly harder task in identifying and proving that a materially inconsistent or disproportionate penalty reflects retaliation rather than a legitimate exercise of managerial discretion — a structural risk the commenter described as independent of the intent behind any individual removal decision.

Commenter 0391 argued that the rule is one piece of a broader effort to convert the federal civil service to a spoils system; that an employee who reports financial irregularities, questions an improper order, or raises a scientific finding inconvenient to a political priority could be moved from a performance rating to a completed removal in roughly a month, with a thinner paper trail and less structured justification required at each step; and that separate anti-retaliation mechanisms, such as complaints to the Office of Special Counsel or an inspector general, proceed on timelines too slow to prevent the harm.

Commenter 0337 argued that not every manager is a good manager; that managers vary in experience, competence, and integrity; that the personnel system should protect employees from poor management just as it protects agencies from poor employees; and that expanding managerial discretion while removing long-standing safeguards increases the risk of arbitrary, biased, or retaliatory decisions, including favoritism and the replacement of experienced employees with preferred candidates, even where a removal is ultimately overturned on appeal.

Commenter 0439 further defended comparator evidence arguing that comparator evidence is the most concrete way an employee can show that a penalty was arbitrary rather than principled, that the Board recently recalibrated its comparator doctrine in a disciplined and agency-protective way in *Singh v. United States Postal Service*, 2022 MSPB 15, and that making the inquiry optional removes a working, recently updated safeguard.

Related concerns came from many quarters. Commenters 0243, 0399, 0463, 0504, 0579, and 0620 argued that discipline must apply with equal rigor to supervisors and senior officials, with commenter 0243 urging that supervisory status continue to be treated, where appropriate, as an aggravating rather than a mitigating circumstance, and commenter 0504 arguing that accountability should begin at the senior grades. Commenter 0544 asserted that discipline is being used pretextually at the commenter's facility to remove employees and repost their positions at lower grades. Commenter 0543, a disabled veteran, and commenters 0518 and 0519 described hostility toward veteran employees and argued that reduced structure in penalty review will fall hardest on employees who depend on independent redress, with commenter 0543 warning of severe personal consequences for affected employees. Commenter 0012 argued that deference to an agency's penalty is unjustified where, in the commenter's view, other provisions of the joint proposal remove standardization. Commenters 0040 and 0671, among many others, expressed concern that the revised standard will empower biased or vindictive management and facilitate the removal of whistleblowers.

Response: The Board agrees that consistency in the treatment of similarly situated employees is a merit-system value, and nothing in this rule diminishes the tools by which inconsistency is exposed and remedied in Board proceedings. Evidence that similarly situated employees received materially different penalties for the same or similar conduct remains relevant under the totality of the circumstances. Beyond penalty review, the structural safeguards against disparate, pretextual, or politicized action are statutory and are untouched by this rule: an appellant may establish as an affirmative defense that the action was based on discrimination — including discrimination on the basis of political affiliation — whistleblower reprisal, or any other prohibited personnel practice described in 5 U.S.C. 2302(b), and the Board may not sustain an action shown to rest on such a practice. 5 U.S.C. 7701(c)(2)(B). Harmful-error and not-in-accordance-with-law defenses likewise remain fully available. 5 U.S.C. 7701(c)(2)(A), (C). A penalty imposed for reasons other than the efficiency of the service fails the statutory standard itself — and that statutory standard is precisely the question the codified totality inquiry directs the Board to ask.

The Board additionally observes, as it did in the NPRM, that the perceived obligation to process every case through an identical twelve-factor template is itself in tension with the individualized judgment the merit system demands, and with Merit System Principles 4 and 6 in particular. 91 FR at 40447. Uniformity of recitation is not uniformity of treatment. The consistency the merit system requires is that like cases produce like outcomes for reasons the record supports — a question the totality standard addresses directly. To the extent commenters' concern rests on the combined effect of this rule and OPM's proposed provisions on penalty tables and comparators, the Board notes that those OPM provisions are not finalized in this document, and the operation of the Board's rule described above — including the continued relevance and admissibility of comparator evidence in Board proceedings — does not depend on them.

These submissions are answered by the same statutory architecture. The retaliation scenarios Commenters 0654 and 0391 describe are the subject of protections this rule does not touch: whistleblower reprisal, retaliation for the exercise of complaint or appeal rights, and every other prohibited personnel practice described in 5 U.S.C. 2302(b) remain affirmative defenses on which the Board may not sustain an action, 5 U.S.C. 7701(c)(2)(B), and an action taken for retaliatory reasons fails the efficiency-of-the-service standard itself. Nothing in the Board's rule shortens any timeline, reduces the record an agency must create — including the due-process obligation to identify in the advance notice the aggravating factors on which the penalty will rest — or accelerates any removal.

In response to Commenter 0337, the Board observes that this rule is not premised on an assumption that every manager exercises discretion well. This rule preserves Board penalty review in full: every penalty within the Board's jurisdiction remains subject to independent adjudication on the whole record, under a codified and publicly stated standard, with the Board's mitigation authority preserved. As to comparator evidence, the Board confirms what is stated above in this section: evidence that similarly situated employees received materially different penalties for the same or similar conduct remains relevant, and nothing in this rule disturbs the Board's precedent governing comparator analysis, including *Singh*.

The responses above answer these submissions as well. The codified standard is a single standard: it governs the Board’s review of penalty reasonableness in every appeal within its scope, whatever the appellant’s grade, position, or supervisory status, and comparator evidence concerning similarly situated supervisors, like comparator evidence concerning any similarly situated employee, remains relevant.

Nothing in this rule alters the settled principle that the heightened responsibilities of a supervisory position may bear on the reasonableness of a penalty wherever the record makes them material. Pretextual discipline of the kind commenter 0544 describes is the subject of the affirmative defenses and prohibited-personnel-practice protections described above, which this rule leaves untouched; evidence that an action was taken to achieve an improper staffing objective rather than to promote the efficiency of the service defeats the action under the statutory standard itself. As to comparator scope, in proceedings before the Board, comparator evidence is not confined to a single supervisor or work unit; its probative weight depends on the similarity the record establishes, as the Board’s precedent, including *Singh*, provides. Finally, the Board takes seriously the concerns of veteran employees expressed by commenters 0518, 0519, 0524, and 0543. Nothing in this rule diminishes the Board’s independent review, the availability of disability-discrimination and reprisal defenses, or the agency’s burden of proof; the Board’s processes remain fully available to veteran appellants, and material evidence of disability, accommodation needs, or service-related circumstances remains cognizable under the totality of the circumstances.

IV.3. Notice to Employees and the Claim That the Rule Hides the Ball

Comment: Commenter 0629 argued that the *Douglas* framework gives both parties notice of the considerations a reviewing body will find relevant, and that the totality standard does not change the ultimate calculation performed by the deciding official but removes the stage at which everyone must show their work, leaving managers and employees in the dark. Commenter 0427 similarly argued that employees use the articulated factors to respond before final agency action and that managers consider the factors and employee evidence before deciding, adding predictability and efficiency to the statutory process. Commenters 0003, 0044, 0217, 0373, and 0493 pressed a related, ex ante version of the argument: that the enumerated factors do front-end work — prompting proposing and deciding officials to seek out mitigating information before deciding, requiring supervisors to show their work, disciplining investigations, and lending credibility to the resulting decision — and that without them penalty decisions will become a "black box." Commenter 0316 argued that added flexibility reduces transparency, and commenters 0095, 0177, 0505, 0508, 0564, and 0663 raised similar transparency and notice concerns.

Response: The Board disagrees. Three sources of notice remain. First, the substantive considerations that have always mattered continue to matter: an employee's years of service, clean record, rehabilitative potential, and mitigating circumstances do not become less relevant because their consideration is no longer compelled by an enumerated list, and this preamble expressly confirms their continued relevance in appropriate cases. Second, and more fundamentally, the constitutional and case-law notice obligations that protect the employee's opportunity to respond are unchanged: as the NPRM stated, an agency that intends to rely on aggravating factors as a basis for its penalty must identify them in the advance notice of the proposed action so the employee has a fair opportunity to respond before the deciding official, and failure to do so risks reversal of the action on due process grounds. 91 FR at 40455. That requirement — not the *Douglas* list — is what guarantees the employee knows the charges to be answered, and it survives this rule in full. Third, the final rule codifies the operative review standard and the already existing *Devall* mitigation framework in regulation for the first time.

The ex ante argument pressed by commenters 0003, 0044, 0217, 0373, and 0493 warrants a direct answer. The Board agrees that well-founded penalty decisions rest on information gathered before the decision is made; that is what the burden of proof requires. What compels that gathering, however, is not the enumeration of twelve factors — it is the agency's obligation to prove, on the record and against the employee's reply, that the chosen penalty is reasonable, together with the due-process obligation to identify in the advance notice the aggravating considerations on which the penalty will rest.

Both obligations survive this rule in full, and a deciding official who fails to inform himself or herself of the material circumstances — including mitigating circumstances raised in the employee's reply — risks producing exactly the unexplained, unsupported penalty determination that fails under the codified standard. Nothing in this rule prevents an agency from continuing to use structured internal aids to organize that work (Sections IV.8 and IX.6) or from providing detailed written decisions; what may no longer be demanded is recitation of an enumerated list as a condition of a penalty's validity. Commenter 0493's related observation — that an excessive penalty itself disserves the efficiency of the service by demoralizing a productive workforce — states a proposition the codified standard embraces: a penalty disproportionate to the sustained conduct on the whole record is not within the tolerable limits of reasonableness and thus will not be sustained.

IV.4. Statutory Authority for the Board's Rule

Comment: Commenter 0656 asserted that OPM and MSPB have no authority to regulate away controlling decisions with which current leadership disagrees and that the change runs counter to congressional intent because Congress has not acted on the issues identified. Commenter 0647 argued that the *Douglas* factors were drawn from preexisting Civil Service Commission law and were understood to be necessary tools compelled by the CSRA's prohibition on penalties that are arbitrary, capricious, or an abuse of discretion, and that without a demonstrated substantive flaw in *Douglas* the Board cannot lay a foundation for abandoning it. Commenter 0634 argued that a regulation cannot make material evidence optional by deleting the name of the framework in which courts have considered it — reasoning that if the proposed standard preserves existing obligations the change is largely semantic, and if it authorizes ignoring material evidence it invites reversal under 5 U.S.C. 7703(c).

Commenters 0010, 0048, 0069, 0341, and 0419 likewise argued that the agencies lack authority for the change or that it is contrary to congressional intent. Commenter 0066, a practitioner before the Board, argued that the *Douglas* analysis is implicitly written into statutory law through Senior Executive Service legislation that, in the commenter's view, legislated mitigation standards paralleling *Douglas*, such that its abandonment would not survive review under the Administrative Procedure Act; the commenter also noted, while expressly reserving them, the questions whether the Board may overrule decisional law by regulation and whether the regulation constitutes a prohibited advisory opinion.

Response: The Board has ample authority for this rule. Congress authorized the Board to prescribe regulations to carry out its adjudicatory functions, 5 U.S.C. 1204(h) and 7701(k), and the standard this rule addresses is one the Board itself created: the *Douglas* factors appear nowhere in the CSRA. Congress enacted a standard — "only for such cause as will promote the efficiency of the service," 5 U.S.C. 7513(a) — and a burden of proof, 5 U.S.C. 7701(c), and left the methodology of penalty review to the Board. The Board articulated one methodology in 1981 through adjudication (in *Douglas*); it may refine that methodology in 2026 through notice-and-comment rulemaking. It is well established that an agency vested with both rulemaking and adjudicatory authority may choose to announce and revise principles of general applicability through rulemaking rather than case-by-case adjudication. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Heckler v. Campbell*, 461 U.S. 458, 467 (1983); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991). A change in the Board's own decisional framework, adopted with public participation and a reasoned explanation, is the ordinary and lawful exercise of that authority — not a usurpation of Congress's role. Congress's silence on the *Douglas* factors cuts in the Board's favor, not against it: the factors are the Board's gloss on the statute, and the Board is returning its review to the statutory text.

Commenter 0647's provenance argument confirms, rather than refutes, this conclusion. The CSRA compels reasoned, non-arbitrary, evidence-supported penalty decisions; it nowhere compels the twelve-factor form. That *Douglas* synthesized considerations drawn from preexisting adjudicatory practice confirms the factors' character as decisional common law — the very kind of framework an adjudicatory agency may restate, refine, or replace, whether by adjudication or by rule. The substantive prohibitions the commenter identifies — against arbitrary, capricious, or abusive penalties — are statutory, are preserved, and are codified in this rule's tolerable-limits-of-reasonableness standard.

As to commenter 0634's dilemma — that the change is either semantic or unlawful — the Board rejects both horns. The change is not semantic: it eliminates a mandatory analytic overlay, the recitation-centered litigation that overlay generated, and any basis for disturbing an otherwise reasonable penalty for failure to enumerate factors. Neither does the change authorize disregard of material evidence: the Board's obligation to decide on the whole record, the agency's burden of proof, and judicial review under 5 U.S.C. 7703(c) all remain. Material record evidence bearing on reasonableness — including mitigating evidence — cannot lawfully be ignored under the totality standard any more than it could under *Douglas*, and this preamble so confirms. What the rule eliminates is the compulsory form, not the substantive obligation of reasoned, record-based decision-making.

Commenter 0066's ratification argument does not alter this analysis. Congressional enactments addressing actions against senior executives operate within subchapter V of chapter 75, a materially different scheme that this rule does not touch (Section IV.13). Legislation particular to that scheme neither enacted the twelve-factor form for actions under 5 U.S.C. 7513 nor withdrew from the Board the authority over its own decisional methodology that 5 U.S.C. 1204(h) and 7701(k) confer, and congressional acquiescence in an adjudicatory framework of the Board's own creation does not freeze that framework against revision through notice-and-comment rulemaking. As for the questions the commenter reserves: the relationship of this rule to decisional law is addressed in Section IV.5, and the rule is not an advisory opinion — it is a legislative rule of general applicability, adopted under 5 U.S.C. 1204(h) and 7701(k) through notice-and-comment procedures, that decides no pending case and advises no party on any specific dispute.

IV.5. Federal Circuit and Supreme Court Precedent

Comment: Commenter 0629 argued that the Board may not eliminate the *Douglas* standard by rulemaking because the Federal Circuit has adopted *Douglas* analysis into its own precedent, which the Board must follow unless and until the court itself revises it, citing Federal Circuit decisions rejecting Board attempts to depart from circuit-endorsed legal tests and a decision applying *Douglas* notwithstanding a subsequent express statute; the commenter predicted the Federal Circuit is likely to reject any attempt by regulation to undercut its longstanding precedent. Commenter 0427 argued that the Supreme Court has upheld *Douglas* as a proper statement of the Board's authority. Commenter 0647 noted that the Federal Circuit has repeatedly approved use of the factors as a basis for determining the reasonableness of a penalty and has held that failure to consider a significant mitigating circumstance constitutes an abuse of discretion. Commenter 0634 similarly emphasized that the Supreme Court has described *Douglas* as the general framework for penalty review. Commenters 0096 and 0212 similarly argued that removing the factors contradicts decades of precedent, and commenter 0066 emphasized that innumerable Federal Circuit decisions have informed and confirmed the application of the *Douglas* standards without ever criticizing their existence.

Response: The Board has carefully considered its relationship to Federal Circuit and Supreme Court precedent and concludes that this rule is consistent with it. Three points are essential.

First, the *Douglas* factors are the Board's creation, not the court's or Congress's. The Supreme Court's description of *Douglas* as the Board's general framework reflects exactly that: *Douglas* is the framework the Board announced for exercising its own review function. The Federal Circuit's decisions have reviewed the Board's application of the Board's framework and have repeatedly emphasized—beginning with *Nagel*—that the factors were intended to assist, need not be applied mechanically, and that consideration of the relevant factors is all the law requires. 707 F.2d at 1386. Decisions approving the framework as a lawful exercise of the Board's authority are not holdings that it is the only lawful methodology; no decision of the Federal Circuit or the Supreme Court holds that the twelve enumerated factors are compelled by 5 U.S.C. 7513, by 5 U.S.C. 7701, or by the Constitution.

What circuit precedent does compel — and what this rule preserves and codifies — are the substantive limits on penalties: a penalty may not be arbitrary, capricious, an abuse of discretion, grossly disproportionate to the offense, or unsupported by the record. *See, e.g., Beard v. Gen. Servs. Admin.*, 801 F.2d 1318, 1321 (Fed. Cir. 1986); *Webster v. Dep't of the Army*, 911 F.2d 679, 685-86 (Fed. Cir. 1990); *Tartaglia v. Dep't of Veterans Aff.*, 858 F.3d 1405, 1408-09 (Fed. Cir. 2017); *Lachance v. Devall*, 178 F.3d 1246 (Fed. Cir. 1999).

The principle Commenter 0647 invokes — that failure to consider a significant mitigating circumstance is an abuse of discretion — survives intact under this rule: the totality of the circumstances by definition includes significant mitigating circumstances established by the record, and a penalty determination that ignores them remains an abuse of discretion under the codified standard. The Supreme Court's decision commenters invoke, *United States Postal Service v. Gregory*, 534 U.S. 1 (2001), is consistent with this understanding. *Gregory* addressed the Board's treatment of prior disciplinary actions in penalty review; it described the *Douglas* factors as the Board's own general framework for penalty review and emphasized the deferential character of the Board's review of agency-selected penalties—the very allocation of responsibility this rule codifies—and it nowhere held that the enumerated factors are required by statute or are otherwise beyond the Board's authority to revise. 534 U.S. at 8–10.

The Federal Circuit decisions commenters collect are of a piece: *Zingg v. Department of the Treasury*, 388 F.3d 839, 841 (Fed. Cir. 2004), approved use of the factors as "a basis for determining the reasonableness of a penalty" — approval of a permissible methodology, not a holding that the methodology is exclusive — and *VanFossen v. Department of Housing & Urban*

Development, 748 F.2d 1579, 1581 (Fed. Cir. 1984), and *Purifoy v. Department of Veterans Affairs*, 838 F.3d 1367, 1372 (Fed. Cir. 2016), enforce the record-based principle, fully preserved here, that significant mitigating circumstances may not be ignored. The same is true of the decisions invoked by commenters 0066, 0096, and 0212: decisions applying and clarifying the Board's framework confirm its lawfulness; they do not enact it as the exclusive methodology.

Second, the line of authority reflected in *Cobert v. Miller*, 800 F.3d 1340, 1349 (Fed. Cir. 2015) — on which commenter 0629 relies for the proposition that the Board must follow circuit-endorsed legal tests unless and until the court itself revises them — concerns a different posture: the Board's obligation, when adjudicating, to follow circuit precedent interpreting governing law rather than departing from it by decision. This rule is not an adjudicatory departure from circuit precedent; it is a legislative rule, adopted through notice-and-comment procedures under an express statutory grant, 5 U.S.C. 1204(h), revising the Board's own methodology on a question the statute leaves to the Board. When the legal framework itself lawfully changes, the court reviews Board decisions under the new framework; prior decisions applying the superseded framework do not freeze it in place.

Miller itself illustrates the distinction: the Federal Circuit there held that the Board, when adjudicating, was not free to disregard circuit precedent that had adopted an interpretation the Board itself first developed. It did not address, much less foreclose, revision of the Board's decisional methodology through a duly promulgated legislative rule. Nor does the Board read the Federal Circuit's decisions as having independently adopted the twelve-factor enumeration as a construction of 5 U.S.C. 7513 or 7701 that binds the Board in rulemaking. What the court has adopted and enforced as its own precedent are the substantive boundaries of penalty review — deference to the agency's primary discretion, bounded by the tolerable limits of reasonableness and policed through abuse-of-discretion review — and this rule codifies those boundaries rather than departing from them. And *Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir. 2021) — the decision commenters cite as applying *Douglas* notwithstanding a subsequent express statute — construed a distinct statutory scheme, the expedited removal authority Congress enacted for a single department (the Department of Veterans Affairs) at 38 U.S.C. 714, and addressed the role of the *Douglas* factors under that scheme in the absence of any regulation or other applicable case law on the question; it did not hold that chapter 75 or chapter 77 mandates the twelve factors as against a duly promulgated Board regulation.

Third, the Board acknowledges — as it must — that the validity of this rule, and of Board decisions applying it, will be subject to judicial review under 5 U.S.C. 7703. The Board has concluded that the rule is within its authority and consistent with statute and precedent for the reasons stated here, and it has structured the rule to codify, rather than displace, the substantive principles the Federal Circuit has enforced. Should the court conclude otherwise in any respect, the Board will of course conform its adjudications to the court's rulings. In the interim, the rule reduces rather than creates tension with circuit precedent: it leaves untouched every holding enforcing the substantive limits of penalty review, and it withdraws only a decisional template the court itself has repeatedly described as non-mandatory. *See Nagel*, 707 F.2d at 1386; *Kumferman v. Dep't of the Navy*, 785 F.2d 286, 291 (Fed. Cir. 1986); *Davis v. U.S. Postal Serv.*, 487 F. App'x 571, 576 (Fed. Cir. 2012) (holding that the Board need not expressly address every factor in every decision).

IV.6. Due Process and Access to Judicial Review

Comment: Commenter 0626 argued that broad discretionary standards without clearly articulated limits may make court review more difficult, invoking Supreme Court decisions reflecting a principle that personnel systems should be predictable and capable of meaningful judicial review. Commenters 0629 and 0656 invoked employees' constitutional due process rights, including the pre-deprivation protections recognized in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Commenter 0654 likewise invoked *Loudermill* and *Arnett v. Kennedy*, 416 U.S. 134 (1974), and argued that the predictability on which *Loudermill*'s due-process framework depends rests on the assumption that a reviewing body's assessment of an adverse action can be meaningfully tested against ascertainable standards — an assumption the commenter contended an undefined discretionary standard undermines even though the nominal right of Board review is retained. Commenters 0014, 0062, 0088, 0121, 0292, 0314, and 0370 likewise invoked due process and the right of employees to defend themselves.

Response: This rule does not touch any of the interests those authorities protect. The mixed-case decisions Commenter 0626 cites concern the forum for judicial review; nothing in this rule alters the Board's jurisdiction, mixed-case procedures, or the routing of judicial review, and those decisions remain fully applicable. *Loudermill* concerns the pre-deprivation process due a tenured public employee — notice of the charges, an explanation of the evidence, and a meaningful opportunity to respond before the deciding official. Those protections arise from 5 U.S.C. 7513(b) and from the Constitution, are administered through agency-level procedures, and are not amended by this rule. Indeed, as noted above, the rule expressly leaves intact the case law requiring that aggravating factors relied upon for the penalty be identified in the advance notice, on pain of reversal on due process grounds. 91 FR at 40455.

As for meaningful judicial review, the codified standard is at least as reviewable as its predecessor: the Board's decisions will identify the circumstances found material, weigh them on the record, and explain why the penalty does or does not fall within the tolerable limits of reasonableness, and the Federal Circuit will review those decisions under the unaltered standards of 5 U.S.C. 7703(c). Commenter 0654's argument fares no better. *Loudermill* and *Arnett* concern the pre-deprivation process due before an adverse action is taken — notice of the charges, an explanation of the evidence, and a meaningful opportunity to respond — and, as stated above, those protections are unaltered by this rule. To the extent the commenter's argument concerns the standards governing post-deprivation review, the codified standard supplies ascertainable standards: the tolerable-limits-of-reasonableness inquiry the Federal Circuit has policed for four decades, the agency's unchanged burden of proof under 5 U.S.C. 7701(c)(1)(B), and reasoned, record-based Board decisions subject to judicial review under 5 U.S.C. 7703(c).

These conclusions answer as well the similar due-process objections of commenters 0014, 0062, 0088, 0121, 0292, 0314, and 0370: the pre-deprivation protections of notice, an explanation of the evidence, and a meaningful opportunity to respond arise from the Constitution and 5 U.S.C. 7513(b) and are unaltered by this rule, and post-deprivation review before the Board and the courts continues under unchanged burdens of proof and standards of judicial review.

IV.7. The Claim That the Rule Will Increase Litigation and Reversals

Comment: Commenter 0634 predicted that, absent identified factors, managers and administrative judges will either recreate *Douglas* under different labels or proceed without a shared method, producing reversals for arbitrary and capricious decision-making; commenters 0667, 0656, 0427, and 0647 predicted increased litigation, less consistency, and poorly reasoned decisions; commenter 0435 predicted a higher likelihood of successful litigation challenges; and commenter 0629 argued that without delineated factors the Federal Circuit would be required to review every penalty more searchingly, opening the door to challenges. Commenters 0027 and 0345 predicted that removals under the revised standard will be undone in litigation; commenter 0496 argued that discarding a framework around which forty-five years of precedent has developed "resets the litigation clock rather than reducing it"; and commenter 0665 argued that the rulemaking supplies no cost estimate for the foreseeable litigation over what the totality standard requires.

Response: The Board expects the opposite, for reasons already stated: the rule removes an entire category of appellate issues — whether each factor was recited, addressed, and adequately weighted — that today consumes party and adjudicator resources without advancing the statutory inquiry. The Board also notes that the standard it is codifying is not novel to the reviewing court: the tolerable-limits-of-reasonableness formulation is the one the Federal Circuit has policed for four decades, and the abuse-of-discretion and gross-disproportion limits the court enforces are unchanged.

The Board's own historical data, submitted by commenter 0647 and discussed in the Statement of Need in Section IX.1, corroborate this expectation: mitigation outcomes have been rare and stable for decades because they turn on substantive reasonableness, which this rule leaves in place. To the extent an initial period of precedent-building accompanies any doctrinal refinement, the Board is confident that its published decisions will supply guidance sufficiently rapidly, as they did in the years following *Douglas* itself. And to the extent commenters predict that adjudicators will continue to find familiar *Douglas* considerations material in many cases, the Board does not regard that as a defect: those considerations are often material. The point of this rule is that their consideration follows from the record, not from a mandatory template.

Commenter 0496's litigation-clock argument, and commenter 0665's related cost objection, are answered by the same points and in Section IX.3. The codified formulation is not a new test whose meaning must be constructed from nothing: it is the tolerable-limits-of-reasonableness standard the Federal Circuit has policed for four decades, together with the *Devall* mitigation framework, both carried forward with their existing case law intact. Precedent applying the substantive limits of penalty review retains its force; what is retired is the litigation of recitation, not the law of reasonableness.

IV.8. The Prediction That Informal Frameworks Will Persist Without Transparency

Comment: Commenter 0625 predicted that removing codified frameworks will not eliminate their use in practice: because the possibility of appeal remains, human resources and legal offices will continue to develop and apply their own informal, *Douglas*-like checklists and penalty aids — but without the transparency, consistency, and accountability that come from codified frameworks — making the application of performance-based and adverse actions more opaque and more variable across agencies. The commenter also observed that large, multi-layered agencies with thousands of supervisors need some shared framework to promote consistent, defensible decisions, and that unstructured discretion is workable only in small organizations.

Response: This rule governs the standard the Board applies on review. The transparency and accountability the commenter values are supplied at that stage by public, codified, and reviewable materials that this rule leaves in place or creates: the codified review standard and mitigation framework in § 1201.56; the due-process requirement that aggravating factors be identified in the advance notice; the record on appeal; and the Board's decisions. Cross-agency consistency is policed by a single codified standard of review applied by one national adjudicator and reviewed by one court.

IV.9. Request To Exclude Federal Law-Enforcement Personnel or To Prescribe Factors for Law-Enforcement Appeals

Comment: Commenter 0443, which expressed support for the proposed rule's stated objectives, requested that covered federal law-enforcement personnel be excluded from the rulemaking's amendments — including the amendment to 5 CFR part 1201 — and that the Board retain *Douglas*-based penalty review in appeals under 5 U.S.C. 7513 involving such personnel. In the alternative, the commenter requested that the final rule expressly require the Board to consider, in law-enforcement appeals, the officer's operational circumstances, prior record, notice of the governing standard, consistency of penalty, intent, and rehabilitation potential. The commenter emphasized that law-enforcement duties — arrests, citations, crowd control, and use of force — predictably generate public complaints, including complaints that are ultimately unsubstantiated; that penalty procedures applicable to officers must preserve the ability to distinguish proven misconduct from good-faith operational judgment exercised under rapidly evolving conditions; and that a general totality standard, particularly in combination with OPM's proposed provisions on penalty tables and comparators, may reduce transparency and produce inconsistent outcomes among similarly situated officers. The commenter also requested, at a minimum, a separate law-enforcement impact analysis before the rule is applied to those workforces. Other commenters serving in or representing law-enforcement and correctional workforces raised similar concerns (commenters 0119, 0239, 0299, 0324, 0349, 0357, 0394, 0397, 0401, 0403, 0404, 0423, 0441, 0648, and 0655), emphasizing the operational realities of policing and corrections, the volume of complaints those environments generate, and the risk of inconsistent or command-influenced discipline; several also addressed OPM's proposed provisions, and those portions of their comments are referred to OPM.

Response: The Board declines to adopt an occupational exclusion from § 1201.56(b)(3) or to codify a mandatory factor list applicable to a subset of appeals. A single standard of review, applied by one national adjudicator and reviewed primarily by one court, is itself a structural guarantor of the consistency the commenter seeks; fragmenting the standard by occupation would multiply the boundary and classification disputes the commenter's own proposed definitions illustrate, and a codified mandatory list for one workforce would reintroduce, for that workforce, the compulsory-checklist dynamic described in Sections IX.1 and IX.5. The Board is confident, however, that the substance of the commenter's concerns is accommodated by the codified standard.

Every consideration the commenter identifies — the operational context in which the conduct occurred; the distinction between proven misconduct and good-faith operational judgment exercised under dangerous, rapidly changing conditions; the officer's record; the clarity of the standards the officer was expected to meet; intent; the consistency of the penalty with penalties imposed on similarly situated officers; and rehabilitative potential — is a circumstance bearing on the reasonableness of the penalty, remains fully cognizable under the totality of the circumstances, and, where the record makes it material, must be weighed.

So too the commenter's observation that policing predictably generates complaints, including unsubstantiated ones: the codified standard operates on charges the agency has proven by preponderant evidence, not on the existence or volume of complaints, and the distinction between sustained misconduct and unsubstantiated allegation is preserved in full. Comparator evidence — including, where the record supports its materiality, evidence concerning officers in comparable commands, districts, or operational units — remains relevant, as stated in Section

IV.2. The same response applies to the other law-enforcement and correctional commenters identified above: every operational consideration they identify remains cognizable under the totality of the circumstances, the codified standard operates only on charges proven by preponderant evidence, and relevant comparator evidence remains admissible in Board proceedings.

IV.10. The "Conscientious Consideration" Formulation and the Standard of Judicial Review

Comment: Commenter 0430 argued that proposed § 1201.56(b)(3) adopts the second half of *Douglas*'s operative sentence — review of the penalty for whether it is within "tolerable limits of reasonableness" — while deleting the first half, under which the Board's review is "essentially to assure that the agency did conscientiously consider the relevant factors," and that a boundary without a metric bounds nothing; the commenter requested that any final rule codify both halves of the sentence. The commenter further argued that under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), courts exercise independent judgment on questions of statutory meaning; that the *Douglas* framework is the Board's contemporaneous and consistent construction of the efficiency-of-the-service standard, of the kind that carries persuasive weight; and that the Board is discarding its most durable construction of the statutes it administers in favor of a position taken for the first time in this rulemaking. Commenter 0509 similarly argued that the proposal keeps "reasonableness" while discarding the analysis that gives it meaning, and commenters 0478 and 0622 likewise invoked *Loper Bright* and the end of judicial deference to agency interpretations of statutes.

Response: The Board declines to add the requested clause to the regulatory text, but it rejects the premise that the omission authorizes penalty decisions unmoored from the relevant considerations. The agency bears the burden of proving, by preponderant evidence on the whole record, that its penalty is reasonable. A penalty determination that is unexplained, rests on facts the record does not support, or ignores material record evidence — including significant mitigating circumstances — is not within the tolerable limits of reasonableness and risks mitigation or reversal; Sections IV.1, IV.5, and V so confirm, and the Federal Circuit's abuse-of-discretion precedent, which this rule codifies rather than displaces, so requires. The obligation of conscientious, record-based decision-making therefore survives in full. What the Board declines to codify is a formulation that four decades of experience shows is understood in practice as commanding a factor-by-factor demonstration — the very understanding this rule is designed to correct. Reasoned consideration of what the record makes material is required; recitation of an enumerated list is not; and the difference between the two is the point of this rulemaking.

As to *Loper Bright*: the Board agrees that courts will exercise independent judgment in reviewing this rule, but the commenter's framing mistakes what the rule decides. The statutory content of chapter 75 penalty review is not in dispute and is not changed: the action must be taken only for such cause as will promote the efficiency of the service; the agency must prove its case, including the reasonableness of its penalty, by preponderant evidence; and the Board's decisions are reviewed by the courts under 5 U.S.C. 7703(c).

What this rule addresses is the Board's own decisional methodology for applying that standard — whether reasonableness review must be organized around an enumerated advisory list. That methodology is committed to the Board by 5 U.S.C. 1204(h) and 7701; the Board created it by adjudication in 1981, and it may revise it by rulemaking in 2026, as Section IV.4 explains. And to the extent longevity confers persuasive force on the Board's constructions, the construction that has endured — and that this rule codifies — is *Douglas*'s actual standard of review: deference to the agency's primary discretion, bounded by the tolerable limits of reasonableness.

The compulsory twelve-factor application the commenter defends is not a construction *Douglas* announced; it is the practice *Douglas* warned against, *Nagel* rejected, and this rule corrects. Finally, the Board has considered the commenter's argument that codifying *Nagel* — retaining the enumerated list with a codified anti-mechanical disclaimer — is the obvious alternative within the ambit of the existing policy. Section IX.5 explains why the Board concludes that course would re-entrench the perceived obligation this rule dispels: *Douglas* and *Nagel* both contained the disclaimer, and four decades of disclaimed practice nonetheless produced the checklist regime the record describes.

These conclusions answer the parallel arguments of commenters 0509, 0478, and 0622. The obligation of reasoned, record-based consideration that gives the reasonableness standard its content survives in full, as stated above; and because the rule revises the Board's own decisional methodology rather than construing ambiguous statutory text, the demise of judicial deference to agency statutory interpretation does not undermine it — the courts will review the rule, and Board decisions under it, exercising their own judgment, and the Board is confident in the rule's validity for the reasons stated in Sections IV.4 and IV.5.

IV.11. Due Process Notice and the Administrability of Penalty Review

Comment: Commenter 0430 argued that the *Douglas* factors are what make administrable the constitutional notice obligation recognized in *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999), and *Ward v. United States Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011): a shared, finite vocabulary in which agencies draft the penalty portion of proposal notices, employees frame replies, and the Board audits whether a decision strayed beyond the noticed grounds. If no factors are required, the commenter asked, what must the proposal notice? The commenter predicted that agencies will either continue noticing aggravating considerations with the same specificity as today — in which case the rule changes nothing — or allow notices to degrade into totality boilerplate while deciding officials reach for un-noticed considerations, producing a wave of automatic due-process reversals at the expense of agencies and employees alike.

Response: The question the commenter poses has a settled answer, and this rule does not change it: the advance notice must identify the charges and the aggravating factors on which the agency intends to rely in selecting its penalty, in sufficient detail to give the employee a fair and meaningful opportunity to respond before the deciding official, and a decision that rests on new and material information not so noticed — whether bearing on the charge or on the penalty — violates due process and will be reversed.

That obligation was never keyed to the *Douglas* taxonomy. It is keyed to the information the deciding official actually considers: an agency has never been required to notice all twelve factors, and it has never been permitted to rely on an un-noticed aggravating consideration merely because that consideration could be sorted under one of them. Nothing in this rule alters those requirements, and Sections IV.3 and VIII expressly preserve them. The commenter's dilemma is therefore a false one. Agencies must continue to disclose, in the advance notice, the considerations on which the penalty will rest — with or without an enumerated review framework — and a deciding official who reaches beyond the notice courts reversal after this rule exactly as before it. What changes is not the notice obligation but the review of the decision: the Board will ask whether the penalty is reasonable on the whole record and consistent with the noticed grounds, not whether the decision letter recited an enumerated list. The Board expects agencies to respond to this rule the way careful litigants respond to any codified standard — by proving their noticed case — and the Board's adjudications will continue to enforce the due-process boundary without exception.

IV.12. Arbitration of Chapter 75 Actions Under 5 U.S.C. 7121(e)(2)

Comment: Commenter 0430 argued that the NPRM did not address arbitration; that under 5 U.S.C. 7121(e)(2), an arbitrator resolving a grievance over a matter covered under 5 U.S.C. 4303 or 7512 shall be governed by 5 U.S.C. 7701(c)(1); and that under *Cornelius v. Nutt*, 472 U.S. 648 (1985), Congress intended arbitrators to apply the same substantive standards the Board would apply, to promote consistency and prevent forum shopping. The commenter contended that the rule therefore either silently rewrites the review standard applied in every negotiated grievance procedure in the government or produces divergent review of identical removals depending on the forum in which they are challenged — the inconsistency, in the commenter's view, that the rule claims to cure. From the opposite direction, Commenter 0631, an individual federal employee commenting in their personal capacity, argued that arbitrators treat the *Douglas* factors as binding criteria and frequently mitigate removals that do not exactingly conform to the twelve-factor test — making it difficult, in the commenter's experience, to remove bargaining unit employees who commit serious misconduct — and urged that the rule be finalized quickly precisely because the codified standard would bind arbitrators.

Many other commenters addressed the rule's operation in negotiated grievance and arbitration procedures from both directions (commenters 0059, 0061, 0445, 0453, 0456, 0459, 0497, 0498, 0499, 0503, 0511, 0541, 0563, 0574, 0635, 0638, 0641, 0643, and 0668), several arguing that arbitrators, unions, and agencies rely on the *Douglas* framework to evaluate and resolve disciplinary disputes and that its retirement will disrupt settled grievance practice. Commenter 0066 argued that arbitrators would be stripped of a useful analytical tool in evaluating adverse actions under just-cause provisions that parallel the efficiency-of-the-service standard.

Response: Congress commanded substantive parity between the Board and arbitrators in covered matters, and this rule maintains that parity. The standard codified at § 1201.56(b)(3) is, upon its applicability, the substantive standard governing the Board's review of penalty reasonableness in appeals within its scope; under 5 U.S.C. 7121(e)(2) as construed in *Cornelius*, an arbitrator adjudicating a grievance over a matter that could have been appealed to the Board applies the same substantive standards the Board would apply. The parity command thus carries the codified standard into arbitration by operation of the statute — just as it has carried the Board's substantive case law into arbitration for four decades — and the forum divergence the commenter predicts does not arise.

The same statutory parity answers Commenter 0631: upon its applicability, the standard codified in § 1201.56(b)(3) is the substantive standard an arbitrator must apply in resolving a grievance over a matter that could have been appealed to the Board, as discussed further in

Sections VII and IX.1. Consistent with the applicability statement described in Sections VIII and IX.6, the Board expects the codified standard to operate in arbitration on the same prospective basis on which it operates before the Board: a matter that would be adjudicated under the prior framework had it been timely appealed to the Board should be adjudicated under that framework in arbitration. The Board acknowledges that it does not administer negotiated grievance procedures, and nothing in this rule purports to regulate arbitral procedure or the content of collective bargaining agreements.

The additional arbitration comments identified above are answered by the parity principle stated in this section: in covered matters, the substantive standard an arbitrator must apply is the standard the Board would apply, and the codified standard — including the continued relevance of every consideration the record makes material — will operate in arbitration exactly as it operates before the Board, on the same prospective basis. Arbitrators are no more stripped of analytical tools than the Board is: the considerations identified in *Douglas* remain available wherever the record makes them material; what may no longer be treated as dispositive is an agency's failure to recite an enumerated list.

IV.13. Scope of Paragraph (b)(3): Appeals Under 5 U.S.C. 7513

Comment: Commenter 0430 observed that proposed § 1201.56(b)(3)(i) applies only to appeals filed under 5 U.S.C. 7513, and argued that the proposal is silent on the standard governing penalty review in Senior Executive Service actions under 5 U.S.C. 7543 and in other categories of penalty review outside § 7513 — a gap the commenter contended the final rule must either explain or close. Commenter 0570, an association representing Foreign Service employees, asked that the final rule confirm that the rule does not govern or bind review of Foreign Service disciplinary and adverse actions by the Foreign Service Grievance Board; that it imposes no obligation on the Department of State to conform the Foreign Affairs Manual's disciplinary-factors framework (3 FAM 4370 et seq.) to the totality-of-the-circumstances approach; and that any such conformance remains governed by the labor-management provisions of the Foreign Service Act, 22 U.S.C. 4101 et seq., rather than compelled by this rule.

Response: The limitation is intentional, and the Board explains it here rather than expand the rule beyond what was proposed. Paragraph (b)(3) codifies the Board's penalty-review standard for the category of appeals in which penalty review is most frequently litigated — adverse actions taken under 5 U.S.C. 7513. For appeals outside that scope, existing law continues to govern, unchanged by this rule. In appeals of performance-based actions under 5 U.S.C. chapter 43, the Board does not review the agency's choice of penalty because it lacks authority to mitigate chapter 43 actions. In other appeals in which the Board reviews the reasonableness of a penalty, including actions taken against members of the Senior Executive Service under 5 U.S.C. 7543, the Board's existing precedent continues to apply unless the Board in the future holds otherwise, either via regulation or case law.

The limitation also reflects the materially different statutory scheme chapter 75 creates for the Senior Executive Service. Actions against senior executives proceed under subchapter V rather than subchapter II: the covered class is defined separately and more narrowly, 5 U.S.C. 7541; the covered actions are only removal and suspension for more than 14 days, 5 U.S.C. 7542, so both the penalties available to the agency and the penalties to which any mitigation could run are more limited than in actions under 5 U.S.C. 7512; and the governing cause standard is not "such cause as will promote the efficiency of the service," 5 U.S.C. 7513(a), but the enumerated grounds of "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function," 5 U.S.C. 7543(a).

Paragraph (b)(3) is drafted against the architecture of subchapter II: its totality inquiry is keyed to the efficiency of the service, and its mitigation framework presupposes the range of actions covered by 5 U.S.C. 7512. A counterpart standard for executive appeals would accordingly require conforming provisions — among them, keying review to the cause standard of 5 U.S.C. 7543(a) and confining any mitigated penalty to an action authorized by 5 U.S.C.

7542 — and would need to account for executive actions that carry no Board appeal at all, such as removal from the Senior Executive Service for less than fully successful executive performance under 5 U.S.C. 3592, for which the statute provides an informal hearing rather than an adjudication. Those design questions were not presented in the NPRM, and the Board does not resolve them here. The Board may consider, in adjudication or in a future rulemaking, whether the standard codified in paragraph (b)(3) should be extended to additional categories of appeals.

The Board confirms the scope limitation that commenter 0570 identifies. This rule amends 5 CFR 1201.56, which governs proceedings before this Board, and paragraph (b)(3) applies only to appeals filed with the Board under 5 U.S.C. 7513. The rule does not (and could not) amend the Foreign Service Act of 1980, does not govern or bind the Foreign Service Grievance Board or its review standards, and imposes no obligation on the Department of State or any other agency to conform internal disciplinary guidance, including 3 FAM 4370 et seq., to the standard codified here. Whether and how an employing agency revises its internal guidance, and any labor-management obligations attending such revisions under 22 U.S.C. 4101 et seq., are matters outside the scope of this rule, on which the Board expresses no view. Commenter 0066's related argument concerning Senior Executive Service legislation is addressed in Section IV.4 and is consistent with the scope limitation explained above: actions against senior executives proceed under a materially different statutory scheme, which is among the reasons paragraph (b)(3) is confined to appeals under 5 U.S.C. 7513.

IV.14. The Factor-by-Factor Submission

Comment: In response to the NPRM's request for comment on whether the Board should retain all or some of the *Douglas* factors, Commenter 0430 submitted a factor-by-factor analysis urging retention of all twelve. For each factor, the commenter identified the protection it supplies and a recurring failure mode it answers, supported by Board and Federal Circuit precedent and by illustrative composites drawn from practice: seriousness established by adjectives rather than facts, and zero-tolerance policies treated as removal mandates (factor 1); "position of trust" recitals for positions carrying no special trust (factor 2); reliance on prior discipline that was un-noticed, unreliable, withdrawn, or expired (factor 3); conversion of long service and a clean record into an aggravator (factor 4); conclusory loss-of-confidence testimony contradicted by the agency's own conduct, such as an intervening promotion or months of unrestricted duty (factor 5); materially different penalties for substantially similar conduct in the same unit under the same deciding official (factor 6); unexplained departure from the agency's own penalty guidance (factor 7); presumed rather than proven notoriety (factor 8); punishment for violating rules of which the employee lacked fair notice, including openly condoned practices (factor 9); treating an employee's denial of the charge or exercise of appeal rights as evidence of poor rehabilitative potential (factor 10); failure to weigh medical or other mitigating circumstances causally linked to the conduct (factor 11); and removal by default, without consideration of whether a lesser sanction would serve the agency's interest (factor 12). The commenter argued that the factors are the accumulated memory of what fairness requires, and that a totality standard under which no particular set of factors must be considered is the phrase without the memory.

Response: The Board specifically requested this form of comment, and it has considered the submission factor by factor. Its answer, considered against each of the twelve, is the same, because the submission's premise is that the protections it catalogs exist by virtue of the enumerated list. They do not. Each is a substantive principle of reasoned, record-based penalty review, and each survives this rule where the circumstances of a particular case present it, for reasons this preamble makes explicit.

It bears emphasis at the outset, however, that what follows describes how these principles operate when a case fairly raises them — it does not reconstitute, under another name, a list that every penalty decision must traverse. Under the codified standard no consideration, enumerated or otherwise, must be addressed in every case; which principles bear on a given penalty, and with what weight, depends on the circumstances of the case and the record the parties make. A penalty may not rest on assertion: seriousness, loss of trust or confidence, notoriety, and reputational harm, when the agency relies on them, are facts the agency must prove, because the agency bears the burden of proving the reasonableness of its penalty by preponderant evidence, and a penalty resting on facts the record does not support is an abuse of discretion (factors 1, 2, 5, and 8). Aggravating considerations on which the agency relies, including prior discipline, must be identified in the advance notice so the employee can respond, on pain of reversal on due process grounds; and the reliability, recency, finality, and similarity of a prior action offered in aggravation remain subject to challenge and bear directly on the weight it can carry (factor 3; Sections IV.3 and IV.11). Length of service, a clean record, demonstrated rehabilitation, and mitigating circumstances causally connected to the conduct remain, where the record presents them, mitigating considerations entitled to the weight the record earns them; material mitigating evidence cannot be passed over in silence; and an employee's lawful denial of a charge, or exercise of the right to appeal, may not be treated as evidence of poor rehabilitative potential (factors 4, 10, and 11; Sections IV.1 and IV.10).

Evidence that similarly situated employees received materially different penalties for substantially similar conduct remains potentially relevant , and an agency that knowingly and unjustifiably treats employees differently may find that fact weighed against the reasonableness of its penalty (factor 6; Section IV.2). Where an agency maintains penalty guidance, an unexplained departure from its own guidance in the case at hand may bear on the reasonableness of the penalty under the totality of the circumstances (factor 7; the Board returns to this factor at the close of this response). Fair notice of the rule assertedly violated, and evidence that the charged practice was known to and tolerated by the agency, remain circumstances the Board will weigh in a case that raises them (factor 9). And because the question under the codified standard is whether the chosen penalty — not merely some penalty — is within the tolerable limits of reasonableness, a record showing that the deciding official gave no consideration to whether a lesser sanction would serve the efficiency of the service remains exactly the kind of record on which a penalty fails (factor 12).

A fuller explanation is warranted with respect to factor 7 — "consistency of the penalty with any applicable agency table of penalties," *Douglas*, 5 M.S.P.R. at 305-06 — because that factor illustrates with particular clarity why the Board will no longer prescribe a fixed set of considerations that must be addressed in every case. The factor presupposes an instrument that need not exist. A table of penalties is internal agency guidance: it is adopted without notice and comment, is ordinarily self-described as advisory and non-exhaustive, and may be revised or rescinded at any time; many agencies maintain no table, and some that once did have rescinded theirs. A mandatory factor keyed to "any applicable" table therefore makes the required content of a penalty analysis turn on the fortuity of whether such a document exists at a given agency at a given time — and, where one does exist, elevates internal guidance into a quasi-regulatory benchmark that no statute prescribes and that the guidance's own drafters typically disclaim. The Board's adjudicatory experience is that mandatory consideration of the factor has generated collateral disputes remote from the statutory question: litigation over which row of a table an offense occupies, whether conduct constitutes a first or a second offense, and how overlapping offense categories interact — questions about the construction of guidance rather than about whether the penalty chosen is within the tolerable limits of reasonableness on the record made.

Tables of penalties can also disserve the individualized judgment the statute requires. A table's ranges attach to offense labels rather than to circumstances, and ranges keyed to labels invite decision by label: the operative penalty judgment migrates upstream into the drafting and selection of charges, and a deciding official who locates the applicable row and stays within the printed range may treat the analysis as complete even though the statutory question — whether this penalty, for this employee and this conduct, promotes the efficiency of the service — has not been asked. Tables ossify as missions, workplaces, and forms of misconduct change, embedding judgments about relative seriousness that may be decades old. Because each agency's table is its own, substantially similar conduct can carry materially different prescribed ranges from one agency to the next, so that fidelity to a table may produce the appearance of consistency within an agency while entrenching unexplained variation across the government. And treating whatever guidance an agency adopts as a mandatory benchmark in litigation creates incentives that run against sound management: an agency can insulate itself by rescinding useful guidance, or by draining it of content through ranges that run from reprimand to removal for every offense — outcomes that serve neither employees nor agencies.

An unexplained departure from the agency's own guidance, or its uneven application among similarly situated employees, may be weighed, as stated above, in determining whether a penalty is within the tolerable limits of reasonableness. What the rule removes is the obligation to address a table in every case — including the many cases in which no table exists, and those in which the table adds nothing the record does not already supply. The Board expresses no view here on OPM's separate proposals concerning agency tables of penalties, which OPM addresses in its own final rule.

IV.15. Structural Objections to the Joint Rulemaking

Comment: Commenter 0430 argued that this is, to public knowledge, the first joint OPM-MSPB rulemaking of its kind; that Congress deliberately separated OPM's workforce-management function from the Board's adjudicatory and oversight functions; that the rule relaxes the Board's own scrutiny of the personnel actions OPM superintends; and that when the adjudicator announces in advance, in a rulemaking co-authored with the entity whose actions it reviews, that it will extend substantial deference and require no particular considerations, deference becomes surrender.

Response: These arguments restate the structural and prejudgment objections addressed in Section VI, and the Board incorporates that discussion here, adding two observations. First, the standard codified in this rule is not OPM's preferred standard adopted by the Board; it is the Board's own standard — the deference formulation and the tolerable-limits-of-reasonableness boundary announced in *Douglas* and enforced by the Federal Circuit for four decades — proposed by the Board under its own statutory authority and finalized by the Board in this separate, Board-only document on its own analysis.

Second, the premise that the rule relaxes scrutiny is answered throughout this preamble: the agency's burden of proof, the affirmative defenses, the Board's mitigation authority, and reasoned-decision review under 5 U.S.C. 7703(c) are unchanged, and Section V states expressly that an unexplained, unsupported, or grossly disproportionate penalty will not be sustained. The Board's decision to finalize only its own proposal, under its own title and on its own timetable, is itself an exercise of the independence the commenter urges the Board to maintain.

IV.16. Additional Objections to the Review Standard and to the Regulatory Analysis

Comment: Commenter 0676, styling its submission as a formal evidentiary submittal and legal brief, argued that the proposed rule is arbitrary and capricious, exceeds statutory rulemaking authority, and fails the analytical standards of E.O. 12866 and OMB Circular A-4. As relevant to the Board's rule, the commenter argued that retiring the *Douglas* factors in favor of what it characterized as an unguided totality standard removes essential guardrails ensuring that aggravating and mitigating circumstances are weighed impartially; invites arbitrary and inconsistent penalty application across supervisors and work units; would make it impossible for agencies to prove by preponderant evidence that a penalty promotes the efficiency of the service; and deprives administrative judges and litigants of objective standards, in violation of reasoned-decisionmaking requirements. The commenter demanded answers to a series of questions, including what objective, replicable evidentiary standard administrative judges will use to evaluate penalty reasonableness under the totality standard and how disparate penalty impositions across regional offices will be prevented. It proposed, as an alternative, that the Board retain the *Douglas* factors as non-binding analytical guideposts, with explicit instructions against rigid, mechanical box-checking, alongside streamlined penalty matrices. The commenter also argued that the rulemaking's economic analysis undercounts secondary litigation, EEO, and arbitration costs and fails the net-benefits directives of E.O. 12866 and Circular A-4.

Response: The commenter's objections to the review standard restate the vagueness, consistency, and reasoned decision-making arguments addressed in Sections IV.1, IV.2, IV.4, and IV.10, and the Board incorporates those responses here. The commenter's proposed alternative — retention of the factors as non-binding guideposts accompanied by an anti-mechanical instruction — is the alternative the Board expressly considered and declined for the reasons stated in Sections IX.5 and IV.10: it is, in substance, the regime *Douglas* and *Nagel* themselves announced, and four decades of experience demonstrate that an enumerated list gravitates toward compulsory-checklist status in practice notwithstanding disclaimers. The Board has therefore evaluated the commenter's proposed alternative on the record and explained its reasons for not adopting it, which is what reasoned decision-making requires.

To the commenter's specific question — what standard the Board's administrative judges will apply — the answer is the one codified in § 1201.56(b)(3) and elaborated throughout this preamble: whether the agency has proven, by preponderant evidence on the whole record, that its chosen penalty is within the tolerable limits of reasonableness in light of the totality of the circumstances relating to the efficiency of the service. That standard is objective in the way legal standards are objective: it is applied to record evidence, in reasoned written decisions, subject to review by the full Board and by the federal courts under 5 U.S.C. 7703(c), and its uniform application across the Board's regional offices is secured by published, precedential Board decisions and a primary reviewing court, as discussed in Sections IV.1 and IV.7.

The premise that the standard makes it impossible for agencies to carry their burden is mistaken for the reasons stated in Section IV.2: the codified inquiry is the same tolerable-limits inquiry the Federal Circuit has policed for four decades, under the same burden of proof, and agencies have carried that burden throughout. The commenter's economic objections are addressed in Section IX: the cost projections in the joint NPRM's regulatory analysis are attributable to OPM's proposed amendments and are addressed in OPM's final rule, and Section IX explains why the Board's own amendment imposes no more than de minimis costs and yields benefits that exceed them.

IV.17. Comments From Members of Congress Concerning Workforce Impacts and National Security

Comment: Commenter 0642, a letter from three United States Senators and three Members of the House of Representatives who represent the civilian workforce at the Portsmouth Naval Shipyard, urged that the proposed rule be withdrawn and that the agencies consider alternatives that preserve federal workers' longstanding civil service protections. The commenters argued that the rule would weaken protections that promote merit-based employment, due process, and the recruitment and retention of skilled workers; that replacing the consistent standards applied since *Douglas* with an arbitrary, case-by-case examination could allow agencies to ignore important mitigating factors — including rehabilitation potential and length of service — and more easily remove skilled workers from critical industries; and that, at a shipyard that must hire hundreds of workers annually to meet the Navy's demand, stripping away the procedures that keep discipline fair introduces costly unpredictability, risks increased attrition in the experienced workforce that keeps the submarine fleet ready, and thereby threatens national security. The commenters also objected to the proposed 30-day limit on performance improvement periods, to making termination the default penalty for unacceptable performance, and to barring the use of official time to represent workers in removal proceedings.

Response: The Board has given respectful consideration to the views of the Members of Congress. The concerns directed to the Board's amendment — that a totality standard permits mitigating considerations to be ignored — are answered in Sections IV.1 and IV.2 and throughout this preamble: rehabilitation potential, length of service, past record, and consistency with the treatment of similarly situated employees remain relevant and cognizable wherever the record makes them material; material mitigating evidence cannot lawfully be passed over in silence; the agency continues to bear the burden of proving the reasonableness of its penalty by preponderant evidence; and the Board retains, and has codified, its authority to mitigate penalties that exceed the tolerable limits of reasonableness. Nothing in the Board's amendments authorizes, requires, or makes more likely any performance-based or adverse action; it governs only the standard of review the Board applies in appeals properly before it, and, for the reasons stated in Sections IX.1 through IX.4, the Board expects outcomes to continue to turn on substantive reasonableness. A review standard under which unexplained, unsupported, or disproportionate penalties will not be sustained protects, rather than threatens, the retention of a skilled workforce.

V. Codification of the *Devall* Framework, Deference, and Mitigation Authority

Comment: Commenter 0626 expressed concern with the proposed rule's statement that the Board will defer to an agency's penalty analysis rather than conducting an independent review, arguing that if the Board simply accepts the agency's analysis, its function shifts from independent adjudicator to reviewer of process. Commenter 0667 observed that an agency's decision already carries substantial weight in a Board appeal unless clearly beyond the bounds of reasonableness, and argued the rule removes standards essential to the Board's system.

Commenter 0427 argued that the proposed standard is designed to leave the Board as little more than a rubber stamp for agency disciplinary decisions, and that *Douglas* rests on Congress's intent that the Board function in an independent, quasi-judicial role applying de novo review. Commenter 0435 urged that the final rule preserve the Board's long-standing authority to review the reasonableness of a penalty and, where warranted, to mitigate it, and that the rulemaking not be used to constrain that authority. Commenter 0629 argued that the proposed codification of *Lachance v. Devall* is not a comprehensive statement of controlling law, and recited Federal Circuit precedent that the Board must review penalties for abuse of discretion, that penalties cannot be grossly disproportionate, and that an agency abuses its discretion by relying on facts unsupported by substantial evidence or by imposing an unconscionably harsh penalty; the commenter stated these requirements cannot be avoided by rulemaking. Commenter 0430 stated that it does not oppose codification of the *Devall* framework, which it acknowledged is existing law, and asked that the Board be held to the NPRM's statement that the rule will not alter the Board's mitigation authority.

Commenters 0012, 0518, 0519, 0538, 0579, 0616, 0646, and 0651 raised related objections: that deference is unjustified or will insulate penalties from meaningful review; that codifying mitigation "to the maximum reasonable penalty" preemptively constrains the Board's independent judgment (commenter 0012); that the Board should not volunteer to narrow its own role (commenter 0558); and that Board review cannot test whether the factual premises of an action are true (commenter 0646). Commenter 0559 argued that retiring *Douglas* while simultaneously codifying the *Devall* deference framework compounds the loss of transparency.

Response: The Board clarifies that this rule neither adopts a rubber stamp nor purports to displace the Federal Circuit's penalty-review precedent. On the contrary, the rule codifies this precedent.

Deference to an agency's choice of penalty is not an innovation of this rule; it is the settled allocation of responsibility under the CSRA, recognized in *Douglas* itself: the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised within tolerable limits of reasonableness, with appropriate deference to the primary discretion entrusted to agency management. 5 M.S.P.R. at 306; see 91 FR at 40455. Commenter 0427's own submission quotes this language. The de novo character of Board adjudication that the same commenter emphasizes concerns the Board's fact-finding and its independent adjudication of the agency's charges and the appellant's defenses — functions this rule does not touch.

As to the penalty, the Board's role has never been de novo penalty selection; *Douglas* allocated primary discretion to agency management and reserved to the Board the assurance that the discretion was legitimately invoked and properly exercised. What this rule codifies is the existing structure of that review as the Federal Circuit articulated it in *Devall*: where the Board sustains all charges and finds the penalty reasonable, it sustains the action; where it sustains all charges but finds the penalty unreasonable, it mitigates to the maximum reasonable penalty; where it sustains fewer than all charges, it applies the *Devall* rules governing mitigation and the agency's expressed penalty preferences. 178 F.3d at 1260; 91 FR at 40454.

None of this withdraws the Board's independent judgment. Under the final rule, the Board and its administrative judges will continue to determine independently, on the whole record and de novo as to the facts, whether the agency has proven its charges, whether the action promotes the efficiency of the service, whether any affirmative defense is established, and whether the penalty falls within the tolerable limits of reasonableness. An agency's penalty analysis receives the weight the record earns it — no more. A penalty that is unexplained, rests on facts the record does not support, ignores material mitigating evidence, or is grossly disproportionate to the sustained conduct will not be sustained, and the Board retains, and has codified, its mitigation authority for exactly those cases — the preservation commenter 0435 requested.

For the same reasons, the Board agrees with commenter 0629 that the regulation is not, and does not purport to be, a comprehensive statement of controlling law, and that the substantive limits recited in the Federal Circuit's abuse-of-discretion precedent continue to govern. The rule is drafted to operate within that precedent, and the Board will apply it that way. The concern that codifying *Devall* somehow narrows administrative judges' authority is misplaced: administrative judges exercise the Board's penalty-review authority in the first instance, and the codified framework describes — for the benefit of all parties and adjudicators alike — how that authority operates. Placing the framework in regulation increases the transparency and predictability of Board review; it does not diminish its independence. Finally, the Board confirms, as commenter 0430 requested, that this rule does not alter the Board's mitigation authority, which predates this rule, was recognized by the Federal Circuit in *Devall*, and is now codified in § 1201.56(b)(3).

The related objections identified above rest on premises this section has addressed. The deference codified in § 1201.56(b)(3) is *Douglas*'s own allocation of responsibility, not a new withdrawal of review, and the maximum-reasonable-penalty formulation to which commenter 0012 objects is not a ceiling invented by this rule: it is the Federal Circuit's articulation, in *Devall*, of the limit on the Board's authority when it mitigates, and it binds the Board with or without this rule. In response to commenter 0646, the Board reiterates that its administrative judges find the facts de novo: whether the charged conduct occurred is determined independently on the record, not accepted from the agency, and an action resting on facts the agency cannot prove fails at the threshold. In response to commenters 0558 and 0559, codification neither narrows the Board's role nor obscures it; it states publicly, in regulation, the review standard and mitigation framework that previously had to be assembled from decades of case law — a gain in transparency for every party who appears before the Board.

VI. The Board's Independence, the Joint Rulemaking, and Claimed Prejudgment

Comment: Commenter 0634 argued that the proposed rule must be evaluated in the context of broader administration actions concerning the career civil service, and that joint authorship with OPM sits uneasily with the Board's separate statutory oversight duty under 5 U.S.C. 1204(a)(4) and 1204(f), demanding decisional separation. Commenter 0427 argued that Congress created the Board to be independent of control or direction and as a check on other executive agencies including OPM; that OPM's recent rulemakings transfer core Board functions to OPM; that without congressional reorganization authority — the last Reorganization Act having lapsed in 1984 — one executive agency cannot diminish or restructure another; and that this proposal likewise seeks to transfer authority the Board cannot relinquish and OPM cannot arrogate, including by eliminating the *Douglas* factors and by divesting the Board of its ability to determine whether a performance-improvement period is reasonably long.

Commenter 0435 identified two features of the joint NPRM as bearing on the Board's independence — the effort to set the Board's standard of review by regulation, and the narrowing of the Board's authority to mitigate a penalty it finds unreasonable — and urged that the rulemaking not constrain the Board's role. Commenter 0629 argued that the Board's co-sponsorship of provisions limiting adjudicators is troubling because, by committing in advance and outside any adjudicatory record that a categorical class of employee defenses will never succeed, the Board prejudges issues that will come before it, raising impartiality concerns. Commenters 0004, 0015, 0016, 0064, 0240, 0448, and 0662 likewise objected that it is inappropriate for the Board to co-author a rulemaking with OPM, and commenter 0496 argued that joint issuance raises a question about the appearance of impartiality. Commenter 0449 argued that the joint package bundles provisions of differing strength, contending that a rule confident in each provision on the merits would not need to package its strongest justification alongside its weakest.

Response: The Board takes seriously its distinct statutory role, and both the structure of this rulemaking and the content of this final rule reflect it.

As to process: the Board and OPM each proposed amendments under their own statutory authorities, and each identified its own proposals and its own RIN in the joint NPRM. Joint publication reflected the practical interaction of the proposals and gave the public the opportunity — which many commenters used — to address that interaction in one place; it did not merge the agencies' deliberations or subordinate the Board's judgment to OPM's. The NPRM expressly preserved each agency's independent decisional path by providing that the agencies might finalize separately, 91 FR at 40444, and the Board's decision to finalize only its own proposal in this document, under its own title, on its own analysis, and on its own timetable, is itself a demonstration of that independence.

The Board's oversight functions under 5 U.S.C. 1204(a)(4) and 1204(f) — including its duty to review OPM rules after they take effect and to determine whether their implementation would require the commission of a prohibited personnel practice — are statutory, are unaffected by this rulemaking, and continue to apply with respect to OPM's rules, including the separate final rule OPM is issuing in this proceeding, in accordance with those provisions. Comments concerning the composition of the Board and related matters are beyond the scope of this rulemaking.

As to the constitutional transfer argument: its premise is mistaken as applied to this rule. Nothing finalized in this document transfers any function from the Board to OPM, and nothing in it diminishes any Board authority. This is the Board's own regulation, adopted by the Board, under the Board's own rulemaking authority, 5 U.S.C. 1204(h), governing the Board's own standard of review. No Reorganization Act or other transfer authority is implicated when an agency revises its own adjudicatory procedures through its own rulemaking. Comments directed at OPM rulemakings that would reassign categories of appeals to OPM are referred to those dockets, and the provision commenter 0427 identifies concerning the length of performance-improvement periods is an OPM proposal under part 432 that is not finalized here. Commenter 0435's first concern — the effort to set the Board's standard of review by regulation — likewise mistakes the author: the standard of review in § 1201.56 is being set by the Board itself, for its own proceedings, through public notice-and-comment procedures. A tribunal's adoption, through public rulemaking, of the standard it will apply is an exercise of independence, not a derogation of it. The commenter's second concern, regarding mitigation authority, is answered in Section V: that authority is retained and, for the first time, codified.

As to prejudgment: the argument proves too much. It is black-letter administrative law that an agency with rulemaking authority may resolve issues of general applicability by rulemaking rather than reserving every question for case-by-case adjudication, and that doing so does not disqualify the agency from adjudicating cases arising under the rule. *See Heckler v. Campbell*, 461 U.S. 458, 467 (1983); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). This rule announces the legal standard the Board will apply; it prejudges no adjudicative fact in any appeal. It does not commit the Board to sustaining any penalty, forecloses no defense, and predetermines no outcome: every element of the agency's case, every affirmative defense, and the reasonableness of every penalty remain to be decided on the record of each appeal. Announcing the governing standard in advance, through public procedures, is the opposite of partiality; it is the ordinary means by which a tribunal gives all parties equal notice of the rules of decision. (The specific provision commenter 0629 characterized as foreclosing a categorical class of employee defenses — concerning the adequacy of performance assistance under proposed 5 CFR 432.104 — is an OPM proposal not finalized here, and comments on it are referred to OPM.)

The appearance concern raised by commenter 0496, and the co-authorship objections of commenters 0004, 0015, 0016, 0064, 0240, 0448, and 0662, are answered by the process points above: the Board's proposal was its own, its deliberations were its own, and its decision to finalize separately, on its own analysis, is the structural answer to the concern. Commenter 0449's bundling objection is answered by this document itself: the Board has unbundled the package. It finalizes here only its own amendment, on its own justification, and the severability discussion in Section VIII confirms that the Board's rule stands independently of any disposition of OPM's proposals.

VII. Comments Supporting the Rule

Comment: Commenter 0664 expressed strong support for the proposed rulemaking, including the Board's refocusing of penalty review, and documented collective bargaining provisions that, in its view, illustrate rigid application of the *Douglas* framework, including an agreement whose mandated *Douglas* analysis was the basis for arbitral mitigation of a penalty. The commenter also proposed specific expansions of OPM's regulatory text concerning official time. Commenters 0435 and 0625 supported aspects of the joint proposal — including the supervisory training provisions and the personnel-records accuracy provisions — while opposing or urging revision of others.

Additional supporting submissions included the following. Commenter 0417, a career senior executive with 33 years of Federal service, described the *Douglas* analysis as having become (in their experience) a checklist completed in a mechanical fashion rather than a thoughtful assessment, and one used within agencies to discourage warranted discipline; the commenter recommended extending supervisory training to human-resources professionals and agency counsel. Commenter 0489, a human-resources and employee-relations professional, supported the rule on the basis of Federal Employee Viewpoint Survey results and published research on the productivity effects of unaddressed misconduct, and described firsthand experience with cases in which accountability was not achieved under the existing framework. Commenter 0545 endorsed commenter 0417's submission and described the totality standard as a balanced approach. Commenters 0587 and 0591, employee-relations practitioners, stated that the totality standard restores appropriate deference while preserving reasonableness review. Commenters 0350, 0359, and 0406, supervisors and labor-relations specialists, described the existing framework's operation in union grievances and arbitration as an obstacle to warranted corrective action. Commenters 0006, 0031, 0301, 0352, 0395, 0405, 0424, 0429, 0434, 0437, 0613, 0614, 0615, and 0627 expressed general support and urged prompt finalization. Commenters 0584, 0585, 0586, and 0588 expressed support directed principally to OPM's proposed amendments, and those comments are referred to OPM; commenter 0387 supported the rule while urging attention to employees with disabilities, a concern referred to OPM to the extent it addresses OPM's proposals and answered, as to the Board's rule, in Sections III and IV.2.

Response: The Board acknowledges these expressions of support and has noted, in the Statement of Need in Section IX.1, the relevance of the collective bargaining materials identified by Commenter 0664 to the Board's assessment of how the *Douglas* framework operates in practice. The specific suggestions from these commenters concerning official time, training, and records accuracy relate to OPM's proposed regulatory text under parts 412, 432, and 752 and are referred to OPM for consideration in its final rule. The in-scope concerns raised by commenters 0435 and 0625 are addressed in Sections IV through VI.

Comment: Four commenters filed detailed submissions in support of the rule. Commenter 0612, a Federal executive department, stated that the administrative procedures governing performance-based and adverse actions have accreted over nearly half a century from regulations, case decisions, and executive orders, and have become overly complicated and excessively burdensome; that the nearly universal expectation that a deciding official thoroughly consider the applicability of each of the twelve *Douglas* factors in every case has in practice produced a checklist used to "paper" the case file — one that carries little meaning for the deciding official or the employee but is then parsed and scrutinized in subsequent grievance arbitrations and appeals; and that the totality-of-the-circumstances standard better promotes the consideration that matters in every case: what is, or is not, in the interest of the efficiency of the service.

Commenter 0623, another Federal executive department, supported the rule on the basis of multi-year workforce, disciplinary, arbitration, and settlement data from its own operations, and stated that the perceived need to address each *Douglas* factor regardless of its relevance increases litigation burden without producing more accurate or defensible outcomes; that a totality-of-the-circumstances standard grounded in the statutory efficiency-of-the-service requirement would allow deciding officials to focus on the facts most relevant to each case; and that, to the extent an individual *Douglas* factor remains relevant in a particular case, it can continue to inform the analysis without separate, mechanical documentation. That commenter also stated, in response to the NPRM's solicitation on reliance interests, that it is not aware of reliance interests of a kind or magnitude that would warrant delaying implementation.

Commenter 0630, a Federal employee with agency responsibility for labor and employee relations, commenting in their personal capacity, strongly supported the Board's proposal, stating that although Board precedent does not require every factor to be addressed in every case, grievance arbitrators often treat each element of the *Douglas* framework as mandatory and seize on an agency's asserted failure to consider, or properly consider, a single factor as grounds to overturn or mitigate a removal. The commenter submitted for the record a December 2024 arbitration award in which the arbitrator sustained charges of timesheet falsification and lack of candor, described the failure to perform assigned work while charging overtime as serious misconduct warranting discipline, and nonetheless mitigated the removal to a thirty-day suspension based on comparator cases and principles of progressive discipline. Because arbitrators must apply the Board's substantive standards in adverse-action grievances, the commenter argued, the Board's rule would carry the codified standard into arbitration and give agencies confidence that warranted removals will be sustained.

Commenter 0631, an individual federal employee, similarly stated that arbitrators treat the *Douglas* factors as binding considerations and will overturn removals if the agency did not conscientiously consider each one, and submitted for the record — obtained through a Freedom of Information Act request — a 2018 arbitration award in which a Forest Service employee who, after consuming alcohol, accepted a fire assignment and drove a government-owned vehicle to the scene of an active fire, registering a blood alcohol content well above the state legal limit, was removed on charges of conduct unbecoming a federal employee and driving a government-owned vehicle after consuming intoxicants. The arbitrator found the charges proven and found a nexus between the conduct and the efficiency of the service, but concluded that the deciding official had not conscientiously evaluated each *Douglas* factor — reasoning that repeated statements about the seriousness of the offense could not substitute for a conscientious review of the case within the *Douglas* framework, and that the resulting penalty was therefore arbitrary, unfair, and unreasonable — and mitigated the removal to a 25-day suspension. The commenter argued that the award illustrates how the framework operates in arbitration and urged that the rule be finalized promptly.

Response: The Board acknowledges these submissions and has considered them both as expressions of support and as record evidence. The two departments' accounts of their own administrative experience — factor-by-factor documentation prepared to insulate the case file and then parsed in subsequent litigation; the burden of addressing each factor regardless of its relevance to the case — corroborate, from the perspective of agencies that must operate the framework, the diagnosis stated in the Statement of Need in Section IX.1, and the Board has weighed them alongside the opposing comments discussed there.

The arbitration award submitted by commenter 0630 is part of the administrative record of this rulemaking, and illustrate, from the opposite direction, the same phenomenon the collective bargaining materials discussed in Section IX.1 illustrate: a proceeding in which sustained, serious misconduct was displaced as the focus of decision by an audit of enumerated considerations. The award submitted by commenter 0631 is likewise part of the administrative record, and it supplies a second, independent arbitral illustration of that phenomenon: charges sustained, their seriousness acknowledged, a nexus to the efficiency of the service found — and removal nonetheless set aside on the ground that the deciding official's analysis did not conscientiously traverse the enumerated factors. Both awards are discussed in the Statement of Need in Section IX.1.

The Board also confirms the premise of the arbitration point made by commenters 0630 and 0631, for the reasons stated in Section IV.12: because arbitrators adjudicating grievances over matters covered under 5 U.S.C. 7512 must apply the same substantive standards the Board would apply, the standard codified in this rule will govern penalty review in arbitration on the same prospective basis on which it governs before the Board.

Commenter 0623's statement that it has identified no reliance interests warranting transitional measures is noted; as explained in Section IX.6, the Board has nonetheless adopted an applicability statement as a measured accommodation of the reliance and transition concerns raised by other commenters.

The Board acknowledges these additional expressions of support. The firsthand accounts of commenters 0417, 0489, 0350, 0359, and 0406 — mechanical, risk-averse factor documentation; warranted actions deterred or abandoned; grievance and arbitral audits of factor recitation — corroborate, from the perspectives of supervisors and practitioners who operate the framework, the diagnosis stated in the Statement of Need in Section IX.1, and the Board has weighed them alongside the opposing comments discussed there. The training suggestion of commenter 0417 concerns OPM's proposed amendments to part 412 and is referred to OPM.

VIII. Changes From the Proposed Rule; Applicability; Severability

After consideration of the comments, the Board is finalizing the amendments to 5 CFR 1201.56 as proposed, with an applicability statement set forth in the DATES section of this document rather than in the regulatory text, as follows:

First, the final rule adopts the amendments to 5 CFR 1201.56 without change to the proposed regulatory text. Several commenters (commenters 0391, 0430, 0435, 0439, 0443, 0625, 0626, 0636, 0642, 0676), together with many individual commenters identified in Sections I, IV.1, and IX.5, urged the Board to codify an enumerated factor list or the conscientious-consideration formulation, a core subset of factors, occupation-specific standards or exclusions, or a general clarification that considerations of the kind identified in *Douglas* remain cognizable. The Board declines to add any such enumeration or clarification to the regulatory text (Sections IX.5, IV.9, IV.10, IV.14, and IV.16).

In brief: four decades of experience demonstrate that an enumerated list gravitates toward compulsory-checklist status in practice notwithstanding anti-mechanical disclaimers — *Douglas* and *Nagel* themselves contained the disclaimer — so re-enacting a list in regulation would entrench the very perception of obligation this rule is designed to dispel; codifying a reduced subset would invite negative-implication arguments that omitted considerations are disfavored; occupation-specific lists or exclusions would fragment a single national standard of review and reintroduce the checklist dynamic for the carved-out workforce; and a regulatory-text clarification that *Douglas*-type considerations remain cognizable is unnecessary because that result follows from totality review itself and is confirmed authoritatively in this preamble. The regulatory text states the operative standard — review of the penalty for whether it is within the tolerable limits of reasonableness in light of the totality of the circumstances, together with the codified *Devall* mitigation framework — and this preamble supplies the Board's authoritative confirmation (Sections IV.1, IV.3, IX.5, and IX.6) that the considerations identified in *Douglas* remain relevant and cognizable wherever they are material to the reasonableness of the penalty.

Second, the final rule states the applicability of the amended standard in this preamble rather than in the regulatory text. As set forth in the DATES section of this document, the amended § 1201.56 standard applies to appeals filed with the Board on or after the effective date of this rule, and appeals pending before the Board on the effective date will be adjudicated under the framework in effect when they were filed. The Board proposed no applicability language for codification, and it adds none in this final rule: the statement is transitional in nature, will be spent once the appeals pending on the effective date are concluded, and is therefore appropriately stated in the preamble — which supplies the authoritative statement of the Board's intent — rather than carried permanently in the Code of Federal Regulations. Section IX.6 explains the basis for the applicability statement and why it accommodates the reliance and transition concerns raised in the comments without prejudicing parties whose underlying actions predate the effective date.

Third, consistent with the NPRM, 91 FR at 40455, the final rule effects no change to the requirement that aggravating factors relied upon in penalty selection be identified in the advance notice of proposed action, and no change to the Board's mixed-case procedures, jurisdiction, burdens of proof, or the availability of affirmative defenses.

The Board's amendments to part 1201 are severable from OPM's amendments to parts 412, 432, 715, and 752, which OPM is finalizing in a separate document; the Board's rule operates independently of OPM's and would function sensibly regardless of the disposition of

OPM's proposals. Within this rule, the totality-of-the-circumstances standard, the codification of the *Devall* mitigation framework, and the applicability statement are likewise severable from one another: each states an independently operative principle of Board review or administration, and the Board would have adopted each without the others.

IX. Regulatory Analysis

1. Statement of Need

This rule is needed to return the Board's review of agency-selected penalties to the standard Congress enacted and to correct the drift, documented in the NPRM and elaborated below in this section, toward a rigid and mechanistic application of the framework announced in *Douglas* — an application the original decision never prescribed and expressly cautioned against. The perceived obligation to address twelve enumerated factors in every case has imposed recurring process costs on agencies, appellants, and the Board: standardized worksheets treated as legally compulsory; penalty appeals litigated as audits of whether each factor was recited and adequately weighted; and a checklist-centered practice that increasingly overshadows the statutory question — whether the agency's chosen penalty reasonably promotes the efficiency of the service under 5 U.S.C. 7513(a). 91 FR at 40453-54.

Federal agency commenters corroborated that need from their own administrative experience, describing factor-by-factor documentation prepared to insulate case files and then parsed in subsequent grievance arbitrations and appeals (Section VII). The rule is also needed to place the Board's operative review standard, and the mitigation framework the Federal Circuit articulated in *Devall*, in the Code of Federal Regulations for the first time. Codification gives agencies, employees, representatives, and the Board's administrative judges a single, public, authoritative statement of how penalty review operates, improving the transparency and predictability of Board adjudication.

Several commenters disputed that need, arguing that the Board offered no evidence that the *Douglas* framework causes unwarranted outcomes. Commenter 0629 characterized the

NPRM's statement that agencies apply *Douglas* in a rigid, mechanistic way as an unsupported stereotype, and asked where the Board precedent chiding agencies for misapplication is, and where the statistics or examples are. Commenter 0634 similarly asserted that the NPRM supplies no example in which an action failed because a deciding official omitted an irrelevant factor and identifies no Board decisions requiring mechanical worksheets.

Commenter 0656 asserted that OPM and MSPB offer no evidence of an issue the rule purports to solve. Commenter 0654 argued that neither the NPRM's stated rationale nor the accompanying record identifies particularized evidence that existing procedures have proven inadequate to protect the efficiency of the service, as opposed to being merely inconvenient to managers seeking faster removals, and that under the reasoned-decisionmaking requirement of *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), and 5 U.S.C. 553(c), a preference for expedited removal authority does not by itself supply a rational connection between the facts found and the choice made; the commenter stated that its submission was made in part to preserve a factual and legal accounting in the administrative record for any subsequent oversight, litigation, or judicial review.

Commenter 0628 noted that agencies prevail in more than 80 percent of employment cases before the MSPB, arguing that agency leadership already has the tools to administer employee discipline. Commenter 0427 argued that agencies' use of *Douglas*-based checklists is evidence of workability rather than rigidity — that the factors have endured because they provide a workable, clear framework. Commenter 0647 presented data drawn from the Board's own annual reports: penalties were mitigated in roughly 6.4 percent of adjudicated cases in FY 1986 and 4.7 percent in FY 1990, and in roughly 1.6 to 2.0 percent of adjudicated cases in each sampled year from FY 2000 through FY 2025. From this, commenter 0647 argued that mitigation rates declined after *Douglas* and remain low; that no evidence shows agencies or the Board mitigate inappropriately or at unusual rates; and that no evidence ties any such problem to the *Douglas* factors.

Commenters 0421, 0433, 0525, 0569, and 0662 pressed related record-based objections, and commenter 0236 offered a contrary observation. Commenter 0421 argued that the agencies failed adequately to explain their deviation from decades of precedent. Commenter 0433, taking no position on adoption or withdrawal, identified what it described as an unreconciled gap between the Statement of Need and the joint NPRM's regulatory analysis, which reported a 33 percent single-year increase in removals under the existing framework; commenter 0616 pressed the same point in urging withdrawal. Commenter 0525 asked what removal rate the agencies believe would demonstrate an appropriately accountable workforce and urged that success metrics be defined before any change is made. Commenter 0569, an agency litigator commenting in their personal capacity, argued that there has been no showing that the *Douglas* factors impede agencies or the Board, and that the factors are non-prescriptive guides with decades of case law that make them easy to research and apply. Commenter 0662 argued that the NPRM's own acknowledgment that *Douglas* was never rigid undercuts the stated rationale. Commenter 0236, by contrast, asserted that the factors are already ignored at the commenter's agency without repercussion.

The Board disagrees that the record is inadequate to support the change. The basis for this rule is, first and foremost, the Board's own institutional experience over more than four decades administering the framework it created. The Board and its administrative judges review the disciplinary records agencies actually produce, and the briefs parties actually file, in thousands of appeals each year. As the NPRM explained, that experience shows that agencies regularly rely on standardized *Douglas* worksheets as though they were legally compulsory; that parties routinely litigate whether each of the twelve factors was recited, whether the deciding official assigned adequate weight to each factor, and whether the administrative judge conducted an explicit factor-by-factor review; and that this checklist-centered practice has increasingly overshadowed the statutory question — whether the agency's chosen penalty reasonably promotes the efficiency of the service under 5 U.S.C. 7513(a). 91 FR at 40454.

An adjudicatory agency's firsthand observation of how a doctrine of its own creation functions in practice is competent — indeed, uniquely probative — evidence of the need to revise that doctrine. Nothing in the Administrative Procedure Act requires an agency to substantiate a change of this kind with statistical studies; it requires a reasoned explanation. An agency changing position "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The same standard answers Commenter 0654. The Board has examined the relevant data available to it — its own sustained adjudicatory experience, the studies cited in the NPRM, and the corroborating comment record described in this section, including the arbitral awards submitted by commenters 0630 and 0631 — considered the important aspects of the problem, and articulated a rational connection between what it has observed and the standard it is codifying; that is what *State Farm* and 5 U.S.C. 553(c) require. To the extent commenter 0654's evidentiary objection is directed at the procedural streamlining proposed by OPM — response windows, improvement periods, and representation — it concerns OPM's proposals and is referred to OPM. The commenter's stated purpose of preserving its analysis in the administrative record is, in any event, accomplished: the submission is a permanent part of the docket of this rulemaking.

The comment record itself corroborates the Board's observation. Commenter 0664 identified collective bargaining agreements that contractually mandate a strict weighing of the *Douglas* factors, including an agreement whose asserted violation — a failure to properly analyze the *Douglas* factors — was the basis for an arbitrator's mitigation of a penalty. Commenter 0631 supplied a second arbitral illustration, described in Section VII: an award in which the arbitrator sustained charges arising from an employee's operation of a government vehicle after consuming alcohol and found a nexus to the efficiency of the service, yet mitigated the removal to a suspension on the ground that the deciding official had not conscientiously evaluated each *Douglas* factor — reasoning that treated the enumerated framework, rather than the sustained misconduct, as the touchstone of decision.

Other commenters, in defending the framework, described the twelve factors as the primary check and the only structured analysis against improper penalties (commenter 0656), and described a practice in which agencies routinely invoke their consideration of the factors as the defense of a penalty's reasonableness (commenter 0628) — descriptions that confirm the factors are treated in practice as an obligatory analytic code rather than the nonexhaustive, case-dependent summary of considerations that *Douglas* itself announced. Commenter 0427's own submission illustrates the point: it defends agency checklist practice as proof of the framework's utility. The persistence of a template, however, shows habituation, not fitness; the question is whether the checklist form serves or overshadows the statutory reasonableness inquiry, and the Board's experience is that it increasingly overshadows it.

The Board also notes a tension that runs through the opposing comments: commenters argue both that *Douglas* is already applied flexibly and non-mechanically under *Nagel*, and that removing the mandatory framework will radically destabilize disciplinary review. Both cannot be true. To the extent the factors function merely as a nonbinding summary of considerations that remain relevant — as the Board confirms elsewhere in this preamble they do — the disruption commenters predict is substantially overstated. To the extent the factors function in practice as a compulsory checklist, the Board's diagnosis is confirmed.

The mitigation-rate data presented by commenter 0647 measure the wrong variable. The Board did not propose this rule because it mitigates penalties too often or not often enough; the identified problem is the analytic overlay — the process costs of building, briefing, and adjudicating a twelve-factor record in every case; the satellite litigation over recitation and weighting; and the deterrent effect on supervisors documented in the studies cited in the NPRM. 91 FR at 40446-47, 40453-54. None of those costs appears in a mitigation rate, and the rate likewise cannot capture agency-level effects such as penalties never proposed or actions abandoned. If anything, the data reinforce two of the Board's points. First, a mitigation rate that has remained low and stable for four decades indicates that outcomes at the Board turn on the substantive reasonableness question rather than on the twelve-factor form — which is precisely why the form can be retired without sacrificing substance.

Second, the same data refute the parallel prediction, advanced by several of the same commenters, that this rule will produce dramatic changes in outcomes: if mitigation has been rare under *Douglas* because agency penalties are generally reasonable, it will remain rare under a codified standard that asks the same ultimate question. As to the observation that agencies prevail in a high percentage of appeals (commenter 0628), the sustain rate does not answer the problem this rule addresses for the same reason: a framework can produce high sustain rates and still misdirect the inquiry while imposing substantial costs on agencies, appellants, and the Board.

The same points answer the record-based objections of commenters 0421, 0433, 0616, 0525, 0569, and 0662. The reasoned-explanation obligation invoked by commenter 0421 is satisfied for the reasons stated throughout this section: the Board has identified the specific practice it observes, explained why that practice disserves the statute, exposed its proposed correction to public comment, and responded to objections on the merits. The removal statistics identified by commenters 0433 and 0616 measure the volume of agency actions, which the Board's rule does not regulate; they bear, if at all, on OPM's amendments, and they say nothing about the process costs and misdirected litigation that are the Board's stated basis for this rule — indeed, that the volume of actions rises and falls under the existing framework confirms that the twelve-factor form is not what determines outcomes.

For the same reason, the Board declines commenter 0525's invitation to specify a target removal rate: the Board adjudicates appeals; it does not manage the workforce, and no removal rate, high or low, is a goal of this rule. Commenter 0569's description of the factors as readily applied, non-prescriptive guides restates the tension addressed above — if the factors truly operated as non-binding guides, retiring the mandatory form would work no disruption — and the Board's experience, corroborated by the record, is that they do not so operate in practice, an observation that commenter 0236's account of factor analyses disregarded without consequence reinforces from another direction and that the tension identified by commenter 0662 does not dissolve. Finally, the corroborating submissions described in Section VII, including the practitioner and supervisory accounts of commenters 0417, 0489, 0350, 0359, and 0406, are additional record evidence supporting the diagnosis stated in this section.

Commenters also challenged the sources cited in the NPRM. Commenter 0554 argued that the studies cited — GAO and MSPB reports issued between 1990 and 2021 — do not support retiring the *Douglas* factors; that those sources instead reflect a decades-old consensus that performance management is best improved through increased supervisory training, individualized support for underperforming employees, and more effective use of probationary periods; that the Board did not assert that the *Douglas* factors have led to the retention of poorly performing employees; and that the Board instead relied on its own knowledge and expertise, which the commenter contended is an insufficient basis for rulemaking under decisions such as *United Mine Workers of America v. Mine Safety & Health Administration*, 626 F.3d 84 (D.C. Cir. 2010), and *Coinbase, Inc. v. SEC*, 126 F.4th 175 (3d Cir. 2025).

Commenter 0492 similarly argued that the *Douglas* factors have worked for decades because they require deciding officials to examine the employee's record, comparative treatment, and rehabilitative potential before imposing discipline; that replacing them with a vague totality standard opens the door for different supervisors to impose different penalties for the same conduct; and that the rulemaking measures the speed of discipline while failing to measure the costs of poor management — how many disciplinary actions are overturned, how many grievances are sustained because management violated a negotiated agreement, how many Board appeals are lost, and how many taxpayer dollars are spent defending personnel actions that should never have been proposed.

To the extent these comments restate the evidentiary objections addressed above, or the vagueness and consistency objections addressed in Sections IV.1 and IV.2, the Board incorporates those responses here, adding the following points specific to these submissions. First, the basis for the Board's rule is stated above: the Board's own sustained institutional observation, as the national adjudicator of these disputes, of how the framework it created operates in litigation — an observation corroborated by the comment record itself.

Second, the decisions the commenter cites condemning conclusory invocations of agency "knowledge and expertise" involve agencies asserting expertise in place of explanation. The Board has not done that. It has identified the specific practice it observes — standardized worksheets treated as legally compulsory, penalty appeals litigated as audits of factor recitation, the statutory question overshadowed — explained why that practice disserves the statute, exposed its proposed correction to public comment, and responded to the objections on the merits. A reasoned explanation grounded in an adjudicative agency's firsthand experience of its own doctrine, tested through notice and comment, is what the Administrative Procedure Act requires; it bears no resemblance to the conclusory assertions at issue in the cases the commenter cites.

Third, the observation that the Board has not claimed the *Douglas* framework causes the retention of poor performers is accurate — and consistent with the Board's rationale. As explained above, the problem this rule addresses is the analytic overlay and its process costs, not the Board's mitigation rate or the outcomes of its cases. Fourth, as to commenter 0492's proposed metrics: the mechanisms by which deficient agency actions fail are untouched by this rule. The agency bears the burden of proof; harmful procedural error, prohibited personnel practices, and decisions not in accordance with law remain grounds on which an appellant prevails; and the Board retains, and has codified, its mitigation authority. An agency case that cannot withstand review will fail under the codified standard exactly as it fails today, and the Board's published decisions and annual reports will continue to make those outcomes visible to the public. Proposals to impose new accountability measures on supervisors and managers, and comments directed at agency labor-relations and human-resources practices, are outside the scope of the Board's rule and are referred to OPM to the extent they bear on its proposals.

2. Impact

This rule governs the standard the Board applies in reviewing the reasonableness of an agency's chosen penalty in appeals of adverse actions taken under 5 U.S.C. 7513 that are filed with the Board on or after the rule's effective date. It does not change which actions are appealable to the Board, who may appeal, the agency's burden of proof under 5 U.S.C. 7701(c), the availability of affirmative defenses, the Board's mixed-case procedures, or the availability or standards of judicial review. Its direct impact falls on the litigation of penalty issues in Board proceedings: parties will direct penalty evidence and argument to the considerations the record makes material rather than to an enumerated template, and the Board and its administrative judges will decide penalty reasonableness on the whole record under the codified standard. Agencies may choose to update deciding-official training and decision templates, but nothing in this rule requires agencies to discard existing training or internal analytic aids, and records assembled under the prior framework remain fully probative under the codified standard (Section IX.6). Employees retain every substantive protection identified in Sections IV and V, including the due-process notice obligations and the Board's codified mitigation authority. Because the ultimate statutory question is unchanged, the Board expects outcomes to continue to turn on substantive reasonableness, as they have for four decades (Section IX.1). The impacts of OPM's amendments to 5 CFR parts 412, 432, 715, and 752 — including any change in the number of performance-based or adverse actions agencies take — are attributable to those amendments and are addressed in OPM's separate final rule.

3. Costs

The Board has considered the costs of this rule and concludes that they are de minimis. Several commenters (commenters 0430, 0439, 0492, 0554, 0665, 0674, and 0676) cited the joint NPRM's regulatory analysis — including its projections of additional removals, additional initial appeals and petitions for review, additional EEO counselings and complaints of discrimination, and associated agency litigation-defense costs — as evidence that the rulemaking would generate litigation rather than efficiency. Commenter 0439 argued specifically that an agency that predicts its own rule will produce roughly 599 additional removals a year, 366 additional Board appeals, 205 additional petitions for review, increases in EEO counseling and formal complaints of discrimination, and more than $20 million a year in new agency litigation-defense costs has not shown that the rule serves efficiency, but the opposite. Those projections concern the joint regulatory package and are driven by OPM's proposed amendments, which the NPRM projected would increase the number of actions agencies take; they are not attributable to the Board's amendment of its own review standard, which neither authorizes, requires, nor makes more likely any performance-based or adverse action, and they are addressed in OPM's separate final rule. Commenter 0665 further argued that the agencies produced granular cost estimates elsewhere in the joint rulemaking while supplying none for litigation over what the totality standard requires; the transition and adjudication costs of the Board's amendment, including the expected brief period of argument over the codified standard's application, are addressed below and in Sections IV.7 and IX.4.

The costs attributable to the Board's own amendment fall into three categories, each of which the Board has considered. The first is one-time familiarization: agency human-resources professionals, deciding officials, employee and union representatives, agency counsel, and the Board's own administrative judges will read the amended regulation and this preamble and absorb the codified standard. That cost is modest in absolute terms. The operative regulatory text is brief; the standard it codifies is the tolerable-limits-of-reasonableness formulation that has governed penalty review for four decades, so the learning burden falls on form rather than substance; and the cost is partially offset by the fact that the rule replaces a framework previously dispersed across decades of case law with a single, public, codified statement. The rule imposes no reporting, recordkeeping, or other compliance obligations, requires no new systems or processes, and requires no filing from any party.

The second category is discretionary updating: agencies, unions, and representatives may elect to revise training materials, decision templates, and internal guidance that reference the *Douglas* factors. The Board expects those costs to be limited and incurred over time, for three reasons. Nothing in the rule requires agencies to discard existing training or internal analytic aids, and deciding officials remain free to organize their analyses around the considerations *Douglas* identified where they fit the case (Section IX.6), so revisions can be folded into ordinary training and guidance refresh cycles rather than undertaken on an emergency basis. The ultimate question in penalty review, the parties' evidentiary obligations, and the agency's noticing requirements are unchanged, so the substantive content of existing materials remains largely serviceable. And records and replies assembled under the prior framework remain fully probative under the codified standard, so no case files must be rebuilt.

The third category is transition and adjudication costs. The applicability statement set forth in the DATES section of this document eliminates the principal potential transition cost — relitigation of penalty issues in appeals already pending — by providing that appeals pending on the effective date will be adjudicated under the framework in effect when they were filed. The Board acknowledges that any doctrinal refinement can generate a short initial period of argument over the new standard's application; it expects that period to be brief and its costs small, because the codified formulation is the one the Federal Circuit has policed for four decades and because the Board's published decisions will supply guidance rapidly, as they did in the years following *Douglas* itself (Section IV.7). Weighing against these limited costs is an offsetting, recurring saving: to the extent the codified standard eliminates satellite litigation over factor recitation and weighting, the per-appeal burden of briefing and adjudicating penalty issues will decline for agencies, appellants, and the Board alike. Finally, should the volume of appeals filed with the Board change as a result of OPM's amendments, the associated adjudication costs are costs of those amendments, were estimated in the joint NPRM, and are addressed by OPM. Considering these categories together, the Board concludes that the incremental costs of its own amendment are de minimis.

4. Benefits

The rule's principal benefits are qualitative. First, it refocuses penalty review on the question Congress enacted — whether the penalty is within the tolerable limits of reasonableness in light of the totality of the circumstances relating to the efficiency of the service — rather than on compliance with an enumerated template. Second, it eliminates a recurring category of satellite litigation: disputes over whether each of twelve factors was recited, addressed, and adequately weighted, which consume party and adjudicator resources without advancing the statutory inquiry. Third, it codifies, for the first time, both the Board's operative review standard and the *Devall* mitigation framework, giving all parties a single, public, authoritative statement of how the Board exercises its penalty-review authority — a gain in transparency and predictability over a framework previously dispersed across four decades of case law. Fourth, it preserves, and this preamble makes express, the substantive protections on which fair penalty review depends: the agency's burden of proof, the due-process obligation to identify aggravating factors in the advance notice, the whole-record requirement, the continued relevance of mitigating and comparator evidence, and the Board's mitigation authority. The Board cannot quantify these benefits with precision, but for the reasons stated in Sections IX.1, IV.1, and IV.7, it concludes that they are substantial and that they exceed the rule's de minimis costs.

5. Regulatory Alternatives

The Board considered a range of alternatives to this rule, including each alternative proposed by commenters. Commenter 0636 recommended that the Board retain, in regulation, a set of clear, understandable, and reviewable standards to guide penalty determinations while expressly disclaiming any requirement that every enumerated factor be mechanically addressed in every case. Commenter 0626 recommended that the final rule expressly provide that relevant *Douglas* factors remain applicable; that agencies must articulate the basis for penalty determinations; that administrative judges retain authority to assess penalty reasonableness; and that Board review remain grounded in objective and reviewable criteria. Commenter 0435 recommended that six considerations remain central to any reasonableness review, whether or not they continue to carry the *Douglas* name — the nature and seriousness of the offense; the employee's executive or fiduciary responsibilities; the past disciplinary and performance record; consistency with genuinely comparable cases; mitigating circumstances; and the potential for rehabilitation — while confirming they are not a rigid formula and that not all apply in every matter.

Commenter 0625 recommended retaining emphasis on a core subset of factors most central to a fair and defensible penalty determination: the seriousness of the offense, the employee's past disciplinary record, the effect on the employee's ability to perform, consistency of the penalty with those imposed on comparable employees, and the potential for rehabilitation. Commenter 0676 proposed that the Board retain the factors as non-binding analytical guideposts, with explicit instructions against rigid, mechanical box-checking, alongside streamlined penalty matrices. Commenter 0509 urged retention of all twelve factors together with mandatory comparator review and continued penalty guidance, and commenters 0426 and 0558 similarly proposed that agencies retain non-prescriptive penalty guidance or written penalty guidelines. Commenter 0658 proposed modernizing the *Douglas* framework through updated guidance rather than retiring it, and commenter 0675 proposed a simplified analysis for minor matters. Commenters 0609 and 0672 proposed augmenting the factors to address the misuse of artificial intelligence, including fabricated or AI-generated evidence and automated monitoring of employees. And many commenters urged, as their preferred alternative, improved selection, training, and accountability of supervisors and human-resources advisers before, or instead of, any change to the review standard (for example, commenters 0013, 0038, 0315, 0386, 0408, 0413, 0466, 0540, 0576, 0593, 0618, and 0666).

Commenter 0629 argued that the problem the Board identified — mechanical use of the factors — can and should be overcome by training and updated policy rather than by discarding the framework, and commenter 0634 likewise urged that the better course is to retain the *Douglas* factors and clarify their application. Commenter 0647 argued that the Board failed to consider obvious alternatives, including continued case-by-case refinement of *Douglas* questions through adjudication, alternative discipline, and pilot programs. Commenters 0391, 0439, and 0642 urged that all twelve *Douglas* factors be retained rather than replaced with an undefined totality standard, as did a large number of individual commenters (see Sections I and IV.1), with commenter 0391 urging that any reform be redrafted from the ground up with that preservation built in from the start, and commenter 0642 asking that the agencies consider alternatives that preserve federal workers' longstanding civil service protections.

The Board first considered leaving the current framework in place. For the reasons stated in the Statement of Need (Section IX.1) and in the NPRM, retaining the status quo would leave the Board's operative review standard uncodified and would perpetuate the checklist-centered practice this rule corrects.

The Board next considered codifying an enumerated factor list — whether the full twelve, a core subset, or a renamed equivalent — accompanied by an anti-mechanical disclaimer; in substance, codifying the rule of *Nagel*. It declines that course because that is, in substance, the regime the Board already has, and its ineffectiveness is the occasion for this rule. *Douglas* itself disclaimed mechanical application, describing the factors as nonexhaustive and cautioning against formulaic weighing; *Nagel* repeated the disclaimer two years later; and the Board and the court have repeated it since. Four decades of experience demonstrate that an enumerated list gravitates toward compulsory-checklist status in practice notwithstanding disclaimers — in agency worksheets, in training, in negotiated agreements, and in litigation. Re-enacting a list in regulation, even with the strongest disclaimer, would entrench the very perception of obligation the rule is designed to dispel, and would invite the same recitation-centered litigation under a new citation.

Codifying a reduced subset, as commenters 0435 and 0625 propose, would add a further problem of negative implication: considerations omitted from a codified subset would inevitably be argued to be disfavored or irrelevant — a result no commenter intends and the Board does not intend. The same reasoning answers commenter 0676's proposed guideposts-and-matrices alternative, which the Board has evaluated on the record and declines for these reasons (Section IV.16).

The Board likewise declines to rely on training alone. Improved supervisory training is valuable — OPM proposed it, and several commenters supported it — but training cannot correct a perceived legal requirement; only a change in the governing legal materials can. The Board notes that the same commenters who propose training as the remedy elsewhere argue that Board and court precedent already make the factors non-mandatory; if forty years of precedential instruction has not dispelled the perceived requirement, additional training premised on that precedent is unlikely to do so. The same reasoning answers the many commenters who urged training-first sequencing or improved supervisory selection as the alternative: a perceived legal requirement is corrected by changing the governing legal materials, not by instruction premised on the very precedent that failed to dispel the perception.

The proposals of commenters 0426, 0509, 0558, 0658, and 0675 — retained penalty guidance, mandatory comparator review, modernized factor guidance, or a tiered analysis for minor matters — are variants of the enumerated-list alternatives addressed above and in Sections IV.10 and IV.14, and the Board declines them for the same reasons; nothing in this rule, however, prevents an agency from maintaining internal decisional aids, as Sections IV.8 and IX.6 explain, and comparator evidence remains relevant as stated in Section IV.2. As to commenters 0609 and 0672: the Board declines to codify new enumerated factors, for the reasons stated throughout this section, but the concern those commenters raise is accommodated by existing law and by the codified standard — the agency bears the burden of proving its charges and the reasonableness of its penalty on the record; the authenticity and reliability of the evidence offered, including digital, automated, or artificially generated material, bear directly on whether that burden is carried; and a charge or penalty resting on fabricated or unreliable evidence will not be sustained.

For related reasons, the Board declines commenter 0647's suggested alternatives of continued adjudication and pilot programs: case-by-case adjudication is the vehicle that, over four decades and notwithstanding repeated precedential cautions, did not arrest the drift toward formalism; and pilot programs are ill-suited to the standard of review applied by a single, national adjudicative body, where a uniform rule of decision is itself the objective. The Board also considered occupational exclusions and occupation-specific factor lists, and declined them for the reasons stated in Section IV.9.

The Board is, however, able to give commenters much of the assurance they seek, and does so in this preamble. First, as stated throughout this document, the considerations identified in *Douglas* — including each of the considerations enumerated by commenters 0435 and 0625 — remain relevant and cognizable under the totality of the circumstances wherever they are material, and parties remain free to raise them.

Second, agencies must, as always, be prepared to articulate and prove the basis for their penalties: the burden of proof under 5 U.S.C. 7701(c)(1)(B) is unchanged, the due process obligation to notice aggravating factors is unchanged, and an unexplained or unsupported penalty will not survive review under the codified standard.

Third, administrative judges and the Board retain full authority to assess penalty reasonableness and to mitigate penalties that exceed the tolerable limits of reasonableness, under the *Devall* framework now codified in § 1201.56.

Fourth, Board review remains grounded in reviewable criteria: the codified standard, the whole record, and the reasoned-decision obligations enforced by the Federal Circuit under 5 U.S.C. 7703(c). The difference between this final rule and commenters' preferred alternatives is not the presence or absence of standards; it is whether the standards take the form of a codified enumerated template.

Finally, the Board adopted one alternative urged by commenters in part: in response to reliance and transition concerns, and as set forth in the DATES section of this document, the amended standard applies only to appeals filed with the Board on or after the effective date, with pending appeals adjudicated under the framework in effect when they were filed. Section IX.6 discusses the reliance interests bearing on that choice, including the view of one commenter (commenter 0623) that no reliance interests warrant transitional measures.

6. Reliance Interests and Transition

Commenters identified substantial reliance interests in the *Douglas* framework in response to the NPRM's express solicitation of comment on reliance interests and possible transition measures. 91 FR at 40460. Commenter 0634 argued that *Douglas* is embedded in agency policies, OPM guidance, Board precedent, training, decision templates, negotiated agreements, and litigation practice; that replacing it will require retraining, rewriting policies, bargaining, and transition litigation; and that the NPRM's treatment of the change as having de minimis cost, with no transition provision, renders the change arbitrary and capricious under *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 30-31 (2020).

Commenter 0629 similarly cited *Regents* and *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), and argued the agencies failed to consider less drastic alternatives. Commenter 0647 argued that the *Douglas* factors are deeply ingrained in the fabric of federal-sector labor relations and have engendered extraordinary reliance interests since 1981 among agencies, employees, unions, reviewing courts, and the Board itself, and that abandoning them without real analysis is arbitrary and unreasoned. Commenter 0642 similarly emphasized that these standards have been applied consistently for nearly five decades, across administrations of both parties, and have provided fairness to federal workers facing accusations of misconduct.

Commenter 0430 requested that any final rule (1) apply the amended § 1201.56(b)(3), if adopted at all, only to actions proposed after the final rule's effective date; (2) preserve *Douglas*-based review for all actions and appeals pending on that date, in whatever forum; (3) resolve the arbitration-parity question on the record; and (4) state expressly that nothing in the rule disturbs the *Devall* mitigation framework or the notice obligations recognized in *Stone* and *Ward*. By contrast, commenter 0623, a Federal executive department, stated that it is not aware of reliance interests of a kind or magnitude that would warrant delaying implementation.

Commenter 0062 expressed a transition concern from the opposite direction, asserting that agency litigators are slow-walking pending disputes in anticipation of this rule in order to obtain the benefit of the revised standard. Commenter 0045 objected that repeated revision of the governing framework destabilizes settled expectations, and commenter 0665 identified reliance interests that include four decades of *Douglas*-based compliance practice built by agencies, employees, and their representatives.

The Board acknowledged in the NPRM that *Douglas* has long been a cornerstone of federal employment law, and it has weighed the reliance interests commenters identified. Having done so, the Board concludes that those interests, while real, are more limited than commenters suggest, and that they are outweighed by the benefits of the rule and accommodated by its design.

The reliance interests are limited because the ultimate legal question is unchanged. Before and after this rule, an agency must select a penalty that promotes the efficiency of the service and must be prepared to prove, by a preponderance of the evidence on the whole record, that its penalty is reasonable. The substantive considerations agencies have trained their deciding officials to evaluate — seriousness, record, notice, consistency, rehabilitation, mitigation —

remain relevant wherever material. An agency whose human-resources professionals and deciding officials are practiced in assembling records addressing those considerations loses none of that investment. Nothing in this rule requires agencies to discard existing training or internal analytic aids, and nothing in this rule prohibits a deciding official from organizing his or her analysis around the considerations *Douglas* identified where they fit the case. What agencies, employees, and adjudicators may no longer do is treat the enumerated list as compulsory in form.

The Board has also accommodated transition concerns — and has granted much of commenter 0430's transition request in substance — through the applicability statement set forth in the DATES section of this document: the amended § 1201.56 standard applies to appeals filed with the Board on or after the effective date of this rule, and appeals pending before the Board on that date will be adjudicated under the framework in effect when they were filed. The Board keys applicability to the filing of the appeal rather than to the date the underlying action was proposed because the rule governs the Board's review methodology — not any standard of primary conduct — and the filing of the appeal is the event that invokes that methodology.

Because the amended standard governs the manner in which the Board evaluates penalty reasonableness in proceedings before it, its application to newly filed appeals is prospective in the relevant sense: it attaches no new legal consequence to completed conduct and alters no substantive standard the parties' actions were required to satisfy. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994) (rules governing procedure in adjudication ordinarily apply to proceedings instituted after their adoption); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Nor does the filing-date rule prejudice a party whose action was proposed, answered, or decided under the prior framework: the ultimate question — whether the penalty is reasonable on the whole record — is unchanged; a record and reply built around the *Douglas* considerations are fully probative under totality review; the agency's noticing obligations are unchanged; and no defense or category of evidence available under the prior framework becomes unavailable under the codified one. The arbitration-parity question raised by commenter 0430 is addressed in

Section IV.12, and the codified standard will operate in arbitration on the same prospective basis on which it operates before the Board. And the final rule confirms expressly, in Sections V and VIII, that it codifies rather than disturbs the *Devall* mitigation framework and effects no change to the requirement that aggravating factors relied upon in penalty selection be identified in the advance notice of proposed action.

The applicability statement also answers commenter 0062's concern that pending disputes are being slow-walked in anticipation of this rule. Delay yields no advantage under the rule's design: appeals pending before the Board on the effective date proceed under the prior framework, and for appeals filed afterward the ultimate question — whether the penalty is reasonable on the whole record — is unchanged, so there is no more forgiving substantive regime to be gained by timing. Dilatory litigation conduct, moreover, remains subject to the Board's existing case-processing authorities. The reliance identified by commenters 0045 and 0665 — practice, training, and records built around the *Douglas* considerations — is the reliance addressed above: that investment remains fully serviceable under the codified standard, and the filing-date applicability rule ensures that no pending appeal is adjudicated under a framework other than the one in effect when it was filed.

Finally, the Board considered the less disruptive alternatives commenters proposed, principally retaining a codified factor list — in whole or in part — with an anti-mechanical disclaimer, and explains in Section IX.5 why it declined that course. The *Regents* line requires an agency to assess reliance and weigh it against competing policy concerns; it does not require the agency to preserve the status quo. The Board has performed that assessment here.

X. Procedural Issues and Regulatory Review

A. Severability

If any of the provisions of this rule is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. As explained in Section VIII of this preamble, the Board's amendments to part 1201 are also severable from the amendments to 5 CFR parts 412, 432, 715, and 752 that OPM proposed in the joint notice of proposed rulemaking and is finalizing in a separate document: the Board's rule operates independently of OPM's and would function sensibly regardless of the disposition of OPM's proposals. In enforcing civil service protections and merit system principles, MSPB will comply with all applicable legal requirements.

B. Regulatory Review

MSPB has examined the impact of this rule as required by E.O.s 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for rules that have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rulemaking does not reach that threshold but has otherwise been designated as a "significant regulatory action" under section 3(f) of E.O. 12866. This rule is not considered an E.O. 14192 regulatory action because, as addressed in Section IX.3, the Board's portion of the proposed rule imposes no more than de minimis costs.

C. Regulatory Flexibility Act

The Board certifies that this regulation will not have a significant economic impact on a substantial number of small entities because it applies only to Federal agencies and employees.

Commenter 0665 argued that this certification fails to address indirect impacts on labor organizations whose negotiated agreements are assertedly displaced by the joint proposal and which may qualify as small entities under 5 U.S.C. 601. The Regulatory Flexibility Act is concerned with the direct economic effects of a rule on regulated small entities, and this rule regulates none: it governs the standard of review the Board applies in appeals before it and imposes no compliance obligation on any labor organization or other small entity. Any displacement of negotiated agreements to which the commenter refers would flow, if at all, from OPM's proposed amendments, which are not finalized in this document and which OPM addresses in its separate final rule. The certification is accordingly unchanged.

D. Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 13132, the Board certifies that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E. Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988 (61 FR 4729; Feb. 7, 1996).

F. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or tribal governments in the aggregate, or on the private sector, in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately $206 million. This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

G. Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 et seq.) requires most final rules to be submitted to Congress before taking effect. The Board will submit to each House of Congress and to the Comptroller General of the United States a report regarding the issuance of this final rule before its effective date. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by the CRA (5 U.S.C. 804(2)).

H. Paperwork Reduction Act

This regulatory action will not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, as amended (44 U.S.C. chapter 35).

Gina K. Grippando,

Clerk of the Board.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Government employees.

Accordingly, for the reasons stated in the preamble, the Merit Systems Protection Board amends 5 CFR part 1201 as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

Subpart B—Procedures for Appellate Cases

2. Amend § 1201.56 by adding paragraph (b)(3) to read as follows:

§ 1201.56 Burden and degree of proof.

* * * * *

(b) * * *

(3) *Penalty determination.* (i) This paragraph (b)(3) applies only to appeals filed under 5 U.S.C. 7513.

(ii) The agency's choice of penalty is entitled to substantial deference. The Board will review a penalty only to determine whether it is within the tolerable limits of reasonableness in light of the charges sustained under paragraph (b)(1)(ii) of this section. This determination is based upon the totality of the circumstances relating to the efficiency of the service, on a case-by-case basis.

(iii) If the Board sustains all of the agency's charges, the Board will determine whether the penalty imposed by the agency is within the tolerable limits of reasonableness, and will not substitute its judgment for the judgment of the deciding official.

(A) If the Board makes an affirmative finding in this regard, the Board will sustain the agency's action.

(B) If the Board makes a negative finding in this regard, the Board may mitigate the agency's original penalty to the maximum reasonable penalty.

(iv) If the Board sustains fewer than all of the agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty so long as the agency did not indicate either in its final decision, or during proceedings before the Board, that it desired that a lesser penalty be imposed if the Board did not sustain all of its charges.

(A) If the agency so indicated, the Board may:

(*1*) Impose the lesser penalty the agency indicated it would have imposed; or

(*2*) If the Board cannot discern what that penalty would have been, accord the agency an opportunity to institute a lesser penalty.

(B) If the agency did not so indicate, the Board may:

(*1*) Mitigate the agency's original penalty to the maximum reasonable penalty; or

(*2*) Accord the agency an opportunity to institute a lesser penalty.

* * * * *

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