

Committee on Oversight and Government Reform
U.S. House of Representatives
115th Congress



Tables of Penalties:
**Examining Sexual Misconduct in the Federal Workplace and Lax
Federal Responses**

October 19, 2017

Staff Report

A Letter from the Chairman

October 19, 2017

Dear agency heads and chief human capital officers:

Sexual misconduct is a challenge the federal government must aggressively and consistently address to ensure the well-being and safety of its workforce.

The vast majority of federal employees do not engage in conduct unbefitting the civil service. However, for those who do engage in sexual misconduct, swift and forceful accountability is warranted and required. In the 114th Congress, the Committee identified examples of this unacceptable behavior including: the solicitation of prostitutes while on official U.S. government business; the sexual harassment of colleagues and interns; and the accessing of pornography during the workday. Because the sexual misconduct and related unacceptable activities continues, a clear, coherent, consistent and forceful federal response is necessary. Accordingly, last year the Committee's majority staff initiated an examination of agency disciplinary policies by reviewing each agency's uniquely constructed "Table of Penalties."

The review showed no standardized definition of sexual misconduct and no requirement agencies have standardized recommended penalties. This could lead to inconsistent responses to unlawful or noxious behavior and disparate treatment of the conduct and offenders depending on the agency. The review also found recommended discipline varies within an agency and some agencies lack a Table of Penalties altogether.

The federal government must address these inconsistencies to better identify and combat sexual misconduct within the federal workforce.

Federal employees deserve a safe work environment, free of predatory behavior. Employees should feel safe and protected doing the people's business. And the American people deserve a work force and a work environment reflective of the law, their high standards for appropriate conduct, and conducive with maximum productivity.

Sincerely,

Trey Gowdy

Executive Summary:

Overview:

A Table of Penalties is a list of recommended disciplinary actions for various personnel misconduct, ranging from reprimand to removal. Agencies use Tables of Penalties to standardize discipline across an agency.

The proper use of a Table of Penalties ensures the appropriateness and consistency of a penalty in relation to the charge. It also ensures merit system principles guide the process by providing penalty transparency, reducing arbitrary or capricious penalties, and guiding supervisors who deal with these issues.

Tables of Penalties are guidelines that work in conjunction with the criteria supervisors use to determine appropriate penalties for misconduct, called the *Douglas* Factors.¹ They do not specify mandatory discipline.² Tables of Penalties also do not apply to contractors, and each agency has discretion as to which employees the Table will apply.

Last year, the Committee initiated an oversight inquiry into the use of Tables of Penalties and disciplinary guidelines across government. Toward that end, on March 18, 2016, the Committee requested Tables of Penalties from 26 executive agencies.³

Given the broad range of topics addressed in Tables of Penalties, the review focused initially on agency treatment of sexual misconduct, an egregious form of wrongdoing and the subject of recent investigative findings by the Committee.

Key Findings:

1. Some agencies lack a Table of Penalties altogether. Others fail to address sexual misconduct

Eight agencies have *no Table of Penalties*, including the Office of Personnel Management—which is the agency ostensibly serving as the human resources manager for the federal government.⁴ Seven agencies have a Table of Penalties, but do not expressly mention sexual misconduct.

¹ The *Douglas* Factors are twelve criteria that supervisors are to consider in determining appropriate penalties for misconduct. See <https://www.opm.gov/policy-data-oversight/employee-relations/reference-materials/douglas-factors.pdf>.

² *Id.*

³ See App'x A, *infra*, for a list of agencies queried.

⁴ In some cases, agencies reported by components. See Appendix B for agency-by-agency breakdowns.

In May 2017, a Department of Justice (DOJ) Office of Inspector General (OIG) report revealed the dangers associated with the lack of a Table of Penalties.⁵ Specifically, the report found the Civil Division’s handling of sexual misconduct allegations was not consistent, penalties were not consistent for high-performing employees, and employees received performance awards even while the subject of ongoing sexual harassment or misconduct investigations or while disciplinary actions were in effect.

2. Broad disciplinary recommendations, inconsistent from one agency to another, put employees at risk of arbitrary punishment

Recommended disciplinary action ranges from oral or written reprimand to removal for one charge, effectively providing no guidance to supervisors. For example, at the Department of Education, the recommended action for violation of the offense “Inappropriate behavior of a sexual nature” is “reprimand to removal” for a first offense. In testimony before the Committee, former acting administrator of the Transportation Security Administration Mark Hatfield stated broad recommended penalties like those are “. . . constant roiling distractions in terms of managing people in the field” and used this as an excuse for his lack of disciplinary action in a misconduct case at the agency.⁶

Since agencies have the ability to create their own Tables of Penalties, recommended discipline, even for similar types of misconduct, can vary across the government and among components of agencies. For example, the DOJ, the Drug Enforcement Agency (DEA), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and the U.S. Marshals Service (USMS) have different punishments for soliciting or engaging in prostitution.

3. There is no standard definition of sexual misconduct

The U.S. Agency for International Development (USAID) (for civilian employees primarily covered under Title 5, United States Code) and the Federal Aviation Administration (FAA) had the most developed list of sexual misconduct categories. The Department of Education, by comparison, merely defines this area as “Inappropriate behavior of a sexual nature.” The FAA identifies 10 distinct categories of sexual misconduct including:

- Sexual teasing, jokes, remarks, questions;
- Suggestive looks or gestures of a sexual nature; and
- Threat or act of reprisal for refusal to provide sexual favors.

While most agencies have general prohibitions on using government resources for unauthorized purposes, not all agencies explicitly penalize the use of federal equipment to view or transmit sexually explicit materials and pornography. In addition, only five agencies

⁵ OFFICE OF INSPECTOR GEN., DEP’T OF JUSTICE, EVAL. AND INSP. DIV. 17-03, REVIEW OF THE HANDLING OF SEXUAL HARASSMENT AND MISCONDUCT ALLEGATIONS BY THE DEPARTMENT’S CIVIL DIVISION (2017), *available at* <https://oig.justice.gov/reports/2017/e1703.pdf> [*hereinafter* “DOJ OIG 2017 Report”].

⁶ Transcribed Interview with Mark Hatfield, former Acting Administrator, at the U.S. Transportation Sec. Admin. (Feb. 23, 2017) [*hereinafter* “Hatfield Interview”].

explicitly mentioned sexual assault or rape in their Tables of Penalties.⁷ And only two agencies list prostitution or consensual sexual misconduct.⁸

Varying definitions for sexual misconduct, like these, make it difficult for the federal government to address this problem in a consistent and comprehensive manner.

4. Some agencies hold supervisors to higher standards, while others do not

Guidance for punishment of sexual misconduct varies from agency to agency. Some agencies differentiate punishments for supervisors and non-supervisors—some do not. For example, the Table of Penalties for the Department of the Interior (DOI) lists “Misconduct of a sexual nature that includes, but is not limited to, unwelcome sexual remarks, indecent comments/jokes, offensive sexual banter, unwanted sexual advances, or unwelcome physical touching” as an offense. According to the Table, for a first offense, front-line employees should receive a disciplinary action ranging from a written reprimand to removal; supervisors should receive a minimum five-day suspension.

Of the 14 agencies including sexual misconduct offenses in their Tables of Penalties, only four separate supervisor misconduct from that of other employees.⁹ The May DOJ OIG report on DOJ’s Civil Division found evidence of supervisory and high performing employees receiving *less* discipline than would otherwise be appropriate. In one instance, a deciding official commented a suspension “would unnecessarily deprive the government of [the senior official’s] litigating services.”¹⁰

5. Many agency Tables are significantly outdated

Agencies’ Tables of Penalties are in some cases decades old, and in need of an update.

- Three agencies—the Environmental Protection Agency (EPA), the Department of Commerce, and the Department of the Army—have not updated their Tables of Penalties since the 1980s.
- Two agencies—the Department of Agriculture (USDA) and the Department of the Air Force—have not updated their Tables of Penalties since the 1990s.
- The oldest Table of Penalties is from the Department of Commerce, and was last updated in 1980.

⁷ The agencies are the Departments of Agriculture, Energy, Health and Human Services (including the National Institutes of Health), Homeland Security (via the United States Secret Service), and Justice (via the ATF).

⁸ These agencies are the Departments of Homeland Security (via the United States Secret Service) and Justice (via the ATF, the DEA, the Federal Bureau of Investigation, and the USMS).

⁹ These agencies are the USAID (for civilian employees covered under Title 5, United States Code) and the Departments of the Interior, of Defense (via the Department of the Army and the National Guard Bureau), and of Transportation (via the FAA and the Maritime Administration).

¹⁰ DOJ OIG 2017 Report, *supra* note 5, at 17.

Sexual Misconduct in the Federal Government

The Committee has examined cases of sexual misconduct at several federal agencies. The fact patterns of such cases are often very different, which presents a challenge for agency officials responsible for defining and punishing the offending staff. Sexual misconduct must be recognized and addressed in a consistent, fair, and forceful manner. The overwhelming majority of federal employees refrain from sexual misconduct, but even a single instance can create a toxic work environment.

Case Study #1: Attorney General Warns Employees Not to Use Prostitutes

Just days before a Committee hearing on sexual misconduct at the DOJ and its components, former Attorney General Eric Holder issued a memo to DOJ personnel stating employees are “prohibited from soliciting, procuring, or accepting commercial sex.”¹¹ This memo came on the heels of a 138-page report by the DOJ OIG chronicling sexual misconduct by DOJ personnel, including the solicitation of prostitutes.

April 2015 Memo to DOJ Personnel from Attorney General Eric Holder

For these reasons, I want to reiterate to all Department personnel, including attorneys and law enforcement officers, that they are prohibited from soliciting, procuring, or accepting commercial sex. This rule applies at all times during an individual’s employment, including while off duty or on personal leave, and applies regardless of whether the activity is legal or tolerated in a particular jurisdiction, foreign or domestic.

On April 14, 2015, the Committee held a hearing to examine the DOJ’s handling of sexual harassment and misconduct allegations.¹² Members considered the DOJ OIG report that found systemic issues with the handling of sexual misconduct allegations, including allegations not being reported to headquarters (such as supervisors failing to report repeat offenders), and disciplinary actions that did not adequately address the solicitation of prostitutes in jurisdictions where the conduct is legal or tolerated.¹³

Among other things, the report described disturbing allegations at DEA.¹⁴ In 2009 and 2010, DEA’s Office of Professional Responsibility (OPR) learned that over a period of years,

¹¹ Memorandum from Att’y Gen. Eric Holder to Dep’t of Justice Personnel (Apr. 10, 2015).

¹² DOJ OIG: *Handling of Sexual Harassment and Misconduct Allegations: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (2015) [hereinafter “DOJ OIG: Handling of Sexual Harassment and Misconduct Allegations”].

¹³ OFFICE OF INSPECTOR GEN., DEP’T OF JUSTICE, *THE HANDLING OF SEXUAL HARASSMENT AND MISCONDUCT ALLEGATIONS BY THE DEPARTMENT’S LAW ENFORCEMENT COMPONENTS* ii (2015), available at <http://www.justice.gov/oig/reports/2015/e1504.pdf> [hereinafter “DOJ OIG 2015 Report”].

¹⁴ *Id.* at 27.

DEA agents participated in “sex parties” in Colombia.¹⁵ These parties involved strippers and prostitutes who were paid for by drug cartels and arranged by a Colombian police commander who was attempting to curry favor with the agents.¹⁶ Ten DEA agents allegedly participated in the parties, which occurred in a U.S. government-rented apartment between 2001 and 2005.¹⁷ During the parties, agents employed local police to guard them and watch over their firearms and property.¹⁸

DEA OPR did not refer this case to DEA’s Office of Security Programs (OSP) to identify potential security risks for DEA and to assess the subjects’ continued eligibility for a security clearances.¹⁹ The assigned inspector identified and discussed the potential security risks with OPR headquarters management. The inspector explained to OPR management the fact that most of the “sex parties” occurred in government-leased quarters where agents’ laptops, BlackBerry devices, and other government-issued equipment were present created potential security risks for the DEA and for the agents who participated in the “parties”, potentially exposing them to extortion, blackmail, or coercion.²⁰ OPR management officials interviewed by the OIG said they did not refer the allegations to OSP because OPR management did not believe the special agents’ conduct rose to the level of a security risk requiring a referral.²¹

In another incident in Colombia, a case involved loud parties held from 2005 to 2008 in DEA-leased housing where the resident special agent had received complaint letters from building management.²² Moreover, the hosting agent and another agent reportedly patronized prostitutes and visited brothels. Additionally, one of the agents allegedly assaulted a prostitute in a dispute over payment. The building management also informed local DEA management about these parties. The OIG report cites the OPR’s report and says prostitutes were at these parties. According to the OIG report, several of his local supervisors admonished the agent, but local managers determined not to refer the matter to OPR.²³

Ultimately, the agents involved received only minor suspensions (ranging from two to ten days). The Department did not try to fire them. In the words of the OIG, DOJ minimized cases of sexual misconduct, or swept them under the rug, by treating them as “local management issues.”²⁴

Ultimately, the OIG found the DOJ and its components did not have adequate Tables of Penalties in place to address instances of sexual misconduct. For example, the OIG found the

¹⁵ Kevin Johnson, *Review: Cartel Funded Sex Parties of DEA Agents*, USA TODAY (Mar. 26, 2015), available at <http://www.usatoday.com/story/news/nation/2015/03/26/dea-brothel-prostitutes/70482964>.

¹⁶ Briefing from DEA to Comm. Staff (Apr. 7, 2015).

¹⁷ *Id.*

¹⁸ DOJ OIG 2015 Report, *supra* note 13, at 27.

¹⁹ *Id.* at 28.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 12.

²³ *Id.* at 12–13.

²⁴ *Id.* at iii.

DOJ and its components did not have Tables of Penalties in place that were sufficient to address the solicitation of prostitutes abroad, or sufficient notification systems in place to inform employees that such conduct is prohibited and would result in possible penalties.²⁵

The OIG also found the ATF Table did not contain specific offense categories to address sexual misconduct and sexual harassment. Additionally, it reported the Tables of Penalties for the DEA and the USMS did not provide adequate explanations of the types of behaviors warranting possible disciplinary action. The OIG wrote, “In some instances, these components applied general offense categories to misconduct more appropriately addressed by the specific sexual misconduct and sexual harassment offense categories in their offense tables.”²⁶ Both agencies have since revised and updated their Tables.

Case Study #2: Watching Pornography on the Job

In February 2017, a Washington, D.C.-based NBC affiliate used records received from Freedom of Information Act requests to reveal almost 100 cases of federal employees viewing pornography while on government computers across the federal government.²⁷ These cases occurred over five years at the Departments of Commerce, Justice, Transportation, and the EPA.²⁸

For example, in September 2013, the EPA’s Office of Environmental Information informed the EPA OIG an EPA employee had been viewing pornography at work.²⁹ When OIG personnel went to investigate this employee at his office, OIG staff found him viewing pornography.³⁰ The employee subsequently told the OIG he viewed pornography for an average of two to six hours a day while at work.³¹ The OIG also found the employee had about 20,000 adult pornographic images on his government-issued

Over a five-year period, 100 cases were identified of federal employees viewing pornography while on government computers.

Source: NBC 4 I-Team

²⁵ *Id.* at iv.

²⁶ *Id.* at iii.

²⁷ Scott MacFarlane, Rick Yarborough & Jeff Piper, *Dozens of Federal Employees Watched Abundance of Porn on the Job in Recent Years*, NBC-4 I TEAM (Feb. 27, 2017), available at <http://www.nbcwashington.com/investigations/Dozens-of-Federal-Employees-Watched-Abundance-of-Porn-on-the-Job-in-Recent-Years-414743293.html>.

²⁸ *Id.*

²⁹ *Is EPA Leadership Obstructing Its Own Inspector General?: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. 22 (2014) (written statement of Allan Williams, Deputy Assistant Inspector General for Investigations, Office of Inspector General, Environmental Protection Agency).

³⁰ *Id.*

³¹ *EPA Mismanagement: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. 16 (2015) (written statement of Patrick Sullivan, Assistant Inspector General for Investigations, Office of Inspector General, Environmental Protection Agency) [*hereinafter* “EPA Mismanagement”].

laptop.³² The OIG referred the case to the U.S. Attorney's Office, which declined to prosecute in March 2015.³³

The EPA identified additional cases of employees viewing pornography at work. The EPA OIG investigated one EPA employee in the Office of the Administrator for watching pornography on his government-issued computer during the workday after an individual reportedly saw him viewing pornography at work in April 2014.³⁴ The subsequent investigation found the employee viewed pornography at work for one to four hours a day and that 30–40 percent of the electronic media on his computer was pornography.³⁵ EPA referred the case to the U.S. Attorney's Office, which declined to prosecute in March 2015.³⁶

In 2010, the Securities and Exchange Commission (SEC) OIG provided Senator Charles Grassley a summary of investigations from the prior five years on employees using work computers to view pornography at the SEC.³⁷ The summary detailed 33 cases, some involving senior employees.³⁸ Despite this, the SEC does not have a Table of Penalties that explicitly addresses sexual misconduct.

The cases illustrated here are only a portion of the total instances of federal employees watching pornography at work, but each demonstrates that current prohibitions on unauthorized use of federal computers are not sufficient to prevent some employees from accessing pornographic materials while on duty. Agencies should penalize watching sexually explicit materials using government resources in their Tables of Penalties. In addition to myriad reasons this conduct is unacceptable, these instances raise cybersecurity concerns for agency computer systems.

Case Study #3: Environmental Protection Agency

Despite concerning and consistent sexual misconduct identified at the EPA since at least 2011, the agency has failed to update its Table of Penalties since 1985. Given the series of serious offenses identified at the EPA, the lack of action to strengthen internal guidance for disciplining sexual misconduct is stunning.

For example, the Committee obtained information related to the former head of the EPA Office of Homeland Security, Peter Jutro. Jutro allegedly harassed over a dozen women. He ultimately retired.

³² *Id.* at 17.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 18.

³⁷ *Report: SEC Staffers Watched Porn as Economy Crashed*, CNN (Apr. 23, 2010), available at <http://www.cnn.com/2010/POLITICS/04/23/sec.porn>.

³⁸ *Id.*

In April 2015, the Committee held a hearing into alleged acts of sexual harassment by Jutro.³⁹ During the course of its investigation, the EPA OIG corroborated the sexual harassment claims of a 21-year-old female intern from the Smithsonian Institution and uncovered other allegations of Jutro's sexual harassment of female EPA employees throughout his 31-year career at the agency.⁴⁰ Senior officials at EPA may have known about Jutro's misconduct prior to the incident involving the intern but did not take the necessary steps to corroborate that information when promoting him to the Acting Associate Administrator position in February 2014.⁴¹ The Deputy Chief of Staff in the Office of the Administrator failed to contact Jutro's direct supervisor, who knew of the allegations against Jutro and verbally counseled him on multiple occasions for inappropriate behavior.⁴² When the EPA OIG attempted to interview Jutro a second time, Jutro retired, blocking the OIG from pursuing its investigation further.⁴³

In another case occurring in March 2011, an EPA Region 5 research intern with the Great Lakes National Program Office (GLNPO) filed a report of sexual harassment against her research supervisor, Paul Bertram, Ph.D.⁴⁴ She alleged Bertram inappropriately hugged her, rubbed her back, grabbed her, rubbed her hands, touched her knees, kissed her, made suggestive comments, and engaged in unsolicited physical and verbal contact.⁴⁵ This harassment took place on numerous occasions spanning the three years she worked for the EPA.⁴⁶

With the help of Deborah Lamberty, an American Federation of Government Employees Local 704 steward at the time, the intern filed a report with Paul Horvatin, Branch Chief of the GLNPO.⁴⁷ Horvatin told the intern he was unsure how to proceed because nothing like this had happened before, although multiple accounts state he knew of previous harassment on the part of Bertram.⁴⁸ That same day the intern met with Horvatin and members of the Human Resources Department, who stated this was a first offense against Bertram and they would not consider any past harassment situations as relevant.⁴⁹ EPA told the intern Bertram would be notified any contact with her would be seen as retaliation.⁵⁰

³⁹ EPA Mismanagement, *supra* note 31, at 19.

⁴⁰ *Id.* at 20.

⁴¹ *Id.* at 21.

⁴² *Id.* at 56 (oral statement of John Reeder, Deputy Chief of Staff, Environmental Protection Agency).

⁴³ *Id.* at 22.

⁴⁴ The intern was a GLNPO Research Fellow with Region 5 of the Environmental Protection Agency. Region 5 is the largest region of the EPA and encompasses Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin, and 35 tribal areas.

⁴⁵ Telephone interview by Comm. staff with Intern (name withheld), Environmental Protection Agency, Region 5 (July 28, 2015) [*hereinafter* "Telephone Interview with Intern"].

⁴⁶ *Id.*

⁴⁷ *EPA Mismanagement, Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 123 (2015) (written statement of Deborah Lamberty, Public Affairs Specialist, Environmental Protection Agency) [*hereinafter* "EPA Mismanagement, Part II"].

⁴⁸ Summary of Sexual Harassment Allegations Against Paul Bertram and the Great Lakes National Program Office, Office of Civil Rights, Region 5, Env'tl. Prot. Agency, Mar. 17, 2011.

⁴⁹ Telephone Interview with Intern, *supra* note 45.

⁵⁰ *Id.*

Sympathetic coworkers contacted Human Capital Officer Ross Tuttle, who stated no word of this situation reached him and he would take over the situation from that point forward.⁵¹ Initially, Bertram faced minimal consequences, *the extent of which ended with the relocation of his cubicle, thereby spreading the harm associated with this individual to other parts of the agency.*⁵²

In addition to Tuttle's investigation, Equal Opportunity Specialist Officer Ronald Harris and then-Director of the Office of Civil Rights Carolyn Bohlen became aware of the sexual harassment allegations and began investigating. Working in conjunction with Tuttle, Harris and Bohlen discovered Bertram had been continuously engaging in the sexual harassment of female interns and coworkers in the office over the last seven years. They discovered Horvatin received several previous notifications about Bertram's harassing behavior and yet failed to take any action.⁵³

Harris and Bohlen created a report on the extent of the sexual harassment, contacted EPA headquarters, and presented their findings to Bharat Mathur, Deputy Regional Administrator of Region 5.⁵⁴ Mathur responded in an aggressive manner and began to yell and curse at the two employees.⁵⁵ According to Bohlen, Mathur was furious the investigators contacted headquarters about the sexual harassment case, even though it was fully within the investigators' authority to do so and expected of them according to protocol.⁵⁶ EPA did not take any additional administrative action against Bertram or Horvatin. Ultimately, the EPA permitted Bertram to retire in late 2011 under a stipulation he would not work for the EPA in the future.

Case Study #4: National Park Service

The National Park Service (NPS) has a history of sexual harassment and misconduct within its ranks. The Committee held two full committee hearings in 2016 examining incidents and the response by the DOI to findings of sexual harassment.

On June 14, 2016, the Committee held a hearing on oversight of the NPS, in particular on DOI OIG findings of systemic sexual harassment in Grand Canyon National Park's (GCRA) River District.⁵⁷ The investigation followed complaints from 13 current and former NPS employees from the River District. They wrote to then-Secretary of the Interior Sally Jewell and submitted declarations describing incidents taking place over a period of 15 years, which they believed showed evidence of "discrimination, retaliation, and a sexually hostile work

⁵¹ *Id.*

⁵² EPA Mismanagement, Part II, *supra* note 47, at 90 (statement of Rep. Jason Chaffetz, Chairman).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Complaint of Carolyn D. Bohlen v. Gina McCarthy, Adm'r, Envtl. Prot. Agency, Chicago District Office, Equal Opportunity Commission, Case No. 2012-0003-R05, Aug. 5, 2013.

⁵⁷ *Oversight of the National Park Service: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2016).

environment.”⁵⁸ The OIG investigation corroborated the claims of the complainants and found evidence of a long-term pattern of sexual harassment and a hostile work environment in the GRCA River District. It also identified an additional 22 other individuals who reported experiencing or witnessing sexual harassment and hostile work environments while working in the River District.⁵⁹

Although DOI currently has a Table of Penalties that includes suggested discipline for sexual misconduct, the discipline given out for that misconduct has been inconsistent. In 2016 at GCRA, the DOI OIG found that NPS re-hired an employee who resigned after facing discipline for repeated sexual misconduct.⁶⁰ In contrast, NPS did not renew employment of the complainants who sent the letter to Ms. Jewell after other employees filed complaints of sexual harassment against them. The complainants believed this was retaliation for filing previous sexual harassment claims against River District boatmen and the DOI OIG found that some NPS officials believed the investigations into those complaints were insufficient and incomplete.⁶¹

The Committee held a second hearing on sexual harassment and misconduct at NPS on September 22, 2016, which featured testimony from whistleblowers detailing how NPS leadership failed to hold employees and supervisors that have committed acts accountable. The hearing addressed how misconduct often goes unaddressed, thus perpetuating an environment where inappropriate and unlawful behavior goes unchecked.

During the hearing, witness Brian Healy from Grand Canyon National Park discussed the history of sexual harassment and misconduct at the park. He testified about a culture in which the behavior of perpetrators denigrated an already untenable work environment. Witness Kelly Martin from Yosemite National Park testified about the sexual harassment she both experienced firsthand and witnessed over the course of her career at NPS, which often went unaddressed by NPS officials. In one case, NPS allowed an employee who committed acts of voyeurism to switch parks in lieu of discipline; after the switch, he continued to engage in the same behavior at the new park, and NPS subsequently moved him again.⁶² He was able to retire after a full career at NPS. DOI’s Table of Penalties provides escalating penalties for misconduct of a sexual nature that recommends removal for a third offense.⁶³ However, cases such as this show how NPS has a history of applying discipline inconsistently or not at all.

Case Study #5: Forest Service

⁵⁸ OFFICE OF INSPECTOR GEN., DEP’T OF THE INTERIOR, CASE NO. OI-PI-14-0695-I, REPORT OF INVESTIGATION MISCONDUCT IN THE GRAND CANYON RIVER DISTRICT (2015).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Examining Misconduct and Mismanagement at the National Park Service: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (2016).

⁶³ DEP’T OF THE INTERIOR, DEPARTMENTAL MANUAL PART 370, CHAPTER 752, DISCIPLINE AND ADVERSE ACTIONS: APPENDIX B – TABLE OF OFFENSES AND PENALTIES 24 (2006) [*hereinafter* “Dep’t of the Interior”].

In recent years, media reports and whistleblowers have described a hostile and discriminatory work environment for women at the U.S. Forest Service, as well as a history of sexual harassment and misconduct that often went unaddressed.⁶⁴

The Committee held a hearing on December 1, 2016, to examine sexual harassment and gender discrimination at the USDA and the Forest Service.⁶⁵ The hearing examined patterns of sexual harassment and misconduct at the USDA, as well as the fear many employees had of retaliation for reporting these types of cases. It also addressed the agency's response to harassment incidents and its efforts to improve.⁶⁶

At the hearing, two women testified publicly about the harassment they personally experienced while on the job at the Forest Service and how the agency's subsequent investigation and discipline failed to address those responsible. Witness Denice Rice testified about her experiences dealing with sexual harassment on the job when her division chief was allowed to retire before facing discipline, despite his history of misconduct.⁶⁷ Further, the Forest Service re-hired this individual as a contractor and invited him to give a motivational speech to employees.⁶⁸ In addition, witness Lesa Donnelly testified about her and others' experiences with sexual misconduct at the Forest Service. Her testimony spoke about those who were too afraid to report harassment because they feared retaliation from the perpetrators.⁶⁹ These experiences indicate discipline at USDA has not been applied in a uniform manner.

Since this hearing, the Forest Service and USDA have adopted new investigative procedures for cases of misconduct and harassment.⁷⁰

Case Study #6: Department of Education

At a February 2, 2016 Committee hearing, the Department of Education Inspector General testified the Education OIG had conducted 10 investigations involving senior Department officials since 2010.⁷¹

⁶⁴ Krista Langlois, *Trial by fire*, HIGH COUNTRY NEWS (May 30, 2016), available at <http://www.hcn.org/issues/48.9/trial-by-fire>.

⁶⁵ *Examining Sexual Harassment and Gender Discrimination at the U.S. Department of Agriculture: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2016).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* (statement of Denice Rice, Prevention Technician, Eldorado National Forest, U.S. Forest Service).

⁶⁹ *Id.* (statement of Lesa Donnelly, Vice President, USDA Coalition of Minority Employees).

⁷⁰ *Id.* (statement of Lenise Lago, Deputy Chief, Business Operation, U.S. Forest Service).

⁷¹ *Department of Education – Investigation of the CIO: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2016) (written statement of Sandra D. Bruce, Deputy Inspector General, Office of the Inspector General, Department of Education). “Senior Department official” is defined as employees at the GS-15 level or higher.

In one of these instances, a GS-15 employee allegedly sexually harassed three contract employees and lied to the supervisor when questioned about the allegation.⁷² The OIG investigation substantiated the allegation that the GS-15 employee made inappropriate sexual comments to contract employees under his operational control.

The OIG referred its findings to the DOJ and the Department of Education; however, the DOJ declined the matter for prosecution and the Department of Education suspended the GS-15 employee for a mere 12 days. As detailed in the following section, the Department of Education's discipline was not as severe in this matter as its Table of Penalties seems to provide for. Additionally, imprecise wording in its Table may allow for insufficient discipline of sexual misconduct at the agency.

Conclusion

Federal employees deserve a safe work environment, free of predatory behavior and sexual harassment. A well-defined Table of Penalties can help provide that atmosphere. As detailed in the next section, a Table of Penalties is a tool to help ensure good working conditions that allow employees to work on behalf of the American people.

⁷² Office of Inspector Gen., Dep't. of Educ. Case Number 11-000486, Closed on 1/25/2012 [*hereinafter* "Dep't of Educ. Office of Inspector General"].

Tables of Penalties at Federal Agencies

Agencies Have Discretion for Disciplining Employees Who Commit Sexual Misconduct

Agencies have the authority to discipline or remove employees who engage in misconduct under rules established by Congress in the Civil Service Reform Act of 1978.⁷³ This includes misconduct while in an off-duty status, so long as a nexus exists between the off-duty misconduct and promoting the efficiency of the service, the standard necessary to remove a competitive service federal employee.⁷⁴ Accordingly, some agencies have issued a Table of Penalties to provide guidance for appropriate discipline for employee misconduct.⁷⁵ Specifically, a Table of Penalties provides a list of various misconduct that warrants discipline by the agency. Next to each offense listed in the Table of Penalties is suggested disciplinary actions for committing that offense. Suggested discipline can range from reprimand to removal from the civil service.⁷⁶

A Table of Penalties does not specify mandatory discipline to bind agency officials; rather, the Table is a companion to the *Douglas* Factors.⁷⁷ The *Douglas* Factors are twelve criteria that supervisors use to determine an appropriate penalty for misconduct.⁷⁸ Two criteria relevant to the Table of Penalties are: 1) discipline consistency with penalties for other agency employees; and 2) consistency with formal Tables of Penalties (while allowing for some deviation in order to address other *Douglas* Factors).⁷⁹

Agencies not only have discretion in the depth and breadth of guidance issued to determine penalties for misconduct but also in establishing a definition of the misconduct action itself. Specific to the issue of sexual misconduct, some agencies opt for a detailed description of related infractions. For example, the FAA's guidance describes some sexual misconduct categories as:

- (1) On or off-duty conduct that results in a felony or misdemeanor conviction or guilty pleas for child abuse, sexual molestation, incest, statutory rape, or any other such crime or offense involving a minor victim, including those intended for coverage under 42 USC 5119(a) and/or 42 USC 13041, for which a penalty of imprisonment can be imposed, or when other reasonable causes exist to determine that the employee was involved in these activities and there is a nexus between the behavior and the employee's position...;

⁷³ 5 U.S.C. §7501 - §7514, §7541 - §7543 (1978).

⁷⁴ JARED P. COLE, CONG. RESEARCH SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 10 (2017) [*hereinafter* "Cole"].

⁷⁵ A Table of Penalties is sometimes referred to as a "Table of Actions" or a "Table of Offenses and Penalties".

⁷⁶ *See e.g.* DEP'T OF AGRIC., DEPARTMENT PERSONNEL MANUAL CHAPTER 751: APPENDIX A – USDA GUIDE FOR DISCIPLINARY PENALTIES (1994).

⁷⁷ *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981) [*hereinafter* "Douglas v. Veterans Administration"].

⁷⁸ *Id.*

⁷⁹ *Id.*

- (2) Sexual teasing, jokes, remarks, questions that are inappropriate to the workplace;
- (3) Suggestive looks or gestures of a sexual nature;
- (4) Sending letters, cards, e-mail, etc., or making telephone calls of an inappropriate or sexual nature;
- (5) Pressure for dates;
- (6) Posting, distributing, showing, or viewing sexually explicit materials in the workplace;
- (7) Inappropriate physical touching of a non-erogenous area of another person (may include unsolicited hug, kiss, neck, or shoulder rub, etc.);
- (8) Inappropriate physical touching of an erogenous area of another person (to include breast, buttocks, or pelvic area);
- (9) Promise of, or suggested benefit in exchange for sexual favors; and
- (10) Threat or act of reprisal for refusal to provide sexual favors.⁸⁰

Conversely, the definition of sexual misconduct may be general and left to interpretation. For example, the Department of Education defines sexual misconduct solely as “inappropriate behavior of a sexual nature.”⁸¹ The Department of Veterans Affairs defines sexual misconduct solely as “sexual harassment.”⁸²

A study by the U.S. Government Accountability Office (GAO) details problems arising without standard categorizations of what constitutes sexual misconduct. The report found federal data-collecting efforts on sexual violence in the U.S. at-large suffer from the use of different terminologies and categorizations. GAO writes:

These data collection efforts use 23 different terms to describe sexual violence. Data collection efforts also differ in how they categorize particular acts of sexual violence. For example, the same act of sexual violence could be categorized by one data collection effort as “rape,” whereas it could be categorized by other efforts as “assault-sexual” or “nonconsensual sexual acts,” among other terms.⁸³

The danger that arises from this non-standardized approach is stark. According to GAO, “Differences in data collection efforts may hinder the understanding of the occurrences of sexual violence.”⁸⁴ Thus without a standardized characterization of sexual misconduct agencies may not even know when sexual misconduct has occurred. This hurts the federal government’s ability to deter and appropriately discipline sexual misconduct by federal employees.

⁸⁰ FED. AVIATION ADMIN., HUMAN RESOURCES OPERATING INSTRUCTIONS: TABLE OF PENALTIES 5, 10-12 (2015).

⁸¹ DEP’T OF EDUC., PERSONNEL MANUAL INSTRUCTION, DISCIPLINE AND ADVERSE ACTIONS: APPENDIX A – TABLE OF PENALTIES FOR STATED OFFENSES 3 (2003) [*hereinafter* “Dep’t of Educ.”].

⁸² DEP’T OF VETERANS AFFAIRS, VA DIRECTIVE 5021, EMPLOYEE/MANAGEMENT RELATIONS: APPENDIX A – TABLE OF PENALTIES FOR TITLE 5 AND TITLE 38 EMPLOYEES II-A-3a (2013).

⁸³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-546, SEXUAL VIOLENCE DATA: ACTIONS NEEDED TO IMPROVE CLARITY AND ADDRESS DIFFERENCES ACROSS FEDERAL DATA COLLECTION EFFORTS Cover Page (2016).

⁸⁴ *Id.*

A Table of Penalties Can Provide a Framework for Consistent Application of Disciplinary Penalties Throughout the Agency

Some agencies have established a Table of Penalties due to their broad discretion to define misconduct issues, prescribe penalties, and issue appropriate guidance. Since consistency to an applicable Table of Penalties is a component of the *Douglas* Factors, the agency's use of a Table can help overcome scrutiny by the Merit Systems Protection Board if an employee decides to appeal an agency action for misconduct.⁸⁵

In 1983 the Office of Personnel Management (OPM), through the Federal Personnel Manual, identified many benefits of a Table of Penalties, including:

- Providing a framework to assure consistent application of disciplinary penalties throughout the agency;
- Transmitting a clear message that misconduct has adverse consequences;
- Informing employees of their agency's standards and expectations regarding conduct;
- Aiding supervisors in overcoming the natural human reluctance to confront the unpleasant circumstances inherent in disciplining employees by providing a standard minimum corrective action, and thus helping supervisors confront unwanted behavior before it grows into a major conduct problem;
- Ensuring all employees, including supervisors and management, are held to the same standard as other employees; and
- Assisting internal auditors and OPM personnel management evaluators in reviewing the effectiveness of the agency's disciplinary program.⁸⁶

The Federal Personnel Manual, having grown to over 10,000 pages, was discontinued in 1993 because it was seen as too unwieldy and bureaucratic.⁸⁷ Over the next year OPM converted sections of the Manual into specific federal regulations.⁸⁸ However, the portion of the Manual regarding Tables of Penalties was left uncodified in regulation, allowing agencies to implement their own directives.

⁸⁵ Cole, *supra* note 74, at 13.

⁸⁶ This passage comes from the Federal Personnel Manual issued in 1983. In a memorandum titled "Suggested Table of Actions for Correcting Employee Misconduct," OPM, in addition to providing a sample Table for agencies to consult when creating their own, laid out the benefits of a Table and urged each agency to publish one as a guide for correcting employee misconduct. U.S. OFFICE OF PERSONNEL MGMT., FPM LETTER 751-3, SUGGESTED TABLE OF ACTIONS FOR CORRECTING EMPLOYEE MISCONDUCT (1983), *available at* https://archive.org/stream/federalperso36unit/federalperso36unit_djvu.txt.

⁸⁷ Stephen Barr, *U.S. Personnel Manual May End Up In Trash*, WASH. POST (Dec. 20, 1993), *available at* https://www.washingtonpost.com/archive/politics/1993/12/20/us-personnel-manual-may-end-up-in-trash/e3330026-0b5e-42d2-bbac-dec3b0f245f7/?utm_term=.65907529eb5a.

⁸⁸ NAT'L P'SHIP FOR REINVENTING GOV'T, HELPING FEDERAL WORKERS CREATE A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1994), *available at* <http://govinfo.library.unt.edu/npr/library/rtable/vol1no1.html>.

Many Agencies Do Not Have a Table of Penalties That Address Sexual Misconduct

Twenty-six agencies provided information to the Committee about the status of a Table of Penalties used by the agency to address issues of misconduct. This information is below:

Chart 1: Agency Table of Penalties Status*

Agency	Table of Penalties Status	Year Last Updated
U.S. Agency for International Development	Has two agency-wide Tables, one for employees primarily covered under Title 5, United States Code, and one for foreign service officers, that both address forms of sexual misconduct.	2009 – Title 5 2016 – Foreign service
Consumer Financial Protection Bureau	No Table provided.	N/A
Department of Agriculture	Has agency-wide Table that addresses forms of sexual misconduct.	1994
Department of Commerce	Has agency-wide Table that does not address specific forms of sexual misconduct.	1980**
Department of Defense	No agency-wide Table, but Tables in use at Air Force, Army, Navy, and National Guard address forms of sexual misconduct.	1981 – Army 1994 – Air Force 2003 – Navy 2010 – Ntl. Guard
Department of Education	Has agency-wide Table that addresses forms of sexual misconduct.	2003
Department of Energy	Has agency-wide Table that addresses forms of sexual misconduct.	2015
Department of Health and Human Services	Has agency-wide Table and Table specific to the National Institutes of Health (NIH), which both address forms of sexual misconduct.	2009 – HHS 2014 – NIH
Department of Homeland Security	Has agency-wide Table, but the Table does not supersede Tables found at various components. Components with a Table that addresses sexual misconduct are the Coast Guard, Customs and Border Protection (CBP), Federal Law Enforcement Training Center (FLETC), Immigration and Customs Enforcement (ICE), National Protection and Programs Directorate (NPPD), Transportation Security Administration (TSA), U.S. Citizenship and Immigration Services (USCIS), and U.S. Secret Service (USSS). The Federal Emergency Management Agency (FEMA) does not have a component-specific Table.	N/A – FEMA 2004 – CBP 2006 – ICE 2009 – FLETC 2010 – USCIS 2011 – NPPD 2014 – TSA 2014 – USSS 2015 – Coast Guard
Department of Housing and Urban Development	Has agency-wide Table that does not address specific forms of sexual misconduct.	2000**
Department of the Interior	Has agency-wide Table that addresses forms of sexual misconduct.	2006
Department of Justice	No agency-wide Table, but Tables in use at the ATF, DEA, Federal Bureau of Investigation (FBI), and USMS address forms of sexual misconduct. The Bureau of Prisons (BOP) has a Table that does not address specific forms of sexual misconduct.	2012 – FBI 2013 – BOP** 2015 – ATF 2015 – DEA 2016 – USMS
Department of Labor	No Table provided.	N/A
Department of State	Has agency-wide Table for foreign service officers that addresses forms of sexual misconduct. There	N/A – Title 5

	is no comparable Table provided for employees primarily covered by Title 5, United States Code.	2016 – Foreign service
Department of Transportation	No agency-wide Table, but Tables in use at the FAA, Federal Highway Administration (FHWA), Federal Transit Administration (FTA), Maritime Administration (MARAD), Pipeline and Hazardous Materials Safety Administration (PHSMA), and Saint Lawrence Seaway Development Corporation (SLSDC) address forms of sexual misconduct. The Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), and National Highway Traffic Safety Administration (NHTSA) did not provide Tables.	N/A – FMCSA N/A – FRA N/A – NHTSA 2006 – MARAD 2007 – FTA 2008 – SLSDC 2013 – PHMSA 2015 – FAA 2016 – FHWA
Department of the Treasury	No Table provided.	N/A
Department of Veterans Affairs	Has agency-wide Table that addresses forms of sexual misconduct.	2014
Environmental Protection Agency	Has agency-wide Table that addresses forms of sexual misconduct.	1985
General Services Administration	Has agency-wide Table that does not address specific forms of sexual misconduct.	2013**
National Aeronautics and Space Administration	Has agency-wide Table that does not address specific forms of sexual misconduct.	2008**
Nuclear Regulatory Commission	No Table provided.	N/A
National Science Foundation	No Table provided.	N/A
Office of Personnel Management	No Table provided.	N/A
Securities and Exchange Commission	Has agency-wide Table that does not address specific forms of sexual misconduct.	2014**
Small Business Administration	Has agency-wide Table that addresses forms of sexual misconduct.	2001
Social Security Administration	Has agency-wide Table that does not address specific forms of sexual misconduct.	2009**

* Almost all data comes from agency documents submitted pursuant to former Chairman Jason Chaffetz’s March 18, 2016 letter to 26 federal agencies requesting all policies, procedures, directives, and/or guidance for taking corrective, disciplinary, and adverse actions against civilian employees (including Senior Executives) in response to misconduct or poor performance, including Tables of Penalties.⁸⁹

** Denotes an agency with a Table that does not specifically address forms of sexual misconduct. Many of these agencies have catch-all penalties for items not otherwise listed. For example, agencies generally have some provision providing for discipline if an employee engages in criminal, dishonest, infamous, or notoriously disgraceful conduct. While an agency may not have sexual misconduct-specific penalties, the catch-all guidance provides flexibility in some cases. In addition, every Table had recommended disciplinary actions for discrimination based on, among other things, sex. Forms of sexual harassment can be penalized under this category pursuant to 29 CFR § 1604.11, but it is unclear the extent to which sexual misconduct related issues are included under sex discrimination. Finally, while only components at the DOJ explicitly mention penalties for retaliation in connection with a sexual harassment claim, every agency with a Table has a penalty for general retaliation arising from the filing of any complaint.

⁸⁹ See, e.g., Letter from Rep. Jason Chaffetz, Chairman, and Rep. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight and Government Reform, to Ernest Moniz, Sec’y, Dep’t of Energy (Mar. 18, 2016). The Department of Homeland Security created and implemented an agency-wide Table after its official submission to the Committee. That information was incorporated into this report.

As the preceding chart indicates, eight agencies do not have a Table of Penalties covering some part of their components and career employees. This includes OPM, which told the Committee it has a number of procedures it follows for addressing misconduct contained in collective bargaining agreements and its human resource manual.⁹⁰ However, OPM states it does not “possess, nor rely upon [a Table of Penalties] in addressing misconduct.”⁹¹

Without a Table of Penalties, agencies run the risk of inconsistent, arbitrary, and inadequate responses to findings of misconduct. A May 2017 DOJ OIG report found serious issues in DOJ’s response to allegations of sexual misconduct at the Civil Division, a component of the agency not covered by a Table of Penalties. The OIG report stated:

[T]he Civil Division does not have its own internal policies governing the handling of sexual harassment and misconduct allegations, opting instead to follow broad federal law and regulations and Department policies. While we found that the Civil Division’s handling of allegations conformed to most applicable regulations and policies, it was not consistent among cases or with the Department’s zero tolerance policy...

Finally, while our sample of 11 cases is relatively small, we found reason for concern that the penalties and discipline imposed for misconduct varied and were less severe for the Civil Division’s high-performing employees. The Civil Division does not have penalty tables or guidelines for handling substantiated cases of sexual harassment and misconduct, which we believe has affected the Civil Division’s ability to impose consistent penalties and enforce the Department’s zero tolerance policy. We determined that in general the penalties for substantiated allegations, including ones we found to be serious, were nothing more than written reprimands, title changes, and reassignment for cases in which the subjects of the allegations were supervisory/senior attorneys. Moreover, we found that Civil Division employees received performance awards while they were the subject of an ongoing sexual harassment or misconduct investigation or while disciplinary actions were in effect.⁹²

The OIG issued four recommendations, including 1) the development of consistent penalty guidelines for substantiated allegations of sexual harassment and misconduct, and 2) policy guidance regarding performance awards given to, and public recognition of, an employee who is under investigation or has recently been disciplined for misconduct, including sexual harassment.⁹³

⁹⁰ Letter from Jason Levine, Dir. of Cong., Legis., and Intergovernmental Affairs, U.S. Office of Personnel Mgmt., to Rep. Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov’t Reform (June 17, 2016).

⁹¹ *Id.*

⁹² DOJ OIG 2017 Report, *supra* note 5, at ii.

⁹³ *Id.* at 23.

Seven Agencies Have a Table of Penalties Which Does Not Specifically Address Sexual Misconduct; 14 Agencies Have a Table of Penalties that Address Sexual Misconduct, but the Tables May Be Inadequate

General characteristics of Tables of Penalties in use at the seven agencies that do not specifically mention sexual misconduct and the fourteen agencies that do mention it include:

- Common offenses, such as drug and alcohol offenses, appeared in each agency’s Table of Penalties.⁹⁴
- Tables addressed misconduct that may be of particular concern to an individual agency. For example, the U.S. Bureau of Prisons of DOJ lists a penalty for the “Physical abuse of an inmate” that is not relevant for all agencies.⁹⁵
- Generally, agencies have chosen to list only those disciplinary actions that become a matter of record in the employee’s official personnel folder.⁹⁶ A few agencies, such as the Federal Bureau of Investigation (FBI), listed actions like oral reprimands.⁹⁷ Such reprimands largely go undocumented.
- Most agencies surveyed provide progressively tougher discipline for second and sometimes third misconduct violations.⁹⁸ The FBI, TSA, and U.S. Secret Service provide a mitigated penalty range, a normal penalty range, and an aggravated penalty range.⁹⁹
- All agencies with a Table of Penalties apply it to competitive service employees who operate under removal procedures in Subchapter II of Chapter 75 of Title 5, United States Code.¹⁰⁰ Agencies may apply it to career Senior Executive Service (SES) employees, but since agencies may not suspend a career SES employee for less than 15 days under Subchapter V of Chapter 75 of Title 5, recommended guidance in penalties must be adjusted accordingly.¹⁰¹ For employees not subject to Chapter 75 disciplinary procedures, such as Schedule C political appointees and non-career SES employees, agencies have the discretion of whether or not to refer to their Table of Penalties for

⁹⁴ See e.g. U.S. GEN. SERVICES ADMIN., CPO 9751.1 MAINTAINING DISCIPLINE: APPENDIX 1 – PENALTY GUIDES 13 (2013) [*hereinafter* “U.S. General Services Admin.”].

⁹⁵ U.S. BUREAU OF PRISONS, 3420.11 STANDARDS OF EMPLOYEE CONDUCT: ATTACHMENT A – STANDARD SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES 27 (2013).

⁹⁶ See e.g. U.S. General Services Admin., *supra* note 93.

⁹⁷ U.S. FED. BUREAU OF INV., OFFENSE CODES AND PENALTY GUIDELINES GOVERNING FBI’S INTERNAL DISCIPLINARY PROCESS 6 (2012) [*hereinafter* “U.S. Federal Bureau of Investigation”].

⁹⁸ See e.g. U.S. General Services Admin., *supra* note 93.

⁹⁹ See e.g. U.S. Federal Bureau of Investigation, *supra* note 96.

¹⁰⁰ See e.g. DEP’T OF THE INTERIOR, DEPARTMENTAL MANUAL PART 370, CHAPTER 752, DISCIPLINE AND ADVERSE ACTIONS 1-2 (2006).

¹⁰¹ See e.g. Federal Bureau of Investigation, *supra* note 96.

guidance on discipline.¹⁰² These types of employees serve at the pleasure of the employing authority (i.e. the President or Cabinet secretary) and so can be disciplined and removed for misconduct without regard to formal removal procedures.¹⁰³

Whereas having a Table of Penalties helps position the seven agencies to be more consistent in penalties for misconduct than those agencies that do not have a Table, the failure to address sexual misconduct in the Table leaves the agency vulnerable when these situations arise.

Fourteen agencies had a Table of Penalties to apply either agency-wide or at certain components specifically addressing sexual misconduct. In concept, these agencies are able to provide consistent penalties for similar misconduct events and provide a strong defense on appeal. However, the agency Tables of Penalties may be inadequate for guiding agency decision-makers for any of the following four reasons: 1) penalties are too broad; 2) the definition of “sexual misconduct” is not consistent, 3) supervisors are not always held to a higher standard, and 4) Tables are not current.

1. Penalties Are Too Broad.

Agencies’ Tables of Penalties identified excessively broad penalties and a listed range of recommended penalties for one infraction of all available disciplinary options. Several Tables of Penalties contain the recommended action of a written reprimand to removal for one infraction’s first offense.¹⁰⁴ For example, the Navy’s Table of Penalties lists “sexual harassment” as a form of misconduct fit for disciplinary action. However, the suggested penalty for the first offense is reprimand to removal.¹⁰⁵ The Department of Energy lists “inappropriate teasing, remarks, jokes, gestures, communications, and touching including, but not limited to, those of a sexual nature” as a form of misconduct fit for disciplinary action, but the suggested penalty for the first offense is also reprimand to removal.¹⁰⁶ No guidance is provided to officials charged with determining discipline allowing for confusion in the disciplinary process.

Testimony before the Committee highlights the vulnerabilities associated with broad recommended penalties. A former TSA Acting Administrator blamed broad recommended penalties in a Table for his lack of disciplinary action in a misconduct case at TSA, testifying:

But the flaw in it was it was still very broad. You could have a manager at an airport who, you know, did some violation, and you’d look at your table of penalties and it would say written reprimand, which is -- or verbal reprimand -- or verbal counseling to 2 week suspension. That’s a huge

¹⁰² Telephone Briefing by Janel Fitzhugh, Acting Dir. of Cong., Legis., and Intergovernmental Affairs, U.S. Office of Personnel Mgmt., with Comm. staff (Mar. 29, 2017).

¹⁰³ DEP’T OF HOMELAND SEC., GUIDE FOR EXITING POLITICAL APPOINTEES 2 (2008), *available at* <https://www.dhs.gov/sites/default/files/publications/priv-09-346-set-2.pdf>.

¹⁰⁴ The list of agencies which had this form of broad suggested penalty range are the USAID; the Departments of Defense (Navy), Education, Energy, Homeland Security (USCIS, FLETC, ICE), Interior, Justice (DEA, USMS, ATF), Transportation (FHWA, FTA, SLSDC), Veterans Affairs; and the EPA.

¹⁰⁵ DEP’T OF THE NAVY, CIVILIAN HUMAN RESOURCES MANUAL, SUBCHAPTER 752, DISCIPLINARY ACTIONS: APPENDIX B – SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES 30 (2003).

¹⁰⁶ DEP’T OF ENERGY, DOE O 333.1X DOE GUIDE, TABLE OF OFFENSES AND PENALTIES: APPENDIX B 4 (2015).

range. I mean, that really goes from what is essentially not a disciplinary action to a potentially career ending disciplinary action.

And so you take that a step further and, let's say, you decide what you're going to do at the local level with that manager, now, that goes through an appeals process or it goes through a validation process. And, again, the looseness in the range, you suddenly get people from headquarters questioning why you gave them that punishment, that was too weak, that was too heavy.

And it was -- you know, this was sort of the constant -- one of those personnel constant roiling distractions in terms of managing people in the field, and I found that it was not all that different at headquarters.¹⁰⁷

2. *Sexual Misconduct Is Not Consistently Defined.*

One factor in the use of a broad range of suggested penalties for an offense is the level of detail in the definition of the offense. Agencies with less clarity and more vagueness regarding what constitutes sexual misconduct tend to broaden the range of suggested penalties. The ATF, for instance, penalizes “employee engagement in sexual misconduct while on- or off-duty, including sexual harassment, unwanted sexual advances, sexual battery, and sexual assault.”¹⁰⁸ Almost all cases of sexual misconduct at the agency would fall under this heading.

The Department of Education uses one catch-all category for sexual misconduct within its Table of Penalties. The categorization reads, “Inappropriate behavior of a sexual nature.” The recommended discipline for a violation on the first offense is reprimand to removal, a 14-day suspension to removal on the second offense, and removal on the third offense.¹⁰⁹ The Department of Education makes no distinction between types of sexual misconduct violations by its employees. This lack of distinction provides little guidance to officials who must then decide the appropriate discipline.

Imprecise Tables of Penalties are problematic for federal employees. For example, a senior official harassed three separate victims at the Department of Education.¹¹⁰ If the Department had a precise Table of Penalties, it may have deterred the bad behavior. The gravity of the employee's actions might have been addressed sooner if Department officials could see those types of actions explicitly penalized. The USAID's Table for civilian employees, on the other hand, includes a penalty for “unwelcome sexual teasing, jokes, remarks, questions, looks, or gestures by a supervisor.”¹¹¹

Agencies with clear Tables of Penalties which include multiple types of offenses for sexual misconduct can narrow the range of suggested penalties, since the number of cases

¹⁰⁷ Hatfield Interview, *supra* note 6.

¹⁰⁸ ATF, ATF GUIDE FOR PENALTIES AND OFFENSES 9 (2015) [*hereinafter* ATF].

¹⁰⁹ Dep't of Educ., *supra* note 81.

¹¹⁰ Dep't of Educ. Office of Inspector General, *supra* note 72.

¹¹¹ U.S. AGENCY FOR INT'L DEVELOPMENT, TABLE OF OFFENSES AND PENALTIES 6 (2009).

considered under each type of offense is smaller and more alike. The FAA and the USAID generally provided the most comprehensive Tables. The FAA in particular has a specific penalty range, based on the type of misconduct.

When considered together, the broad range of penalties and vagueness surrounding what constitutes sexual misconduct poses a danger to the fair application of discipline within agencies. Considering the *Douglas* Factors may mitigate the danger. However, two of the *Douglas* Factors are “consistency of the penalty with those imposed upon other employees for the same or similar offenses” and “consistency of the penalty with any applicable agency table of penalties.”¹¹² While adherence to the *Douglas* Factors can help mitigate some of the risks of inconsistent discipline application across an agency, they become less effective without an in-depth Table of Penalties to inform deciding officials on whether a contemplated penalty is consistent with past precedent for similar misconduct. In the case agencies that have no Tables of Penalties and rely solely on the *Douglas* Factors during discipline adjudication the risk of inconsistency greatly increases since two of the key factors are absent.

The differences in defining sexual misconduct not only affect internal agency deliberations on appropriate discipline but also hurt attempts to understand the prevalence of sexual misconduct across the federal government. Agencies with comprehensive Tables of Penalties provide more detail on the types of issues arising within the agency based on the detailed sexual misconduct offense used to discipline the employee. Agencies with a single disciplinary category for sexual misconduct, such as the Department of Education and ATF, do not provide such information through their Tables since misconduct as varied as watching pornography while at work, pressuring another employee for sexual favors, or sexual assault fall under a single heading.

Such discrepancies lead to differing disciplinary recommendations for sexual misconduct among federal agencies, and even among components of cabinet departments where no department-wide Table of Penalties exists. DOJ provides a good example. Committee staff reviewed the Tables of Penalties for various DOJ components and discovered the ATF, the DEA, and the USMS all recommend different penalties for soliciting or engaging in prostitution. Only the DEA now requires immediate removal for an employee’s first offense.¹¹³ The ATF allows for a three-day suspension, while the USMS allows for a five-day suspension.¹¹⁴ These variances could be explained by OPM’s 1983 decision to allow agencies to create their own Tables of Penalties and DOJ’s subsequent decision to delegate discipline authority to its individual components.

3. *Supervisors Are Not Always Held to A Higher Standard.*

¹¹² *Douglas v. Veterans Administration*, *supra* note 77.

¹¹³ U.S. DRUG ENFORCEMENT AGENCY, TR-15-02 PERSONNEL MANUAL, DEA GUIDE FOR DISCIPLINARY OFFENSES AND PENALTIES: APPENDIX 2735A 10 (2015).

¹¹⁴ ATF, *supra* note 107, at 8; and U.S. MARSHALS SERV., USMS GUIDANCE, TABLE OF DISCIPLINARY OFFENSES AND PENALTIES 4 (2016).

The third potential inadequacy of agency Tables is not all agencies hold supervisors to a higher standard. For example, the DOI Table of Penalties lists “[m]isconduct of a sexual nature that includes, but is not limited to, unwelcome sexual remarks, indecent comments/jokes, offensive sexual banter, unwanted sexual advances, or unwelcome physical touching” as an offense.¹¹⁵ According to the Table, for a first offense front-line employees should receive a disciplinary action ranging from a written reprimand to removal. Supervisors should receive a minimum of a five-day suspension.¹¹⁶ The Department of the Army, the National Guard Bureau, the DOI, the FAA, the Maritime Administration, and USAID-civilian employees were the only agencies or components to specify discipline for supervisors.

A cautionary tale can be found in the May 2017 DOJ OIG report on sexual misconduct at the DOJ Civil Division. While the Civil Division does not have a Table of Penalties, the same principle of inconsistent disciplinary standards for supervisory employees applies. The report stated:

A GS-15 attorney who occupied a senior, supervisory position in the division was alleged to have made sexually charged and offensive comments and to have groped the breasts and buttocks of two female trial attorneys without their consent during an office happy hour. This senior official had previously received a written reprimand and diminution of title for sending emails of a sexual nature to coworkers. Immediately after the second misconduct incident, the senior official began a scheduled detail to another Department component, apparently with no notice to the component of the misconduct allegations. After branch supervisors and OMP/HR investigated the allegations, the senior official’s formal discipline included a written reprimand for inappropriate touching, a further change in title, and relief from supervisory duties. **He received no suspension or loss in pay or grade, despite the prior misconduct and the seriousness of the second incident, with the deciding official commenting that a suspension “would unnecessarily deprive the government of [the senior official’s] litigating services.”** The Civil Division transferred the senior attorney to a different office within the Civil Division upon his return from the detail.¹¹⁷

4. *Some Tables of Penalties Are Not Current.*

Some agencies have not updated their Tables of Penalties in decades. The oldest Table was at the Department of Commerce (1980), followed by the Department of the Army (1981) and the EPA (1985). When Tables fall out of date and out of use, agency decision-makers are at risk of being accused of arbitrary and selective behavior when they do reference the Tables.

¹¹⁵ Dep’t of the Interior, *supra* note 63, at 24, 28.

¹¹⁶ *Id.*

¹¹⁷ DOJ OIG 2017 Report, *supra* note 5, at 17 (emphasis added).

For example, according to testimony before the Committee, the EPA reprimanded a senior employee at least three times before the employee sexually harassed a female intern.¹¹⁸ Whereas the EPA's Table of Penalties recommended a 30-day suspension to removal for an employee's third offense of sexual harassment,¹¹⁹ EPA instead just moved the cubicle further from the intern.¹²⁰ In a July 2015 hearing, then-EPA Administrator Gina McCarthy testified EPA management and employees were in the process of creating the agency's very first procedure for addressing allegations of workplace harassment.¹²¹ Although this is a good first step, it demonstrates that there is a need for current, clear, and consistently applied guidance for dealing with misconduct not only at EPA but also throughout the government.

Work Remains in Addressing Employee Sexual Misconduct

The federal government should be encouraging the best and brightest to enter public service, and providing federal employees with a protected working environment is paramount to doing so. The current system of Tables of Penalties across the federal government is inadequate to help provide this environment.

¹¹⁸ EPA Mismanagement, Part II, *supra* note 47 at 59 (statement of Ronald Harris, Equal Opportunity Specialist Officer, Environmental Protection Agency).

¹¹⁹ ENVIRONMENTAL PROTECTION AGENCY, EPA ORDER 3110.6B, ADVERSE ACTIONS: APPENDIX – GUIDANCE ON CORRECTIVE DISCIPLINE A-13 (1985).

¹²⁰ EPA Mismanagement, Part II, *supra* note 47, at 58 (statement of Ronald Harris, Equal Opportunity Specialist Officer, Environmental Protection Agency).

¹²¹ *Id.* at 83 (statement of Gina McCarthy, Administrator, Environmental Protection Agency).

RECOMMENDATIONS

For Agencies

1. Agencies without a Table of Penalties should create one.
2. Agencies should update their Tables of Penalties regularly to ensure up-to-date information is considered.
3. The 2015 DOJ OIG report found a lack of coordination between the internal affairs offices that receive sexual misconduct allegations and the offices responsible for ensuring that employees meet the requirements to hold security clearances.¹²² Agencies should implement policies to ensure timely information sharing between those offices so that those holding security clearances do not become a risk to national security.
4. The 2017 DOJ OIG report found the Department's Civil Division:

[M]aintain[ed] paper records of the case files of the allegations it handles, which [the OIG] found to be insufficient... Additionally, the Civil Division lack[ed] consistent criteria for reporting sexual harassment and misconduct allegations to [human resources], including no minimum standard for preserving information to effectively maintain records and track allegations over time... [Furthermore, the OIG] found that the Civil Division lacks a consistent standard for reporting such cases to the OIG as well as to Civil Division leadership.¹²³

All agencies should ensure cases of sexual misconduct are properly documented and tracked using updated computer technology, set minimum standards for documentation that is necessary for allegations of sexual misconduct, and review existing policies to ensure proper compliance with the Inspector General Act of 1978 and federal regulations.

5. Agencies should ensure supervisors and employees are aware of applicable agency Tables to increase adherence to recommended discipline.

For the Office of Personnel Management

6. OPM, in coordination with the Chief Human Capital Officers (CHCO) Council, should begin to provide guidance on all aspects of Tables of Penalties to agencies in order to begin the process of standardizing them government-wide.
7. OPM, in coordination with the CHCO Council, should create a nature of offenses list for sexual misconduct that is detailed and comprehensive to the extent practical. The nature of offenses list should break up offenses and refrain from packing too many punishable actions in one offense.

¹²² DOJ OIG 2015 Report, *supra* note 12, at 28.

¹²³ DOJ OIG 2017 Report, *supra* note 5, at i.

8. OPM, in coordination with the CHCO Council, should create a range of recommended penalties that is concise and narrow for cases of sexual misconduct. OPM should distribute the recommended penalties broadly.

DRAFT

APPENDIX A – Federal Agencies Queried

The following is a list of Executive Branch departments and agencies from which the Committee requested Tables of Penalties:

1. U.S. Agency for International Development
2. Consumer Financial Protection Bureau
3. Department of Agriculture
4. Department of Commerce
5. Department of Defense
6. Department of Education
7. Department of Energy
8. Department of Health and Human Services
9. Department of Homeland Security
10. Department of Housing and Urban Development
11. Department of the Interior
12. Department of Justice
13. Department of Labor
14. Department of State
15. Department of Transportation
16. Department of the Treasury
17. Department of Veterans Affairs
18. Environmental Protection Agency
19. General Services Administration
20. National Aeronautics and Space Administration
21. National Science Foundation
22. Nuclear Regulatory Commission
23. Office of Personnel Management
24. Securities and Exchange Commission
25. Small Business Administration
26. Social Security Administration

APPENDIX B – Federal Agencies and Their Components Sorted by Table Status

In a March 18, 2016 letter to Executive Branch agencies, the Committee initiated a review into the decision-making processes currently in use at federal agencies to evaluate and discipline poor performance and misconduct among the federal civil service, including the Senior Executive Service. As part of this broader effort, Committee majority staff reviewed guidelines established by agencies that inform discipline for employees who engage in sexual misconduct.

The 26 agency responses can be classified into three categories: those with sexual misconduct-related penalties in their Table of Penalties, those without sexual misconduct-related penalties in their Table, and those without a Table of Penalties.

Departments and agencies can be classified in multiple categories due to having (or not having) Tables of Penalties for different components within the department or agency. Therefore, the number of departments and agencies below exceeds 26. For example, the Department of Justice uses Tables of Penalties at five of its components. However, the Bureau of Prisons Table of Penalties does not list penalties for sexual misconduct-related issues. Therefore, the Department of Justice belongs in both the first and second category.

All Tables of Penalties are applicable agency-wide unless otherwise noted.

Category 1—Agencies and Components with a Table

While each of the below agencies mentioned sexual misconduct within their Tables of Penalties, what constitutes sexual misconduct, the level of specification, and recommended penalties varies widely. The agencies in the first category are:

1. U.S. Agency for International Development (differing Tables of Penalties for foreign service employees and other civilian employees primarily covered by Title 5, United States Code)
 - a. Title 5 Civilian Employees
 - b. Foreign Service Employees
2. Department of Agriculture
3. Department of Defense (no agency-wide Table of Penalties, but Tables of Penalties at the component level)
 - a. Department of the Air Force
 - b. Department of the Army
 - c. Department of the Navy
 - d. National Guard Bureau
4. Department of Education
5. Department of Energy
6. Department of Health and Human Services
 - a. National Institutes of Health (in addition to the HHS agency-wide Table of Penalties)

7. Department of Homeland Security¹²⁴
 - a. Coast Guard
 - b. Customs and Border Protection
 - c. Federal Law Enforcement Training Center
 - d. Immigration and Customs Enforcement
 - e. National Protection and Programs Directorate
 - f. Transportation Security Administration
 - g. U.S. Citizenship and Immigration Services
 - h. U.S. Secret Service
8. Department of the Interior
9. Department of Justice (no agency-wide Table of Penalties, but Tables of Penalties at the component level)
 - a. Bureau of Alcohol, Tobacco, Firearms, and Explosives
 - b. Drug Enforcement Administration
 - c. Federal Bureau of Investigation
 - d. U.S. Marshals Service
10. Department of State (Table is used for foreign service employees only)
 - a. Foreign Service Employees
11. Department of Transportation (no agency-wide Table of Penalties, but Tables of Penalties at the component level)
 - a. Federal Aviation Administration
 - b. Federal Highway Administration
 - c. Federal Transit Administration
 - d. Maritime Administration
 - e. Pipeline and Hazardous Materials Safety Administration
 - f. Saint Lawrence Seaway Development Corporation
12. Department of Veterans Affairs
13. Environmental Protection Agency
14. Small Business Administration

Category 2—Agencies and Components with a Table, but Which Do Not Address Specific Forms of Sexual Misconduct

As previously noted, many of the agencies that do not address specific forms of sexual misconduct such as sexual harassment and viewing pornography while on a federal computer have catchall penalties for items not otherwise listed. For example, agencies generally have some provision providing for discipline if an employee engages in criminal, dishonest, infamous, or notoriously disgraceful conduct. While an agency may not have sexual misconduct specific penalties, it is reasonable to assume that the catchall guidance could be applicable for an employee that commits sexual misconduct.

¹²⁴ The Department of Homeland Security has an agency-wide Table. However, almost all of its components have created their own Table. In such case, the component Table supersedes the agency-wide Table. The Federal Emergency Management Agency is the only major component that does not have its own component Table. It is, therefore, covered under the agency-wide Table.

In addition, every Table of Penalties had recommended disciplinary actions for discrimination based on, among other things, sex. Forms of sexual harassment can be penalized under this category pursuant to the definition of sex discrimination found at 29 CFR § 1604.11, but it is unclear the extent to which sexual misconduct related issues are included under sex discrimination. Finally, while only the Department of Justice explicitly mentions penalties for retaliation in connection with a sexual harassment claim, every agency with a Table of Penalties has a penalty for general retaliation arising from the filing of any complaint. The agencies in the second category are:

1. Department of Commerce
2. Department of Housing and Urban Development
3. Department of Justice (no agency-wide Table of Penalties, but Tables of Penalties at the component level)
 - a. Bureau of Prisons
4. General Services Administration
5. National Aeronautics and Space Administration
6. Securities and Exchange Commission
7. Social Security Administration

Category 3 – Agencies and Components with No Table

These agencies do not have a Table to provide guidance for misconduct of any nature.

1. Consumer Financial Protection Bureau
2. Department of Labor
3. Department of State (non-foreign service employees only)
 - a. Title 5 Civilian Employees
4. Department of Transportation (no agency-wide Table of Penalties, but Tables of Penalties at the component level)
 - a. Federal Motor Carrier Safety Administration
 - b. Federal Railroad Administration
 - c. National Highway Traffic Safety Administration
5. Department of the Treasury
6. Nuclear Regulatory Commission
7. National Science Foundation
8. Office of Personnel Management