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IMPORTANCE OF THE CHARGE(S)

Careful attention must be paid when drafting discipline

A poorly written charge can torpedo your case in the blink of an eye!

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The Anatomy of a Charge


- A quality charge is decipherable and formatted in the conventional style:
 - The Charge label
 - The title of the misconduct (e.g., Failure to follow instructions)
 - The Specification
 - Describes the essential facts of the conduct (i.e., Who, What, When & Where)
 - The charge and the specification(s) must be clearly separated, clearly designated and differentiated

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CHARGE LABEL


- The label should be distinctly designated as the charge or reason and separated from the specification
- Nothing but **the essential name** should go in the title of the charge
 - The charge is "AWOL," **NOT** "Repeated and continuous AWOL from January 1, 2022-February 1, 2022, causing disruption"
 - Avoid adjectives and adverbs in label
- There is nothing inappropriate about the agency using a broad label such as "improper conduct," as long as the reasons for the proposed action were described in sufficient detail to allow the employee to make an informed reply
 - *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202-03 (1997)



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CHARGE LABEL


- An agency need not label its charge narrowly with "magic words"
- Nevertheless, "what the agency calls the conduct makes a great deal of difference in proceedings before the Board"
- "When a charge is labeled, the label, and not something else, must be proven"
 - *Nazelrod v. DOJ*, 54 M.S.P.R. 461 (1992)
- Elements of the charge must be proven and cannot be recast during the appeal process
 - *Seas v. U.S. Postal Service*, 73 M.S.P.R. 422 (1997)
 - The Board will not consider a charge the agency could have brought but did not



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SPECIFIC INTENT CHARGES

- **Caution!**
- *Boo v. Department of Homeland Security*, 122 M.S.P.R. 100 (2014), states an agency must prove **ALL** the following to show the employee committed a falsification charge:
 - The employee knowingly supplied incorrect information with the intent to deceive or mislead for his own personal gain
- **Solution** → Select a **general label charge** with a simple description **OR know the elements of the full charge**
 - **Charge:** Improper Conduct
 - **Specification:** On June 1, 2023, you worked from 6:00 a.m. PDT to 7:00 a.m. PDT but claimed 8 work hours




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MORE ABOUT SPECIFIC INTENT CHARGES

- Intent adds an element of proof which may be unnecessary
- Most acts of misconduct can be labeled in a way that does not require the agency to show the appellant acted intentionally

Requires Intent	Intent Not Required
Theft	Unauthorized Use of Government Property
Insubordination	Failure to Follow Instructions
Falsification or Fraud	Lack of Candor


- **Solution** → Charge down
 - **Specification:** On June 1, 2023, I instructed you to report for work at 6:00 a.m. PDT; you reported for work at 9:00 a.m. PDT



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MORE ABOUT SPECIFIC INTENT CHARGES


- Be careful when alleging a THREAT
- To determine whether a statement was threatening, the Board applies reasonable person criteria:
 - 1) The listener's reactions;
 - 2) The listener's apprehensions;
 - 3) The speaker's intent;
 - 4) Any conditional nature of the statements; and
 - 5) The attendant circumstances
- *Metz v. Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986)



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MERGER


- Charges must be factually and legally distinct
- An additional charge must be based on something additional (i.e., additional misconduct, additional specification, or an additional element)
- If proving one charge necessarily proves another, the charges will be merged
- A general charge such as "conduct unbecoming a Federal employee" should be merged into a more specific charge, such as falsification, when both charges are based on the same acts



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BEWARE ADDING ADVERBS/ADJECTIVES TO LABEL


- Doing so adds an unnecessary layer of proof
- Labels such as "Excessive AWOL" or "Egregious Unauthorized Use of Government Property" should be avoided in favor of "AWOL" and "Unauthorized Use of Government Property"
- **Solution** → Remove unnecessary words
 - **Charge:** Unauthorized Use of Government Property
 - **Specification:** You used your assigned Government vehicle to drive more than 900 miles on Saturday, June 1, 2023, to visit Disneyland



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BEWARE REFERRING TO REGULATION OR STATUTE


- A charge such as "Making Comments of a Sexual Nature to Subordinates in Violation of 29 CFR § 1604.11" would require the agency to prove:
 - 1) Comments of a sexual nature were made to a subordinate employees, and
 - 2) The comments violated 29 CFR § 1604.11 (i.e., the comments met the regulatory definition of sexual harassment)
- A better approach may be to charge the employee with "Conduct Unbecoming a Federal Employee" or "Conduct Unbecoming a Supervisor" and then describe the inappropriate comments in one or more specifications



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BEWARE CHARGES BASED ON TERMS OF ART OR LABELED AS CRIMES


- Charges such as "Sexually Harassing a Co-Worker" or "Creating a Hostile Work Environment" would require an agency to prove the conduct:
 - 1) Occurred;
 - 2) Was unwelcome;
 - 3) Was of a sexual nature; and
 - 4) Created a hostile work environment
- Similarly, using labels such as *Theft*, *Forgery*, *Assault*, or *Perjury* may require an agency to prove the elements which comprise the **legal definitions** of those crimes
- Better to use labels such as "Conduct Unbecoming a Federal Employee," "Unauthorized Use of Government Property," or "Lack of Candor"



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BEWARE OF THE “SLASH” CHARGE


- **Scenario:** An employee is AWOL on June 6, 10, and 11. On June 14th, she takes an agency printer home to make invitations to her pool party, and on June 17th, she totals a Government vehicle by driving it into a telephone pole
 - Using a label such as “AWOL/Unauthorized Use of Government Property/Destruction of a Government Vehicle” could require the agency to prove **all three acts** of misconduct to prevail
 - Better to **separate each act of misconduct** into a separate charge, rather than combining them into a single charge label



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CONSIDER A NON-MISCONDUCT CHARGE IF APPROPRIATE


- A separation based upon a charge of “Medical Inability to Perform the Essential Functions of Your Job” is a non-misconduct removal
- An option to consider if documented medical issues appear to be the cause of the employee’s absenteeism or poor performance
- Such a charge has one distinct benefit for the agency and two for the employee:
 - **Agency Benefit** – Limits the risk of the charge not being sustained or the penalty mitigated
 - See *Vitanza v. U.S. Postal Service*, 89 M.S.P.R. 319, ¶ 6 (2001)
 - “Evidence that an employee’s medical condition played a part in the charged conduct is ordinarily entitled to considerable weight as a significant mitigating factor”



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CONSIDER A NON-MISCONDUCT CHARGE IF APPROPRIATE (cont.)


- A non-misconduct charge has two distinct **benefits for the employee**:
 - 1) When applying for jobs, to include Federal Government positions, the employee does not have to say she was removed for misconduct
 - 2) The Bruner Presumption
 - If the employee applies for a disability pension, she is presumed to have a disability which prevents her from being able to do her job
 - See *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993)



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OFF-DUTY MISCONDUCT


- The Board will determine if there is a "nexus" between the alleged misconduct and the efficiency of the service
- Nexus can be shown when:
 - Circumstances surrounding the misconduct are particularly egregious;
 - The misconduct affected the employee's or co-workers' job performance or the agency's trust and confidence in the employee's job performance; or
 - The misconduct interfered with or adversely affected the agency's mission
- *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987)
- There must be a clear and direct relationship between the charged conduct and either the employee's ability to accomplish his duties satisfactorily or some other legitimate Government interest



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OFF-DUTY MISCONDUCT (cont.)


- Consider whether the charged conduct will prevent the employee from performing the duties of his position:
 - Driver's License revocation
 - Security Clearance revocation
 - Bar membership revocation
- The Board has held that the agency's loss of confidence is a significant aggravating factor
 - See *Woodford v. Department of the Army*, 75 M.S.P.R. 350, 357 (1997)



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SPECIFICATIONS


- Specifications are used to provide notice and give substance to the charge
 - Who, what, when, where
 - Model pattern: On [when] ____, at [where] ____, you [who and what] ____.
- All other information should be placed in a background or narrative section
- Do not include conclusions, just facts
- A charge must have at least one specification, but it may also have multiple ones
- Each specification must contain all the information required to support the charge
- An agency does not need to prove every specification to establish the charge
- Avoid adding an unnecessary layer of proof by including words like "intentionally" or "fraudulently" in the body of the specification



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DUE PROCESS AND PROPER NOTICE

- Due Process requires that notice of the charged misconduct be sufficiently detailed to make the reply opportunity meaningful
 - See *Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656 (1994)
- Avoid ambiguity
 - Each Specification should sufficiently describe an act of alleged misconduct
 - The employee should not have to guess as to what he or she is alleged to have done wrong

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 **ANY QUESTIONS**

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 **THANK YOU FOR ATTENDING**



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