

CHAPTER 6

THE GENERIC, NARRATIVE CHARGE REDUX

Major Topics

- The General and Narrative Charges
- The Law of the Narrative Charge
- Charge Recharacterization and the Unfocused Narrative
- Penalty Determination and the Narrative Charge
- Proving Service Efficiency in the Narrative Charge

I. INTRODUCTION

In the past, the generic and narrative charges were poor, frowned upon relatives of the specific label charge. But changes in the law, namely how to interpret and construe, have virtually flipped that situation. It is not too far off the mark to say that the generic/narrative charge is the charge *du jour*.

The distinction between the generic charge and the narrative charge is, as we have said, one of form and not one of substance. Generic charges are, as noted by the Federal Circuit in *LaChance, OPM [Crouse] v. MSPB*, 147 F.3d 1367, 1371–73 (1998), essentially meaningless and wholly dependent upon the specification. A pure narrative charge is, in fact, the specification. Two seminal narrative charge cases are *Crouse* and *Otero*, but the charges are actually generic label charge cases. In the following discussion, the terms generic charge, general charge, and narrative charge are often used interchangeably. Virtually every observation that can be made about a generic label charge is equally applicable to the narrative or no-name charge.

As indicated, the generic label/narrative charge has been traditionally disfavored by many practitioners. The perceived shortcomings are easily recapped. These charges were frequently viewed as the lazy man's charge, often signaling that the agency is unsure what appellant did and what the charge should be. Many looked upon the general charge as a kitchen sink or spaghetti charge, with all appellant's perceived or suspected misdeeds simply thrown in to see what sticks.

Administrative judges have disfavored the generic, narrative charge because of its lack of structure and focus.

A real problem with the generic or narrative charge was that these charges can be confusing, giving rise to notice defenses, opening the door to charge recharacterization by the administrative judge. When the administrative judge recharacterizes the charge, the agency loses control of the process and often loses the appeal. Additionally, the old bugaboo was that the general charge could not support a significant penalty. General charges (inappropriate conduct) are often so "vanilla" that, without a well-crafted specification and detailed penalty analysis, they cannot support any kind of meaningful penalty.

Although these charges have been around since the inception of the civil service system, several decisions (*Cross, Crouse, Otero* as well as others) have made these charges a much more desirable charging option. See *Cross v. Dept. of Army*, 89 MSPR 62 (2001). Given these recent decisions, there is no valid reason for agencies not to make maximum use of general charges. Simply describing the appellant's behavior, in a well-focused specification, is consistent with the Civil Service Reform Act's requirement that the employee be given the "reasons" for the adverse action. The only downside or danger lies in sloppy specification writing, something that can even be a problem in a specific label charge.

II. THE GENERIC, GENERAL CHARGE

Selected Generic, General Label Charges

- Inappropriate conduct
- Conduct unbecoming
- Misconduct
- Inappropriate behavior
- Dishonest conduct

The list given above is obviously not exhaustive. The problem with these kinds of generic labels is that they say nothing. The government does not, or should not, remove employees for appropriate or honest conduct.

A. A WORD ABOUT “CONDUCT UNBECOMING,” “DISHONEST CONDUCT”

Two generic charges warrant special comment and stand apart somewhat from other generic charges. Unlike other generic charges, “conduct unbecoming” and “dishonest conduct” are generally recognized charges and are frequently listed in agency penalty guides and standards of conduct. Although vague, each charge carries, at a minimum, a connotation of definite wrongdoing, and each is more forceful and compelling than most other generic charges. *Miles v. Dept. of Army*, 55 MSPR 633, 637–38 (1992), defines a conduct unbecoming charge:

[There was] [n]o specific definition of this term...in the record, although the proposal notice states that it is “disgraceful” conduct.... The ordinary meaning of unbecoming is: “unattractive; unsuitable...; detracting from one’s...character, or reputation; creating an unfavorable impression.”... Certainly, running over a deer in a government vehicle, even for humanitarian motives, when a game warden is available, is at the very least unsuitable and tends to detract from one’s character because it reflects poor judgment.... [A]ppellant’s misconduct was conduct unbecoming a Federal employee.

III. THE NARRATIVE CHARGE

In addition to *Crouse*, *Otero*, *Cross*, several other significant cases have made the generic and narrative charges desirable charging options. See *Russo v. USPS*, 284 F.3d 1304 (Fed. Cir. 2002); *Farrell v. Dept. of Interior*, 314 F.3d 584 (Fed. Cir. 2002); *Kennedy v. USPS*, 75 MSPR 281 (1997). These decisions have significantly changed the way generic and narrative charges are looked at, construed, and interpreted.

These decisions have put the breaks on charge recharacterization, the problem always plaguing the generic, narrative charge. In other words, the “old law” was that since the generic/narrative charge was, at least at first read, essentially meaningless, the interpretation would be driven by the specification and just as often the penalty analysis.

As to the specification, if the specification appeared to describe what was essentially falsification, the general charge would usually be recharacterized as a falsification charge. This was especially the case where the specification contained a “buzzword” or term of art, such as falsification or threat. For that reason, a primary guide in drafting specifications has always “just the facts”: describe the misconduct factually; do not characterize it (e.g., do not label it in the specification).

As to the penalty, Board thinking was that, in such a situation, the penalty was, more likely than not, based on the misconduct of “falsification” or “threat.” The phobia was that an appellant could not or should not be penalized for “theft,” if the charged and proven misconduct was merely “unauthorized possession”; the charge was often a function of the penalty. In this mindset, the Board seemed to wholly ignore the obvious option of adjusting the penalty (e.g., fitting the penalty to the proven misconduct); instead, the charge was often thrown out with the bath water so to speak.

Much of this law or thinking has now changed, at least in substance. The brakes have been put on charge recharacterization,

and there is nothing wrong with getting, in effect, a “theft penalty” off of an “unauthorized possession” charge, provided that the appropriate aggravating factors have been noticed and proven.

Indeed, the fairly recent cases of the *Crouse*, *Otero*, and *Cross* ilk or genre have changed the way we look at general and narrative charges; they have dramatically opened the door to an effective way to charge, that is, alternative charging (e.g., bring lesser-included offenses as well as the “main charge”). Read collectively, these decisions have opened the door for powerful charging options. These decisions allow alternative charging (bring lesser-included offenses, alternative charges, or generic charges as “backup charges” to the main or base charge). These decisions provide for an effective way to charge in the alternative (as explained below, to include alternative theories in the specification to a general charge or in the narrative charge itself). And, these decisions bless the once-shunned practice of “charging down and proving up.” In the latter respect, the old bugaboo that a general charge cannot support a significant penalty has been put to rest. These changes have been so fundamental and important that several individual chapters have been devoted to these “new tools.”

A. THE LAW OF THE NARRATIVE CHARGE: INTERPRETING THE NARRATIVE CHARGE

An easy way to recap the law on the generic or narrative charge is to say that the law of the narrative or general charge is essentially the law as to the specification: only so much of the specification need be proven as necessary to sustain the essence of the charge. The rule in *Crouse* and *Otero* line of cases seems to be that any misconduct noticed and specified in the specification is in play and anything so noticed and proven that will satisfy the standard of service efficiency can sustain the adverse action. As indicated, the agency is no longer sacrificing much, if anything *vis-à-vis* penalty. By going from a specific label charge to a general or narrative charge, the agency does not give up on a significant penalty.

Again, both Board and Federal Circuit decisions, namely *Cross*, *Crouse*, and *Otero*., have made it clear that any misconduct in the specification of a general or narrative charge is at issue. If the agency proves that any of that specified and noticed misconduct satisfies the standard of service efficiency, the adverse action should be, absent something unusual, upheld.

Second, by applying a general label to the specification, as in *Cross*, the agency seems to get some added protection against the narrative being recharacterized or read narrowly and limited to a specific offense. The general label is a signal that the specification is not to be restricted; put yet another way, the general label is a signal that the agency did not intend to restrict, for example, a specification that was for the most part, but not exclusively, a threat specification to a charge of threat. *Cross* seems to provide the agency with an added guard against charge recharacterization. By applying the general label, the agency is implying that the charge is not to be narrowly characterized. The narrative in *Cross* could easily be read as a falsification specification and the charge thereby so limited. But the general “conduct unbecoming” label, quite probably, kept that narrative from being read as a falsification charge. So an agency may be wise to us a generic label (as added protection) instead of a narrative charge.

The seminal case on general and narrative charges is *Otero*. The backdrop to *Otero v. USPS*, 73 MSPR 198 (1997), is that the agency removed the appellant for “improper conduct.” In support of its charge, the agency alleged in a two-page narrative specification that the appellant made certain threatening remarks to his supervisor, stating, “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 that, the supervisor ordered *Otero* to perform a certain duty but he immediately went to the Customer Services Office and continued to disrupt the workplace by, among other things, speaking in a loud and aggressive manner, pointing his finger at her several times and pounding his fist on the conference table. The AJ characterized the charge as threatening conduct and, over the agency’s ultimate objection (the agency had earlier characterized the charge that same way), made clear that the agency would be required to meet the *Metz* standards. After a hearing, the AJ reversed the agency action, finding that the agency had not proven that the appellant threatened his supervisor.

On review, a Board majority determined that the AJ erred by narrowly limiting the charge to threatening conduct, instead of also considering the “improper conduct” that preceded and followed the threats to the supervisor. It reversed and remanded. The Board made clear that an agency has the option to label a charge and, if it does so, it must prove the elements of that labeled misconduct, as evidenced by such court decisions as *Burroughs* and Board decisions as *Chauvin*.

However, the Board emphasized that the law does not require an agency to affix a label to a charge and that an agency

can choose to “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.” The Board seemed to suggest that the only qualifying standards in such instances were that an agency meet requirements of due process and fundamental fairness, which the Board found had been “easily” satisfied in this appeal by the specific two-page narrative statement in the agency’s proposal. In sum, the Board concluded that the appellant “had not been harmed in the least because the agency used a broad label such as ‘improper conduct’ rather than using a label more ‘specific’ in the eyes of the administrative judge.” The case was remanded to allow the parties an opportunity to submit evidence and defend against the charge, as it had been defined by the Board in this decision. Vice Chair Slavet dissented on the basis that the Board had improperly reopened the appeal, *sua sponte*; the agency representative had moved to expand the charge at the hearing after the AJ’s initial determination but the AJ had denied that motion and the agency neither objected to the ruling before the AJ nor challenged the ruling in its petition for review.

Specifically, the Board’s decision in *Otero v. USPS*, 73 MSPR 198, 202–04 (1997), underscores the point that an agency need not even label a charge, that all that is required is to notice the reasons for the adverse action and satisfy the standard of service efficiency:

Nothing in law or regulation requires an agency to 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.... 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.... Hypertechnical common law pleading is not Board practice, and so an agency is not required to narrowly label its charge with magic words for it to be sustained by the Board.

The agency’s two-page narrative description of the incident... is very specific and easily satisfies the requirements of notice and fairness.... The appellant has not been harmed in the least because the agency used a broad label such as “improper misconduct” rather than using a label more “specific” in the eyes of the administrative judge.

...In addition to characterizing the appellant’s misconduct as “threatening,” the agency also described his conduct as “out of control,” “aggressively and verbally” abusive, “disruptive,” and otherwise “extremely abusive.”... Even absent the “threatening” characterization, the agency has more than adequately described the misconduct in which the appellant engaged and its detrimental effects on the efficiency of the service.

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Moreover, although the court in *Burroughs* held that a charge must fall if any element of the charge label is not proven, that does not thereby mean that a charge must fall if any portion of the narrative description of the charge is not proven. For example, if an agency named a charge “theft of government property,” and then in the narrative description stated that on a single occasion, the employee stole a hammer, a wrench, and a screwdriver the charge would not fall under *Burroughs* if on appeal the agency could prove only that a hammer and a wrench were taken. The employee would still be found to have committed theft of government property, and the agency’s decision to impose discipline would be sustained, although there might be cause to mitigate the penalty. As the court stated in *Burroughs*, “[w]here more than one event or factual specification is set out to support a charge... proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge.”

Otero, 73 MSPR 202–04 (citations omitted).

Soon after *Otero*, the Board came out with *Crouse* but *Crouse* and *Otero* did not square and OPM ended up taking *Crouse* to the Federal Circuit. We turn to *Crouse* and its various holdings that show how easily a narrative charge can be recharacterized. The Federal Circuit stepped in and squared *Otero* and *Crouse* and, in doing so, signaled a clear change in interpretative guidelines applicable to general or narrative charges. *Crouse* involved a charge of “unacceptable and

inappropriate behavior by a supervisor” based on a specification of “obstructing an investigation” as well as other misconduct, e.g., poor judgment. Nevertheless, the Board treated the inappropriate conduct charge as a single charge of obstructing an investigation, including the element of intent, and disregarded other misconduct in the specification. OPM took *Crouse* to the Federal Circuit and argued that the Board was bound by the generic label and recharacterized the label based on a reading of the specification.

Appellant, a supervisory police officer, was demoted on the following action.

Crouse v. Dept. of Treasury

Charge 2: Unacceptable and inappropriate conduct by a supervisor.

Proposal Specification: Appellant violated agency procedures by failing to remove his shoes in going through security, and in failing to return through the metal detector when the alarm on the magnetometer rang. Before this matter was investigated, appellant stood very close to Sargent Scheppler and stated in a harsh manner that whatever she said could be used against him. It appears this was an attempt to persuade Sargent Scheppler into not cooperating in the investigation. Even if this was not intended, appellant should have realized how this would have been perceived by a subordinate. Appellant’s misconduct in attempting to persuade a subordinate into not cooperating outweighs any mitigating factors.

Final Decision: It appears that appellant was attempting to persuade Sargent Scheppler into not cooperating fully in the investigation.

The deciding official testified that charge 2 was in essence an obstruction charge as to the investigation into the charge 1 conduct. The administrative judge recharacterized the charge based primarily upon the deciding official’s testimony.

The Board upheld its administrative judge:

A charge should be construed in light of its specifications.... When specifications and other evidence indicate that the agency is charging the appellant with a serious charge, it is error for the administrative judge to analyze the charge as a lesser offense.... An administrative judge must determine what are the essential elements of a charge.... In this matter, intimidation of an employee was not a mere consequence of the charged misconduct; it was the gravamen of the charge. Given the ambiguity apparent in the record, the administrative judge did not err in incorporating that element into the title of the charge, and into her analysis, when the agency’s narrative description and subsequent testimony identified it as essential.

Crouse, 70 MSPR at 628–29.

In *Crouse II*, OPM sought reconsideration. Although the Board offered some comforting language, it still affirmed the administrative judge:

By considering the testimony of the deciding official in determining the elements of the agency’s charge in this case, *we do not suggest that an administrative judge may disregard the charge as framed in the proposal and decision notices and substitute his or her own understanding of the essence of the charge based on all the evidence in the record. We agree with OPM that the Board should not have to look outside the agency’s proposal and decision notices to determine the elements of the agency’s charge. Here, however, those documents described the unacceptable and inappropriate conduct charge as an attempt to impede...yet denied that this was the charge.* Thus, it was appropriate to look at the deciding official’s testimony to support an interpretation of these documents. After all, the agency official who decides to take a disciplinary action certainly knows the reasons for the action and can be expected to accurately explain those reasons.

We also disagree with OPM’s assertion that the Board’s decision effectively...allow[s] administrative judges to change the agency’s charges based on the testimony at the hearing. Here, the agency described its unacceptable and inappropriate behavior charge as an attempt to impede the investigation.... The appellant’s response... reflects that he...understood this to be the basis of the charge. The deciding official also understood this to be the basis of the charge. [T]he due process requirements of notice [and an opportunity to respond]...require...the