

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

- Chapter 75 actions are:
 - Based on any reason that can be shown to “promote the efficiency of the service”
 - Typically used in misconduct cases but can also be used for performance or medical inability to perform cases

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

- Misconduct is a failure to comply with a, regulation, rule, requirement, order or instruction.
- Charge Label provides framework to identify nature of the misconduct.

CHARGE LABEL

- Examples of Charge Labels

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

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

AWOL: Unauthorized absence without leave.

SPECIFICATION

- Specifications provide details of employees actions that support the charge.
- Charge: Insubordination

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

Specification:

On July 2, 2010, when I ordered you to turn in your report, you said, “No, I will not,” and you left the room.

SPECIFICATION

Charge: AWOL

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

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.

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.

NUTS AND BOLTS APPROACH TO CHARGING



- A. Three Parts of a Charge
- B. Brief Overview of Evidence
- C. Framing of a Charge
- D. MSPB's Three Prong Test for Determining the Charge
- E. Types of Charges

Charging

- **Three Parts to a Charge**

1. Charge label
2. Specifications
3. Legal elements

- **Brief Overview of Evidence**

1. Real or Direct
2. Scientific
3. Circumstantial
4. Documentary

Charging *cont.*

- **Framing of the Charge**

1. Brevity
2. Clarity
3. Avoid Duplicity/Multiplicity
4. Match the Caption with the Charge

Charging *cont.*

- **MSPB's Three Prong Test for Determining the Charge**
 1. What the agency *thinks* it is charging.
 2. What the employee *thinks* they are charged with.
 3. What the AJ *determines* the employee was charged with.



II. TYPICAL/COMMON AGENCY CHARGES

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

Violation of Regulation

- **Unauthorized use of Government Property**

5 CFR 2635.704(a) Standard. An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.

- **Misuse of Official Time**

5 CFR § 2635.705 (a) Use of an employee's own time. Unless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties.

- **Unauthorized Use of GOV**

An employee violates 31 U.S.C. §1349(b) if he “willfully” uses a GOV for nonofficial purposes. The employee’s actions are willful if he had actual knowledge that the use would be characterized as “nonofficial,” or if he acted in reckless disregard as to whether or not the use was for nonofficial purposes.

FACTS AND EVIDENCE

- Evidence:
Types of Evidence:

- Direct Evidence
- Circumstantial Evidence
- Corroborating Evidence

FACTS AND EVIDENCE

- Evidence can be documentary or testimonial
 - Did someone witness the misconduct?
 - Are there documents that reflect the misconduct?
 - Did employee admit to the misconduct?
- Does the evidence support the facts alleged?

Intentional vs. Non-Intentional Charges

1. Terms of art require additional elements of proof
 - ex.** Theft – agency must show an 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 Requiring Proof of Intent

- Falsification/Making False Statement

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
 - Lack of Candor
 - Poor Judgment
 - Conduct Unbecoming
 - Inappropriate Conduct

Charge Label without Intent

- Example:
an agency may charge employee with failure to follow instructions, rather than with insubordination, an offense requiring proof of intent.

Conduct Unbecoming

Doing Dumb Things

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

Conduct Unbecoming

- Example – proof of intent not required

Cross v. Army, 89 M.S.P.B. 62 (2001). In a case where the manager changed a rating on another employee's performance evaluation and denied doing it, the Board held that the agency was entitled to use a general charge of conduct unbecoming a federal employee, rather than the charge of falsification.

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.

Sexual Harassment

- Elements of Sexual Harassment

29 C.F.R. § 1604.11

1. Submission to such conduct is either implicitly or explicitly a term or condition of employment.
2. Submission or rejection is used as the basis for employment decisions.
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance.

Sexual Harassment *cont.*

- Title VII is violated when the workplace is permeated with unwelcome discriminatory intimidation, and insult
 - That is pervasive or severe enough to alter conditions of employment and create abusive working environment
- Simple teasing, offhand comments, and isolated incidents will not amount to discriminatory changes in conditions of employment

Sexual Harassment cont.

To meet its burden of proof on a charge of sexual harassment, an agency must establish that the allegedly harassing conduct

- occurred
- was unwelcome
- of a sexual nature
- interfered with work performance
- and created a hostile work environment.

Practice Preference

- Don't use Title VII terms of art like Sexual Harassment or Hostile Work Environment in your charges.
- Limit specific charging to cases where conduct is clear and unquestioned & all elements can be established
- Better to charge general count of misconduct than be required to prove elements of the "crime."

Agency Actions to take before Disciplinary Action

- Mandatory that prompt, effective action must be taken by management once problem is known or we risk liability
- Exs. of management action: issuance of “no contact” order, relocating work areas, reassigning duties
- In worst cases, admin leave or temp duty outside the office may be appropriate

Charging Alternatives

- Poor Judgment
- Conduct Prejudicial to the Agency
- Failure to Follow Instructions or Policy

Failure to Follow Instructions

- Elements:
 - A. Proper instructions were given to employee
 - B. Employee failed to follow them
- Intent: is not an element of this charge.
Hamilton v. USPS, 71 MSPR 547 (1996).

Related Offenses

- Insubordination: willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed. *Phillips v. GSA*, 878 F.2d 370 (Fed. Cir. 1989).
- Insubordination/Failure to follow: when agency uses combined charge based on a single incident of misconduct, agency generally will be required to prove element of intent. *Hamilton v. USPS*, 71 MSPR 547, 556 n.5 (1996).

Poor Judgment

1. Example of charge

- Board sustained a charge of poor judgment where the appellant, a criminal investigator with the DEA, asked a personal friend to house an informant for a week.
- It affirmed the admin judge's findings that the request, even if subsequently withdrawn, was inappropriate and could have jeopardized the informant's confidentiality. *Rackers v. DOJ*, 79 MSPR 262, 282 (1998).

Poor Judgment cont.

2. Alternative charge labels that also implicate poor judgment

- “Failure to follow post orders”
- “Unprofessional Conduct”

False Statements

1. False statements during an administrative investigation.
 - *Lachance v. Erickson*, 118 S. Ct. 753 (1998). Supreme Court determines that, under the due process clause, a Fed. Employee's right to be heard in a misconduct investigation does not include a right to make false statements concerning the misconduct.

False Statements *cont.*

- Perjury. To prove misconduct, must be able to establish elements of the “crime.”
- Must be able to show intent and that “lie” was material to the matter at issue.
- 18 U.S.C. § 1001. False statement in a matter of official interest. Lower threshold than perjury.

Alternative Charges

- Submission of False, Misleading, or Inaccurate Statement (encompasses every possibility, i.e., intent, negligence, carelessness)
- Inattention to Duty, Failure to Follow Instructions, Conduct Unbecoming, Conduct Prejudicial

Lack of Candor

1. 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).

2. *Ludlum v. Justice*, 87 MSPR 56, 63-70 (2000).

Misuse 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.

Government Property

- Misuse or unauthorized use:
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

Intent

- Intent: is not an element of this charge.
Castro v. Dept. of Defense, 39 MSPR 555 (1989).
 - a. Exception: Agency charges willful or knowing misuse.

Penalty for Misuse

- Notice is not relevant to the charge but will be considered in determining reasonableness of the penalty. *Rogers v. Dept. of Justice*, 60 MSPR 377 (1994).
- 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).

De Minimis Value or Use

- a. De minimis value of item misused is a factor mitigating the penalty imposed. *Lovenduski v. Dept. of Army*, 64 MSPR 612 (1994).
- b. Will generally mitigate penalty *Winebarger v. TVA*, 22 MSPR 635 (1984).
- c. BUT, may not mitigate penalty when the employee has been previously disciplined for the same type of misconduct. *Cobb v. Dept. of the Air Force*, 57 MSPR 47 (1993).

Unauthorized Use of An Official Government Vehicle (OGV)

- Common categories of misconduct involving an OGV
 1. Misuse
 2. Improper Use
 3. Unauthorized Use

Unauthorized Use *cont.*

- 31 U.S.C. § 1349(b) – imposes a minimum 30 day penalty for unauthorized use of an OGV.
No ifs, ands, or buts.
- Conduct must be either willful or taken with reckless disregard
- Board often tries to avoid the statutory penalty in those cases when it is driven by compassionate or equitable reasons

Basic Questions

Was the employee utilizing the OGV on a frolic or detour? There is no bright line test.

- *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.

“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.

Criminal Conduct

- Crime exception: 5 U.S.C. 7513.
- Indefinite Suspension

Criminal Conduct *cont.*

- Discipline for misconduct
 - Once appropriate, agency may discipline employee for underlying misconduct

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. Utilization of an Indefinite Suspension vs. Removal.
4. Employee's medical condition is always relevant, even after the fact.

Leave-Related Offenses

- Approved Leave

A. General Rule: An agency may not take an adverse action against an employee based on the employee's use of approved leave. *Webb v. USPS*, 10 MSPR 536 (1982)

Leave Offenses cont.

B. Exception (Cook v. Army, 18 MSPR 610 (1984)): Removal for excessive absences will be sustained if:

1. The employee was absent for compelling reasons beyond his or her control making approval or denial of leave immaterial
2. Absence continued beyond a reasonable period of time and employee warned of possible adverse action
3. Agency shows that the position needs to be filled by an employee available for duty on a regular, full or part time basis.

AWOL

- **Elements**

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

- The Board may sustain a charge of AWOL even when the agency fails to prove that the employee was AWOL for the entire period charged. *Senior v. USPS*, 85 MSPR 285 (2002).

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 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)



III. PENALTIES

An Overview

1. Mandatory to consider
2. Not all factors are applicable in every case
3. Fatal if appropriate review and reasoning is not conducted
4. Deciding official can mitigate penalty if appropriate
5. Best practice is to formally articulate consideration to factors

Past Discipline

- Has the employee done this particular conduct before?
- Has the agency cited the prior discipline in the proposal notice?

Other Aggravating Factors

- Effect upon confidence of employer
- Notoriety of Offense
- Clarity of notice of agency rules, policies, and procedures

Typical Mitigating 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

Mitigating Circumstances

- Unusual job tensions
- Personality problems
- Mental Impairment
- Provocation, malice or bad faith on the part of others

Alternative Sanctions

- *Blake v. Department of Justice*, 81 MSPR 394, 414 (1999).
 - A. Other job series vs. removal?
 - B. Creative resolutions:
retraining, sensitivity classes



CONCLUSION