

INTRODUCTION

“Virtue or morality is a necessary spring of popular government.”

—Washington’s Farewell Address

Stuffy though it may sound, Washington had a sound point that remains pertinent to this day: democracy is about more than people voting. It is about beliefs in the way government should treat people and the way people should treat each other. It is about not contractual values, but moral values. Fail though we often do in achieving them, virtue and morality remain the necessary spring of American democracy. The virtues and morality Washington spoke of govern more than the relationship between America and its citizens. These same moral values also shape the internal relationships within America’s civil service—between the management and employees of federal agencies. They are at the heart of all our internal written codes and unwritten understandings about the way things should be.

Our personnel rules are not an amalgam of arbitrary procedures fashioned out of whimsy and intended for pharisaic application. They are neither arbitrary nor new. One can, without overstatement, trace them back even to the dawn of Western Civilization. The fundamentals of what agencies expect of employees and what employees may expect of agencies can be found in the Mosaic Codes, Aristotle’s *Ethics*, and the writings of all the great philosophers.

When the Merit Systems Protection Board mitigates the removal of an employee fired for a trivial offense and explains that a lesser penalty would suffice to correct the behavior, the MSPB is following Aristotle’s admonition two millennia earlier that counseled corrective over retributive justice. When labor arbitrators uphold severe penalties for insubordination and portray it as the cardinal sin of the work site, their rationale differs little from that of ancient Romans describing the sin of *Laesa Majestas* (high treason).

Similarly, George H. Bush’s appeal for a kinder and gentler America, although unpretentious and heartfelt, is taken from Lincoln’s inaugural plea to the Confederacy to heed the “better angels of our nature.” Lincoln lifted the line from St. Augustine who pirated the thought from Aristotle who says that he thought it up himself but probably did not although nobody is around to dispute his claim. One can trace a genealogy of moral forces from primeval springs right down to the way federal agencies and their employees in the 21st century behave towards each other.

This is not a book on morality. It is a book on taking disciplinary actions, but disciplinary actions are the result of moral judgments. Morality and disciplinary actions are conjoined because disciplinary actions are nothing more than one of the many media through which management inculcates its employees with the *ethos* of American public service and with those values and beliefs unique to each agency. Although few think of it in these terms, one of the major HR responsibilities of federal agencies is developing and nurturing normative ethical values within employees.

William Kirk Kilpatrick wrote that teaching moral values is more than imparting a decision-making process. To teach morality is to transmit an outlook on life that nourishes the imagination with “rich and powerful images.” Federal agencies nourish imaginations and create visions in employees through a variety of media: they write slogans (the Postal Service’s “neither rain, nor snow...”); they provide unique uniforms (Park Service Rangers in their Smokey the Bear hats); they bow in remembrance (the spontaneous silence falling over all of NASA on the minute of the anniversary of the “Challenger” disaster); they participate in ritual (award ceremonies for the deserving); and they even create myths (the FBI and John Dillinger).

Philistine though it may sound, they also nourish imagination and create visions through the disciplinary process. Values, codes, doctrines, rules, and visions have no meaning without enforcement. Discipline is the point of the lance of morality. It is the reinforcement of the written and unwritten; the new and ancient laws of the workplace. It is one way that we set moral direction and then teach employees. Unlike the criminal justice system, the disciplinary process in the federal government applies corrective justice to teach behavior rather than retributive justice. The government is not trying to punish transgression; it is trying to teach propriety.

When you give an employee a letter of reprimand for unexcused tardiness, you are not exacting retribution or playing “gotcha.” You are telling him, and others, that coming to work on time is important in your office and that he may need to buy an alarm clock. When you suspend an employee for cursing a customer, you are trying to teach him to bite his tongue when angry no matter how justified the emotion. If the person cannot adapt to the government’s standards, you tell him to find another job.

You are also being selective and trying to single out those rules and those beliefs that count most in your agency. The behavior of federal agencies and employees is already directed and circumscribed by warehouses full of directives, SOPs, rules, regulations, policies, and turgid letters beginning with, “It has come to my attention that...” The disciplinary process selectively emphasizes those rules—written or unwritten—which form the heart of the institutional values of the agency.

When discipline collapses and employee disobedience and transgression become the norm, management is at fault—not the employees. The vast majority of people who enter government service are willing to do whatever is required and to conform to all reasonable and most unreasonable rules. Over 200 years ago Lord Chesterfield told his son that most people, regardless of their social station, are of “good-breeding...[who] endeavor to please and oblige our fellow-creatures by all good offices.”

So too are federal employees, men and women, of good breeding. They do not start their first day on the job looking for government property to take home or asking when they can start abusing leave. At any federal agency with a high absenteeism rate you will find an agency that does not enforce the rules on attendance, not morally imperfect employees. In the absence of even moderate controls, even good employees will, sooner or later, slip into bad habits.

People conform to rules and to normative value systems for one of two reasons—the threat of punishment or a sense of duty or moral obligation. The disciplinary process directly serves the first function and tangentially the second. Disciplinary sanctions provide direct disincentives to employee misconduct.

At the same time, the sanctions indirectly pay respect to those with high ethical standards. For example, the Postal Service’s draconian internal rules on theft of mail offer calamitous penalties for even the most trivial offense. Harsh though it may sound to fire a letter carrier two months short of retirement for stealing \$1.00 from the mail (true story), the action serves both the above purposes. It frightens those who might steal into honesty, but it does something even more important—it sends a subtle yet powerful message to those who would never steal no matter how desperate their circumstances, how tempting the plunder, or how escapable the consequences. Inconspicuous, quiet, and modest though they may be, they are the people who matter in the organization.

You are not punishing. You are setting high standards. Do not be afraid to set high standards of quality and goodness in work products and work behavior. You not only have the right to do so but the obligation. Now let us see how to carry them out.

CHAPTER 1

PRINCIPLES OF DISCIPLINE

When a wise man is advised of his errors, he will reflect on and improve his conduct. When his misconduct is pointed out, a foolish man will not only disregard the advice but rather repeat the same error.

—Gautama Buddha

In the introduction, we discussed in a broad sense the moral foundations of discipline in federal service. In the remainder of the book, we'll deal with the specifics of the legalities and practicalities of disciplinary actions, but I want to start by making sure that you understand several important foundational principles about discipline in federal service.

Discipline in federal service is significantly different from that in other personnel systems—private sector, the military, academia, and other institutions. It is not just different legally, but also in its fundamental approach to treating its employees.

CORRECTION

To begin with, the federal government believes and practices the principle that the purpose of discipline is to correct, not punish, employee behavior. When you give an employee a letter of reprimand for sneaking away from the job during duty hours, you are trying to teach the employee the importance of not leaving the job without permission. When you suspend an employee for two weeks for cursing a supervisor, you are trying to improve his language and respect for supervisors.

This differs significantly from most of private industry and the military. While they may say that discipline is to correct behavior, they don't mean it. If you've ever seen training videos or read books or articles about discipline in private industry, they refer repeatedly to the importance of documenting misconduct, but with no mention of correcting it.

This is because in private industry, employees not under a contract (94% of the private sector) serve at will and can be removed for any reason not prohibited by law. The only way employees can challenge a removal is to allege and try to prove that the real reason they were removed was something prohibited by law, for example a discrimination complaint filed with the Equal Employment Opportunity Commission (EEOC) where they might at least get a settlement just to buy them off.

Therefore, the purpose of the documentation they encourage supervisors to accumulate is not to correct the behavior in progressive steps, but to rebut a lawsuit alleging that the removal was taken for some reason prohibited by law, like illegal discrimination, retaliation for filing a workers' compensation claim, retaliation for trying to organize a union, and many others depending upon the state.

I preface this by emphasizing that this is no criticism, but in the military, formal actions like official reprimands, non-judicial punishment under Article 15 of the UCMJ, or, God forbid, a court-martial are intended to punish and they have a devastating if not terminal effect on a service member's career, especially for officers and NCO's. Therefore, those actions are not done with the intent of teaching a lesson and to expect improvement.

The practical effect of this principle of correction in federal service is that you must act quickly and not let the behavior become ingrained. We'll discuss later the myth of documentation, but one of the problems with just sitting back and watching somebody commit acts of misconduct while you do nothing more than document it is that the

behavior now becomes entrenched. This is not an abstraction, it's a real issue that causes many agencies problems on appeal because of what labor arbitrators call punitive discipline: when an agency allows an employee to commit numerous low-level offenses and then combines them all into a single serious disciplinary action.

The Office of Workers' Compensation Programs at the Department of Labor in San Francisco started a flextime program. Like all other, it allowed employees to work their weekly 40 hours at any time during the work week. The agency used a sign-in sheet and put employees on the honor system to accurately record starting and quitting times.

In one unit, the supervisor witnessed a GS11 Claims Examiner come in twice one week and sign in for 8:00 A.M. when he had actually come in at 9:00 A.M. The supervisor became suspicious and told other employees in the unit to watch this employee and note down when he actually came to and left from work. Then the supervisor compared this information with the sign-in sheet to see what he was claiming compared to when he was at work.

After watching him for six weeks, the supervisor found 14 falsifications, adding up to 19.5 hours of work the employee had claimed but not done.

DOL removed the employee for the falsification of time with what would seem to be a solid case. However, as we'll discuss in detail in [Chapter Four](#), third parties call this condonation—where management has knowingly allowed misconduct without trying to correct the behavior, and when proven, it most always results in a sizeable mitigation of the penalty, in this case reinstatement with nothing more than a mere letter of reprimand.

However, this is where this concept becomes a reality. Remember that the supervisor actually witnessed the first incident when he claimed an hour not worked. What would have happened if that supervisor had immediately confronted him, expressed outrage, and given the employee a stern letter of warning or even a formal letter of reprimand for falsifying time records? Of course he would have stopped. And if he decided to repeat the behavior, management would have been able to remove him with no more than two or three more formal disciplinary actions.

The federal system forces you to try to correct the behavior—except for obvious extreme cases—with low-level disciplinary actions rather than trying to fire somebody for cumulative acts of misconduct that you simply sat around and watched.

REDEMPTION

The second principle flows from the first: all misconduct resulting in discipline short of removal is ultimately forgiven. As an Air Force colonel, talking about the difference between employee conduct and performance deficiencies, said, "Sin can be forgiven, but stupid is forever." Other personnel systems are unforgiving towards sin. As we discussed, formal punishment in the military, is the end of your career—especially if you're an officer or NCO.

The practical effect of this is that in the military all discipline done for the purpose of correcting the person is in the form of street justice—not formal punishment. Better a quick punch to the stomach, no exaggeration and I've seen it often, to teach the soldier a lesson about manners than a letter of reprimand or Article 15 that can ruin the career. Better a two-month sea duty assignment to a disrespectful desk-bound sailor who gets and stays violently seasick than Captain's Mast.

The federal civil service, though, takes a wholly different attitude. Since the purpose of discipline is to correct, not punish, if you get some formal discipline and there is no repetition of misconduct, nobody holds it against you later on—even when you're applying for a higher-level job a few years later.

I have personally known many high-level managers and executives in federal civil service who had serious formal disciplinary actions in their record when they were young, yet were promoted later in their careers.

The rationale is that even if an employee got a 30-day suspension 15 years ago for driving somewhere in a government car where he or she wasn't supposed to be, it shouldn't be held against them if the employee learned the lesson, shaped up, and has not been a disciplinary problem since.

What this means is that you should use mostly formal, not unofficial disciplinary actions to correct the behavior. Many supervisors are reluctant to issue formal actions, because they fear staining the employee's record. Yet, as long as the employee corrects the behavior, there remains no lasting stain.

A Border Patrol sector chief in a busy part of the southwest border gave out many disciplinary actions, but whenever he issued an action short of removal, like a suspension, he always gave the employee a pep talk, or what he called his "serve your time speech." He told the agent to "serve your time," and that when he or she came back, it was with a fresh start, and reminded them that as long as they committed no more misbehavior, the disciplinary action would not harm their career.

UNIFORMITY

In federal service, far more than in any other system, you must be ruthlessly uniform in administering discipline. You may be able to play favorites in other areas—performance, awards, hiring, work schedules, and even pay-setting.

However, you cannot get away with favoritism in enforcing rules. Federal employees have too many different ways of challenging disciplinary actions and the defense of disparate treatment—that somebody else was not punished—is a commonly invoked successful defense before all tribunals. The Merit Systems Protection Board (MSPB), labor arbitrators, Equal Employment Opportunity Commission (EEOC), the Federal Labor Relations Authority (FLRA), and the federal courts all deal with allegations of disparate treatment raised in their areas of jurisdiction.

If an employee, let's say, physically threatens a coworker and you respond by letting the employee off with a tongue-lashing, then somebody else comes along a few months later and commits the same act, but gets fired. It doesn't matter which forum hears the case—the MSPB, a labor arbitrator, EEOC, or any other—your action is in serious jeopardy of being either overturned or mitigated to a lesser penalty that still brings the employee back.

Disparate treatment is a defense raised in a large number of appeals and grievances, and you'd better be prepared for it. In [Chapter Five](#) on penalties, we'll spend considerable time on disparate treatment, as many factors govern how far third parties look to find disparate treatment. Keep in mind that whatever you let your worst employee get away with becomes the workplace standard.

THIRD-PARTY REVIEW

Both the federal service and private sector have warehouses full of rules and regulations governing all matter of substantive and procedural issues. Where we differ from private industry though, is that we take our rules seriously and have set up, and I do not mean this as criticism, correspondingly large bureaucracies to enforce them. These agencies have the power to overturn unfounded or capricious actions harmful to your employees.

In this book, I'll only be discussing those who oversee and rule on disciplinary actions—mostly the MSPB, and labor arbitrators, and to a lesser extent the FLRA and the EEOC.

Several dozen federal agencies, not even including law enforcement, have enforcement jurisdiction over all manner of agency practices—OPM, OSC, OSHA, OWCP, just to throw around a few initials.

Those are just the agencies outside your own agency. Even internal departments within your agency exercise oversight often with the independent power to overturn personnel actions.

For example, the law requires that every federal agency have an internal EEO complaint process employees must go through that ends up at a department in your agency's headquarters. This department acts like a judge and, after reviewing the evidence, writes a final agency decision with an official finding of discrimination or no discrimination. The decision is appealable to EEOC if unfavorable to the complainant.

Don't think for a moment that these departments, being part of the agency, are predisposed to lean in favor of the agency. I have seen many of these final agency decisions that not only found discrimination but blasted and encouraged discipline for the managers who had committed the illegal act.

Employees have recourse, and people are watching you. But don't be afraid, just pay attention, and do what I suggest.

CHAPTER 2

THE LAW OF THE WORKPLACE: AN OVERVIEW

Roosevelt: *How many men have you killed?*
Pat Garrett: *Three*
Roosevelt: *How did you come to do it?*
Pat Garrett: *In the discharge of my duty as a public officer.*
Roosevelt: *(looking pleased) Have you ever played poker?*
Pat Garrett: *Yes.*
Roosevelt: *Are you going to do it when you are in office?*
Pat Garrett: *No.*
Roosevelt: *All right, I am going to appoint you. But see that you observe the civil service law.*

—Theodore Roosevelt interviewing Pat Garrett, former Sheriff of Lincoln County, New Mexico and killer of Billy the Kid, for the position of Customs Collectorship of El Paso in November 1901

When Teddy Roosevelt told Pat Garrett to obey civil service law, he knew what he was talking about. Roosevelt was one of the first commissioners of the Civil Service Commission (now succeeded by the Office of Personnel Management and the Merit Systems Protection Board) and believed strongly in the principle that the employer/employee relationship in the federal service is a shared trust.

Roosevelt, and those who have followed him recognized that the American people have entrusted federal agencies and the civil servants who staff them with the responsibility for our lives, our property, our social good, our dollars, our security, and our defense. To carry out those responsibilities, the American people have created, through their elected representatives, a human resources management system that gives federal agencies and their employees an orderly framework of rules and responsibilities guiding and binding both.

These rights and obligations are complementary and correlative. Both supervisors and employees have responsibilities and both have rights. Management, for example, may have the right to maintain order and to discipline its employees. However, it also has a responsibility to the American people not to deprive them arbitrarily of a good public servant. Indeed, when we examine the basis for discipline in [Chapter Three](#), we shall see that this is precisely what those who framed the law on discipline had in mind when they wrote the cause standard governing disciplinary actions.

When an agency fires a good employee without cause the loser in the case is not only the employee, it is the people whom the agency serves—the American people. On the other hand, employees have significant rights, some of which are deeply rooted in the American spirit and ethos. Before we begin examining the specifics of discipline in the federal service, let's make sure you have a solid grasp of your rights and responsibilities as a supervisor.