CHAPTER FOUR
CHARGES AND PENALTIES

I. THE NATURE OF CHARGES

A provisions of the Civil Service Reform Act, 5 USC 7513, requires "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." The statute also provides the right to appeal for individuals whose cases are within the jurisdiction of MSPB, and a determination by the MSPB of whether the "efficiency of the service" is furthered by the action taken by the agency against the employee if the underlying charges are proved. The Reform Act does not require a particular form of charge. Many agencies utilize disciplinary tables of penalties that classify offenses and provide suggested ranges of penalties for the listed offenses. Those who draft charges for agencies with tables of penalties often write advance notice of intended disciplinary or adverse actions, known as proposal letters, with charges or specifications mirroring one or more of the specific offenses classified by the table of penalties, e.g., theft, insubordination, fighting on duty. The specification links a particular offense classified under the table with the suggested penalty associated with that charge in the penalty table. But the statute and regulations do not require either the use of the table of penalties or a particular classification of a charge. Agencies have had difficulties in sustaining charges when they have asserted a particular offense as the charge and then provided a narrative of facts that do not establish the elements of the charged offense. To avoid the problem of establishing charges that require proof of particular sets of fact, agencies may dispense entirely with the use of classifications of charges and instead provide narratives of the facts in support of the penalty proposal. The agency may then use a general charge, e.g., "conduct unbecoming a federal employee," supported by a factually–specific narrative, as explained in *Otero v. USPS,* 73 MSPR 198 (1997), and *Cross v. Dept. of Army,* 89 MSPR 62 (2001).

Otero v. USPS, 73 MSPR 198 (1997)

The agency removed the appellant from his PS-5 Window Distribution Clerk position, based on a charge of "improper conduct" due to his making threatening remarks toward a supervisor. Specifically, the agency alleged that on March 15, 1995, the appellant 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 the appellant to perform a certain duty; and immediately afterwards, the appellant entered the office of Jan Miller, the Manager of Customer Services, and disrupted the workplace by, *inter alia*, speaking 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.

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In *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990), the U.S. Court of Appeals for the Federal Circuit held that the Board may not sustain a charge where the agency fails to prove one of the elements by preponderant evidence. Here, the agency charged the appellant with improper misconduct based on threatening behavior as a single charge. In its notice of proposed removal, the agency did not define which aspects of its narrative of the charge constituted which element of the charged misconduct. In addition, the charge arose from one factual specification set out to support it.

In a prehearing conference memorandum dated August 2, 1995, the 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*, 780 F.2d 1001, 1004 (Fed. Cir. 1986).

Five days after the prehearing conference, the agency moved to withdraw its representation that the threat charge was the sole specification. The agency also objected to the administrative judge's restricting it to this single act of misconduct (a threat) and moved that it be allowed to include at the hearing the "improper conduct which lead [sic] up to the threat, during the threat and after the threat," arguing that the appellant's "conduct alone would have justified a removal…even if the threat had not been made."

At the hearing, the administrative judge denied the agency's motion. The agency has not specifically alleged on petition for review that the administrative judge erred in her characterization of the charge. We find, however, that the administrative judge improperly characterized the agency's charge as being an allegation of making a threat, and that she incorrectly analyzed this charge under the *Metz* criteria. Similarly, we find that the administrative judge's requirement that the agency narrowly label its charge amounted to error.

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 MSPR 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's case law reflects the requirements of due process and fundamental fairness in this area. *See, e.g., O'Connor v. Department of Veterans Affairs*, 59 MSPR 653, 656-58 (1993); *Stephen v. Department of the Air Force*, 47 MSPR 672, 680-81 (1991). But, while an agency is required to state the reasons for a proposed adverse action in sufficient detail to allow the employee to make an informed reply, *see Spearman v. U.S. Postal Service*, 44 MSPR 135, 139 (1990), the charge must be

viewed in light of the accompanying specifications and circumstances, and should not be technically construed, *see, e.g., Pflanz v. Department of Transportation*, 21 MSPR 71, 73 (1984), *aff'd*, 776 F.2d 1058 (Fed. Cir. 1985) (Table). The agency's two-page narrative description of the incident that is the basis for this appeal is very specific and easily satisfies the requirements of notice and fairness. *See also Friese v. Department of Justice*, 45 MSPR 210, 214-15 (1990), *aff'd*, 932 F.2d 980 (Fed. Cir. 1991) (Table). 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. Additionally, the appellant must prove any affirmative defenses. 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. *See Spearman*, 44 MSPR at 139. 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. *See, e.g., King v. Nazelrod*, 43 F.3d 663, 665 (Fed. Cir. 1994); *Lockett v. U.S. Marine Corps*, 37 MSPR 427, 429 (1988). Similarly, an appellant is not held to strict rules of pleading when making his claims in pursuit of his appeal. *See Hill v. Department of the Air Force*, 796 F.2d 1469, 1472 (Fed. Cir. 1986).

Furthermore, even if the Board were to apply *Metz* here and dismiss those aspects of the narrative charge in which the agency describes the appellant's conduct as "threatening," discipline would still be warranted. 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.

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 MSPR 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 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 MSPR 46, 50 (1994), *dismissed*, 48 F.3d 1236 (Fed. Cir. 1995) (Table); *Campbell v. Department of Transportation*, 15 MSPR 92, 103 (1983), *aff'd*, 735 F.2d 497 (Fed. Cir.), *cert. denied,* 469 U.S. 881 (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.

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 still would 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." *Burroughs*, 918 F.2d at 172.

Based on the above, we find that it would be most fair to the parties if the case were remanded to allow the appellant to defend against the charge that was originally brought against him. The administrative judge's improper recharacterization of the charge into one of "threat" no doubt caused confusion and did not properly put the parties on notice as to what they would need to show in order to prove, or to defend against, the charge as the agency framed it originally.

The parties did not introduce all of the evidence and argument that they may have wanted to on the merits and the reasonableness of the penalty, and they restricted their assertions below and on petition for review to the parameters set forth by the administrative judge's ruling on the narrowed charge of threat. Also, neither party has had an opportunity to describe the evidence and argument that they were deterred from introducing or were given an opportunity to explain precisely how this ruling by the administrative judge would have affected the outcome of the case. *See Farris v. Department of the Air Force*, 20 MSPR 547, 550-51 & n.3 (1984).

ORDER

Accordingly, we REMAND the appeal to the Atlanta Regional Office for further adjudication. On remand, the administrative judge shall address the issues herein and shall afford the parties an opportunity to submit evidence and argument on the merits and the reasonableness of the penalty, including a supplemental hearing if requested by the appellant. The administrative judge shall then issue a new initial decision consistent with this Opinion and Order.

***Cross v. Dept. of Army,* 89 MSPR 62 (2001)**

The AJ found that, with respect to specifications 1, 3, and 4 of the "conduct unbecoming" charge, the agency was required to prove the elements of a falsification charge—that the employee knowingly supplied incorrect information with the

intention of defrauding the agency. *[S]ee Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). The AJ further found that the agency failed to prove the requisite intent with respect to specifications 1 and 4.

In its petition for review, the agency contends that the AJ erred in requiring it to prove the specific intent required for a falsification charge. The Board faced an analogous situation in *Otero v. U.S. Postal Service*, 73 MSPR 198 (1997). The agency charged Otero with "improper conduct." In a lengthy narrative supporting this charge, the agency made a number of specific allegations as to what Otero said and did, including the characterization that the appellant threatened his supervisor by these statements and actions. *Id.* at 200. The AJ required the agency to prove the elements of a threat under *Metz v. Department of the Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986). *Otero*, 73 MSPR at 201-02. The Board reversed this ruling, stating that: an agency need not affix any label to its charges, but can instead describe actions that constitute misbehavior in narrative form and have its discipline sustained if the efficiency of the service suffers because of the misconduct; if an agency instead chooses to label an act of misconduct, it is bound to prove the elements that make up the legal definition of the charge, if any; and there was nothing inappropriate about the agency using a broad label such as "improper conduct" as long as the reasons for the proposed action were described in sufficient detail to allow the employee to make an informed reply. *Id.* at 202-03.

Applying these 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.

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" 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 MSPR 280, 305 (1981); *see Ford v. Department of the Navy*, 43 MSPR 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.

II. MITIGATION OF PENALTIES

The Civil Service Reform Act does not specify how agencies are to establish adverse action penalties or how the MSPB is to review the penalties imposed by agencies. There are a couple statutes that prescribe specific penalties, for example, a mandatory 30 day suspension for misuse of a government vehicle; otherwise, agencies are on their own, leaving managers to their discretion, as that discretion may be guided by internal agency policies, e.g., tables of penalties, or by requirements of collective bargaining agreements.