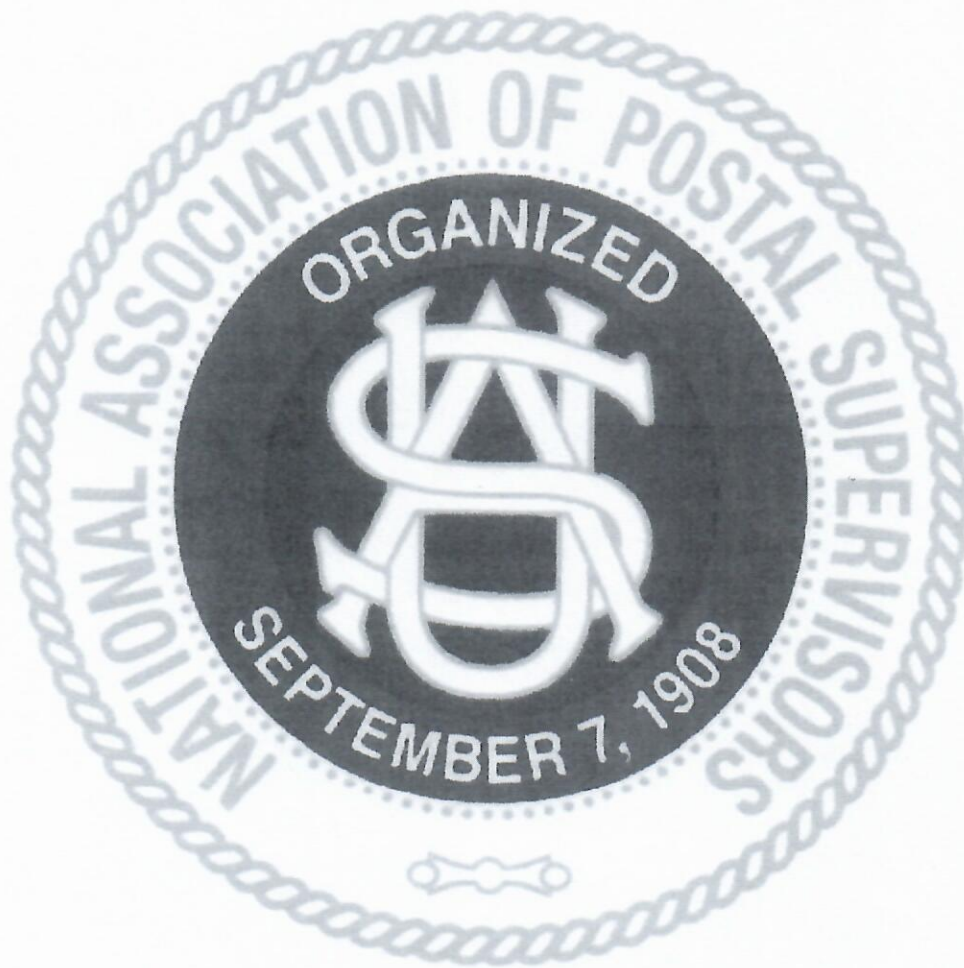


Lack of Candor



This information is for training purposes only, consult an attorney for further advice.

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This is what the MSPB wrote in one case.

Lack of candor is a "broad[] and . . . flexible concept whose contours and elements depend on the particular context and conduct involved." *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). Such a charge does not require proof of intent, but rather "involve[s] a failure to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete." *Id.*

Chavez v. SBA, 2014 M.S.P.B. 37, 6 (M.S.P.B. May 28, 2014).

I think advocates need to assert the response to the questions were accurate and not misleading when responding to such a charge.

Increasingly, Federal agencies are charging employees with misconduct based on "lack of candor". This charge is what Agencies use when they can't prove "falsification".

Falsification is an intentional misrepresentation of some fact. It often arises in filling out some government form, or in the course of an official (or unofficial) investigation – the employee is accused of knowingly providing an incorrect answer to a question, or knowingly trying to deceive or mislead the investigator.

"Lack of Candor", on the other hand, does not necessarily require any intent to deceive. It is a broader concept that depends on the specific facts and context of each case. Just because it's a broader charge doesn't mean that Federal agencies have an easier job of proving up the charge.

I surveyed MSPB Initial Decisions, issued in 2006, involving charges of "Lack of Candor" and uncovered some interesting trends:

If an employee is honestly doing his or her best to cooperate with an investigation, and there is evidence that corroborates the employee's "good-faith", the Agency is going to have a hard time sustaining the charge.

In the context of an investigative scenario, if the employee gave a specific answer to a specific question, and the Agency cannot prove that the answer is inaccurate, the charge seems destined to fail.

The quality of the investigation, the reputation and experience of the investigators, and the credibility of the investigators seems to be a pivotal factor when the lack of candor purportedly occurred in an investigation.

There appears to be a trend that the Agency must prove that the conduct underlying the charge actually occurred; otherwise, what the Agency perceives as a lack of candor may be nothing more than the employee legitimately defending themselves.

The credibility of witnesses is often crucial to sustaining or over-turning the charge.

"Lack of Candor" can be a tricky charge of misconduct. If you have been suspended or removed because of a charge of "lack of candor", or any misconduct, it is best to consult with a Federal Employee lawyer to discuss the charges against you.

When a Federal Agency charges you with misconduct, it has the burden of proving its case against you. What does the Agency have to prove?

The first thing the Agency has to prove is that the misconduct occurred. This is usually broken into two parts:

The conduct charged actually occurred;

The conduct charged is misconduct;

Many times, one or the other is not disputed. For example: an employee and the Agency may agree that the employee was AWOL (Absent Without Leave). However, they may not agree that the AWOL was actually misconduct. This usually happens when the employee provides administratively acceptable evidence of a medical condition requiring them to be absent. In this example, the Agency can prove an employee was AWOL, but they can't prove the employee was "wrong" to be AWOL.

After proving that the conduct occurred, and that the conduct was misconduct, the Agency must prove that the misconduct affects, or has a nexus to, the Agency's mission. It is a rare case where this is contested. In fact, there are very few cases where the MSPB has said that a charged and proven allegation of misconduct does not bear any nexus to the Agency's mission. Usually, this happens in three general scenarios:

The misconduct occurred entirely outside of the workplace and doesn't affect the employee's job or the Agency's work;

The misconduct occurred at work, but has no connection to the Agency's mission (extremely rare);

The charged misconduct is a novel charge or a vague charge.

Once the Agency has proved that the misconduct occurred, and that the misconduct is connected to the Agency's mission, it merely has to prove that it chose a reasonable penalty. To do so, the deciding official will testify to his or her analysis of the "Douglas Factors".

The MSPB is typically very deferential to the Agency's penalty selection. When the Agency has proved all of the misconduct, the Board cannot insert its own judgment – it can only consider whether the Agency's selection of a penalty was "within the tolerable bounds of reason".

However, when the Agency cannot prove all of the misconduct, the Board may substitute its own analysis in assessing the penalty. In either case, the evidence pertaining to the Douglas Factors will prove crucial in your case.

In almost every adverse action case before the MSPB, the issue of the "Douglas Factors" is likely to come up. In short, the Douglas Factors are a tool that the Deciding Official should use in choosing the property penalty to take when a Federal Employee commits misconduct.

Later, at hearing, the MSPB will either take testimony regarding the consideration of the Douglas Factors (if the penalty is challenged as too severe) or may consider the Douglas Factors itself (if the Agency has not proved all of its charged misconduct).

In essence, these factors are a tool to make sure that the "punishment fits the crime". Here are, in abridged format, the 12 Douglas Factors:

The nature and seriousness of the offense, the relation of the offense to the employee's duties, whether the offense was intentional or inadvertent, or whether or not the offense was committed for gain, with malice, or repeatedly.

The employee's job level and type of employment – supervisory or fiduciary, contact with the public, prominence of the position;

The employee's past disciplinary record

The employee's work record: length of service, quality of performance, and dependability

the effect of the offense upon the employee's ability to continuing performing at a satisfactory level, and the effect on the supervisor's confidence in the employee after the misconduct;

The consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Consistency of the penalty with the Agency's Table of Penalties (if any)

The notoriety of the offense and the impact on the reputation of the Agency;

The clarity with which the employee was notice of the rules violated in committing the offense, including warnings about the conduct;

The potential for the employee's rehabilitation

Mitigating circumstances surrounding the commission of the offense (unusual job tensions, personality conflicts, bad faith issues, mental impairment, harassment, etc)

The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by this employee or others.

Not all of the Douglas Factors apply in every case. Agencies will tell you that not all of them apply in every case. While it is a rare case where all of the Douglas Factors apply, it is not uncommon for the Deciding Official to fail to consider one or more of the factors that may have affected his or her penalty choice.

A question folks frequently ask when contacting my Firm is an explanation of the difference between a "disciplinary action" or an "adverse action".

A "Disciplinary Action" is a suspension of 14 days or less, written letter of reprimand, or oral counseling. Aside from truly egregious misconduct, an Agency will usually propose a disciplinary action before taking more serious steps. Disciplinary actions lay the groundwork for Agencies to successfully take an adverse action. In most Agencies, bargaining unit employees can challenge disciplinary actions through their negotiated grievance process or through the Agency's grievance process. Supervisors and non-bargaining unit employees may challenge disciplinary actions through the Agency's grievance process (if the Agency actually has one). No disciplinary action is appealable to the MSPB.

Adverse actions are suspensions of 15 days or more, downgrades, demotions, and removals. (Constructive actions – constructive suspension or removal, involuntary resignation or retirement may be adverse actions, but more on that another day). All adverse actions are appealable to the MSPB – so long as the employee has MSPB appeal rights.