

# *Labels are Not Required, but if Used They Must be Proven*

Nothing in law or regulation requires that an agency attach a label to a charge of misconduct. If it so chooses, the agency may simply describe the actions that constitute misbehavior in a narrative form and have its discipline sustained if the efficiency of the service suffers because of the misconduct.<sup>50</sup>

If, however, the agency chooses to use a label, that label must be proven. The U.S. Court of Appeals for the Federal Circuit has held that an agency must prove every element of a charge, including intent if that is an element. For example, if an agency uses the label of “theft” as its charge, then the agency must prove that the employee “intended to permanently deprive the owner of possession” of the item in question.<sup>51</sup> In contrast, an agency is not required to prove intent as part of a charge of unauthorized possession of the property.<sup>52</sup> Similarly, “[i]nsubordination by an employee is a willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed.”<sup>53</sup> In contrast, a charge of failure to obey orders does not require proof of intent.<sup>54</sup>

Proving elements can become particularly complex if the agency uses a label that has a specific meaning in a statute or is defined in more than one place. Take, for example, the label of “sexual harassment.” Such harassment can be defined in an agency policy as well as policy issued by the Equal Employment Opportunity Commission, and either (or both) of those definitions may vary from what a person drafting or reading the charges may think of as “sexual harassment.” This can result in a situation where an agency that uses the term “sexual harassment” in a charge may be required to prove that the conduct meets a formal definition, regardless of whether that was the drafting official’s intent. For example, in *Booker v. Department of Veterans Affairs*, neither the notice of proposed action nor notice of decision defined the phrase “sexual harassment.” As a result, the agency was required to meet the Title VII definition because of the content of its agency’s policy which referenced Title VII.<sup>55</sup>

However, it is not necessary for the agency to use the term sexual harassment at all. In *Morrison v. National Aeronautics & Space Administration*, the Board affirmed the agency’s penalty of a reassignment and 35-day suspension for loading sexually explicit material on a Government computer and exposing individuals in the work environment to that material. The appellant asserted that the agency had not

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<sup>50</sup> *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997).

<sup>51</sup> *King v. Nazelrod*, 43 F.3d 663, 666-67 (Fed. Cir. 1994).

<sup>52</sup> *Culley v. Defense Logistics Agency*, 60 M.S.P.R. 204, 212 (1993) (finding that the intent to permanently deprive is not an element of unauthorized possession); *Castro v. Department of Defense*, 51 M.S.P.R. 506, 510 (1991) (explaining that the intent to permanently deprive is not an element of unauthorized removal of property).

<sup>53</sup> *Phillips v. General Services Administration*, 878 F.2d 370, 373 (Fed. Cir. 1989) (emphasis and internal notes omitted).

<sup>54</sup> *Eichner v. U.S. Postal Service*, 83 M.S.P.R. 202, 205 (1999); *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 555–57 (1996).

<sup>55</sup> *Booker v. Department of Veterans Affairs*, 110 M.S.P.R. 72, ¶ 5 (2008).

proven that sexual harassment occurred, but the Board held that the conduct did not need to rise to the level of sexual harassment for the Board to sustain the agency’s action as the charges that the agency used – loading and displaying the material – were proven.<sup>56</sup>

In *Brim v. U.S. Postal Service*, the agency charged the appellant with sexual harassment, but also charged conduct unbecoming a Postal Service employee based on the same behavior.<sup>57</sup> A charge of “conduct unbecoming,” much like a charge of “improper conduct,” has no specific elements of proof; it is established by proving that the employee committed the acts alleged in support of the broad label.<sup>58</sup> The Board found that the Postal Service did not prove sexual harassment, but that because the unbecoming conduct in question – sexually explicit comments within earshot of other employees – was proven and was unacceptable in the workplace, a 30-day suspension was permissible under the second charge.<sup>59</sup>

In *Brim*, the agency opted to have two separate charges. That is something an agency is permitted to do, but also something that the agency must do if it wishes to have more than one charge to be independently examined. MSPB is under clear instructions from the Federal Circuit that it is not permitted to split a charge and then sustain one of the newly created charges. MSPB can only assess what it is given – not make repairs to the underlying case.<sup>60</sup>

This same rule applies to undefined labels used in specifications. For example, in *Thomas v. U.S. Postal Service*, the agency asserted in a specification that the appellant “continually subjected” another employee “to demeaning, sexually derogative comments.” The agency did not describe “continually” and the events later submitted as evidence, while serious, did not occur with the necessary frequency or duration to meet the dictionary’s definition of “continual.” Accordingly, while the Board sustained two other specifications related to specific events of inappropriate touching on specific days, it was not able to sustain the specification regarding comments because the agency had opted to use the word “continually” without

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<sup>56</sup> *Morrison v. National Aeronautics & Space Administration*, 65 M.S.P.R. 348, 352, 357-58 (1994). See *Cisneros v. Department of Defense*, 83 M.S.P.R. 390, ¶¶ 5-7, 17-20 (1999) (holding that the agency proved its charge of “conduct unbecoming a Federal employee” when it described the employee’s physical acts and statements that had a sexual component), *aff’d*, 243 F.3d 562 (Fed. Cir. 2000). See *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 561-63 (1994) (sustaining the agency’s decision to remove an employee for “conduct prejudicial to the Postal Service” when the employee hired a prostitute to pose nude in the workplace, arranged for the photographs to be published in a magazine, and informed others in the workplace of what he had done), *aff’d*, 56 F.3d 1375 (Fed. Cir. 1995).

<sup>57</sup> *Brim v. U.S. Postal Service*, 49 M.S.P.R. 494, 496–99 (1991).

<sup>58</sup> *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, ¶ 9 (2010).

<sup>59</sup> *Brim v. U.S. Postal Service*, 49 M.S.P.R. 494, 496–99 (1991).

<sup>60</sup> *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). However, charges will be merged when proof of either charge is automatically proof of the other charge. *Mann v. Department of Health & Human Services*, 78 M.S.P.R. 1, 7 (1998). The fact that a charge has been merged into another does not mean that the duplicative charge is not sustained or that the appellant’s misconduct somehow becomes less serious by virtue of the merger. However, MSPB must examine whether the penalty is reasonable for the merged charge. *Shiflett v. Department of Justice*, 98 M.S.P.R. 289, ¶ 12 (2005).

any details to shed light on what it meant for something to be continual and the evidence did not meet the dictionary's definition of that word.<sup>61</sup>

An agency will be required to prove it is more likely than not that the conduct in question occurred, regardless of whether the agency opts for a label for that conduct.<sup>62</sup> However, if the agency chooses to use a label, it will be required to prove that label as well as the underlying conduct. The more elements there are in that label, the more elements there are for the agency to prove.

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<sup>61</sup> *Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶¶ 6-7 (2011). While the sustained charges may have otherwise supported removal, the case was remanded to an MSPB regional office to address whether the agency violated the appellant's constitutional due process rights regarding the process by which it reached its penalty. *Id.* at ¶¶ 9-13.

<sup>62</sup> 5 U.S.C. § 7701(c)(1)(b); 5 C.F.R. § 1201.4(q).