

Charges and Penalties

Description: This session provides a comprehensive look at framing or crafting charges; the specific charges typically brought by agencies and their elements of proof; considerations in taking, supporting and defending against penalty determinations; and, frequent mistakes made in framing charges and in making penalty decisions.

Length: 2 days

(Note from Sam: This could be part of VG and G but I may need to teach this with Renn if 2 instructors are needed)

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- II. The Charges
 - A. Charge Framing
 - 1. The Basics
 - 2. Charge Framing Snafus: 11 Deadly Sins
 - B. Recent Developments in Charge Framing
 - 1. The Focus on Notice

2. A Less Legalistic Analysis: Approval of General-Label Charges
3. The Risk in General-Label Charges
4. Continued Loosening
5. Allowing Flexibility in Structuring Charges
6. But Still Scrutinizing the Wording of the Charge
7. Endorsing Alternatives to Intent Charges
8. Merger
9. Having it Both Ways: A Reduced Charge Burden with More Bang in Penalty?

C. Proof of Charges

1. Insubordination and Failure to Follow Orders
2. Falsification
3. Physical or Mental Inability to Perform
4. Willful Vehicle Misuse
5. Threats
6. Attendance Related Offenses

7. Failure to Cooperate in an Agency Investigation
8. Theft / Conversion
9. Sex Harassment
10. Unauthorized Use of Government Property
or Conversion
11. Conviction-related Offenses
12. Performance / Chapter 75 Charges
13. Indefinite Suspensions
14. Disrespectful Conduct Charges

III. Nexus

IV. Penalty

A. Recent Developments in Penalty Law and Determinations

1. Deference
2. The Due Process problem
3. The Deciding Official's Involvement
4. The emergence of Douglas Factor

5. The scapegoat problem
 6. The focus on the content of the agency proposal
 7. Misconduct during the administrative process as an aggravating factor
 8. Selling the penalty / emphasizing the harm to the agency and employees
 9. Stricter application of Douglas factors
 10. De minimis as a mitigating factor even if custody and control
 11. Trust and confidence determination rests primarily with agency
 12. Illustrative cases in which penalty mitigated
 13. Illustrative cases in which penalty upheld
- B. Penalty mistakes made by agencies
- V. Affirmative Defenses
- A. A Closer Look at the Affirmative Defenses:
1. Harmful Procedural Error
 2. Prohibited Personnel Practices
 3. Not in Accordance with law

Appendix A: Charging Exercises

Appendix B: Case Summaries

EEOC and MSPB Advocacy

Description: This is a class for those who represent parties before both the EEOC and MSPB. It can be adapted to particularly suit Agency or Employee representatives. There is an emphasis on practical exercises. The class culminates with a mock hearing, where the course participants play witnesses and advocates. The topics covered include: (1) the EEO laws; the theories of discrimination; the 1614 regulations, MD-110 and other EEOC Guidance; the Civil Service Reform Act; resolving and settling claims; advising managers at mediations; pre hearing conferences; taking discovery (e.g., conducting and defending depositions, writing and responding to interrogatories, etc.); analyzing evidence; selecting, preparing, presenting and cross examining witnesses; moving documents into evidence; making opening and closing statements; making objections or offers; motion practice (e.g., motions for summary disposition); appeal; post hearing issues; and other matters and (2) the Civil Service Reform Act, MSPB regulations, related laws EEO laws, whistleblower reprisal; charges and penalties; and the other matters, addressed in (1), above.

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