

ADVERSE ACTION CHARGES

MSPB AJ Craig A. Berg

Foley Hoag Training

Adverse Actions

- Removal
- Reduction-in-Grade
- Reduction-in-Pay
- Furlough of 30 days or less
- Suspensions of more than 14 days

Burden of Proof at MSPB

- The agency has the burden to prove the charge by a preponderance of the evidence:
- “The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.”

5 C.F.R. § 1201.56(c)(2).

Types of Charges

1. Descriptive/Specific Charge
2. Generic Charge-Ex. Improper Conduct
3. Narrative Charge-No label

Parts of a charge

1. Charge label
2. Specifications
3. Legal elements

Burroughs v. Army. 918 F.2d 170
(Fed. Cir. 1990)



Due Process Issues

- 5 USC 7513-Notice and Opportunity to be heard.
- 30 days advance written notice
- Reasonable time to answer orally and in writing
- Right to representation
- Written decision stating reasons for action

Due Process (Cont.)

Stone v. FDIC, 179 F.3d 1368 (Fed. Cir. 1999) & *Ward v. US Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011).

- Deciding official may not consider new and material information without affording appellant opportunity to respond.
- Applies to both evidence on merits and aggravating factors considered in penalty determination.
- Violation will lead to summary reversal.

Common Charging Issues

- **Splitting of Charges (All or Nothing)**
 - Splitting of a unified charge is impermissible. *Burroughs*, 918 F.2d 170.
- **Merger of Charges**
 - While an agency may take a single instance of misconduct and prepare charges containing several specifications, the Board will merge charges if they are based on the same conduct and proof of one charge automatically constitutes proof of the other charge. *Shifflett v. Dept. of Justice*, 98 MSPR 289, 292 ¶5 (2005); *Mann v. DHHS*, 78 MSPR 1 (1998)
- **Multiple Specifications Under a Single Charge**
 - If a single charge has multiple specifications, an Agency need only prove one specification to sustain the charge. *Avant v. Dept. of the Air Force*, 71 M.S.P.R.192, 198 (1996).
- **Lesser Included Offenses**
 - A judge may not eliminate elements of a charge brought by the Agency and find the Appellant guilty of a lesser offense. *Greenough v. Dept of the Army*, 73 MSPR 648 (1997).

Charging Issues, Cont'd.

- **Criminal Offenses**

- If an agency charges an individual with a criminal offense, the agency must prove the elements of the offense. *Knuckles v. US Postal Service*, 1 MSPR 358, 359 (1980).
- Can't charge with getting arrested (exception is indefinite suspension)
- Underlying Conduct vs. Conviction

“Loaded” Words

- Words implying intentional misconduct may require an agency to prove that element of intent: “knowingly,” “willfully,” “threatened,” etc.
- Board may examine the “structure and language of the proposal notice” to determine how charges are to be construed.



CHARGES REQUIRING PROOF OF INTENT

- Intent is a state of mind and is generally proven by circumstantial evidence. *Riggins v. DHHS*, 13 MSPR 50 (1982). Examples:
- **Theft** - intent to deprive the owner permanently of possession and use of the property. *King v. Nazelrod*, 43 F.3d 663, 665-67 (Fed. Cir. 1994).
- **Threat** – reasonable person test applied to: listener’s reactions and apprehension of harm; speaker’s intent; the circumstances; and if conditional. *Metz v. Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986); *Wiley v. Treasury*, 102 MSPR 535.
- **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).
- **Falsification** – knowingly providing wrong information with the intention of defrauding, deceiving, or misleading the agency. *Naekel v. Dept of Transportation*, 782 F.2d 975, 978 (Fed. Cir. 1986); *George v. Army*, 104 MSPR 596.

CHARGES WITH ELEMENTS, NOT REQUIRING INTENT

- **Misuse of Government Property** – misuse or unauthorized use means use for purposes other than those for which the property is made available, or other than those authorized by law, rule, or regulations. 5 C.F.R. § 2635.704; *Martin v. Transportation*, 103 MSPR 153 (computers); *Crawford-Graham v. DVA*, 99 MSPR 389 (telephones); *Quarters v. DVA*, 97 MSPR 511 (government charge card).
- **AWOL** – the employee was required to be at the duty station; s/he was absent; and the absence was not authorized or a leave request was properly denied. If based upon a denial of LWOP, the Board will determine whether the denial was reasonable. *Johnson v. DLA*, 54 M.S.P.R. 370 (1992). FMLA issues, **agency has burden**.

- **Failure to Follow Leave Requesting Procedures** – the agency has procedures for requesting leave; the employee knew what the procedures are; and s/he failed to follow them. *Wilkinson v. Dept of the Air Force*, 68 M.S.P.R. 4 (1995). Approval of FMLA leave does not negate the charge but the question is whether the agency interfered with the appellant's rights under FMLA in bringing the charge. The agency must show that it did not violate the appellant's FMLA rights regarding notice of absences (5 C.F.R. § 630.1206) and the provision of timely medical documentation (5 C.F.R. § 630.1207) in response to the agency's request. *Somuk v. Navy*, 117 MSPR 18 (2011).
- **Failure to Follow Instructions** - proper instructions were given and the employee failed to follow them. *Hamilton v. US Postal Service*, 71 M.S.P.R. 547 (1996); *Grubb v. Interior*, 96 MSPR 361 (2004).

CHARGES WITH ELEMENTS, NOT REQUIRING INTENT

- **Lack of Candor** - elements depend on context and conduct; may involve failure to disclose something that should have been disclosed to make a statement accurate and complete. *Ludlum v. Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002); *Hoofman v. Department of the Army*, 2012 MSPB 107 (Sept. 18, 2012)
- **Unauthorized Use of an Official Government Vehicle**
 - Mandatory 30-day suspension under 31 U.S.C. § 1349(b) if conduct was willful or done with reckless disregard. Can charge simple misuse, statute is not invoked.

Not requiring intent, continued

- **Sexual Harassment (Title VII)** – Unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature constitute sexual harassment when: Submission to such conduct is made either explicitly or implicitly a term/condition of an individual's employment; Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual. If charge based on hostile environment, conduct must be offensive, based on the victim's sex, unwelcome, and sufficiently severe or pervasive to interfere with the victim's job performance or to create an abusive work environment. *Hillen v. Army*, 66 MSPR 68 (1994).
- **Approved Leave** – not a valid charge unless: absence is for compelling reasons beyond employee's control so that approval or denial of leave was immaterial; absence went beyond a reasonable period; employee was warned of consequence if s/he did not return to duty; and the position needs to be filled on a regular, full- or part-time basis. *Cook v. Army*, 18 M.S.P.R. 610 (1984).

Questions??



THANKS FOR YOUR ATTENTION!

