

SUMMARY TABLE OF CONTENTS

INTRODUCTION: CHARGES, PENALTIES, AND AFFIRMATIVE DEFENSES.....	1
PART ONE—THE AGENCY CHARGE	
CHAPTER 1: THE BASICS, THE ESSENTIALS—ADVERSE ACTIONS	21
CHAPTER 2: CHARGES AND PROOF REQUIREMENTS	37
PART TWO—FRAMING OR WRITING THE CHARGE	
CHAPTER 3: CAUSE—THE OFFICIAL, CSRA CHARGE	409
CHAPTER 4: “SPECIFIC REASONS”; SPECIFIC RULES.....	445
CHAPTER 5: CHARGES—THE KINDS OF CHARGES, THEIR PARTS, THEIR RULES	457
CHAPTER 6: THE SPECIFIC LABEL CHARGE	489
CHAPTER 7: GENERIC, NARRATIVE CHARGES.....	509
CHAPTER 8: THE CONJUNCTIVE CHARGE	535
CHAPTER 9: CHARGE INTERPRETATION	549
CHAPTER 10: MERGER, MULTIPLICITY OF CHARGES, AND ADMINISTRATIVE DOUBLE JEOPARDY	591
CHAPTER 11: NOTICE; DUE PROCESS	617
CHAPTER 12: KEY CHARGES AND THEIR ALTERNATIVES.....	671
CHAPTER 13: SPECIAL, UNIQUE, <i>DU JOUR</i> CHARGES—CONDITIONS OF EMPLOYMENT, INABILITY TO PERFORM.....	751
CHAPTER 14: CHARGES <i>DU JOUR</i> —TELEWORKING; T&A IN SWIPE TIME; PRIVACY AND HIPAA VIOLATIONS	791
CHAPTER 15: THE INDEFINITE SUSPENSION CHARGE	831
CHAPTER 16: POWER CHARGING—CHARGING DOWN, PROVING UP; CHARGING IN THE ALTERNATIVE.....	857
CHAPTER 17: SELECTING, DRAFTING THE CHARGE; WORKING WITH PROPOSING, DECIDING OFFICIALS	877
PART THREE—THE PENALTY	
CHAPTER 18: PENALTY BASICS AND FUNDAMENTALS	907
CHAPTER 19: PENALTY REVIEW AND DEFERENCE	939
CHAPTER 20: THE <i>DOUGLAS</i> FACTORS BY THE NUMBERS	975
CHAPTER 21: TRICKS OF THE TRADE—SELLING/ATTACKING THE PENALTY; DEALING WITH DECIDING OFFICIALS	1053
PART FOUR—HOW TO DO IT (IN REAL TIME)	
CHAPTER 22: HOW TO DO IT: MASTERING THE BASICS, APPLYING THE FUNDAMENTALS	1077
CHAPTER 23: HOW TO DO IT: A CLOSER, “POST-GRAD” LOOK AT THE NUANCES.....	1093
PART FIVE—INITIAL DECISIONS	
CHAPTER 24: WHAT’S CURRENT AND HAPPENING IN REAL TIME.....	1109
PART SIX—CHARGES AND AFFIRMATIVE DEFENSES	
CHAPTER 25: CHARGES AND AFFIRMATIVE DEFENSES.....	1137
TABLE OF CASES.....	1235

TABLE OF CONTENTS

INTRODUCTION: CHARGES, PENALTIES, AND AFFIRMATIVE DEFENSES.....	1
I. NEW EO, RESCINDING PREVIOUS EOS REGARDING LABOR AND EMPLOYEE RELATIONS AND CREATION OF SCHEDULE F..	1
II. NEW REGULATIONS.....	1
A. 5 CFR 315 CHANGES OR ADDITIONS	1
B. 5 CFR 432 CHANGES OR ADDITIONS	1
C. 5 CFR 752 CHANGES OR ADDITIONS	2
III. NEW COURT CASES	2
A. ADVERSE ACTIONS.....	2
1. Appropriate Relief.....	2
2. Illegal Appointment.....	3
B. AGE DISCRIMINATION—STATUTORY CONSTRUCTION	3
C. ARBITRATION.....	4
1. Applicable Precedent	4
2. Due Process—Right to Review Evidence.....	4
3. Election	5
D. CHARGE—CONDITION OF EMPLOYMENT.....	5
E. DISCOURTESY.....	5
F. DISCRIMINATION—“BECAUSE OF SEX”.....	6
G. DUE PROCESS VIOLATION—APPELLANT REVIEWED DOCUMENTS RELIED ON	6
H. EVIDENCE—AWOL; ADMINISTRATIVELY ACCEPTABLE EVIDENCE	6
I. FEDERAL EMPLOYEE LIABILITY	7
J. FIFTH AMENDMENT, SELF-INCRIMINATION—DISPARATE PENALTY—EVIDENCE	7
K. INDEFINITE SUSPENSION—CHARGE VAGUENESS CURED BY INFORMATION PROVIDED.....	7
L. LACK OF CANDOR	8
M. MIXED CASE	8
1. Election	8
2. Petition for Enforcement	8
N. NATIONAL GUARD TECHNICIANS—MSPB JURISDICTION.....	9
O. NEGLIGENCE	9
1. Penalty	9
2. Performance-Related Actions.....	9
P. OFF DUTY—DISPARAGING REMARKS OF RACIAL NATURE.....	10
Q. PENALTY	11
1. Board Mitigation Affirmed Charge	11
2. Impact of Excessive Absences	11
3. Mitigating Factors—Whistleblower Reprisal	11
4. Violation of CBA.....	12
R. PERFORMANCE—CHAPTER 43—PROOF OF PRE-PIP UNACCEPTABLE PERFORMANCE.....	12
S. PERFORMANCE-BASED ACTIONS—OPPORTUNITY TO DEMONSTRATE ACCEPTABLE PERFORMANCE.....	12
T. REDUCTION IN GRADE—JURISDICTION—SUPERVISORY PROBATIONARY PERIOD	12
U. SANCTIONS—APPROPRIATE FOR REPEATED FAILURES TO COMPLY	13
V. SECTION 714.....	13
1. DVA Penalty.....	13
2. Retroactivity.....	13
a. Standard of Review.....	14
3. Untimeliness	14
W. SES—PERFORMANCE-RELATED REMOVAL.....	14
X. SETTLEMENT—INTERPRETATION	14
Y. SUITABILITY—MSPB JURISDICTION.....	15
Z. USERRA	15
AA. WHISTLEBLOWER REPRISAL	15
1. Carr Factors.....	15
2. Contributing Factor and Clear and Convincing Evidence	15
3. Emotional Harm Damages.....	16
4. IRA and Clear and Convincing Evidence	16

5.	IRA and Nonfrivolous Allegations	16
6.	IRA and <i>Prima Facie</i> Case	17
7.	IRA—Mixed Case	17
8.	Lawful Assistance Under 5 USC 2302(B)(9)(B)	18
9.	Personnel Action	18

PART ONE—THE AGENCY CHARGE

CHAPTER 1: THE BASICS, THE ESSENTIALS—ADVERSE ACTIONS 21

I.	INTRODUCTION	21
A.	JURISDICTION	21
II.	ADVERSE ACTIONS	22
A.	SHORT SUSPENSIONS (5 USC 7501–7504 NON-ADVERSE ACTIONS)	23
B.	MAJOR ADVERSE ACTIONS	23
C.	COVERED EMPLOYEES	25
D.	THE PROPOSAL: PREDECISIONAL DUE PROCESS AND STATUTORY, REGULATORY ENTITLEMENTS	26
1.	Importance of the Proposal	27
2.	No Predecisional Discovery; Materials Relied Upon, <i>et al.</i>	27
3.	Oral, Written Replies	28
4.	Preappeal Advocacy	28
E.	THE AGENCY FINAL DECISION	29
F.	THE EMPLOYEE’S STATUS PENDING THE AGENCY FINAL DECISION: FULL DUTY, PAY STATUS; REASSIGNMENT OR DETAIL; ADMINISTRATIVE LEAVE; INDEFINITE SUSPENSION	30
III.	38 USC 714: DEPARTMENT OF VETERANS AFFAIRS	31
IV.	SUITABILITY, SECURITY ACTIONS, <i>ET AL.</i> : A RECAP, A GLIMPSE AHEAD	32

CHAPTER 2: CHARGES AND PROOF REQUIREMENTS 37

I.	BURDENS AND SPECIFIC BURDEN CHARGES	37
A.	ABSENCE WITHOUT LEAVE (AWOL) (TO INCLUDE TARDINESS)	37
1.	Elements	37
2.	Specification	37
3.	Overview	37
4.	Explanation	38
a.	Absence From Duty Element	38
b.	Absence Not Authorized or Request Properly Denied Element	39
c.	Scope of Evidence	39
d.	The Importance of Medical Evidence	39
e.	Relationship of AWOL to Approved and Excessive Leave Cases	40
f.	Relationship of AWOL to Failure to Follow Leave Procedure Cases	40
g.	Constructive Suspensions and Absences	40
h.	Relationship of AWOL to Insubordination	41
i.	Main Cases	41
5.	Defenses	50
6.	Key Penalty Considerations	52
7.	Related Charges	54
B.	ABUSE OF LEAVE	55
1.	Elements	55
2.	Specification	55
3.	Explanation	55
a.	Nature of Charge	55
4.	Defenses	55
5.	Key Penalty Considerations	56
6.	Related Charges	56
C.	ABUSIVE, OFFENSIVE, INDECENT, DISGRACEFUL, DISRESPECTFUL, INSOLENT, OR INFLAMMATORY LANGUAGE	56
1.	Elements	56
2.	Specification	56
3.	Explanation	57
a.	Nature of Charge	57
b.	Definitions and Examples of Offenses	58

c.	Presence	62
d.	Intent and Truth of Statements	62
4.	Defenses	63
5.	Key Penalty Considerations	67
6.	Related Charges	68
D.	ALCOHOL: POSSESSION, USE, OR IMPAIRMENT	69
1.	Elements	69
2.	Specification	69
a.	Alcohol: Possession or Use Specification	69
b.	Alternative Specification When Alcohol Possession Results From Alcohol Test	69
c.	Alternative Specification When Alcohol Impairment Is Charged	69
3.	Explanation	69
a.	Nature of Charge and Definitions	69
b.	Testing, Constitutional, and Chain of Custody Issues	69
c.	Main Cases	69
4.	Defenses	72
5.	Key Penalty Considerations	72
6.	Related Charges	73
E.	ARREST	73
1.	Elements	73
2.	Specification	73
3.	Explanation	73
a.	Definition	73
b.	Inappropriate Cause	73
4.	Defenses	73
5.	Key Penalty Considerations	73
6.	Related Charges	73
F.	ASSAULT, BATTERY, FIGHTING	74
1.	Elements	74
a.	Assault	74
b.	Battery	74
2.	Specification—Assault	74
3.	Specification—Battery (or Fighting)	74
4.	Explanation	74
a.	Nature of Charges and Definitions	74
b.	Battery-Type Offenses	75
c.	Intent	75
d.	Main Cases	75
5.	Defenses	78
6.	Key Penalty Considerations	80
7.	Related Charges	81
G.	ATTEMPT	81
1.	Elements	81
2.	Specification	82
3.	Explanation	82
a.	Intent	82
b.	Main Cases	82
4.	Defenses	83
5.	Key Penalty Considerations	83
6.	Related Charges	83
H.	BREACH OR VIOLATION OF PHYSICAL SECURITY POLICY	83
1.	Elements	83
2.	Specification	83
3.	Explanation	83
a.	Nature of Charge	83
4.	Defenses	84
5.	Key Penalty Considerations	84
6.	Related Charges	85
I.	CARELESS OR NEGLIGENT PERFORMANCE OF DUTIES	85
1.	Elements	85

2.	Specification.....	85
3.	Explanation.....	85
a.	Lack of Due Care Requirement and Definitions.....	85
b.	Main Cases and Examples of Conduct Covered.....	86
4.	Defenses.....	91
5.	Key Penalty Considerations.....	92
6.	Related Charges.....	93
J.	CONDUCT UNBECOMING (TO INCLUDE CHARGES OF IMPROPER CONDUCT, DISHONEST CONDUCT, UNACCEPTABLE CONDUCT, AND UNPROFESSIONAL CONDUCT).....	93
1.	Elements.....	93
2.	Specification.....	93
3.	Explanation.....	93
a.	Nature of Charge.....	93
b.	Definitions, Examples of Conduct Covered, and Main Cases.....	93
4.	Defenses.....	104
5.	Key Penalty Considerations.....	105
6.	Related Charges.....	106
K.	CONFLICT OF INTEREST; APPARENT CONFLICT OF INTEREST.....	106
1.	Elements.....	106
a.	Conflict of Interest.....	106
b.	Apparent Conflict of Interest.....	106
2.	Specification.....	107
a.	Conflict of Interest.....	107
b.	Apparent Conflict of Interest.....	107
3.	Explanation.....	107
a.	Introduction.....	107
b.	Direct and Predictable.....	107
c.	Creating the Appearance.....	108
d.	Notice of the Policy Violated.....	108
e.	Definitions, Elements, and Main Cases.....	108
4.	Defenses.....	113
5.	Key Penalty Considerations.....	115
6.	Related Charges.....	115
L.	CONVERSION.....	115
1.	Elements.....	115
2.	Specification.....	116
3.	Explanation.....	116
a.	Intent.....	116
b.	Main Cases.....	116
4.	Defenses.....	116
5.	Key Penalty Considerations.....	117
6.	Related Charges.....	117
M.	CONVICTION (ACTION BASED ON CONVICTION ITSELF AND NOT BY USING CONVICTION TO PROVE UNDERLYING CONDUCT).....	117
1.	Elements.....	117
2.	Specification.....	117
3.	Explanation.....	117
a.	Nature of Charge.....	117
b.	Main Cases.....	117
4.	Defenses.....	119
5.	Key Penalty Considerations.....	119
6.	Related Charges.....	119
N.	CONVICTION (ACTION BASED ON UNDERLYING MISCONDUCT AS PROVEN BY THE CONVICTION).....	120
1.	Elements.....	120
2.	Specification.....	120
3.	Explanation.....	120
a.	Nature of Charge.....	120
b.	Main Cases.....	120
4.	Defenses.....	121
5.	Key Penalty Considerations.....	122

6.	Related Charges.....	122
O.	DISCLOSURE OF CONFIDENTIAL, PRIVACY ACT, OR SENSITIVE INFORMATION; UNAUTHORIZED DISCLOSURE	122
1.	Elements.....	122
2.	Specification.....	122
3.	Explanation.....	122
a.	Nature of Charge	122
b.	Main Cases	123
4.	Defenses	125
5.	Key Penalty Considerations	127
6.	Related Charges.....	128
P.	DISCRIMINATION: ACTIONS AND COMMENTS	128
1.	Elements.....	128
2.	Specification.....	128
3.	Explanation.....	128
a.	Nature of Charge	128
b.	Intent Not Required.....	129
c.	Main Cases	130
4.	Defenses	131
5.	Key Penalty Considerations	131
6.	Related Charges.....	131
Q.	DISORDERLY CONDUCT	131
1.	Elements.....	131
2.	Specification.....	132
3.	Explanation.....	132
a.	No Intent	132
b.	Main Cases	132
4.	Defenses	134
5.	Key Penalty Considerations	134
6.	Related Charges.....	135
R.	DRUGS: POSSESSION OR USE	135
1.	Elements.....	135
2.	Specification.....	135
a.	Alternative Specification When Drug Possession Results From Drug Test	135
3.	Explanation.....	136
a.	Nature of Charge and Definitions	136
b.	Executive Order Issues.....	136
c.	Constitutional Issues.....	136
d.	Chain of Custody Issues	137
e.	The Effect of the District and Several States Legalizing Marijuana	137
f.	Main Cases	138
4.	Defenses	142
5.	Key Penalty Considerations	144
6.	Related Charges.....	145
S.	DRUGS: REFUSAL TO TAKE DRUG TEST	145
1.	Elements.....	145
2.	Specification.....	145
3.	Explanation.....	145
a.	Nature of Charge	145
b.	Main Cases	145
4.	Defenses	146
5.	Key Penalty Considerations	147
6.	Related Charges.....	147
T.	EMBEZZLEMENT.....	147
U.	ENFORCED LEAVE	147
1.	Elements.....	147
2.	Specification.....	148
3.	Explanation.....	148
a.	Nature of Charge	148
b.	Jurisdictional Issues and Constructive Suspensions	148
c.	Main Cases (Jurisdictional and Merits).....	150

4.	Defenses	153
5.	Key Penalty Considerations	153
6.	Related Charges	154
V.	ENGAGING IN A PROHIBITED RELATIONSHIP	154
1.	Elements	154
2.	Specification	154
3.	Explanation	154
a.	Nature of Charge	154
b.	Notice of Regulations, Policies, or Procedures	154
c.	Main Cases	154
4.	Defenses	156
5.	Key Penalty Considerations	157
6.	Related Charges	157
W.	ETHICS VIOLATIONS, STATUTORY AND STANDARDS OF CONDUCT	157
X.	EXCESSIVE ABSENCE (EVEN THOUGH APPROVED)	157
1.	Elements	157
2.	Specification	157
3.	Explanation	157
a.	Nature of Charge	157
b.	Main Cases	158
4.	Defenses	160
5.	Key Penalty Considerations	161
6.	Related Charges	161
Y.	FAILURE TO COMPLETE TRAINING	161
1.	Elements	161
2.	Specification	161
3.	Explanation	161
a.	Nature of Charge	161
b.	Main Cases	161
4.	Defenses	163
5.	Key Penalty Considerations	163
6.	Related Charges	163
Z.	FAILURE TO COMPLY WITH LEAVE PROCEDURES	163
1.	Elements	163
2.	Specification	163
a.	If Leave Has Been Denied	163
b.	After Approval of Leave	163
3.	Explanation	164
a.	Nature of Charge	164
b.	Main Cases	164
4.	Defenses	165
5.	Key Penalty Considerations	166
6.	Related Charges	166
AA.	FAILURE TO FOLLOW EEO PROCEDURES	166
BB.	FAILURE TO FOLLOW ORDERS, INSTRUCTIONS, OR PROCEDURES	166
1.	Elements	166
2.	Specification	167
3.	Explanation	167
a.	No Intent	167
b.	Main Cases	167
4.	Defenses	173
5.	Key Penalty Considerations	174
6.	Related Charges	174
CC.	FAILURE TO REGISTER WITH SELECTIVE SERVICE SYSTEM	174
1.	Elements	174
DD.	FAILURE TO REPORT AN OFFENSE, STATUS, OR RELATIONSHIP	175
1.	Elements	175
2.	Specification	175
3.	Explanation	175
a.	Nature of Charge, Examples of Conduct Covered, and Main Cases	175

	b. Notice	177
	4. Defenses	177
	5. Key Penalty Considerations	177
	6. Related Charges	177
EE.	FAILURE TO REPORT FOR A FITNESS-FOR-DUTY EXAMINATION	178
	1. Elements	178
	2. Specification	178
	3. Explanation	178
	a. Nature of Charge	178
	b. Main Cases	178
	4. Defenses	179
	5. Key Penalty Considerations	184
	6. Related Charges	184
FF.	FAILURE TO REPORT FOR DUTY	184
GG.	FAILURE TO SAFEGUARD GOVERNMENT PROPERTY	184
HH.	FALSIFICATION; MISREPRESENTATION; FRAUD	184
	1. Elements	184
	2. Specification	184
	3. Explanation	184
	a. Nature of Charge	184
	b. Intent	184
	c. Alternatives to Intent	185
	d. Materiality	186
	e. Reliance	186
	f. Personal Gain	186
	g. Main Cases	186
	4. Defenses	201
	5. Key Penalty Considerations	203
	6. Related Charges	205
II.	FIGHTING	205
JJ.	FIREARM: POSSESSION AT WORK	205
KK.	FORGERY	205
LL.	FURLOUGH	206
	1. Elements	206
	2. Sample Notice	206
	3. Explanation	207
	a. Nature of Charge	207
	b. Other Recent Cases	209
MM.	GOVERNMENT VEHICLE OR GOVERNMENT LEASED VEHICLE, WILLFUL MISUSE	211
	1. Elements	211
	2. Specification	212
	3. Explanation	212
	a. Nature of Charge	212
	b. Intent	212
	c. The Minimum Statutory Penalty of a 30-Day Suspension	212
	d. Main Cases	212
	4. Defenses	215
	5. Key Penalty Considerations	215
	6. Related Charges	216
NN.	GRANTING PREFERENTIAL TREATMENT	216
	1. Elements	216
	2. Specification	216
	3. Explanation	216
	a. Nature of Charge	216
	b. Elements of Charge	217
	c. Main Cases	217
	4. Defenses	220
	5. Key Penalty Considerations	220
	6. Related Charges	221
OO.	INABILITY TO PERFORM (AS A RESULT OF A MEDICAL CONDITION)	221

	1. Elements.....	221
	2. Specification.....	221
	a. Specification Under Alternative Formulation.....	221
	3. Explanation.....	221
	a. Nature of Charge.....	221
	b. Recovery Before the Hearing.....	222
	c. Importance of Medical Evidence.....	224
	d. Fitness-For-Duty Examinations.....	225
	e. Importance of Performance-Related Information.....	225
	f. Effect on Receipt of Disability Retirement.....	226
	g. The Obligation to Consider Accommodation or Reassignment.....	226
	h. Main Cases.....	227
	4. Defenses.....	238
	5. Key Penalty Considerations.....	239
	6. Related Charges.....	239
PP.	INDEBTEDNESS, REFUSAL TO HONOR FINANCIAL OBLIGATIONS.....	240
	1. Elements.....	240
	2. Specification.....	240
	3. Explanation.....	240
	a. Nature of Charge.....	240
	b. No Intent.....	240
	c. The Significance of the Efficiency of the Service.....	240
	d. Main Cases.....	240
	4. Defenses.....	241
	5. Key Penalty Considerations.....	242
	6. Related Charges.....	242
QQ.	INDEFINITE SUSPENSION BASED ON A SECURITY CLEARANCE DETERMINATION OR INELIGIBILITY TO HOLD A NONCRITICAL SENSITIVE POSITION.....	242
	1. Elements.....	242
	2. Specification.....	242
	3. Explanation.....	242
	a. Nature of Charge.....	242
	b. "Minimum Due Process Requirement".....	243
	c. An Alternative Procedure.....	245
	d. Matters of National Security: <i>Egan</i> Applies to Determinations Related to Security Clearances and Eligibility to Occupy Noncritical Sensitive Positions.....	245
	e. Main Cases.....	247
	4. Defenses.....	252
	5. Key Penalty Considerations.....	253
	6. Related Charges.....	254
RR.	INDEFINITE SUSPENSION PENDING CRIMINAL CHARGES.....	255
	1. Elements.....	255
	2. Explanation.....	255
	a. Nature of Charge.....	255
	b. Condition Subsequent Element.....	255
	c. A Second Action After the Completion of the Condition Subsequent.....	256
	d. Shortening the Notice Period.....	256
	e. Nexus and Penalty.....	257
	f. The Confusion Caused by <i>Perez v. DOJ</i>	257
	g. Back Pay.....	261
	h. Main Cases.....	261
	3. Defenses.....	266
	4. Key Penalty Considerations.....	267
	5. Related Charges.....	267
SS.	INSUBORDINATION.....	267
	1. Elements.....	267
	2. Specification.....	267
	3. Explanation.....	267
	a. Intent.....	267
	b. Alternative Charges Treated or Not Treated as Insubordination.....	268

	c. Main Cases.....	268
	4. Defenses.....	274
	5. Key Penalty Considerations.....	276
	6. Related Charges.....	277
TT.	INTERFERING WITH AN AGENCY INVESTIGATION.....	277
	1. Elements.....	277
	2. Specification.....	277
	3. Explanation.....	277
	a. Nature of Charge.....	277
	b. Main Cases.....	277
	4. Defenses.....	278
	5. Key Penalty Considerations.....	278
	6. Related Charges.....	278
UU.	LACK OF CANDOR.....	278
	1. Elements.....	278
	2. Specification.....	279
	3. Explanation.....	279
	a. Nature of Charge.....	279
	b. Main Cases.....	281
	4. Defenses.....	290
	5. Key Penalty Considerations.....	290
	6. Related Charges.....	291
VV.	LARCENY.....	291
WW.	LAST CHANCE AGREEMENT VIOLATIONS.....	291
	1. Main Cases.....	291
XX.	LIBELOUS AND SLANDEROUS STATEMENTS.....	292
YY.	LOSS OF CREDENTIALS OR CERTIFICATION OR OTHER REQUIREMENT OF POSITION.....	293
	1. Elements.....	293
	2. Specification.....	293
	3. Explanation.....	293
	a. Nature of Charge.....	293
	b. Main Cases.....	294
	4. Defenses.....	300
	5. Key Penalty Considerations.....	301
	6. Related Charges.....	301
ZZ.	LOSS OF MILITARY QUALIFICATION REQUIREMENTS.....	301
	1. Elements.....	301
	2. Specification.....	301
	3. Explanation.....	301
	a. Nature of Charge.....	301
	b. Main Cases.....	302
	4. Defenses.....	302
	5. Key Penalty Considerations.....	303
	6. Related Charges.....	303
AAA.	LOSS OR DENIAL OF SECURITY CLEARANCE AND INELIGIBILITY TO OCCUPY A NONCRITICAL SENSITIVE POSITION.....	303
	1. Elements.....	303
	2. Specification.....	303
	3. Explanation.....	303
	a. Nature of Charge and Agency's Burden.....	303
	b. Main Cases.....	305
	4. Defenses.....	309
	5. Key Penalty Considerations.....	310
	6. Related Charges.....	310
BBB.	MANDATORY REMOVAL CHARGES (BY STATUTE).....	311
	1. Elements.....	311
	2. Specification.....	311
	3. Explanation.....	311
	a. Nature of Charge.....	311
	b. Main Cases.....	315

4.	Defenses.....	318
5.	Key Penalty Considerations.....	318
6.	Related Charges.....	318
CCC.	MISAPPROPRIATION OF GOVERNMENT PROPERTY.....	318
DDD.	MISTREATMENT OF MAIL.....	318
1.	Elements.....	318
2.	Specification.....	318
3.	Explanation.....	318
a.	Nature of Charge.....	318
b.	Main Cases.....	319
4.	Defenses.....	319
5.	Key Penalty Considerations.....	320
6.	Related Charges.....	320
EEE.	MISTREATMENT OF SUBORDINATES.....	320
FFF.	MISUSE OF A COMPUTER.....	321
GGG.	MISUSE OF A CREDIT CARD.....	325
HHH.	MISUSE OF OFFICE/POSITION.....	328
III.	MISUSE OF PROPERTY (INCLUDING UNAUTHORIZED USE, UNAUTHORIZED POSSESSION, AND UNAUTHORIZED REMOVAL).....	329
1.	Elements.....	329
2.	Specification.....	329
3.	Explanation.....	329
a.	Nature of Charge.....	329
b.	Main Cases.....	330
4.	Defenses.....	336
5.	Key Penalty Considerations.....	337
6.	Related Charges.....	338
JJJ.	OFF-DUTY MISCONDUCT.....	338
1.	Elements.....	338
2.	Specification.....	338
3.	Explanation.....	338
a.	Nature of Charge.....	338
b.	Main Cases.....	341
4.	Defenses.....	346
5.	Key Penalty Considerations.....	347
6.	Related Charges.....	347
KKK.	PATIENT ABUSE, ENDANGERMENT.....	347
1.	Elements.....	347
2.	Specification.....	347
3.	Explanation.....	348
a.	Nature of Charge.....	348
b.	Main Cases.....	349
4.	Defenses.....	351
5.	Key Penalty Considerations.....	351
6.	Related Charges.....	352
LLL.	PERFORMANCE-BASED ACTIONS UNDER CHAPTER 75.....	352
1.	Elements.....	352
2.	Specification.....	352
3.	Explanation.....	352
a.	Nature of Charge.....	352
b.	The Differences Between a Chapter 75 and a Chapter 43 Action.....	352
c.	The Significance of the Presence or Absence of Performance Standards in a Chapter 75 Action.....	353
d.	Notice.....	353
e.	Main Cases.....	353
4.	Defenses.....	356
5.	Key Penalty Considerations.....	357
6.	Related Charges.....	357
MMM.	PERJURY.....	358
NNN.	POOR JUDGMENT.....	358
OOO.	REASSIGNMENT, REFUSAL TO REPORT.....	358

1.	Elements.....	358
2.	Specification.....	358
3.	Explanation.....	358
	a. Nature of Charge and Burdens.....	358
	b. Main Cases.....	359
4.	Defenses.....	361
5.	Key Penalty Considerations.....	362
6.	Related Charges.....	362
PPP.	REFUSAL (OR FAILURE) TO COOPERATE IN AN AGENCY INVESTIGATION.....	362
1.	Elements.....	362
2.	Specification.....	362
3.	Explanation.....	362
	a. Nature of Charge.....	362
	b. Conduct Constituting a Refusal or Failure to Cooperate.....	362
	c. Constitutional Considerations.....	363
	d. Main Cases.....	364
4.	Defenses.....	367
5.	Key Penalty Considerations.....	368
6.	Related Charges.....	368
QQQ.	REFUSAL TO COOPERATE IN AGENCY SEARCH OF PROPERTY.....	369
1.	Elements.....	369
2.	Specification.....	369
3.	Explanation.....	369
	a. Nature of Charge.....	369
	b. Main Cases.....	370
4.	Defenses.....	370
5.	Key Penalty Considerations.....	370
6.	Related Charges.....	370
RRR.	REPRISAL (FOR WHISTLEBLOWING).....	370
1.	Elements.....	370
2.	Specification.....	370
3.	Explanation.....	370
	a. Nature of Charge.....	370
	b. The "Authority to Take" (or "to Influence") Element.....	371
	c. The "Taking or Failing to Take a Personnel Action" Element.....	371
	d. The Disclosure Element.....	371
	e. The Knowledge Requirement.....	371
	f. The Causation Element.....	371
	g. Main Cases.....	372
4.	Defenses.....	372
5.	Key Penalty Considerations.....	373
6.	Related Charges.....	373
SSS.	REPRISAL (NON-WHISTLEBLOWING).....	373
1.	Elements.....	373
2.	Specification.....	373
3.	Explanation.....	373
	a. Nature of Charge.....	373
	b. Protected Activity Element.....	374
	c. Significant Factor Element.....	374
	d. Main Cases.....	374
4.	Defenses.....	375
5.	Key Penalty Considerations.....	375
6.	Related Charges.....	375
TTT.	SEXUAL HARASSMENT (TITLE VII AND AGENCY POLICY CHARGES).....	375
1.	Elements.....	375
2.	Specification.....	376
3.	Explanation.....	376
	a. Nature of Charge.....	376
	b. Intent Not Required.....	377
	c. The Sexual-In-Nature Element.....	377

d.	The Unwelcomeness Element	377
e.	The Hostile Environment Element	377
f.	Main Cases	378
4.	Defenses	386
5.	Key Penalty Considerations	386
6.	Related Charges	388
UUU.	SEXUAL MISCONDUCT	388
VVV.	SOLICITATION OF MISCONDUCT	388
WWW.	THEFT	389
1.	Elements	389
2.	Specification	389
3.	Explanation	389
a.	Nature of Charge	389
b.	Intent	389
c.	Main Cases	390
4.	Defenses	392
5.	Key Penalty Considerations	392
6.	Related Charges	393
XXX.	THREAT	393
1.	Elements	393
2.	Specification	393
3.	Explanation	394
a.	Nature of Charge	394
b.	Intent Factor	394
c.	Considerations Underlying the <i>Metz</i> Factors	394
d.	Alternative Charges	396
e.	Main Cases	396
4.	Defenses	403
5.	Key Penalty Considerations	405
6.	Related Charges	405
YYY.	UNAUTHORIZED USE, POSSESSION OR REMOVAL OF GOVERNMENT PROPERTY	406

PART TWO—FRAMING OR WRITING THE CHARGE

CHAPTER 3: CAUSE—THE OFFICIAL, CSRA CHARGE 409

I.	INSTANT ESSENTIAL KNOWLEDGE: SERVICE EFFICIENCY	409
II.	A CLOSER, MORE SUBSTANTIVE LOOK AT SERVICE EFFICIENCY	410
III.	CAUSE AS WILL PROMOTE SERVICE EFFICIENCY: A CASE-BY-CASE, FACT-DRIVEN CONCEPT	411
A.	CAUSE DOES NOT REQUIRE THE VIOLATION OF A RULE, REGULATION, OR POLICY	412
B.	INTENT AND NOTICE ARE NOT ESSENTIAL TO A FINDING OF SERVICE EFFICIENCY	413
C.	CAUSE MAY VARY FROM AGENCY TO AGENCY, JOB TO JOB	414
D.	SPECIFIC SERVICE EFFICIENCY DETERMINATIONS	415
IV.	HOW TO PROVE SERVICE EFFICIENCY IN OFF-DUTY MISCONDUCT ACTIONS	422
A.	THE REBUTTABLE PRESUMPTION OF NEXUS	423
B.	FACTORS 2 AND 3	424
V.	FEDERAL CIRCUIT AND BOARD ROADMAPS TO PROVE OR DISPROVE NEXUS	429

CHAPTER 4: “SPECIFIC REASONS”; SPECIFIC RULES..... 445

I.	INSTANT ESSENTIAL KNOWLEDGE: “SPECIFIC REASONS”	445
II.	“SPECIFIC REASONS” AS CAUSE	445
III.	THE IMPORTANCE OF GETTING IT RIGHT, OF CORRECTLY MATCHING THE REASON (AN UNEMBELLISHED, CLEAN CHARGE) TO FACTS, THE SPECIFICATION	446
IV.	THE IMPORTANCE OF STATING SIMPLY, CONCISELY, CLEARLY THE SPECIFIED REASONS: WORDS MATTER	448
V.	A GLIMPSE AHEAD AT THE EIGHT ESSENTIALS: THE RULES	450
VI.	THE RULES, DUE PROCESS, AND SOME QUESTIONS	453

CHAPTER 5: CHARGES—THE KINDS OF CHARGES, THEIR PARTS, THEIR RULES 457

I.	INSTANT ESSENTIAL KNOWLEDGE: THE THREE CHARGES, THEIR PARTS, AND THEIR RULES	457
II.	A CLOSER, MORE SUBSTANTIVE LOOK AT THE KINDS OF CHARGES	457

A.	THE SPECIFIC LABEL CHARGE.....	458
1.	The Specific Label Charge Illustrated.....	458
2.	Specific Burden Charges: Specific Labels, Specific Burdens	459
B.	THE GENERIC, GENERAL LABEL CHARGE	459
1.	The Generic Charge Label Illustrated.....	460
2.	The Generic Charge's Golden Rule and It's Caveat.....	461
C.	THE NARRATIVE, NO-NAME CHARGE.....	463
1.	The Narrative Charge Illustrated.....	463
D.	THE PROCESS OF CHARGE SELECTION.....	464
E.	TACTICAL CONSIDERATIONS IN CHARGE SELECTION.....	465
F.	TACTICAL CONSIDERATIONS IN CHARGE DRAFTING	465
III.	A CLOSER, MORE SUBSTANTIVE LOOK AT THE PARTS OF A CHARGE.....	466
A.	THE CHARGE'S LABEL, BASIS	466
1.	The Label, the Basis Rule, aka the Cardinal Commandment	467
2.	The Model Label	473
B.	THE ELEMENTS.....	477
1.	The Elements Rule.....	477
C.	THE SPECIFICATION	479
1.	The Specification Rule	480
2.	The Model Specification	481
D.	THE RULE AGAINST SPLITTING	482
1.	The Rule Against Splitting Also Known as the Rule Against Lesser-Included Offenses	483
2.	The Rule Against Splitting and Specifications	484
E.	THE LAW OF CHARGING REDUX	485
F.	CHARGES MAY BE BROUGHT IN ANY FORM	485
1.	The Inverted, Summary Charge	486
2.	Agency Designations as to Charge or Specification Are Not Necessarily Controlling	487
	CHAPTER 6: THE SPECIFIC LABEL CHARGE.....	489
I.	INSTANT ESSENTIAL KNOWLEDGE: THE SPECIFIC LABEL CHARGE.....	489
II.	A CLOSER, MORE SUBSTANTIVE LOOK AT THE SPECIFIC LABEL CHARGE	489
A.	SPECIFIC LABEL CHARGE RULES AND GUIDELINES.....	490
B.	SPECIFIC LABELS AND SPECIFIC BURDENS	491
1.	Intent Charges; Proving Intent	494
C.	DRAFTING THE SPECIFIC LABEL.....	500
D.	THE SPECIFIC LABEL SPECIFICATION MUST MATCH THE CHARGE.....	505
	CHAPTER 7: GENERIC, NARRATIVE CHARGES.....	509
I.	INSTANT ESSENTIAL KNOWLEDGE: THE GENERAL, NARRATIVE CHARGES	509
II.	A CLOSER, MORE SUBSTANTIVE LOOK AT THE GENERAL AND NARRATIVE CHARGES	509
III.	THE GENERIC, GENERAL CHARGE.....	512
A.	A WORD ABOUT THE CRITICAL IMPORTANCE OF THE SPECIFICATION UNDERPINNING THE GENERIC CHARGE: THE SPECIFICATION USUALLY TRUMPS THE GENERAL LABEL	512
B.	A FURTHER WORD ABOUT "CONDUCT UNBECOMING" AND "DISHONEST CONDUCT"	515
C.	A WORD ABOUT "SLASH AND DASH" CHARGES AND USING "I.E." OR "ETC." OR COMMINGLING THE GENERIC CHARGE WITH SPECIFIC LABEL CHARGES	517
D.	THE POPULARITY OF GENERIC CHARGES.....	520
1.	Conduct Unbecoming.....	520
2.	Inappropriate Conduct	521
3.	Improper Conduct	523
IV.	THE NARRATIVE CHARGE	523
A.	THE LAW OF THE NARRATIVE CHARGE: MISCONDUCT THAT IS CLEARLY NOTICED AND SATISFIES SERVICE EFFICIENCY IS CONSIDERED CHARGED.....	523
V.	THE GENERIC, NARRATIVE CHARGE: THE IMPORTANCE OF THE WELL-DRAFTED SPECIFICATION.....	526
VI.	THE NARRATIVE, GENERIC CHARGE AND THE PENALTY ANALYSIS	530
VII.	A USER'S GUIDE FOR THE NARRATIVE CHARGE.....	532
A.	WHEN TO USE THE NARRATIVE CHARGE.....	532
B.	SATISFYING CAUSE.....	532
C.	DEALING WITH THE NARRATIVE, GENERAL CHARGE	533

CHAPTER 8: THE CONJUNCTIVE CHARGE	535
I. INSTANT ESSENTIAL KNOWLEDGE: UNDERSTANDING THE CONJUNCTIVE CHARGE	535
II. A CLOSER, MORE SUBSTANTIVE LOOK AT CONJUNCTIVE CHARGES	535
III. SPLITTING THE CONJUNCTIVE CHARGE	536
A. TESTING FOR THE CONJUNCTIVE CHARGE: TWO OR MORE CHARGES	536
B. THE CONSEQUENCES OF FLUNKING THE CONJUNCTIVE TEST.....	544
CHAPTER 9: CHARGE INTERPRETATION	549
I. INSTANT ESSENTIAL KNOWLEDGE: UNDERSTANDING OF CHARGE INTERPRETATION.....	549
II. A CLOSER, MORE SUBSTANTIVE LOOK AT CHARGE INTERPRETATION	550
III. BASIC CHARGE INTERPRETATION: FINDING THE ESSENCE OF THE CHARGE.....	550
IV. FINDING THE ESSENCE OF THE CHARGE	551
A. FINDING THE ESSENCE IN THE AGENCY’S CASE.....	552
B. FINDING THE ESSENCE IN THE APPELLANT’S CASE.....	554
V. THE CARDINAL RULE: CHARGES ARE NOT TECHNICALLY CONSTRUED	555
A. READING THE CHARGE IN LIGHT OF THE SPECIFICATIONS.....	556
B. READING THE CHARGE IN LIGHT OF THE CIRCUMSTANCES	558
VI. A FINAL CAUTIONARY WORD ABOUT WORD CHOICE.....	560
VII. ADVANCED CHARGE INTERPRETATION: FINDING THE ELEMENTS.....	561
VIII. “SPLITTING” THE CONSEQUENCE AND THE RESULT OF THE MISCONDUCT	562
A. THE ESSENCE VERSUS EFFECT CHARGE: PARSING THE ESSENCE AND THE EFFECT	562
B. THE ESSENCE VERSUS EFFECT SPECIFICATION: PARSING THE ESSENCE AND THE EFFECT	563
C. WHEN THE RESULT IS THE CHARGE, AN ELEMENT, A PROOF REQUIREMENT	564
IX. “SPLITTING” DESCRIPTIVE INFORMATION.....	567
X. “SPLITTING” PURELY PENALTY INFORMATION	574
XI. “SPLITTING” ELEMENTS AND DESCRIPTIVE INFORMATION REDUX.....	575
XII. CHARGE INTERPRETATION: THE GENERIC, NARRATIVE CHARGE AND CHARGE RECHARACTERIZATION.....	576
A. THE DANGER OF CHARGE RECHARACTERIZATION	576
B. THE DEATH KNEEL FOR CHARGE RECHARACTERIZATION: THAT THE AGENCY DID NOT USE A SPECIFIC LABEL CHARGE PROVES THAT IT DID NOT CHARGE A SPECIFIC LABEL CHARGE.....	582
C. CHARGE RECHARACTERIZATION, HYPER-TECHNICAL PLEADING RISES FROM THE ASHES: <i>O’LAGUE?</i>	585
D. THE CASE FOR NO CHARGE RECHARACTERIZATION	589
CHAPTER 10: MERGER, MULTIPLICITY OF CHARGES, AND ADMINISTRATIVE DOUBLE JEOPARDY 591	591
I. INSTANT ESSENTIAL KNOWLEDGE: MERGER AND DOUBLE JEOPARDY	591
II. A CLOSER, MORE SUBSTANTIVE LOOK AT MERGER.....	591
A. ASKING FOR MERGER.....	592
III. THE ALCHEMY OF MERGER	593
A. SUBSTANTIVE MERGER.....	593
B. PENALTY MERGER.....	594
IV. MERGER’S FLASHING YELLOW LIGHTS.....	594
A. MERGER OF SPECIFIC CHARGE AND VAGUE, GENERAL CHARGE WITH BOTH CHARGES PREDICATED UPON SAME UNDERLYING MISCONDUCT	595
B. MERGER OF THE MISCONDUCT CHARGE WITH REGULATORY CITE CHARGE, BOTH BASED ON THE SAME UNDERLYING MISCONDUCT	598
C. ONE GLOBAL SPECIFICATION UNDERPINNING MORE THAN ONE CHARGE.....	601
D. LEGALLY DISTINCT: LESSER-INCLUDED OFFENSES; SEPARATE OR IDENTICAL CAUSES OF ACTION; EQUIVALENT CHARGES; DOES PROOF OF ONE PROVE THE OTHER?	603
V. MERGING “CONTINUATION” CHARGES: WHEN THE UNDERLYING CONDUCT IS DISTINCT ENOUGH TO BE TREATED IN MULTIPLE CHARGES	606
VI. THE RELATIONSHIP OF PENALTIES AND MERGER.....	607
VII. ADMINISTRATIVE DOUBLE JEOPARDY.....	609
CHAPTER 11: NOTICE; DUE PROCESS	617
I. INSTANT ESSENTIAL KNOWLEDGE: NOTICE AND DUE PROCESS	617
II. A POTENTIAL, PROBABLY SIGNIFICANT MODIFICATION IN BOARD DUE PROCESS LAW: THE RESULT OF A DUE PROCESS VIOLATION	619
III. A CLOSER, MORE SUBSTANTIVE LOOK AT NOTICE, E.G., SPECIFIC REASONS, CHARGE INTERPRETATION AND DUE PROCESS.....	621
IV. NOTICE: THE AGENCY NOTICE MUST ALLOW FOR AN INFORMED RESPONSE	621

V.	TESTING THE ADEQUACY OF NOTICE: TRADITIONAL BOARD APPROACHES	627
VI.	STONE, WARD ET AL. AND THE INCREASED EMPHASIS ON DUE PROCESS	631
VII.	WARD AND ITS PROGENY: DUE PROCESS EXTENDS TO PENALTY	633
VIII.	COMMON NOTICE ISSUES.....	639
IX.	THE BOARD AND COURT’S APPLICATION OF STONE, WARD	647
X.	RECENT BOARD AND COURT DECISIONS APPLYING STONE, WARD	655
XI.	A WORD OF CAUTION: THE AFTERMATH OF STONE AND THE BOARD’S CONFUSION WITH HARMFUL ERROR; THE COURT’S CLARIFICATION	663
	A. THE FEDERAL CIRCUIT STEPS IN	664
XII.	THE SITUATION TODAY	666

CHAPTER 12: KEY CHARGES AND THEIR ALTERNATIVES..... 671

I.	INSTANT ESSENTIAL KNOWLEDGE: KEY AGENCY CHARGES AND ALTERNATIVES	671
II.	A CLOSER, MORE SUBSTANTIVE LOOK AT KEY CHARGES AND THEIR ALTERNATIVES	671
III.	A CLOSER LOOK AT KEY CHARGES	673
	A. FALSIFICATION, MISREPRESENTATION, LYING, LACK OF CANDOR.....	673
	1. Falsification, Misrepresentation, Lying	675
	2. Lack of Candor.....	688
	3. Improper Conduct	711
	B. INSUBORDINATION AND FAILURE TO FOLLOW INSTRUCTIONS	713
	C. THREAT AND “MAKING STATEMENTS THAT...”	722
	1. The “McCarty Charge”: “Making Statements That Caused Anxiety and Disruption”.....	724
	2. Inappropriate Remarks.....	725
	D. THEFT AND 18 USC 641	726
	1. 18 USC 641	727
	2. Unauthorized Removal	729
	E. SEXUAL HARASSMENT AND POLICY STATEMENTS	730
	1. Policy Statement; Inappropriate Conduct	732
	F. ASSAULT AND BATTERY	736
	1. Unacceptable Conduct, Disorderly Conduct	736
	2. Fighting, Disturbances	737
	G. MISUSE CHARGES AND GOV MISUSE	738
	1. Nonstatutory Charge	739
	2. Misuse Charges Not Involving GOVs.....	740
	H. LEAVE-RELATED CHARGES; INABILITY TO PERFORM	740
	I. AGENCY REGULATIONS, ETHICS.....	746

CHAPTER 13: SPECIAL, UNIQUE, DU JOUR CHARGES—CONDITIONS OF EMPLOYMENT, INABILITY TO PERFORM..... 751

I.	INSTANT ESSENTIAL KNOWLEDGE: CRITICAL, SPECIALIZED CHARGES.....	751
II.	A CLOSER, MORE SUBSTANTIVE LOOK AT SPECIAL, OFTEN JOB-ENDING CHARGES	751
III.	ADVERSE ACTIONS RELATING TO SECURITY CLEARANCE DETERMINATIONS AND ELIGIBILITY FOR A SENSITIVE POSITION.....	751
	A. DECISIONS RELATED TO SENSITIVE POSITIONS; CONYERS	754
	B. ADMINISTRATIVE LEAVE.....	768
IV.	OTHER CONDITIONS OF EMPLOYMENT DECISIONS	771
V.	INABILITY TO PERFORM	779
VI.	ILLEGAL DRUGS	782
VII.	5 USC 7371 MANDATORY REMOVAL FOR LAW ENFORCEMENT OFFICERS CONVICTED OF A FELONY	787

CHAPTER 14: CHARGES DU JOUR—TELEWORKING; T&A IN SWIPE TIME; PRIVACY AND HIPAA VIOLATIONS 791

I.	INSTANT ESSENTIAL KNOWLEDGE: THE “HOT CHARGES”	791
II.	TELEWORKING: THE ESSENTIALS	791
	A. A BRIEF LOOK AT A FEW CASES.....	794
	B. A BRIEF LOOK AT MEASURING, MONITORING TELEWORKING ABUSE	802
III.	T&A CHARGING IN SWIPE-TIME, FLEXTIME	804
	A. A BRIEF LOOK AT A FEW “SWIPE” CASES	807
IV.	PRIVACY ACT REDUX AND HIPAA	817

CHAPTER 15: THE INDEFINITE SUSPENSION CHARGE	831
I. INSTANT ESSENTIAL KNOWLEDGE: INDEFINITE SUSPENSIONS.....	831
II. A CLOSER, MORE SUBSTANTIVE LOOK AT THE INDEFINITE SUSPENSION.....	832
A. PRE- <i>PEREZ</i> INDEFINITE SUSPENSIONS, REASONABLE CAUSE, AND THE CRIME PROVISION.....	832
B. <i>PEREZ</i> AND INDEFINITE SUSPENSIONS.....	834
 CHAPTER 16: POWER CHARGING—CHARGING DOWN, PROVING UP; CHARGING IN THE ALTERNATIVE.....	 857
I. INSTANT ESSENTIAL KNOWLEDGE: POWER CHARGING	857
II. CHARGING DOWN AND PROVING UP.....	858
A. HOW TO CHARGE DOWN AND PROVE UP	859
III. ALTERNATIVE CHARGING	861
A. THE BASIS FOR ALTERNATIVE CHARGING.....	862
IV. ALTERNATIVE CHARGING: THE TECHNIQUE	864
A. CHARGING IN THE ALTERNATIVE WITH THE NARRATIVE, GENERIC CHARGE	864
B. ALTERNATIVE PLEADING: SPECIFICALLY NOTICING ALTERNATIVE CHARGES	866
V. A HISTORICAL LOOK AT LESSER-INCLUDED OFFENSES	868
A. THE BOARD HAS NOT FORMALLY RECOGNIZED LESSER-INCLUDED OFFENSES	869
B. AN ILLUSTRATION OF THE BAR AGAINST LESSER-INCLUDED OFFENSES	869
C. THE BASIS FOR THE BAR AGAINST LESSER-INCLUDED OFFENSES.....	869
D. PRE- <i>CROUSE</i> BOARD DECISIONS ALLOWED LESSER-INCLUDED OFFENSES IN THE AGENCY FINAL DECISION	870
1. Amended Notice	871
2. “ <i>Rose</i> ” Charges.....	871
E. SOME PRE- <i>CROUSE</i> BOARD DECISIONS ARGUABLY ALLOWED OR CAME CLOSE TO ALLOWING LESSER-INCLUDED OFFENSES.....	872
VI. LESSER-INCLUDED OFFENSES AND MERGER	873
 CHAPTER 17: SELECTING, DRAFTING THE CHARGE; WORKING WITH PROPOSING, DECIDING OFFICIALS	 877
I. INSTANT ESSENTIAL KNOWLEDGE: CHARGE SELECTION, CHARGE DRAFTING; WORKING WITH DECIDING AND PROPOSING OFFICIALS	877
II. SELECTING THE CORRECT CHARGE	878
A. CHARGE SELECTION AND PENALTY SELECTION GO HAND-IN-HAND	879
1. Step One: Finding the Facts.....	880
2. Step Two: Fitting the Charge to the Facts.....	880
3. Step Three: Weighing the Alternatives and Penalty Range.....	880
4. Step Four: Weighing Appellant’s Record	881
B. AGENCY CHARGE SELECTION IS NOT LIMITED TO THE TABLE OF PENALTIES AND STANDARDS OF CONDUCT	881
C. THE AGENCY NEED NOT BRING AN INTENT CHARGE OR HARD-TO-PROVE CHARGE	882
D. OVER-CHARGING, UNDER-CHARGING, AND ALTERNATIVE CHARGING	883
III. THE SEVEN HABITS OF HIGHLY EFFECTIVE CHARGE DRAFTERS.....	885
A. THE CHARGE MUST BE EASILY DECIPHERABLE AND FORMATTED IN THE CONVENTIONAL STYLE	885
B. THE CHARGE’S TITLE: JUST THE TITLE; ALL ELSE GOES ELSEWHERE	887
1. The Model Label	887
C. THE SPECIFICATION: JUST THE ESSENTIALS	889
1. The Model Specification	889
a. Pattern.....	889
b. No Conclusions, Just the Facts	889
c. The Unfocused Narrative.....	890
2. The Rule of the 4 Ws: Facts.....	890
D. EACH CHARGE SHOULD BE SEPARATELY STATED AND NUMBERED.....	891
E. EACH CHARGE IS BASED ON ITS OWN SPECIFICATION.....	892
F. THE CHARGE AND THE SPECIFICATION SHOULD BE CLEARLY SEPARATED FROM EACH OTHER.....	893
G. THE CHARGE AND THE SPECIFICATION SHOULD BE CLEARLY SEPARATED FROM THE PENALTY ANALYSIS.....	893
1. The Rule of W.....	894
IV. THE “PUSH-DOWN PRINCIPLE”.....	894
V. A WORD OF CAUTION: PUTTING IT ALL TOGETHER	896
VI. WORKING WITH PROPOSING, DECIDING OFFICIALS.....	896
A. UNDERSTANDING THE IMPORTANCE OF PREPARATION AND PROVIDING NOTICE	897

B.	UNDERSTANDING THE STANDARD OF SERVICE EFFICIENCY	897
C.	UNDERSTANDING THE IMPORTANCE OF A CONCISE, FOCUSED PROPOSAL AND FINAL DECISION NOTICE	899
D.	GUARDING AGAINST THE DECIDING, PROPOSING OFFICIALS' PROPENSITY FOR OVERKILL BY CITING REGULATIONS, RULES, AND LAWS	899
E.	GUARDING AGAINST THE DECIDING, PROPOSING OFFICIALS' PROPENSITY FOR OVERKILL BY USING INTENT CHARGES	900
F.	PROPOSING AND DECIDING OFFICIALS AND DRAFTING THE AGENCY NOTICES	900
G.	PROPOSING AND DECIDING OFFICIALS' PROPENSITY FOR OVERKILL: ADJECTIVES, ADVERBS, NASTY WORDS	901
H.	PROPOSING AND DECIDING OFFICIALS' PROPENSITY FOR OVERKILL: CHARGING THE DAMAGE	901
I.	PROPOSING AND DECIDING OFFICIALS' PROPENSITY FOR OVERKILL: PILING ON	902

PART THREE—THE PENALTY

CHAPTER 18: PENALTY BASICS AND FUNDAMENTALS 907

I.	INSTANT ESSENTIAL KNOWLEDGE: PENALTY BASICS	907
II.	A CLOSER, MORE SUBSTANTIVE LOOK AT <i>DOUGLAS</i> AND ITS RULES.....	908
A.	WITH A FEW EXCEPTIONS, AN AGENCY MUST MAKE A PENALTY SHOWING IN VIRTUALLY EVERY ACTION BASED ON MISCONDUCT	908
1.	No <i>Per Se</i> Exceptions	910
2.	Senior Executive Service.....	912
B.	THE AGENCY'S BURDEN UNDER <i>DOUGLAS</i>	912
III.	AGENCY PENALTY GUIDES, TABLES OF PENALTIES	913
IV.	THE DECIDING OFFICIAL, THE PROPOSAL, NOTICE AND DUE PROCESS.....	913
A.	DUE PROCESS AND NOTICE	913
B.	THE DECIDING OFFICIAL'S INVOLVEMENT/INVESTIGATION: DECISION, PENALTY RAMIFICATIONS.....	931
C.	REPLACING THE DECIDING OFFICIAL.....	933
D.	REPLACING THE PROPOSING OFFICIAL.....	934

CHAPTER 19: PENALTY REVIEW AND DEFERENCE 939

I.	INSTANT ESSENTIAL KNOWLEDGE: DEFERENCE AND PENALTY REVIEW.....	939
A.	<i>DOUGLAS</i> AND DEFERENCE	940
II.	<i>LACHANCE V. DEVAL</i> : THE REAFFIRMATION, REBIRTH OF DEFERENCE & THE MAXIMUM REASONABLE PENALTY.....	941
A.	WHEN ALL CHARGES ARE SUSTAINED	942
1.	The Generic, Umbrella Charge	944
B.	WHEN LESS THAN ALL CHARGES ARE UPHELD.....	946
C.	WHEN LESS THAN ALL SPECIFICATIONS ARE UPHELD.....	948
D.	WHEN ALL RELEVANT <i>DOUGLAS</i> FACTORS ARE NOT CONSCIENTIOUSLY CONSIDERED.....	951
E.	WHEN THE PENALTY IS UNREASONABLE.....	957
F.	THE MAXIMUM REASONABLE PENALTY.....	958
G.	PENALTY REMANDS TO AGENCIES	961
III.	THE BOARD'S POST- <i>LACHANCE/DEVAL</i> APPLICATION OF <i>DOUGLAS</i> MITIGATION	962
IV.	"A HISTORICAL PERSPECTIVE": THE EVOLUTION OF <i>DOUGLAS</i> AND THE DEATH OF DEFERENCE.....	964
A.	THE <i>SKATES</i> TRILOGY AND THE BATTLE OVER DEFERENCE	964
B.	THE DEATH OF DEFERENCE: THE BOARD'S <i>WHITE</i> DECISION	965
C.	<i>WHITE</i> AND THE SPECIFICATIONS: NO APPLICATION	966
1.	<i>White's</i> Affirmation.....	967
V.	MITIGATION <i>ET AL.</i> : A CURRENT PERSPECTIVE; WHAT IS HAPPENING IN ACTUAL PRACTICE	968

CHAPTER 20: THE *DOUGLAS* FACTORS BY THE NUMBERS 975

I.	INSTANT ESSENTIAL KNOWLEDGE: THE <i>DOUGLAS</i> FACTORS	975
II.	<i>DOUGLAS</i> FACTOR 1: SERIOUSNESS OF THE OFFENSE	978
A.	SERIOUSNESS; RELATIONSHIP TO DUTIES	979
1.	Agency Showings as to Seriousness	982
2.	<i>De Minimis</i> Value; Custody, Control; Technical Violation	983
3.	Seriousness and Zero-Tolerance	984
4.	Seriousness and Exemplary Penalties.....	988
B.	INTENT, INADVERTENCE	988
C.	PERSONAL GAIN, REPEATED	990
III.	<i>DOUGLAS</i> FACTOR 2: EMPLOYEE'S POSITION	990

A.	LAW ENFORCEMENT	990
B.	SUPERVISORS	991
C.	PERSONNEL RESPONSIBLE FOR THE SAFETY OF OTHERS	992
D.	POSITIONS OF TRUST	992
E.	CONTACTS WITH PUBLIC	992
IV.	<i>DOUGLAS</i> FACTOR 3: DISCIPLINARY RECORD	992
A.	PRIOR DISCIPLINE MUST BE NOTICED IN THE PROPOSAL IF TREATED AS AN AGGRAVATING FACTOR	994
1.	Recordation	995
B.	REVIEW OF PRIOR DISCIPLINE	995
C.	SUBSTANCE: CLOSER IN TIME, CLOSER IN NATURE	998
D.	SUBSEQUENT ACTIONS	999
1.	Pending or Subsequent Reversal	999
E.	NO NOTICE REQUIREMENT IF PAST DISCIPLINE USED FOR PURPOSES OTHER THAN AN AGGRAVATING FACTOR ..	1000
F.	NONDISCIPLINARY PENALTY ENHANCERS	1000
V.	<i>DOUGLAS</i> FACTOR 4: LENGTH OF SERVICE AND WORK RECORD	1000
A.	WORK RECORD	1000
1.	Work Record and Performance Appraisals	1002
B.	LENGTH OF SERVICE	1002
C.	GETTING ALONG WITH FELLOW WORKERS	1003
VI.	<i>DOUGLAS</i> FACTOR 5: EROSION OF SUPERVISORY CONFIDENCE	1003
VII.	<i>DOUGLAS</i> FACTOR 6: DISPARATE TREATMENT; CONSISTENCY OF PENALTY WITH THAT IMPOSED ON OTHER EMPLOYEES	1006
A.	BOARD DISPARATE PENALTY LAW	1006
1.	Agency Guidance on Defending a Disparate Penalty Attack	1015
2.	Employee Guidance on Proving a Disparate Penalty	1023
B.	A BRIEF LOOK AT THE OLD LAW	1025
1.	“Substantial Similarity”	1026
2.	“Substantial Similarity”: Work Unit	1026
3.	“Substantial Similarity”: Time	1027
C.	RELIANCE ON SETTLED CASES	1027
VIII.	<i>DOUGLAS</i> FACTOR 7: CONSISTENCY WITH AGENCY PENALTY GUIDE OR AGENCY POLICY	1028
IX.	<i>DOUGLAS</i> FACTOR 8: NOTORIETY	1032
X.	<i>DOUGLAS</i> FACTOR 9: NOTICE	1033
XI.	<i>DOUGLAS</i> FACTOR 10: POTENTIAL FOR REHABILITATION	1035
A.	EVIDENCE OF THE POTENTIAL FOR REHABILITATION OR THE LACK OF IT	1037
1.	Acknowledgment, Remorse, or the Lack of It	1038
2.	Remedial Measures	1039
3.	Notice and Progressive Discipline	1040
4.	Board Testimony	1040
B.	DEFENDING AND REHABILITATION	1040
C.	DISABILITIES, AFFIRMATIVE DEFENSES, AND REHABILITATION	1041
XII.	<i>DOUGLAS</i> FACTOR 11: MITIGATING CIRCUMSTANCES	1043
A.	CAUSAL CONNECTION	1046
B.	CORRECTION, CONTROL	1048
C.	PROVOCATION	1048
D.	OTHER CIRCUMSTANCES	1049
E.	DRUG-RELATED MISCONDUCT	1049
XIII.	<i>DOUGLAS</i> FACTOR 12: EFFECTIVENESS OF A LESSER SANCTION	1050
XIV.	PENALTY POTPOURRI	1051
A.	COMPOUND, UNIFIED PENALTIES	1051
B.	MITIGATION/DEMOTION	1051
C.	DEMOTION OF NON-SUPERVISORS AND LONG SUSPENSIONS	1051
D.	NO PILING ON; NO RUNNING UP THE SCORE; THE SANCTION	1051

CHAPTER 21: TRICKS OF THE TRADE—SELLING/ATTACKING THE PENALTY;

DEALING WITH DECIDING OFFICIALS 1053

I.	INSTANT ESSENTIAL KNOWLEDGE: WORKING THE PENALTY, THE DECIDING OFFICIAL	1053
A.	THE PENALTY SHOWING FROM AN ADVOCACY PERSPECTIVE	1054
1.	Theory and Theme	1054
a.	Theory	1054

b.	Theme	1054
2.	The Proposal Notice and the Proposing Official	1055
a.	Notice of All Reasons and Aggravating Factors	1055
b.	The Materials Relied Upon	1055
3.	The Final Decision and the Deciding Official	1056
a.	Consideration of the Oral, Written Response	1056
b.	Consideration of Unnoticed Information	1056
c.	The Final Decision	1057
4.	Prehearing Submissions	1058
5.	Discovery	1059
6.	Deciding Official's Testimony	1059
7.	The Agency's Unique Interests and the Harm	1060
a.	Conclusory Testimony From Deciding Officials	1062
b.	Exaggeration of Aggravating Factors	1062
8.	The Need to Anticipate Unproven Charges	1063
9.	The Need to Approach Correctly Disparate Penalties	1064
II.	AGENCY PENALTY ADVOCACY: A CHECKLIST	1065
III.	DECIDING OFFICIALS AND COMMON ERRORS <i>VIS-À-VIS</i> BOARD LAW	1067
A.	USING THE EMPLOYEE TO SEND A MESSAGE TO OTHERS	1068
B.	RELYING ON INFORMATION NOT DISCLOSED TO THE APPELLANT	1068
C.	FAILING TO EXPLAIN WHY AN ALTERNATIVE WAS NOT CONSIDERED	1068
D.	PROVIDING CONCLUSORY TESTIMONY	1068
E.	TOO MUCH FIRST HAND INVOLVEMENT IN THE ADVERSE ACTION	1069
F.	FAILING TO CONSCIENTIOUSLY CONSIDER RELEVANT PENALTY FACTORS	1069
G.	RELYING ON PRIORS NOT IN THE PROPOSAL	1069
H.	RELYING ON DISCIPLINE OUTSIDE THE RECKONING PERIOD	1070
I.	RELYING TOO HEAVILY ON ZERO TOLERANCE POLICIES	1070
J.	AGENCY ACTIONS NOT CONSISTENT WITH CLAIMED LOSS OF TRUST	1070
K.	SUPERVISORY ACQUIESCENCE (CONDONATION)	1071
L.	OVERREACHING: EXAGGERATION OF AGGRAVATING FACTORS	1071
M.	OVERREACHING: EXAGGERATION OF THE SERIOUSNESS OF AN OFFENSE	1071
N.	IGNORING THE UNWELL EMPLOYEE	1072
O.	RELYING ON A PENALTY GUIDE WHICH IS TOO GENERAL	1072
P.	FAILING TO CONVEY THE AGENCY INTEREST IN THE ACTION	1072

PART FOUR—HOW TO DO IT (IN REAL TIME)

CHAPTER 22: HOW TO DO IT: MASTERING THE BASICS, APPLYING THE FUNDAMENTALS 1077

I.	THE SAGA OF NANCY MAGILL	1077
A.	THE FACTS	1077
II.	THE AGENCY PROPOSAL NOTICE	1078
III.	THE ESSENTIAL STEPS AN APPELLANT MUST TAKE (OR CONVERSELY THE AGENCY MUST TEST ITS PROPOSAL AGAINST) UPON RECEIPT OF THE PROPOSAL: GETTING THE MATERIALS RELIED UPON AND TAKING THE PROPOSAL APART, BREAKING DOWN THE CHARGES	1080
A.	THE MATERIALS RELIED UPON (MRUS)	1080
B.	THE CHARGES, THE SPECIFICATIONS, THE EVIDENCE	1080
C.	THE CHRONOLOGY	1084
D.	THE PROOF GRID	1085
E.	THE CAST OF CHARACTERS	1087
IV.	THE REPLY STAGE	1087
V.	THE AGENCY DECISION NOTICE	1087
A.	AN INITIAL TAKE ON THE AGENCY DECISION NOTICE REDUX	1088
B.	THE APPEAL AND THE AGENCY FILE	1089
C.	THE APPEAL AND THE AGENCY FILE	1089
VI.	THE TRIAL STAGE: A FEW NUANCES AND ISSUES AS TO EVIDENCE	1090

CHAPTER 23: HOW TO DO IT: A CLOSER, "POST-GRAD" LOOK AT THE NUANCES 1093

I.	THE SAGA OF NANCY MAGILL REDUX	1093
A.	THE ESSENTIAL FACTS	1093

B.	THE AGENCY NOTICES	1094
1.	The Proposal	1094
2.	The Agency Decision Notice	1096
C.	THE APPEAL AND THE AGENCY FILE.....	1097
II.	ANALYSIS OF CERTAIN ISSUES	1098
A.	MS. MAGILL'S DUAL, UNITARY PENALTY.....	1098
B.	THE POTENTIAL MERGER OF CHARGES I, II, III	1099
C.	THE POTENTIAL DUE PROCESS, <i>WARD VIOLATION</i>	1100
D.	A FEW ADDITIONAL CHARGE INTERPRETATION ISSUES	1102
III.	REDRAFTED NOTICES	1102
A.	THE AGENCY NOTICES	1102
1.	The Proposal	1102
2.	The Agency Decision Notice	1105

PART FIVE—INITIAL DECISIONS

CHAPTER 24: WHAT'S CURRENT AND HAPPENING IN REAL TIME..... 1109

I.	ABUSE OF SUPERVISORY AUTHORITY	1109
II.	ATTEMPTING TO GET EMPLOYEE TO DROP EEO COMPLAINT.....	1109
III.	AWOL / DENIAL OF LWOP	1109
IV.	CHARGE FRAMING.....	1109
V.	CONDUCT UNBECOMING	1109
VI.	CONSTRUCTIVE SUSPENSION	1111
VII.	CREATING A HOSTILE WORK ENVIRONMENT	1111
VIII.	DIRECTED REASSIGNMENT	1112
IX.	DISRESPECT TO SUPERVISOR	1112
X.	DRUG USE.....	1112
XI.	DUE PROCESS VIOLATIONS	1112
XII.	ENFORCED LEAVE.....	1115
XIII.	EEO RETALIATION	1115
XIV.	ETHICS VIOLATION.....	1115
XV.	EVIDENCE; CREDIBILITY	1115
XVI.	FAILURE TO COOPERATE; IMPEDING AN INVESTIGATION.....	1116
XVII.	FAILURE TO FOLLOW INSTRUCTIONS	1116
XVIII.	FAILURE TO FOLLOW INSTRUCTIONS; ORDER.....	1117
XIX.	FAILURE TO FOLLOW LEAVE REQUESTING PROCEDURES.....	1117
XX.	FAILURE TO FOLLOW POLICY / INSTRUCTIONS	1118
XXI.	FAILURE TO MAINTAIN CONDITION OF EMPLOYMENT.....	1118
XXII.	FALSIFICATION.....	1118
XXIII.	FOURTH AMENDMENT VIOLATION	1118
XXIV.	INDEFINITE SUSPENSION	1119
XXV.	INVOLUNTARY TERMINATION	1119
XXVI.	LACK OF CANDOR.....	1119
XXVII.	MEDICAL / PHYSICAL INABILITY TO PERFORM	1120
XXVIII.	MISHANDLING GOVERNMENT INFORMATION.....	1121
XXIX.	MISREPRESENTATION	1121
XXX.	MISUSE OF GOVERNMENT RESOURCES AND TIME	1121
XXXI.	MISUSE OF POSITION	1121
XXXII.	MITIGATION	1121
XXXIII.	NEGLIGENT PERFORMANCE.....	1125
XXXIV.	OFF DUTY MISCONDUCT	1126
XXXV.	PERFORMANCE-BASED REASONS	1127
XXXVI.	PREFERENTIAL TREATMENT	1127
XXXVII.	RACIALLY OFFENSIVE LANGUAGE.....	1127
XXXVIII.	RETALIATION AGAINST UNION STEWARD.....	1127
XXXIX.	REVERSALS	1128
XL.	SECTION 714 CASES	1130
XLI.	SEXUAL MISCONDUCT; COMMENTS OF SEXUAL NATURE	1130
XLII.	UNAUTHORIZED DOCUMENT MISUSE	1132

XLIII. UNAUTHORIZED REMOVAL OF DOCUMENTS	1132
XLIV. UNAUTHORIZED REMOVAL / POSSESSION OF PROPERTY.....	1132
XLV. UNAUTHORIZED USE OF GOVERNMENT CREDIT CARD.....	1133
XLVI. UNLAWFUL FORCE.....	1133
XLVII. UNWELCOMED PHOTOGRAPHY.....	1133
XLVIII. WHISTLEBLOWER REPRISAL.....	1133
XLIX. WILLFUL MISUSE OF GOV.....	1134

PART SIX—CHARGES AND AFFIRMATIVE DEFENSES

CHAPTER 25: CHARGES AND AFFIRMATIVE DEFENSES.....	1137
I. INTRODUCTION	1137
II. HARMFUL PROCEDURAL ERROR.....	1137
III. PROHIBITED PERSONNEL ACTIONS, 5 USC 2302 (B)	1139
A. PROHIBITED DISCRIMINATION, 5 USC 2302(B)(1).....	1142
1. The Process for “Mixed Cases”.....	1142
2. Theories of Discrimination and Relevant Case Law.....	1144
a. Disparate Treatment, Intentional Discrimination Claims.....	1144
b. Mixed-Motive Discrimination	1152
c. Reasonable Accommodation Claims—Religion and Disability Discrimination.....	1155
d. EEO Reprisal	1165
e. EEO Harassment	1169
B. WHISTLEBLOWER REPRISAL UNDER 5 USC 2302(B)(8)	1171
1. Some History	1172
2. The Threshold Elements for an IRA	1173
3. The Common Elements—Protected Disclosure, <i>Prima Facie</i> Case and the Agency Burden	1175
a. Protected Disclosure Under (b)(8)	1175
b. The <i>Prima Facie</i> Case	1206
c. The Agency’s Burden to Prove That it Would Have Taken the Same Action Anyway	1211
C. APPEAL RIGHT AND OTHER REPRISAL, 5 USC SECTION 2302(B)(9).....	1224
IV. THE ACTION WAS NOT IN ACCORDANCE WITH LAW	1231
TABLE OF CASES.....	1235