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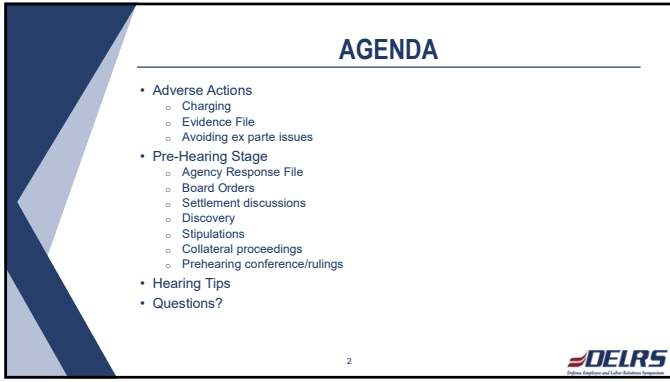
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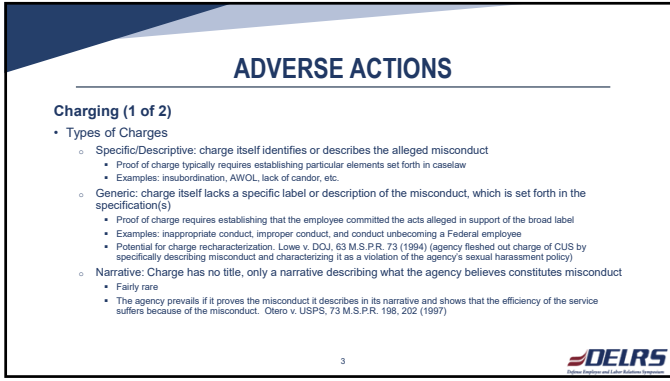
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### ADVERSE ACTIONS

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**Charging (2 of 2)**

- Flesh-out the charge with specification(s) which provide the Ws
  - Avoid altering the charge through language used in specifications
- Remember you must prove all elements of a charge
- Avoid unnecessary words, especially adjectives and adverbs, that do not add to a charge
  - Example: Isaacs v. DVA, MSPB Docket No. AT-0752-11-0710-I-1, Final Order (Apr. 21, 2014)
    - Removal based on several charges, including "deliberate failure to follow instructions"
    - Agency charged failure to follow instructions instead of an intent charge like insubordination
    - However, by adding the term "deliberate" the agency converted a non-intent offense into an intent offense because every word, including adjectives and adverbs, in the charge label must be proved
- Avoid using criminal terminology, e.g., theft, assault, and fraud in charges
- Use of "and" vs. "or"
- Laser beam vs. blow torch



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### ADVERSE ACTIONS


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**Proposal Notice**

- Must sufficiently place the employee on notice of the charged conduct in order to provide a meaningful reply opportunity
  - *Mason v. Navy*, 70 M.S.P.R. 584 (1996) (reversal for due process violation where the agency failed to specify when or where the alleged misconduct took place)

**Evidence File**

- As a constitutional matter, an employee is entitled to an explanation of the agency's evidence
- An appellant is entitled to any supporting material relied upon (MRU) by the agency
  - 5 U.S.C. § 7513(e); *Bize v. Treasury*, 3 M.S.P.R. 155 (1980); 5 C.F.R. § 752.404(b)(1)
- Better practice to provide a copy of the MRU to the employee with the proposal notice rather than notifying the employee of his/her right to request the same
- No statutory obligation to compile an investigative file containing the evidence on which the charge was based
  - *Scheutes v. USPS*, 19 M.S.P.R. 390 (1984)
- However, it is a good practice to follow Brady disclosure guidelines and provide all exculpatory documentation as well as adverse information
- The agency has virtual unilateral, one-sided control of the documents and that is not a level playing field, something that may draw scrutiny on subsequent review



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### ADVERSE ACTIONS

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**Ex Parte Communications**

- The Due Process Clause of the 5th Amendment requires an agency to afford an employee notice of the charges against them and of the agency's supporting evidence and to give that employee an opportunity to respond before effecting their removal
  - *Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1388 (Fed. Cir. 1999)
- Under *Ward* and *Stone*, a deciding official violates an employee's due process rights when they rely upon new and material ex parte information as a basis for their decision on the merits of a proposed charge or the penalty to be imposed
- Good practice to erect an artificial barrier around the deciding official to insulate them from potential ex parte communications
- If additional evidence or information comes to light which the deciding official wants to consider, make sure the employee has an opportunity to review and respond before a decision is made (could include rescinding original proposal and issuing new proposal or providing an additional, truncated reply period)



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### PRE-HEARING STAGE

- **Agency File (AF)**
  - Important, for multiple reasons
  - If the action was properly prepared prior to issuance of the proposal notice, assembly of the AF should not require a lot of work
  - The AF provides the AJ with a roadmap of the case and is regularly the most referenced submission in an initial decision
  - Do not submit an entire ROI as part of the AF; only include the portions relevant to the challenged action
  - Electronic Submissions
    - File size limits have doubled
    - Proper bookmarking
    - Do not include "Tab cover pages" or hard copy Tables of Contents

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### PRE-HEARING STAGE (cont.)

- **Board Orders**
  - Carefully review all Board orders and make note of filing deadlines (orders which appear to be boilerplate could include important modifications)
  - Jurisdictional Orders
    - Agency should file a response, even if the appellant does not (most AJs are reticent to dismiss appeals without sufficient information)
    - Attach all necessary documentation, e.g., SF-50s (appointment and termination), termination letters, and resignation notices
    - Statements of party representatives are not evidence. Provide affidavits or documents to support your positions
    - No need to style your response to a jurisdictional order as a motion to dismiss; the AJ may afford the appellant a final opportunity to oppose the motion pursuant to 5 C.F.R. § 1201.59(c)

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### PRE-HEARING STAGE (cont.)

- **Board Orders**
  - Affirmative Defense Orders
    - Responding to these orders can be time-consuming for both parties
    - Nonetheless, responses help define the defenses raised, especially when the Board receives appeals that check off every box
    - Agency responses should offer more than simple restatements of their narrative responses
- **Motion Practice**
  - Although the Board's electronic cover sheet allows for the entering of text, drafting an actual motion tends to better explain your position
  - Board regulations require the movant to discuss most motions with the opposing party before filing a motion (5 C.F.R. § 1201.55(a))

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**PRE-HEARING STAGE (cont.)**

- **Settlement Discussions**
  - Required by Board Acknowledgment Orders, and should take place prior to the preliminary status conference
  - AJs want to hear what the parties have discussed and what their respective positions are as of the date of the conference, hearing, etc.
  - Cases can settle at any time before the initial decision becomes final.
  - Cases with seemingly no chance to settle frequently do so simply because the parties have talked. This includes the cases that settle on the "virtual steps of the courthouse" just prior to hearing.
  - Board Resources
    - Mediation Appeals Program (MAP)
    - Settlement Judge Program
    - Waiver of ex parte discussions

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**PRE-HEARING STAGE (cont.)**

- **Discovery**
  - Parties are expected to start and complete discovery with a minimum of Board intervention" (5 C.F.R. § 1201.71)
  - The Board should not need to be involved in discovery or resolving disputes. When disputes arise, parties must attempt to resolve them prior to filing motions to compel.
  - If you file an MTC, be prepared to defend your position
- **Stipulations**
  - Substantive stipulations are helpful to streamline issues and avoid unnecessary hearing time spent on matters which are not in dispute
- **Collateral proceedings**
  - Promptly advise the AJ of any collateral proceedings (e.g., criminal proceeding involving the same facts or EEO complaints)

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**PRE-HEARING STAGE (cont.)**

- **Witnesses**
  - Carefully select witnesses, keeping relevance in mind at all times
  - Remember that the DO is always an essential witness, while the PO is less helpful except where the PO is also a fact witness
  - Agencies are required to arrange for the testimony of all approved witnesses who are agency employees; not just those requested by the agency
- **Prehearing Conference**
  - Come prepared, and carefully review the summary of the prehearing conference because it will provide a legal roadmap for the hearing
  - The order and summary may be the last chance to object to the issues accepted for hearing

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### HEARING

- **Opening Statements**
  - Opening statements are rarely permitted
- **Examining Witnesses**
  - When questioning a witness, ask the question before presenting the witness with a document
  - Witness testimony supplements the record; witnesses should not read extensive portions of a document in the record
  - Most hearings are now virtual; representatives should be able to quickly direct participants to a document's location in the record ("Tab 4 at page 128")

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### HEARING (cont.)

- **Presenting Evidence**
  - Know your burden(s) of proof and the elements you must establish, and tailor your questions accordingly
  - We may not have an in-depth familiarity with your operations. Present evidence and testimony in a logical manner to ensure the story is presented in a clear and precise
  - Minimize testimony reliant on acronyms and ensure witnesses explain necessary acronyms to ensure the record is clear
  - When preparing witnesses, remind them to speak clearly and loudly
- **Objections**
  - Hearings are administrative proceedings not bound by the FRE
  - Don't just say "Objection"— State a basis so that other party may respond, and AJ can rule
  - Employ objections judiciously – Too many will cloud the record and slow down the hearing
  - Hearsay is admissible – Argue how much weight should be given to it rather than objecting to admission

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# ? ANY QUESTIONS

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