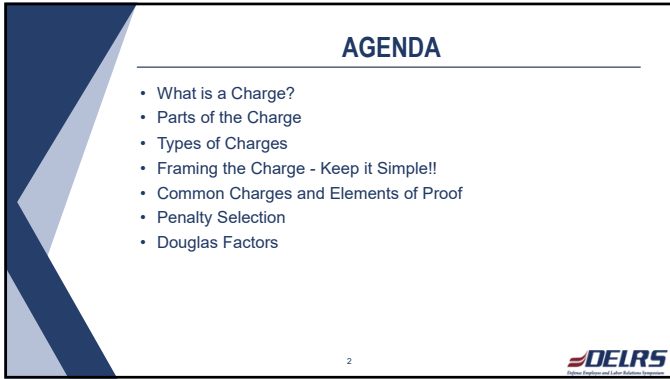
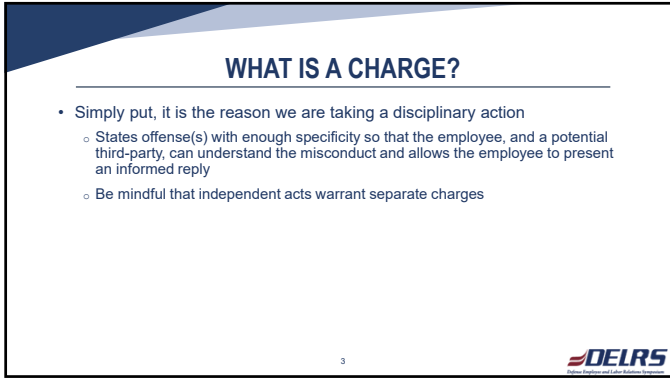




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PARTS OF THE CHARGE


- Label - Provides a framework for characterizing the nature of the misconduct
 - Selecting an appropriate charge label can make or break a case
 - MSPB will hold the agency to the charge it selects
 - Advance notice must contain the "specific reasons" for the proposed action and the label can aid in ensuring this requirement is met
 - 5 U.S.C. § 7513(b)(1)



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PARTS OF THE CHARGE (cont.)


- Elements – Essential proof requirements necessary to sustain the charge
 - Usually unstated in the written proposal notice but a critical part of the charge
 - If a charge has more than one element the agency must prove all elements
 - Example:
 - AWOL (to include tardiness) Elements
 - The employee was absent from duty, and
 - The absence was either not authorized or a request for leave was properly denied
- Specifications – Provides facts and details
 - Should be limited to who, what, where, & when facts
 - Poorly constructed specs may introduce unintended charges and required elements of proof



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TYPES OF CHARGES

- Specific Label
 - AWOL, Falsification, Theft, Insubordination
 - Carry specific proof requirements
 - All elements of the charge must be proven
 - Can support a significant penalty
- General Label
 - Inappropriate behavior, Conduct unbecoming
 - Elements are derived from the specification(s)
- Narrative (No Label)
 - Essentially the specification without a label
 - No statutory requirement to label a charge. The sole requirement is that the adverse action be taken for such cause as will promote the efficiency of the service
 - Otero, 73 MSPR at 202-03 (1997)



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SPECIFIC & GENERAL LABELS


- If you are going to use a labeled charge, keep it simple
 - Avoid using unnecessary adjectives or adverbs
 - Avoid conjunctive charges
 - Multiple charges strung together
 - Failure to comply with supervisory instructions in a reasonably prompt manner
 - Using inappropriate language in the workplace in a loud and disruptive voice
 - Anything other than the actual misconduct belongs somewhere else
 - Background, specifications, penalty analysis



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PROS AND CONS OF SPECIFIC LABEL CHARGES


- Pros:
 - Provides clear notice and structure
 - Reflects what the Agency thinks it has charged
 - Often are linked to tables of penalty and can drive the penalty
- Cons:
 - Charge brought is the only charge at issue
 - Comes with clearly defined elements and the risk of ensuring proof for all such elements



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PROS AND CONS OF GENERAL & NARRATIVE CHARGES


- Pros:
 - Any misconduct that is properly "noticed" in the specification is at play
 - Not all specification(s) have to be proven to sustain action
 - Anything satisfying service efficiency will uphold the action
 - Need to ensure there is enough detail in the specification for the employee to make an informed reply and thus satisfy the statutory notice requirement at 5 U.S.C. § 7513
- Cons:
 - Can cause confusion and may be subject to re-characterization by the Administrative Judge
 - Certain "buzz-words" in the specifications may walk you into an intent-laced charge that is not proven
 - "Conduct Unbecoming" could be re-characterized as a sexual harassment charge when the specification cites a violation of the Agency's sexual harassment policy
 - Words matter! Choose them carefully!
 - May also give rise to notice defenses
 - Employee must be provided with sufficient details to make an informed reply



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FRAMING THE CHARGE


- Charge only what you can prove
- Specifications must include clear and concise facts to support elements of the charge
- Evidence must support the facts alleged and satisfy the burden of proof for the charge
- Don't "double dip" – don't use multiple charges for singular misconduct
 - AWOL and Failure to follow leave procedures when the AWOL charges are solely based on the employee's failure to follow leave procedures
 - *Westmoreland v. DVA*, 83 MSPR 625 (1999)



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LEAVE RELATED CHARGES


- Absent without leave (AWOL)
 - Elements:
 - Employee was required to be on duty
 - Employee was not on duty
 - Absence was not authorized or leave request was properly denied
 - Practice Notes:
 - Employee may establish entitlement to FMLA leave during period of AWOL
 - Employee may defend against AWOL charge by presenting medical documentation to the Board that was not previously presented to the agency
 - *Atchley v. Dept. of Army*, 46 MSPR 297 (1990)
 - *Zeiss v. VA*, 8 MSPR 15 (1981)



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LEAVE RELATED CHARGES (cont.)


- Failure to follow leave request procedures
 - Elements:
 - Agency has procedure for requesting leave
 - Employee was on notice of procedures and consequences of not following them
 - 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)



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INSUBORDINATION VERSUS FAILURE TO FOLLOW


- Insubordination
 - Elements:
 - Given lawful order
 - Disobeyed order
 - Disobedience was **willful and intentional**
 - *Phillips v. GSA*, 878 F.2d 370, 373 (1989)
 - *Pedeleese v. DoD & OPM*, 2009 MSPB 16 (2009)
- Failure to Follow Instructions
 - Elements:
 - Proper instructions were given to an employee
 - Employee failed to follow them
 - *Hamilton v. USPS*, 71 MSPR 547 (1996)

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FALSIFICATION VERSUS LACK OF CANDOR


- Falsification
 - Elements:
 - Employee gave incorrect information
 - Information was material
 - Information was knowingly supplied
 - Information was supplied with the intent to deceive
 - *Nækel v. Department of Transportation*, 782 F.2d 975, 978 (1986)
- Lack of Candor
 - Elements:
 - Employee gave statements that were less than candid, accurate, truthful or complete
 - Employee did so knowingly
 - *Rhee v. Dept. of Treasury*, 2012 MSPB 26 (2012)

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THEFT VS. UNAUTHORIZED POSSESSION


- Theft
 - Elements:
 - Taking another's property
 - Without authorization
 - With the **intent** to permanently deprive
 - *Nazelrod v. Department of Justice*, 91 FMSR 5570, 50 MSPR 456 (1991)
- Unauthorized possession of government property
 - Elements:
 - Items are government property
 - Items are in the employee's possession
 - Property was improperly used for employee's own benefit
 - *Heath v. Department of Transportation*, 64 MSPR 638, 644-46 (1994)

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THREAT AND METZ


- Threat
 - Elements:
 - Threatening words spoken
 - A reasonable person hearing those words would have feared for safety
 - Hearer actually feared for safety
 - Metz Factors
 - The listener's reactions
 - The listener's apprehension of harm
 - The speaker's intent
 - Any conditional nature of the statements
 - The attendant circumstances
- Alternative Charges – Inappropriate, Disruptive, or Disrespectful behavior; Conduct unbecoming

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PRACTICE TIPS


- Conduct a thorough investigation of misconduct
 - Including questioning the employee
 - Questioning a BUE may trigger Weingarten Rights or additional rights under an applicable CBA or past practice
 - Gather all relevant documentation
- Let the evidence dictate the charge label
- Charge down and prove up
- Do not add extraneous information in the label or specification that might have to be proven or could change your burden of proof
 - Create a separately labelled "Background" section to provide further information for context and so that the employee and other readers can easily understand the basis for the action, supported by evidence gathered
 - "Background" section can be for the entire letter, if applicable for all charges, or can be included for individual charges and/or specs

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PRACTICE TIPS (cont.)


- Read, re-read and have someone else read your proposal
- Follow your agencies procedures for coordinating with servicing legal office
- Recommended references:
 - "MSPB Charges and Penalties, A Charging Manual," by Renn Fowler & Samuel Vitaro
 - Cyberfeds Quick Start Guides

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SAMPLE CHARGE & SPEC FORMAT


- Charge # 1 – (Specific Labeled Charge)
 - Background to Specification #1
 - [Sets up the nature of the misconduct, explains elements of the misconduct in a narrative way that the employee and other readers can easily understand the basis for the action that is supported by evidence gathered]
 - Specification: On X date, at X location/place, [X employee] did X thing.
- **Practice Tip:** If you have more than one charge, and/or multiple specifications, separately label them as "Charge #1, and Specification #1 to Charge #1, Specification #2 to Charge #1, etc., so that it is clear what specification(s) go with what charges

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A WORD ABOUT TEMPLATES...


- Many commands have sample templates which can be useful as a starting point when drafting letters
 - Legal Office and HR should work together to make sure such templates incorporate best practices
- Be mindful that every case is unique and every element of the letter must be carefully reviewed to ensure accuracy
- The devil is in the details!

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A CAUTIONARY TALE

- Consider this...
 - Agency charged employee with "Sleeping on the Job"
 - At hearing, union contended that grievant was not sleeping but saying a 4 – 6 minute prayer
 - Arbitrator agreed with union stating "in this secular world we live in" it was understandable that the grievant didn't want to explain his religious beliefs to his supervisor
 - *Department of the Army, Tooele Army Depot, Utah and AFGE Local 2185, 115 LRP 4731 (2014)*

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SELECTING AN APPROPRIATE PENALTY

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DEIRS
Department of Education and Labor Relations System

22

KEY FACTORS IN PENALTY SELECTION

- Management must be able to show that the penalty was fair, reasonable and consistent, as well as not arbitrary or capricious
- If a penalty is disproportionate to the alleged violation or is unreasonable under the Douglas Factors, it is subject to being reduced or reversed by the MSPB, even if the charges would otherwise be sustained
- An agency must give "substantive consideration to a lesser penalty"
 - *Banez v. Dep't of Defense*, 69 M.S.P.R. 642, 650 (1996)

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Department of Education and Labor Relations System

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CONSIDER ...

- Agency Table of Penalties
- Douglas Factors
 - *Douglas v. VA*, 5 M.S.P.R. 280 (1981), 81 FMSR 7037


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DOUGLAS FACTORS

1. Nature and seriousness of the offense
2. Employee's job level and type of employment
3. Employee's past disciplinary record
4. Employee's past work record
5. Effect of the offense upon the employee's ability to perform at a satisfactory level
6. Consistency with similarly-situated employees


Douglas v. VA, 5 MSPR 280 (1981), 81 FMSR 7037



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DOUGLAS FACTORS (cont.)


7. Consistency with table of penalties
8. Notoriety of the offense
9. Clarity with which employee is on notice of any rule violated by the misconduct
10. Potential for the employee's rehabilitation
11. Other mitigating circumstances
12. Adequacy of alternative sanctions to deter future conduct



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DOUGLAS FACTOR GUIDELINES


- Not all factors apply to every case
- Deciding official must consider the relevant factors
- No requirement that proposal or decision notice contain detailed information or analysis that the agency considered all the pertinent mitigating factors



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APPLYING THE DOUGLAS FACTORS

- Balancing act
- The MSPB did not assign weights to each factor




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DOUGLAS FACTORS – THE BIG FOUR

1. Nature & Seriousness of the Offense


- *Most important factor*
- How to determine seriousness?
 - Intentional vs. inadvertent
 - Repeated or isolated event
 - Table of penalties as a guide
 - Nature of the incident
 - Relation of misconduct to the employee's duties, position, and responsibilities



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DOUGLAS FACTORS – BIG 4
NATURE & SERIOUSNESS OF THE OFFENSE

- If the misconduct is serious enough, mistakes by the agency in the application of other Douglas factors may be overlooked; e.g. failure to properly notify the employee of consideration of past record
 - *Howarth v. U.S. Postal Service*, 77 M.S.P.R. 1 (1997), 98 FMSR 5146; disparate penalties, *Parker v. Department of the Navy*, 50 M.S.P.R. (1991), 91 FMSR 5554 – But see *Ward*
- Serious misconduct can outweigh an employee's length of service and overall good work record
 - *Hanna v. Department of the Army*, 42 M.S.P.R. 233 (1989), 89 FMSR 5402




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DOUGLAS FACTORS – BIG 4
THE EMPLOYEE'S PAST RECORD

3. The Employee's Past Record


- When an agency relies on past discipline to support the disciplinary action that is on appeal, the MSPB will review the past discipline to determine whether:
 - the employee was informed of the action in writing;
 - the employee had an opportunity to have the action reviewed, on the merits, by an authority different from the one that took the action; and
 - the action was made a matter of record
- If those three criteria are met, the board will discount the past discipline only if it is left with a definite and firm conviction that a mistake has been committed



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DOUGLAS FACTORS – BIG 4
THE EMPLOYEE'S PAST RECORD (cont.)


- An employee's record of past discipline may be used to enhance the penalty; it may not be used as factual proof of currently-charged misconduct
 - *Raines v. U.S. Postal Service*, 32 M.S.P.R. 56 (1986), 86 FMSR 5375
- The agency's intent to consider the past disciplinary record must be stated in the proposal letter
 - *Horn v. U.S. Postal Service*, 56 M.S.P.R. 511 (1993), 93 FMSR 5076



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DOUGLAS FACTORS – BIG 4
THE EMPLOYEE'S PAST RECORD (cont.)

- Prior disciplinary actions may be cited even if they involved offenses unrelated to the current charges
 - *Slaughter v. Department of Agriculture*, 56 M.S.P.R. 349 (1993), 93 FMSR 5039
- Past discipline that occurred years before the current action and that involved unrelated offenses may be discounted as not probative of the appropriateness of the penalty in the current case
 - *Skates v. Department of the Army*, 69 M.S.P.R. 366 (1996), 96 FMSR 5027




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DOUGLAS FACTORS – BIG 4
THE CLARITY OF NOTICE

9. The Clarity of Notice


- While lack of notice of the rules to be followed can be a mitigating factor, an agency is under no obligation to warn employees about behavior they should know is improper
 - *Flanagan v. Department of the Army*, 44 M.S.P.R. 378 (1990), 90 FMSR 5210
- Supervisors' ignoring or condoning certain behavior can indicate lack of notice
 - *Davis v. Department of the Army*, 33 M.S.P.R. 223 (1987), 87 FMSR 5270



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DOUGLAS FACTORS – BIG 4
THE CLARITY OF NOTICE (cont.)

- Training on agency policies constitutes notice of expected behavior
 - *Morrison v. National Aeronautics and Space Administration*, 65 M.S.P.R. 348 (1994), 94 FMSR 5595
- Prior misconduct, even though the employee was not formally disciplined, can be cited to show an employee was on notice of the rules to be followed
 - *Arnold v. Department of Energy*, 36 M.S.P.R. 561 (1988), 88 FMSR 5092




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DOUGLAS FACTORS – BIG 4
MITIGATING CIRCUMSTANCES

11. Mitigating Circumstances


- A key issue in supporting a penalty selection is whether the deciding official considered the relevant factors and any mitigating circumstances raised by the employee
 - *Banez v. Department of Defense*, 69 M.S.P.R. 642 (1996), 96 FMSR 5078
- An agency does not have to prove that it considered every possible mitigating factor that might apply to the circumstances
 - *Chauvin v. Department of the Navy*, 59 M.S.P.R. 675 (1993), 93 FMSR 5477



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UPHELD OR MITIGATED?


- **Charge:** AWOL; Unprofessional Conduct
- **Penalty:** Removal
- **Details:** Supply Systems Analyst, GS-2003-14, DLA, employee requested leave for an extended absence. Failed to provide details to supervisor. Employee then requested FMLA. Supervisor sent notice that the request did not contain administratively acceptable information. Employee responded with information that justified his periodic time off work but not 4 consecutive weeks he was off work. Supervisor gave another 15 days for more documentation. Upon further documentation the supervisor granted FMLA for part of the absence and assigned AWOL one month of dates not covered by documentation. The unprofessional conduct charge included abruptly terminating a telephone call with his supervisor.



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UPHELD OR MITIGATED?


- **Charge:** Conduct Unbecoming a law enforcement officer (failure to maintain time and attendance records)
- **Penalty:** Removal
- **Details:** Police Officer, GS-0083-06, Army: Initial inquiry led to an Administrative investigation. Results of administrative investigation led to proposed removal based on 8 dates of which the employee was not present for duty but requested compensation. Other police officers were removed but for other charges not related to timecard issues. Some police officers with similar issues were not removed. Employee had a long successful work history.



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UPHELD OR MITIGATED?


- **Charge:** Failure to Follow Safety Procedures
- **Penalty:** Demotion
- **Details:** Research Scientist, NIST, employee accessed a laboratory without proper authorization, completed a procedure without obtaining approval and without using proper PPE. Employee asserted the lab overseer was aware of his laboratory use, and that he did follow the safety SOP's for other lab procedures which he believed were more stringent. In his response to the In his response to the proposed notice of demotion, he accepted his mistakes and apologized for them. Deciding official Douglas Factor analysis stated he lost confidence in the employee's judgement. Table of Penalties showed a first offense of a safety violation range oral admonishment – 3 day suspension. Deciding official justified the higher penalty based on loss of trust.



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ROLE OF THE PROPOSING OFFICIAL

- Fact-finding
- Identify misconduct
- Document and support any aggravating factors
 - Notice to employee of aggravating factors to be considered is required
 - But, no comprehensive Douglas Factors analysis is required
- Communicate due process requirements
- Notice of appeal rights "if proposal is sustained"
- Other considerations: Employee Assistance Program (EAP) statement




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ROLE OF THE DECIDING OFFICIAL

- Consider all relevant Douglas Factors
- Consider mitigating factors
- Remain impartial
- Receive and consider employee's response
- Only consider the charge(s) documented in the proposal letter
- Make and issue a timely decision

Note → The decision letter does not have to specifically list each Douglas Factor and how it applies to the case. However, documentation that the DFs have been considered is critical!

- *Stephens v. Department of the Air Force*, 58 M.S.P.R. 502 (1993), 93 FMSR 5311



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ANY QUESTIONS




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