

Charge Writing for ER Practitioners:

An Essential Building Block for Defensible Actions

Objectives

- Understanding the ER practitioners role at the proposal stage
- Providing an overview of the approach to writing good charges
- Understanding common agency charges and the penalty selection process

ER Practitioners Role

- To draft the proposal, the ER practitioner must know or research relevant regulations and case law to be successful
- The first step to advising management on the proper charge and penalty is knowing the facts of the case before writing the charge
- The charge writer must know the elements that must be proven for a particular charge

Proposal Notice Composition

A proposal should include:

- The authority under which the action is proposed
- Charge Label
- Specification (narrative)
- Nexus (between the misconduct and the efficiency of the service)
- Reasonableness of the proposed penalty, including discussion of aggravating factors
- Specific notification of reply rights



Authority for Disciplinary Action

Most Federal agencies are authorized under 5 U.S.C. chapter 75 to suspend, demote, or remove employees based upon misconduct, unacceptable performance, or a combination of both, for “such cause as will promote the efficiency of the service.”

Three Parts to a Charge

1. Charge label

Names the misconduct

2. Specifications

Who, What, When, Where

3. Legal elements

Evidence, Support for Charge

CHARGE LABEL

Charge Label provides framework to identify nature of the misconduct.

Examples of Charge Labels

- Insubordination
- Falsification
- AWOL
- Failure to Follow Policy (Agency, Division, Office)

SPECIFICATION

Charge: AWOL (Absent without leave)

Your tour of duty is Monday through Friday, from 8:00 a.m. until 4:30 p.m.

- **Examples of Specifications:**

Specification: On July 2, 2010, you reported for duty at 10:00 a.m., and you did not have leave or authorization for your two hour absence.

or

Specification: On July 3, 2010, you were absent from duty without leave or authorization for your absence.

SPECIFICATION

Charge: Failure to Follow Leave Requesting Procedures

Office leave procedures require employees to request and schedule leave in advance by contacting their immediate supervisor.

- **Specification:** On July 2, 2010, you failed to request leave for your absence from duty.

or

- **Specification:** On July 2, 2010, you failed to contact your supervisor to request leave for your absence that day, as required by this office's leave requesting procedures.

CHOOSING THE CHARGE

- Charge what you can prove.
- Facts must support the charge.
- Evidence must support the facts alleged.

FACTS AND EVIDENCE

- Facts
- What facts are before you?
 - Was there a governing regulation or rule?
 - Did the conduct violate the regulation or rule?
 - Was an order given?
 - Did the conduct defy the order?

FACTS AND EVIDENCE

- Evidence can be real (physical), documentary or testimonial
 - Is there damaged or altered property or document?
 - Are there documents that reflect the misconduct?
 - Did employee admit to the misconduct?
- Does the evidence support the facts alleged?

Framing the Charge

1. Brevity
2. Clarity
3. Avoid Duplicity/Multiplicity



II. COMMON AGENCY CHARGES

Leave-Related Offenses

AWOL

- Elements:
 - Employee was required to be at duty station
 - Employee was absent; and
 - Absence was not authorized or leave request was properly denied

Practice Notes

- Employee may defend against AWOL charge by presenting medical documentation to the Board that was not previously presented to the agency.
- Employee may establish entitlement to FMLA leave during period of AWOL

Failure to Follow Leave Requesting Procedures

- Agency has procedure for requesting leave
- Employee knew procedures
- Employee failed to follow them



*Agency may remove employee for failure to follow leave requesting procedures even if it subsequently approves leave in question.
Wilkinson v. Air Force, 68 MSPR 4 (1995)*

Medical Inability/Unavailability

1. Employee physically or mentally unable to perform job.
2. Fitness for Duty Exam – To order this Exam (medical or psychiatric), employee must be subject to a medical standard.
3. Employee's medical condition is always relevant, even after the fact.

Excessive Absence

- Absent for compelling reasons beyond his or her control so that approval or disapproval was immaterial because the employee could not be on the job
- The absence(s) continued beyond a reasonable time and the employee was warned in writing that adverse action might be initiated unless the employee became available for duty on a regular, full-time or part-time basis; and
- The position needed to be filled by an employee available for duty on a regular, full-time or part-time basis. *Cook v. Army*, 18 MSPR 610 (1984).

Misuse or Unauthorized Use of Government Property

- Government Property is any form of real or personal property in which the gov't has an interest,
 - including office supplies
 - telephone and other telecommunications
 - equipment and services
 - government mails, printing facilities, and records
 - government vehicles. 5 C.F.R. § 2635.704



Misuse or Unauthorized Use of Government Property

- Misuse: Government property used for purposes other than those for which the property is made available to the public or other than those authorized by law, rule, or regulation. 5 C.F.R. § 2635.704
- Fact that employee did, or intended to, pay for the use of government equipment does not negate misuse. *Wenzel v. Dept. of Interior*, 33 MSPR 344 (1987).

Official Government Vehicle (OGV)

- Common categories of misconduct involving an OGV

1. Unauthorized Use
2. Improper Use



Unauthorized Use

- 31 U.S.C. § 1349(b) – imposes a minimum 30 day penalty for unauthorized use of an OGV.
- Conduct must be either willful or taken with reckless disregard.
- *Kimm v. Treasury*, 61 F.3d 888, 891-92 (Fed. Cir. 1995). An employee violates §1349(b) if he “willfully” uses an OGV for non-official purposes.
- The employee’s actions are willful if he had actual knowledge that the use would be characterized as “non-official,” or if he acted in reckless disregard as to whether or not the use was for non-official purposes.

Improper Use

- Consider charging minor traffic offenses in a third separate category for employees who, while authorized to operate an OGV, do so in a negligent, reckless, or irresponsible manner.
- For example, employee receives speeding or parking tickets, or has an accident.



Intent versus Non-Intent Based Charges

■ Charges Requiring Proof of Intent

- Falsification

Knowingly supplying wrong information with the intent to deceive or mislead.

- Insubordination

Willful and intentional refusal to obey lawful order of supervisor or superior.

- Theft

Taking with the intent to deprive the owner permanently of possession and use of his or her property. King v. Nazelrod, 43 F.3d 663, 665-67 (Fed. Cir. 1994).

Types of Charges

- Charges Without Intent Element
 - Failure to Follow Instructions
 - Poor Judgment
 - Conduct Unbecoming
 - Inappropriate Conduct

Alternative Charges

- Submission of False, Misleading, or Inaccurate Statement (encompasses every possibility, i.e., intent, negligence, carelessness)
- Lack of Candor: Focuses on an employee's duty to be forthcoming in responses with regard to all facts and information in their possession.
Frederick v. Justice, 52 MSPR 126, 133 (1991); Fagnoli v. Dept. of Commerce, 123 MSPR 330 (2016).

Failure to Follow Instructions

- Elements:

A. Proper instructions were given to employee;
and

B. Employee failed to follow them.

- Intent: is not an element of this charge.
Hamilton v. USPS, 71 MSPR 547 (1996).

Improper Associations

- Personal, unprofessional, or off-duty relationships with the “wrong” people (felons, aliens, informants, inmates, etc.).
- Such relationships or contacts innately undermine the credibility of agency or employee or both and bring public criticism.



Conduct Unbecoming

- Abusive to the Public
- Detention by local law enforcement with or without arrest
- Disrespectful conduct such as rudeness, insolence, or contempt

“Loaded” Words

- Words implying intentional misconduct may require an agency to prove that element of intent.
- Board may examine the “structure and language of the proposal notice” to determine how charges are to be construed.
- Avoid these words – “knowingly,” “willfully,” “maliciously,” “intentionally,” or words referring to threats or intimidation.

III. PENALTY CONSIDERATIONS

The Douglas Factors

The Merit Systems Protection Board in its landmark decision, *Douglas vs. Veterans Administration*, 5 *M.S.P.R.* 280 (1981), established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. The following relevant factors must be considered in determining the severity of the discipline:

The Douglas Factors

(1) The **nature and seriousness of the offense**, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee's past disciplinary record;

The Douglas Factors

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;

Douglas Factors (cont.)

- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

Douglas Factors (cont.)

- (10) the potential for the employee's rehabilitation;
- (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

An Overview

- Mandatory to consider
- Not all factors are applicable in every case
- Deciding official can mitigate penalty if appropriate
- Best practice is to formally articulate consideration of relevant factors



Seriousness of the Offense

- In determining the appropriate penalty, a supervisor should consider primarily the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities.

Past Discipline

- Has the employee done this particular conduct before?
- Has the agency cited the prior discipline in the proposal notice?
- If prior discipline is going to be used as an aggravating factor, it must be cited in the proposed notice.



The Employee's Position

- Factors considered are the employee's job level and the type of employment which may include a supervisory or fiduciary role, contacts with the public, and prominence of the position.



Erosion of Supervisory Confidence

- Specific evidence/testimony as to why an employee can no longer be trusted is critical.
- It is critical for the agency to articulate a relationship between the misconduct and the employee's position and responsibilities.

Other Factors

- Employee's work record
 1. Employee's past evaluations
 2. Employee's awards and accomplishments
- Consistency of penalty with those for other employees
- Potential for rehabilitation



Penalty Discussion

In determining the penalty to propose for these offenses, I have considered a number of factors, including your employment history. You have almost 13 years of federal service and you have received satisfactory performance ratings.

Based on your lengthy service and good performance I choose to mitigate the penalty.

OR

However... these factors do not outweigh (or mitigate) the gravity of your misconduct in this instance.

Penalty Discussion

- As noted above, you were suspended for four days last year for AWOL and failure to follow leave procedures and policies. You also have been subject to leave control restrictions twice, once in 2012 and again in 2014. In addition, I have considered the fact that the misconduct was repeated over an extended period of time, including after formal discipline.

Penalty Discussion

We must be able to rely on you to be at work on a regular basis. Reliable, regular attendance at work is an expectation that applies to any employee and is a basic requirement of the position you hold in this office. As you are the Legal Administrative Specialist assigned to me, your presence is particularly important. When your absence from the office is not scheduled in advance, it creates a particular hardship...

Alternative Sanctions

- The deciding official must be prepared to support a penalty and communicate why it is the appropriate penalty.
- The discussion should include why lesser penalties, though considered, were not chosen.

QUESTIONS

