

# Free of Charge

## An Employee's Guide to Understanding Adverse-Action Notices

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Ken Ward, President of the North Central Council, National Joint Council of Food Inspection Locals, AFGE, asked me to train union officials on the charge of "Conduct Unbecoming" at their convention on April 16, 2005. Preparing for this training caused me to question again why an agency bothers *labeling* the misconduct which it is charging the employee with. As far as I know, an agency can skip the label and simply narrate the acts of misconduct in a notice proposing an adverse action.

Let's see if a law, regulation, or rule requires an agency to put a label on the misconduct.

5 U.S.C. § 7701(c)(1) states the burdens of proof in appeals to MSPB (the Board) and provides:

Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision--

- (A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or
- (B) in any other case, is supported by a preponderance of the evidence.

If you are a devoted reader of my articles, then you already know that adverse actions based on misconduct are not actions based on unacceptable performance (read: *How to Survive a PIP*). Accordingly, under 5 U.S.C. § 7701(c)(1)(B), the agency "decision" in an adverse action will be sustained only if supported by a preponderance of the evidence.

But what exactly does an agency "decide" in taking an adverse action? It must decide whether any of the five adverse actions listed in 5 USC § 7512<sup>1</sup> was taken "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a) provides:

Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

*This article contains no legal advice. If you need legal advice, you should request it from someone qualified to dispense it.*

Accordingly, to sustain a subchapter II adverse action appealed to the Board, the agency must prove by a preponderance of the evidence that it took that action only for such cause as will promote the efficiency of the service.

So far, I haven't read anything that says that an agency has to put a label on the misconduct. Let's read on a little further.

5 U.S.C. § 7513(b) provides as follows:

(b) An employee against whom an action is proposed is entitled to--

- (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the *specific reasons* for the proposed action;
- (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and
- (4) a written decision and the *specific reasons* therefor at the earliest practicable date.

(Italics added)

So, *specific reasons* have to be stated in both the advance written notice of proposed adverse action and the final decision thereon. What *function* do you suppose the *specific reasons* in the advance notice serve? Do you think those reasons should give the employee enough *information* about the incident(s) of the alleged misconduct to enable the employee to answer the advance notice "orally and in writing"? Do you think that you could answer a notice of proposed removal charging you with "Conduct unbecoming" a federal employee or a postal worker without also being informed of the specific acts of misconduct on which the agency placed that label?

Of course not. The Board has consistently held that a party must know of the claims with which he is being charged so that he may adequately prepare and present a defense before the agency.<sup>2</sup> In order to satisfy this notice requirement, an agency is required to state the specific reasons for a proposed adverse action in sufficient detail to allow the employee to make an informed reply.<sup>3</sup> A label may be shorthand for that detail but it is not a due-process substitute for the *details* themselves.<sup>4</sup>

If the *specific reasons* means the specific acts of misconduct and not the label affixed thereto, then perhaps the OPM regulations to which 5 U.S.C. § 7513(a) adverts prescribe labels. Nope. Check out the endnote<sup>5</sup>: 5 CFR § 752.404(b) is completely silent about charge labels *or* charge specifications. The Civil Service Commission had more guts than OPM; the Commission said that the proposal notice had to state the reasons specifically and in detail, and when I worked at FEAA, we used to reverse agencies with some regularity when they did not state the reasons with the required specificity.

In conclusion, I was right; there is no reason why an agency must fix a label to the specifications of misconduct. The specifications alone without a label will do; and, of course, I knew that all along, but I had to play stupid to step you through the statute & regulations to make the point clear.

*The case law*

The seminal “non-labeling case” is *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997)<sup>6</sup> The agency removed Otero, a veterans preference eligible, from his PS-5 Window Distribution Clerk position, based on a charge of “improper conduct.” Specifically, the agency alleged that on March 15, 1995, Otero threatened his supervisor, Eric Sprague, when he stated, “Stop fucking with me, just stop fucking with me. Get the fuck away from me, I’ll tear your head off, you fucking piece of shit,” after Sprague ordered Otero to perform some duty. Then Otero entered the office of the Manager of Customer Services, and spoke in a loud and aggressive manner, pointing his finger several times at her, and pounding his fist on her conference table. The agency contended that the appellant’s remarks violated its standards of conduct and its commitment to ensure a safe work environment for all of its employees.

In a prehearing conference memorandum, the Board’s administrative judge wrote that the agency had generally charged the appellant with “improper conduct.” The administrative judge also noted that the agency’s representative specified that the sole specification for the charge was that the appellant “ma[de] a threat against his supervisor.” The administrative judge further noted that she thereupon informed the agency that, if it were charging the appellant with making a threat, then it would be required to meet the standard for that charge under *Metz v. Department of the Treasury*.<sup>7</sup> The agency objected to this ruling, contending that it should be permitted to prove the misconduct leading up to the alleged threat.

Following a hearing, the administrative judge reversed Otero’s removal, finding that the agency failed to prove that he threatened Sprague. The agency petitioned for review and the Board reversed, holding that the administrative judge erred in forcing the agency to change the label of its charge from “improper conduct” to “threatening a supervisor.”

The Board stated that the agency was not required to use a label at all:

Nothing in law or regulation requires that an agency affix a label to a charge of misconduct. If it so chooses, it may simply describe actions that constitute misbehavior in a narrative form, and have its discipline sustained if the efficiency of the service suffers because of the misconduct. *See, e.g., Boykin v. U.S. Postal Service*, 51 M.S.P.R. 56, 58-59 (1991). If an agency chooses to label an act of misconduct, then it is bound to prove the elements that make up the legal definition of that charge, if there are any.

Much of the relevant case law regarding an agency's labeling of its charge discusses the analysis of those elements, and the Board's responsibility regarding that analysis. *See, e.g., Chauvin v. Department of the Navy*, 38 F.3d 563, 565-66 (Fed.Cir.1994); *Burroughs*, 918 F.2d at 171-72. There is no requirement, though, that the Board impose on the agency *an obligation* to label specifically the misconduct, if it chooses not to do so.

The Board remanded Otero to the administrative judge and told her to forget about the label and to decide solely whether the agency proved by a preponderance of the evidence the acts of misconduct specified in the notice of proposed removal. In that regard, the Board found that the agency's two-page recitation of the incident "easily satisfies the requirements of notice and fairness."

The narrative contains dates, times, names of participants, exact quotes of the offensive language the appellant purportedly used, and a detailed description of the alleged events of that morning. To defend against such specifics, the appellant can refute the agency's evidence that he engaged in the misconduct, that the agency's action promoted the efficiency of the service, or that the agency considered the appropriate mitigating factors.<sup>8</sup>

Then, to blunt Vice Chair Slavet's criticism of the majority's decision, the Board conducted a useful tutorial on how to frame a charge:

Much of the quandary in distinguishing this case from *Burroughs* stems from the confusion as to what constitutes a "charge." A charge usually has two parts: (1) A name or label that generally characterizes the misconduct; and (2) a narrative description of the actions that constitute the misconduct. In *Burroughs*, the court used the term "charge" to apply to the charge's label, holding that when an agency names a charge so that the label has more than one element, then the agency must prove all of the elements for the overall charge to be sustained. *See Burroughs*, 918 F.2d at 172; *see also Boykin*, 51 M.S.P.R. at 59. In *Burroughs*, the charge label was "directing the unauthorized use of Government materials, manpower and equipment for other than official purposes." *Burroughs*, 918 F.2d at 172. The court held that the charge could not be sustained because, although \*204 the agency proved the use was "unauthorized," it did not prove that it was "for other than

official purposes." *Id.* The court's conclusion there made sense because Burroughs could easily have been misled by the label of the charge since it was a characterization of the entire act of misconduct.

That is not the situation in the instant case, however. Here, the agency broadly named the charge "improper misconduct." There are no separate elements to this label, and there is no confusion caused by the use of this broad term. The agency sufficiently put the appellant on notice of what he allegedly did and on what formed the basis for the discipline in its detailed narrative portion of the charge. *See Johnson v. Department of Justice*, 65 M.S.P.R. 46, 50 (1994), *dismissed*, 48 F.3d 1236 (Fed.Cir.1995) (Table); *Campbell v. Department of Transportation*, 15 M.S.P.R. 92, 103 (1983), *aff'd*, 735 F.2d 497 (Fed.Cir.), *cert. denied*, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984). *Burroughs* stands for the proposition that an agency must not label its charge with terms that are not supported by the proven misconduct. *Burroughs*, 918 F.2d at 172. However, it does not therefore stand for the proposition that an agency *must* label a charge using narrow terms with legal elements of definition.<sup>9</sup>

Why then would an agency ever use a label with a strict legal definition when it does not even have to label a charge? Because charges with strict legal definitions frequently denote a more *serious* offense than charges without those definitions.

You have all heard of the *Douglas*' factors, right? If you have not, *Douglas* is the Board's penalty-fits-the-crime decision in which it listed a dozen factors which might be relevant in selecting the penalty to impose for misconduct.<sup>10</sup> Consider *Douglas* factor #1: *The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.* What's the more serious offense? Getting into a fight with a co-worker or assaulting him? Deliberately falsifying an application for employment or inadvertently forgetting to list your conviction for treason? Theft of a government laptop computer or walking out with it but forgetting to sign it out? Getting into a verbal altercation with your supervisor or threatening her? The answers are obvious; but, as noted above, if the agency labels the charge as "assault," "falsification," "theft," or "threat," it must prove each element of the offense by a preponderance of the evidence.<sup>11</sup>

Take the threat cases for example. To determine whether an employee's words constitute a threat, courts look to "the connotation which a reasonable person would give to the

words."<sup>12</sup> The following evidentiary factors are relevant to this determination:

- (1) The listener's reactions;
- (2) The listener's apprehension of harm;
- (3) The speaker's intent;
- (4) Any conditional nature of the statements; and
- (5) The attendant circumstances.<sup>13</sup>

What if four of the five factors are relevant in a particular case and the agency fails on one of them? Does the agency lose? Maybe. But why should the agency take that chance by labeling the charge a threat? Could the agency accomplish the same result without the risk? Consider this notice of proposed removal which I made up:

To promote the efficiency of the service, I propose to remove from the Postal Service you based on the following incident of misconduct:

On January 1, 2005, you walked up to your first-line supervisor, Manager of Distribution Operations, Adolph Hitler, and told him that if you had any guts you would punch him out, right then and there. Whether you intended to punch out Hitler or not, he thought you were serious, as a consequence of which he called the Postal Inspectors and then promptly checked into the infirmary. So even if you are not guilty of threatening Hitler, you still created a disturbance and acted disrespectfully to a supervisor.

(Did you catch the conditional threat? Good.) Why did I hedge my bet by noting that even if the employee was not guilty of threatening Hitler, he was still guilty of two other offenses? Two reasons. Even though I did not affix a label to the charge, the Board is required to read the specification, figure out what the agency is charging the employee with, and then require the agency to prove the charge, label or no label.<sup>14</sup> Here, the specification alleges a threat and so the agency is stuck with *Metz*, like it or not. But I have created an escape hatch for the agency by explicitly including the less serious charges of creating a disturbance and disrespecting a supervisor. One might argue that those charges are implicit in the specification; the administrative version of "lesser included offenses." But why take the chance, since it is horn book law that if a charge validly brought is not sustained, the Board will not consider another charge that could have been made but was not.<sup>15</sup> That's exactly what happened to the Department of Interior in *Held v. Department of Interior*.

Doug Held was a Forestry Technician, Area Fire Management Officer, in the Redding, California, field office of the agency's Bureau of Land Management (BLM). He was put in charge of the Lowden Ranch Prescribed Burn Project as the "Burn Boss." According to the Prescribed Fire Plan for that project the objective was to ignite and control a fire

which would burn off star thistle on about 100 acres of land, which included public and private property.

On the morning of July 2, 1999, Held gave the order to ignite a fire to begin the Lowden Project burn. According to a later report from an interagency Board of Inquiry, the fire "escaped control and was declared a wildland fire." The report stated that the "Lowden Ranch fire grew to about 2,000 acres and destroyed 23 residences before it was contained." The Board of Inquiry concluded that the Lowden Ranch fire was a "significant event" that put over 200 members of the public at risk, resulted in the evacuation and destruction of homes, and placed firefighters in peril. The Board of Inquiry report estimated that the federal government alone spent \$20 million to deal with the Lowden Ranch wildfire.

Based on the findings of the Board of Inquiry, the agency removed Held for "intentional disregard of [BLM] policy and procedures intended to safeguard the Public, Bureau Personnel, Private and Government Property and for [his] acting without authority." In particular, the deciding official found that Held ordered the Lowden Ranch burn without referring to the burn plan to ascertain the allowable wind speed and the required type and number of on-site fire engines.

Interior removed Held based on a single charge with two elements: intentional disregard of BLM policy and acting without authority. Held appealed to MSPB, and the administrative judge reversed Held's removal, finding that the agency failed to prove that the Held acted with intentional disregard of agency policy. Interior filed a petition for review in which it argued that the administrative judge erred by concluding that the evidence was insufficient to show that Held acted with intentional disregard for agency policy and procedures. Because Chair Slavet and Vice Chair Marshall could not agree, the administrative judge's decision became the Board's final decision.

Everyone agreed that Held was guilty of acting without authority because, under the burn plan, Held only had the authority to start the fire if the wind speed was below a certain speed and it was above that speed when he ignited the fire. But rather than charging Held with two separate offenses, Interior charged Held with one offense comprising two elements; and, as we know, *Burroughs, supra*, required the agency to prove both elements. As Chair Slavet noted:

However, as the administrative judge found, the agency's charge consisted of two elements, "intentional disregard" and "acting without authority," both of which the agency was required to prove in order to sustain its charge. *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed.Cir.1990) (the Board may not split a single charge into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original charge).

Chair Slavet agreed with the administrative judge that because Interior had failed to prove that Held was guilty of intentional disregard, it failed to prove its charge against Held. Of interest to us, however, is the Chair's musings on what the agency could have charged and probably proven but inexplicably did not charge:

Although the agency was under no obligation to do so, the agency chose to charge intent as an element of the charge in this case, and it therefore had the burden to prove the requisite intent by a preponderance of the evidence. *See King v. Frazier*, 77 F.3d 1361, 1363 (Fed.Cir.) (the Civil Service Reform Act does not limit disciplinary actions to cases of intentional misconduct), *cert. denied*, 519 U.S. 814, 117 S.Ct. 62, 136 L.Ed.2d 24 (1996); *King v. Nazelrod*, 43 F.3d 663, 666 (Fed.Cir.1994); *Naekel v. Department of Transportation*, 782 F.2d 975, 978 (Fed.Cir.1986) (where intent is an element of the charge, the agency must prove intent by a preponderance of the evidence); *Baracker v. Department of the Interior*, 70 M.S.P.R. 594, 599 (1996) ("Whether an agency must prove intent as part of its case in chief depends, not on the status of the employee being disciplined, but on the nature of the charge."). Despite the fact that the appellant may have acted negligently and exercised extremely poor judgment when he ordered the Lowden Ranch prescribed burn ignited, the Board has no discretion to eliminate elements and find the appellant guilty of a **lesser offense** than that charged by the agency. *See Bonanova v. Department of Education*, 49 M.S.P.R. 294, 298 (1991). Thus, despite the extreme consequences of the appellant's actions, the Board could not sustain the agency's charge unless the agency proved that the appellant acted with "intentional disregard" for agency policy and procedures. Therefore, because I find that the administrative judge properly determined that the agency failed to show that the appellant acted with the requisite intent, I also conclude that the administrative judge properly determined that the agency failed to sustain its charge against the appellant.

What a monumental blunder! It appears as if Held carelessly caused a fire which cost the government 20 million bucks, and he beat the rap because they agency did not know how to frame its charge against him. The agency could have charged him, in the alternative, with intentional disregard and negligence. The notice of proposed removal might have read in part something like this:

I believe that you started the fire knowing full well that the wind speed exceeded the speed limit in the burn plan. I believe that you took the chance that the fire would not spread out of control even though wind speed was in excess of the wind-speed limit in the burn plan.

But even assuming for the sake of argument that you mistakenly believed that burn plan's wind-speed limit was greater than it was, you would not have made that mistake if you had double or triple-checked the plan before you ignited the fire. Accordingly, even if you were not guilty of intentionally disregarding the wind-speed limit, you were nonetheless guilty of negligence in not knowing it.

Interior got burned (I could not resist) because it *overcharged* Held. In all likelihood, it could have made the removal stick if it had charged Held with nothing more than plain-vanilla negligence. Look at the destruction which the fire caused. Under *Douglas* factor #1 alone, he is a goner. But if for some reason Interior thought it needed some wiggle room, it could have charged him, in the alternative, with the intent offense and with the lesser offense of negligence as insurance to achieve the same result as the intent offense or at worse a very long suspension and/or a demotion.

Although the Federal Circuit and the Board have invited agencies to refrain from labeling their adverse-action charges, being creatures of habit, agencies for the most part have declined the invitation, feeling more comfortable, at a minimum, to slap a catchall label on the charge like "conduct unbecoming." Although these general charges sometimes provide agencies with a false sense of security,<sup>16</sup> they sometime allow the agency to bat more successfully on a sticky wicket. *Cross v. Department of Army*<sup>17</sup> is the best case on point.

Cross was an EEO Specialist at Fort Meade, who was cross with one of his subordinates, whose performance appraisal he allegedly doctored. The Army charged Cross with, among other things, conduct unbecoming, and cited, among several specifications, one instance in which Cross forged the name of the reviewing official on his subordinate's appraisal. Cross admitted that he had forged the reviewing official's initials on the appraisal, but claimed that he intended to get the reviewing official to ratify the forgery, but he had neglected to do so. The Army fired Cross who appealed to the Board. The administrative judge required the Army to prove deliberate and intentional falsification on this specification under *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed.Cir.1986). After the hearing, the AJ further found that Army had failed to prove the requisite intent on this specification. The full board, including the two Democrat members, disagreed, reversed, and reinstated Cross's removal.

In its petition for review, Army contended that, on its "conduct unbecoming" charge, the administrative judge erred in requiring it to prove the specific intent required for a falsification charge. Referring to *Otero*, the Board agreed:

Applying [*Otero*] principles to this case, the agency was entitled to use a general charge such as conduct unbecoming a federal employee, which contains no specific intent element, rather than a charge of falsification, which contains a specific intent element. The fact that the agency used the words "falsified" and "falsely" in the narrative account of specifications 3 and 4 does not mean that it was required to prove falsification under the *Naekel* test, just as the agency in *Otero* was not required to prove a "threat" under the *Metz* test even though it used this word in its supporting narrative<sup>18</sup>

The Board was quick to note that while Army did not have to prove that Cross intended to mislead a reader into believing that the reviewing official had signed off on the performance appraisal, Cross's motive in forging the reviewing official's initials was nonetheless relevant to the agency's selection of penalty:

Our conclusion that the agency was not required to prove the specific intent element required for a falsification charge does not mean that the question of intent is irrelevant to the "conduct unbecoming"\*69 charge. Even when a specific intent is irrelevant to whether a charge has been proved, "whether the offense was intentional or technical or inadvertent" is always a factor to be considered in assessing the reasonableness of an agency's penalty. *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 305 (1981); see *Ford v. Department of the Navy*, 43 M.S.P.R. 495, 502 n. 4 (1990) (while the appellant's mental confusion was irrelevant to the charge of delay in complying with orders, it was a factor to be considered in determining the reasonableness of the penalty). We will therefore consider the evidence on whether the appellant's actions were intentional or inadvertent as we examine the specifications of misconduct.<sup>19</sup>

Pretty damn slick. The Army received all the benefit of charging Cross with "Falsification of Subordinate's Performance Appraisal" without the risk of having the charge shot down because it could not prove that Cross intended to mislead a reader into believing that the reviewing official had signed off on the appraisal. To make matters worse for Cross, he could not very well claim that he was not on notice that the agency was relying on his alleged impure motives in selecting the penalty of removal because the Army did use "falsified" and "falsely" to describe his misconduct. Pretty damn slick indeed!

Send me the questions you would ask the deciding official in your deposition of him to force him to admit that he would not have sustained this specification against Cross if he were not convinced that Cross forged the signature of the reviewing official with the intent to mislead a reader into believing that the reviewing official had concurred with his rating of the subordinate. Oh, yes: explain why you would be deposing the deciding official rather than the proposing official.

### About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Action appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB LITIGATION TECHNIQUES*

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### Endnotes

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<sup>1</sup> 5 USC § 7512 lists the adverse actions appealable to the Board under subchapter II of Chapter 75 and provides:

This subchapter applies to--

- (1) a removal;
- (2) a suspension for more than 14 days;
- (3) a reduction in grade;
- (4) a reduction in pay; and
- (5) a furlough of 30 days or less;

<sup>2</sup> See, e.g., *Hartigan v. Veterans Administration*, 39 M.S.P.R. 613, 618 (1989).

<sup>3</sup> *Hartigan*, 39 M.S.P.R. at 618; *Lockett v. United States Marine Corps*, 37 M.S.P.R. 427, 429 (1988); *Coltrane v. Department of the Army*, 25 M.S.P.R. 397, 403 (1984).

<sup>4</sup> *O'Connor v. Department of Veterans Affairs*, 59 M.S.P.R. 653 (1993)

<sup>5</sup> Sec. 752.404 Procedures.

(b) Notice of proposed action. (1) The notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The agency may not use material that cannot be disclosed to the employee of his or her representative or designated physician under Sec. 297.204(c) of this chapter to support the reasons in the notice.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of proposal shall state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(3) Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed shall remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

(i) Assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or to Government property;

(ii) Allowing the employee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave;

(iii) Curtailing the notice period when the agency can invoke the provisions of Sec. 752.404(d)(1) of this part, the "crime provision." This provision may be invoked even in the absence of judicial action if the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed; or

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action.

<sup>6</sup> *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198 (1997)

<sup>7</sup> 780 F.2d 1001, 1004 (Fed.Cir.1986).

<sup>8</sup> *Otero v. U.S. Postal Service* 73 M.S.P.R. 198, \*203

<sup>9</sup> *Otero v. U.S. Postal Service* 73 M.S.P.R. 198, \*203 -204

<sup>10</sup> The Board in its landmark decision, *Douglas vs. Veterans Administration*, 5 MSPR 280, established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. . The following relevant factors must be considered in determining the severity of the discipline:

- (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

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- (7) consistency of the penalty with any applicable agency table of penalties;
  - (8) the notoriety of the offense or its impact upon the reputation of the agency;
  - (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
  - (10) the potential for the employee's rehabilitation;
  - (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
  - (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

<sup>11</sup> *Burroughs, supra.*

<sup>12</sup> *Meehan v. United States Postal Serv.*, 718 F.2d 1069, 1075 (Fed.Cir.1983).

<sup>13</sup> *Metz v. Department of Treasury* 780 F.2d 1001, \*1002 (C.A.Fed.,1986)

<sup>14</sup> *Lachance v. Merit Systems Protection Bd.* 147 F.3d 1367, \*1371 -1372 (C.A.Fed.,1998)

<sup>15</sup> *Kennedy v. USPS*, 19 MSPR 379, 380-81 (1984); see *Horne v. MSPB*, 684 F.2d 155 (D.C. Cir. 1982).

<sup>16</sup> *Colbert v. U.S. Postal Service* 93 M.S.P.R. 467, \*471 (parties interpreted the "unacceptable conduct" charge as an accusation that the appellant altered time records to mislead agency officials into believing that he was following the directive concerning reduction of overtime, and with the effect of depriving employees of pay for overtime authorized and worked. Charge not sustained when employees testified that they in fact had received overtime pay.)

<sup>17</sup> 89 M.S.P.R. 62, \*68

<sup>18</sup> *Cross v. Department of Army* 89 M.S.P.R. 62, \*68

<sup>19</sup> *Cross v. Department of Army* 89 M.S.P.R. 62, \*68 -69