Federal Employment Law Training Group
Training By Professionals For Professionals

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Gravity waves. I'm not sure exactly what they are, but if Neil deGrasse Tyson is excited about them, then I'm excited about them, as well. And who predicted them nearly a hundred years ago? That's right: Albert Einstein. And what was Einstein's job before he became a famous physicist? That's right again: civil servant. And who else do we think about fondly when we think of civil servants, just doing their jobs, without praise or necessarily receiving a sustained superior performance award? That's right one more time: federal employees like Jack Ryan, Jason Bourne, and Maya in "Zero Dark Thirty." I'd have to assume that Civil Servant James Bond's travel claims look a bit different from yours, but still … he's just some GS-Whatever, doing what his PD says, including "other duties as assigned." And that's why here at FELTG, we love you guys. Every work day of your civil service lives, you get up in the morning, put on your pants one leg at a time, and go out and do whatever The People need you to do to make our society work. Most of what you do doesn't end up all praiseworthy on the front page of the *Washington Post*, but it makes a difference to us citizens on the front pages of our hearts. And if we here at FELTG help you just one little bit in doing your jobs better, then we are humbled and honored to have been of assistance. Gravity waves … who would have thought it? Oh, yeah - a civil servant thought it. So what are you going to think up this day in your civil service life? We citizens can hardly wait to find out.

Bill

UPCOMING WASHINGTON, DC SEMINARS

MSPB Law Week
March 7-11, 2016

Leave & Attendance Management and Performance Management
March 14-17

EEOC Law Week
April 4-8

Workplace Investigations Week
April 18-22

JOIN US IN SAN FRANCISCO

MSPB Law Week
June 13 - 17

WEBINARS ON THE DOCKET

March 3:
Preventing and Correcting Workplace Discrimination: A Focus on Religion and National Origin

March 24:
Dealing with Technology Issues in the Federal Workplace

Speaking of Jack Ryan
By William Wiley

In one of the last scenes in *The Hunt for Red October*, Jack's with the good Russians in the Red October when Viktor Tupolv, captain of the bad Russians in another submarine, against the wishes of his crew, arms his torpedoes in their tubes before firing them. You see, the reason this is a bad idea is that if the pre-armed torpedoes don't immediately hit their target, they can circle back and destroy the submarine that initially fired them. Which, of course, is what happens in the movie, thereby destroying the Russian submarine and crew while allowing the Red October to escape to the good old US of A. Just before the pre-armed torpedoes complete their circle and are about to explode the Russian sub, knowing that death is imminent, one of the crew members turns angrily to Captain Tupolev, and says, "You arrogant ass: you've killed us!" Then, "Boom," the end, just like real life is supposed to work.

Right now, you are probably asking yourself "Where the devil is Wiley going with this one? Isn't this supposed to be a newsletter about federal employment law?" Well, watch this segue, those of you who are faint of heart readers.

Some of you might remember that back in 2010, this newsletter sounded the alarm bell when the two "new" members of MSPB issued three decisions that threw the business of federal employment law for a loop. Known as The Terrible Trilogy, the cases of *Lewis/Villada/Woebcke* redefined the importance of comparative penalties in the *Douglas* factor analysis defending the penalty selection, essentially requiring agencies – for the first time in history – to implement the same penalties for similar misconduct throughout an agency. Since 1981, penalties given to other similarly-situated employees had always been one of many considerations in determining whether a penalty was reasonable. Post-Trilogy, that consideration was raised to a very high level, requiring agencies that fire employees for misconduct to lose their cases and have to reverse the removals if on appeal the employee-appellant could point to other cases like his in which the agency did not implement a removal. Reversal was to become the outcome *even if otherwise the employee had engaged in misconduct* if the evidence demonstrated disparate penalties.

Man, oh, man, did this reporter have a criticizing fit when The Trilogy was issued. First, it is physically impossible to track all the misconduct within an agency, and then assure that everyone gets the same penalty. Can't humanly do it because you'd have to know all the MISCONDUCT (not just all DISCIPLINE) within an agency, and somehow centralize all of the agency's decision making. Second, within weeks, smart agencies realized that discipline within the philosophy of The Trilogy made the most sense if the agency always administered the most severe discipline option available. As a practical matter, an agency could best defend itself if it always terminated for a particular act of misconduct, thereby keeping the bar set high for the next similar acts of misconduct. Doing anything less than removal today could hamstring an agency well into the future for years.

Officially, The Terrible Trilogy remains good law at the Board today. In 2012, new Member Robins wisely dissented from the direction this philosophy was taking, arguing that The Trilogy "attempts to promote a universal consistency in penalty setting, without identifying any legitimate individual interest or broad value under the Civil Service Reform Act that is being promoted." *Boucher v. USPS*, 118 MSPR 640 (2012). Unfortunately, Member Robbins is only one vote on a three-member Board, and The Trilogy lives on, despite his disagreement.

Which brings us to appeal decisions released just this month. As most everyone who has had access to the news media these past couples of years knows, our friends at the Department of Veterans Affairs have caught Congressional-Hell because of what has been seen as unaccounted-for gross managerial misconduct on the part of certain senior executives at DVA. So loud has been the outcry that Congress created a law that allows the

Secretary of DVA to fire SESers with relatively little due process and a truncated appeal to a single MSPB administrative judge. The goal was to make it easier for DVA to hold its senior leadership accountable by enforcing discipline based on perceived acts of misconduct, with exceedingly little oversight.

DVA has been trying to take advantage of this new law. It has disciplined several SESers within the past 18 months, the appeal results of three of which were released just last week (two demotions and a removal). And guess what: all three were reversed by the Board's judges, and two of the three reversals (the analysis of the third has not yet been released) were based in large part on the disparate penalty philosophy of The Terrible Trilogy. Yes, charges of misconduct were sustained in both cases. However, even in spite of the proven misconduct, the judges applied The Trilogy, found other employees who in the opinion of the judges were similar-enough to the appellants to warrant the same discipline, and who DVA had chosen not to discipline because the Deciding Official at DVA saw the misconduct of the others to be significantly less harmful. When confronted with such disparity, the judges dutifully applied The Terrible Trilogy and reversed DVA's demotions of the two individuals. *Rubens v. DVA*, PH-0707-16-0151-J-1 (2016) and *Graves v. DVA*, CH-0707-16-0180-J-1 (2016).

Focus on the essence of this situation for a moment:

1. Congress wants it to be easier for DVA to discipline its senior leadership.
2. DVA has embarked on an effort to comply with this Congressional mandate.
3. However, DVA has been frustrated in doing so by MSPB's Terrible Trilogy philosophy.

As a result of these reversals, it was reported last week that the leadership of DVA is going to try to get its SES appointees removed from Title V of the United States code so that the nasty old MSPB will no longer have jurisdiction over DVA's attempts to hold its employees accountable. In other words, DVA wants MSPB to go away in large part because of The Terrible Trilogy, the exact cases the FELTG newsletter warned the world about back in 2010. If DVA leadership manages to get Congressional action to move MSPB out of the picture for its SESers, how long will it take for DVA to recognize the huge benefit of no MSPB oversight, and push for legislation that would apply the no-MSPB approach to ALL of its employees? And after that, how long will it be before other agencies see that DVA can hold its employees accountable more easily than can they, and then they will ask for similar MSPB-exclusion from Congress for their agencies?

Captain Tupolev arrogantly launched his torpedoes armed in their tubes, thereby destroying himself and his crew when they circled around. The Board Members at MSPB arrogantly issued The Terrible Trilogy in 2010, mandating that all agency discipline be the same. The Trilogy has now circled around, in the eyes of some allowing senior government managers who have engaged in misconduct to escape accountability for their misconduct. And the result may well be that MSPB becomes irrelevant to government oversight as agencies apply to Congress to be excluded from its jurisdiction. In fact, the day may well come when Congress sees no need for an MSPB whatsoever because of the impediments to accountability that it creates as it decides cases, and the dearth of agencies willing to be constrained by its wacko decisions like The Terrible Trilogy. If that happens, do you know what we'll all hear in the distance because of what the Board has done to itself?

Boom! Wiley@FELTG.com

Sanctions: Failure to Complete EEO Investigation within the Regulatory Timeframe

By Deryn Sumner

As promised, over the next several months we're going to discuss the different reasons why one party may move for sanctions against the other in the federal sector EEO process. We're going to begin this month with something that has gotten a fair

amount of attention over the past nine years: requests for sanctions, up to and including default judgment, when an agency fails to timely complete an EEO investigation.

Let's first look at the regulations. The Commission's regulations at 29 C.F.R. 1614.108(f) require agencies to complete EEO investigations within 180 days of the filing of (not receipt of) the formal complaint. Where a complainant subsequently amends a complaint, the investigation must be completed by either 180 days from the last amendment, or 360 days from the filing of the original formal complaint, whichever is earlier. Once that timeframe has expired, a complainant can request a hearing, even if the investigation is not completed.

A new requirement set forth in Chapter 5 of the recently revised MD-110 states, "If the investigation is not completed within the 180-day time limit, the agency must send a notice to complainant informing him/her that the investigation is not complete, providing an estimated date by which it will be complete and explaining that s/he has a right to request a hearing from a Commission Administrative Judge or to file a civil action in the appropriate U.S. District Court. The notice must be in writing, must describe the hearing process including some explanation of discovery and burdens of proof, and must acknowledge that its issuance does not bar complainant from seeking sanctions." I can't say I've seen one of these notices yet.

There are many cases addressing whether sanctions are appropriate for untimely investigations. Here are some of the key ones for federal sector practitioners to review and familiarize themselves with:

- *Cox v. Social Sec. Admin.*, EEOC App. No. 0720050055 (Dec. 24, 2009)
- *Royal v. Dep't of Veterans Aff.*, EEOC App. No. 0720070045 (Sept. 10, 2007), *recons. den.*, 0520080052 (Sept. 25, 2009)
- *Talahongva-Adams v. Dep't of the Interior*, EEOC App. No. 0120081694 (May 28, 2010)
- *Giza v. Dep't of Justice*, EEOC App. No. 0720100051 (Apr. 1, 2011)
- *Montes-Rodriguez v. Dep't of Agriculture*, EEOC App. No. 0120080282 (Jan. 12, 2012), *recons. den.* 0520120295 (Dec. 20, 2012)
- *Adkins v. FDIC,* EEOC App. No. 0720080052 (Jan. 13, 2012)

So, how should Agency Representatives respond to such motions when, in fact, the Agency failed to timely complete the investigation? First, engage in an investigation of your own. Figure out what happened and who was involved in the investigation. Get affidavits, if appropriate, from the EEO or Civil Rights staff explaining what happened. Also, if the timeframes of non-compliance are minimal, point that out to the Administrative Judge. However, do not hang your hat on blaming a contractor for any delays. As the Commission said in *Cox*, "The fact that the agency contracts with an outside company to conduct the investigation does not absolve it of its responsibility to ensure that the ROI is adequately developed on which to base a decision."

In your response, talk about each of the pertinent factors cited by the Commission in determining what, if any, sanction is appropriate. These include (1) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; and (4) the effect on the integrity of the EEO process. If the non-compliance was minimal and if there's any colorable justification for the delay, provide that. Point out if there were no prejudicial effects or consequences as a result of the delay.
If the non-compliance is substantial, you may want to consider arguing for a lesser sanction, such as covering the costs of discovery, in lieu of default judgment. As the Commission stated in *Cox,* "In general, the Commission has held that sanctions, while corrective, also act to prevent similar

misconduct in the future and must be tailored to each situation*, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions,* as well as to equitably remedy the opposing party." *(citations omitted and emphasis added).*

Next month we'll talk about when sanctions are appropriate for insufficient or inappropriate investigations. Sumner@FELTG.com

Relief Regarding Administrative Leave During Notice Period
By William Wiley

We don't often write about pending legislation in our newsletter for two reasons:

1. Most bills do not become law, and
2. Tentative legislation confuses people (your humble reporter included) because it's hard to remember, "Did that thing ever pass or did I just read about it?"

However, we're going to make an exception this time because this bill, if it becomes law and is properly implemented, could save your life.

S. 2450, the bi-partisan "Administrative Leave Act of 2016" recently was voted out of committee and thereby has a decent chance of becoming law. The main purpose of the bill is to restrict the use of administrative leave (i.e., excused paid absence approved by agencies), not doubt in response to recent news reports about federal employees being on paid administrative leave for months and years because their supervisors (who apparently have not been to FELTG training) could not figure out what to do with them.

A number of agencies have embarked on a program to restrict the use of administrative leave even without this proposed legislation. I think we would all agree that the image of a federal employee sitting home watching soaps while drawing his six-figure salary when hard-working non-feds are fighting for a $15 federal minimum wage is enough to make one want to storm the Bastille. Government waste is on the front pages a lot this year, in large part because of the upcoming Presidential election. Feeding such stories of government ineptitude to the populace is a tried-and-true method for getting folks to vote.

As much as we all might agree with the desire to curb excessive administrative leave, there are some times that the use of short-term administrative leave is not only desirable, but may be a life-and death matter. Those of you who have attended our supervisory training program, *UnCivil Servant*, know that we are big believers that once a supervisor has issued an employee a proposed removal letter, that employee should be removed from the workplace until a final agency decision is made on the proposal. The main reason is that an employee who has been given a proposed removal is under a huge amount of stress, and stressed-out people sometimes become angry and dangerous. The Bureau of Labor and Statistics estimates that every workday of the year (Monday - Friday), about two people are killed by a coworker in a worksite. And you don't have to read many news reports about those homicides to learn that many of those killings are directly related to workplace discipline or termination. There are a number of other reasons, as well, to get people out of the workplace (e.g., curtailing access to sensitive agency information available to the about-too-be –fired employee who will soon be in need of some money), but the potential for homicide is the number one reason.

Unfortunately, a number of agencies (and other versions of administrative leave restriction proposed legislation) swipe at administrative leave control with a broad brush, failing to see the significant benefit of getting the employee out of the workplace once removal is proposed. As every reader of this newsletter knows, back in 1978 Congress said that any federal employee who has a removal proposed is entitled to 30 days of paid notice prior to the removal being effectuated. Agencies that restrict all administrative leave, regardless of duration or need, place employees in a dangerous situation once a proposal to remove is issued.

S. 2450, fortunately, addresses the need to get employees out of the workplace once a removal is proposed. While restricting administrative leave in other situations, this bill creates a new form of excused paid absence to be known as Notice Leave. Such leave can be implemented by an agency for the length of the notice period prior to a removal, most likely the 30-days created by Congress in 1978, but not necessarily so restricted should the agency grant a longer notice period. So all you federal employees out there who are reading this article and have concern for your own life as well as that of your coworkers and citizen clients of your agency, contact your Congress Members and Senators. Tell them you LOVE-LOVE-LOVE S. 2450 and that you hope they will vote for it.

The main downside to the legislation, however, is that it leaves it up to agencies to decide when Notice Leave should be used rather than mandating that it should be used in every proposed removal. The problem with that is that some idiot at some agency is going to decide that he can predict who is going to be dangerous after being given a proposed removal, and that only potentially dangerous employees should be placed on Notice Leave. That is SO foolish and arrogant. NO ONE can predict who is going to go over the edge once a proposal is issued. Read the news reports about workplace homicides. In my collection of such articles, over half of the killings "came out of nowhere." "She was so nice. No one would have guessed that she could become violent." There is a special place in Hell (thank you, Madeline Albright) for individuals within agencies who declare that they can predict who is going to be violent, thereby arrogantly putting other people's lives at risk.

Hey, all you policy makers out there. If S. 2450 becomes law, put on your grown-up pants and make an important policy decision for your organization. Accept that every employee who is issued a 30-day notice of a tentative removal can become life-or-death violent. Then, in line with the new law, issue a policy that within your organization, EVERY SINGLE EMPLOYEE who has a removal proposed will be placed on Notice Leave until the final decision is issued. After that, make sure that the darned decisions are issued not much later than 30 days, and the world will be a better place: Congress will be happy, the employees at your agency whose lives have been spared will be happy, and here at FELTG, we can finally put aside one of our big soap box speeches that we've been preaching for the past 15 years. Wiley@FELTG.com.

Discipline in the Public View – Credit Card Misuse VI

By Barbara Haga

Last month's column addressed travel and purchase card misuse. We continue with a discussion of the OMB guidance regarding dealing with instances of misuse.

OMB's Opinion

Appendix B of OMB Circular A-123 entitled *Improving the Management of Government Charge Card Programs* (January 2009) sets out requirements for managing purchase and travel card programs. Paragraph 3 includes requirements for training for card holders and approving officials; paragraph 4.3 mandates that agencies to establish risk management strategies including 1) closely monitoring delinquency reports from charge card vendors; 2) contacting appropriate personnel to ensure that delinquent payments are addressed and corrective actions are taken to prevent further occurrences; and 3) establishing controls, policies, and practices for ensuring appropriate charge card and convenience check usage and oversight of payment delinquencies, fraud, misuse, or abuse.

Paragraph 4.5 address the actions agencies regarding delinquent card holders. These include suspending the accounts as well as instructing the charge card vendor to cancel cards, initiate collection efforts, notify credit bureaus, etc. The guidance also suggests imposing disciplinary action deemed appropriate by the agency. Paragraph 4.9 makes a similar recommendation regarding purchase card holders. These suggestions seem reasonable, but somewhere between these

paragraphs and Attachment 5 on Best Practices the recommended actions expanded to this list:

When initiating administrative or disciplinary actions for card misuse and/or for instances when account delinquency is discovered, CHARGE CARD MANAGERS SHOULD (my ALL CAPS)*, in addition to consultation with agency human resources professionals:*

- *Initiate verbal counseling and warning;*
- *Provide written warning;*
- *Suspend or revoke charge card privileges;*
- *Suspend or revoke employee security clearance;*
- *Include misuse or delinquency occurrence in employee performance evaluations;*
- *Suspend or terminate employment;*
- *Ensure consistent enforcement of penalties; and*
- *Publish actions taken by the agency for misuse of charge cards.*

What are the Issues with this Guidance?

Thankfully OMB suggested that charge card program managers coordinate with the HR as part of these actions, but I am afraid that is not going to overcome some of the fundamental problems. First, authority to take disciplinary action is normally delegated through the chain of command of an organization, so the proposing and deciding officials are typically supervisors and higher level managers in that employee's reporting chain. An agency might delegate authority for all of a certain type of action such as charge card abuse to one official, but in all of my review of cases related to charge card use I did not find a decision where that was noted.

Some of the guidance regarding the charge card manager's authority is reasonable. Suspending or revoking charge card privileges is what one would expect the card manager to do in such circumstances. Other parts of the guidance are problematic. The list of actions states that charge card managers should, in consultation with agency human resources professionals, initiate verbal counseling and warning, provide written warning, suspend or terminate employment, and ensure consistent enforcement of penalties. Since charge card managers would not be in the employee's reporting chain in most cases, it is easy to anticipate where problems could arise. Proposing and deciding officials are being told what to do so that they did not have authority to truly decide the matter (a la, security clearance denial/revocation cases). One can imagine what the current MSPB would do with that kind of scenario.

Speaking of security clearances, the guidance provides that charge card officials should suspend or revoke employee security clearances. Reporting the information to security officials where card holders also are required to have security clearances would make sense since matters of debt and financial insolvency are issues in the granting of clearances, but I don't know of a combination charge card program manager/security manager job in any agency.

Which recommendation makes the least sense?

Including occurrence of misuse or delinquency in employee performance evaluations is the suggestion that gives me the most heartburn.

In June 2013 in one of my earliest FELTG columns I wrote about mixing up disciplinary matters in performance plans. What I said then still makes sense.

> Disciplinary infractions should be dealt with in the discipline system, and performance problems should be dealt with performance procedures. Procedures for dealing with poor performance are designed to teach and coach and develop skills and abilities so that the employee can meet the critical functions of the job. Discipline is designed to correct misconduct – infractions, failure to follow rules and procedures, etc.

Misusing a credit card to me is a very clear example of failing to follow rules and procedures. Would it make sense for an agency to give an opportunity period when Gerald uses his government travel card to take more cash advances than what is authorized for the period of travel? With that logic if Gerald didn't do it again during the opportunity period, there would be no action, right? What if Gerald was disciplined for

credit card misuse in the third month of the appraisal cycle and didn't commit any further misconduct for the remaining nine months. Should Gerald be rated at below Fully Successful?

What to Expect

This is a topic that is getting attention. Just this week an article was issued by the *Daily Signal*, a publication of the Heritage Foundation, with the eye-catching title *Government Employees Spent Almost $1 Million in Taxpayer Money at Casinos* (http://dailysignal.com/2016/02/08/government-employees-spent-almost-1-million-in-taxpayer-money-at-casinos/). The article notes that the Senate passed legislation trying to put more teeth into credit card program management through the Saving Federal Dollars Through Better Use of Government Purchase and Travel Cards Act of 2015 (S. 1616) in December. The article suggests that if money is being wasted on such expenditures perhaps budgets could be reduced as part of larger cost-cutting measures.

The legislation was referred to the House Committee on Oversight and Government Reform on December 17th. Govtrack.us says the bill has a 45% chance of passing. The Committee is busy with trying to control administrative leave right now, but I think this will be an easy segue for them. Haga@FELTG.com

Using a PIP for a 752 Removal
By William Wiley

One of the great gifts of the Civil Service Reform Act of 1978 was the ability for agencies to remove poor performers using what have come to be called the "432" procedures. Misconduct removals (non-performance terminations) rely on the "752" procedures that have been around since the cooling of the Earth. The 432 procedures were brand new back in 1978 and have several advantages for agencies over the old 752 procedures:

- A lower burden of proof to support the removal (substantial evidence rather than the preponderance required for 752 removals).
- No mitigation of the penalty (under 752, agencies have to a *Douglas* Factor analysis to defend their removals) because the agency does not have to prove that the removal promotes the efficiency of the service.
- All that really matters is what the employee does during the performance improvement period (the PIP or the Opportunity Period). Pre- and Post-PIP performance does not weigh into the calculus of a correct outcome.

Most federal agencies are covered by the 432 procedures. However, by statute a few are not, the U.S. Postal Service being the largest agency that is not covered. Therefore, the non-covered agencies have to use 752 procedures for everything: performance and conduct.

It is our experience here at FELTG that at least a couple of agencies who are not covered by 5 USC Chapter 43 (the 432 procedures) still like the idea of using a PIP when confronted with a poor performer. The question then becomes, what are the pros and cons of using a PIP in a world controlled by the 752 procedures.

First, the traps to avoid. Even though a Chapter 43-excluded agency might choose to develop a PIP approach to unacceptable performance problems, it does not thereby give itself the big 432 procedural advantages of a lower burden of proof and no need to prove the efficiency of the service using the *Douglas* Factors to defend the penalty. As a practical matter, although there's no case law squarely on point, it would be perfectly reasonable for an arbitrator to expect to see a *Douglas* Factor analysis in a case in which the agency fires the employee for failing a 752-PIP, perhaps even insisting that an appropriate alternative to removal might be a suspension. A penalty ruling like that would be antithetical in a 432 performance removal, but not necessarily irrelevant in a 752-PIP removal.

However, even without these two big advantages, a 752-PIP approach to poor performance still has a

significant advantage when compared to regular misconduct 752 removals. In a classic case of misconduct, the agency has to do an investigation into an act of rule-breaking conduct that has occurred in the past. It has to collect hard evidence to support a lot of facts that would be critical to proving the elements of whatever charge it comes up with. For example, did the employee walk out with an agency laptop in his backpack on January 15? Was the employee on notice that the start of his shift was 8:00 AM? Has the supervisor failed to enforce the rule in the past, thereby excusing the employee from obeying the rule today? These are all factual determinations that must be made, sometimes based on scant evidence or blurry security camera images.

Now, compare that with a PIP approach to poor performance. In a PIP situation, the supervisor is telling the employee that what is important is what happens in the future (during the PIP), not what happened in the past. Therefore, there's no need to collect evidence relative to past performance because during the PIP, the supervisor will be collecting evidence of unacceptable performance as the PIP goes forward into the future. When we consult with supervisor clients during the PIP process here at FELTG, we review the supervisor's efforts on a weekly basis and give immediate feedback as to the quality of the necessary PIP counseling as well as the adequacy of the evidence of poor performance that is being developed. That way, the supervisor can tweak her efforts during the PIP while evidence is being collected, thereby providing the employee better feedback and simultaneously building a more defensible action, should she decide at the end of the PIP that removal is warranted.

The PIP approach to performance-based removals under 752 lacks some of the great advantages of a classic 432 performance removal, but still gives us good reason to use it. Just be sure that you don't make the mistake of thinking that if it talks like a PIP and walks like a PIP, you can use the lower burden and no-*Douglas* approach of a 432 removal. Wiley@FELTG.com.

Webinar Spotlight:

Sometimes it's Good to Settle: Resolving Disputes Without Litigation
March 31, 2016

Most employment law disputes end up settling long before they get to litigation. At the completion of this 90-minute program, participants will be better able to resolve employee complaints and avoid speculative litigation by understanding:

· **The Law:** What have the oversight agencies told us about settlement in cases in those forums; what's required, what's not.

· **The Strategy:** There are tested approaches to settling conflict; what are they and how do they operate.

· **The Options:** Agencies have independently developed discipline alternatives ideal for settlement consideration; what might work for you, how to incorporate these options into your settlement strategy.

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EEOC Seeks Public Comments on Proposed Enforcement Guidance on Retaliation
By Deryn Sumner

A few weeks ago, the EEOC announced that it is seeking public comment on a draft of proposed Enforcement Guidance concerning retaliation: http://www.eeoc.gov/eeoc/newsroom/release/1-21-16a.cfm. The press release noted that the EEOC had last issued guidance about retaliation in 1998. Since then, there have been some substantive developments in the case law. Notably, in 2006, the Supreme Court issued its decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which addressed what constitutes an adverse action for purposes of a claim of retaliation. The decision held that for purposes of retaliation claims, adverse actions do not need to be "ultimate employment decisions." It also contains one of my favorite sentences from a

Supreme Court decision for its sheer simplicity, "Context matters." As the decision goes on to explain, a schedule change taken in retaliation may not be a big deal to every employee, but it can be a big deal to someone with school-age children. Therefore, the context of each action alleged to be retaliatory matters.

Now, ten years after this Supreme Court decision, the EEOC is looking to update its Enforcement Guidance. Another interesting note from the press release is the massive increase in retaliation claims:

> The percentage of retaliation charges has roughly doubled since 1998, making retaliation the most frequently alleged type of violation raised with EEOC. Nearly 43 percent of all private sector charges filed in fiscal year 2014 included retaliation claims. In the federal sector, retaliation has been the most frequently alleged basis since 2008, and retaliation violations comprised 53 percent of all violations found in the federal sector in fiscal year 2015.

The 1998 guidance about retaliation claims was part of the *EEOC Compliance Manual* and was primarily geared towards investigators reviewing claims of private sector retaliation, though the same legal elements apply to both private sector and federal claims. The proposed Enforcement Guidance, for which the EEOC now seeks comment, takes the format of other EEOC publications, including the EEOC's *Enforcement Guidance on Reasonable Accommodation* and *Undue Hardship Under the Americans with Disabilities Act* (available at http://www.eeoc.gov/policy/docs/accommodation.html), a document I refer clients and others to almost weekly.

This proposed Enforcement Guidance on retaliation is thorough, coming in at 76 pages with 222 footnotes, and is well-organized. Just as in the 1998 release, it starts out by laying out the elements of a retaliation claim, focusing on all the forms protected activity can take, and the broad view of coverage of adverse actions (as we discussed in last month's newsletter article, http://feltg.com/claims-of-retaliation-have-a-broader-view-of-coverage-than-discrimination-claims/). It's important to remember that employees are protected from retaliation for initiating an EEO complaint even if the claims being raised in the underlying claims do not have any merit. The Proposed Guidance also details some of the other forms of protected activity beyond just participating in and opposing protected activity, including "complaining about alleged discrimination against oneself or others, or threatening to complain; providing information in an employer's internal investigation of an EEO matter; refusing to obey an order reasonably believed to be discriminatory; advising an employer on EEO compliance; resisting sexual advances or intervening to protect others; passive resistance (allowing others to express opposition); and requesting reasonable accommodation for disability or religion." Something I also find very useful in the proposed Enforcement Guidance is the inclusion of specific examples, which are sprinkled throughout the document.

The proposed Enforcement Guidance also dedicates a section to the prohibition of employer interference with an employee's exercise of ADA rights, includes a section on remedies available when an employee prevails on retaliation claims, as well as a section on best practices employers can adopt to reduce incidents of workplace retaliation.

Public comments on the proposed Enforcement Guidance are due on February 24, 2016 and you can submit input through www.regulations.gov (Docket ID: EEOC-2016-0001).
Sumner@FELTG.com

Leave & Attendance Management and Performance Management
March 14-17, 2016
Washington, DC

Join FELTG in Washington, DC, for practical instruction on how to handle leave and performance issues in the federal government. Here's what we'll cover:

Monday: Legal and regulatory requirements; intersection with labor relations; annual leave; sick leave; FMLA

Tuesday: FMLA continued; LWOP and AWOL; leave-based actions; medical issues

Wednesday: Performance appraisal processes; system design; performance plans

Thursday: Performance plans continued; pay and RIF; dealing with deficient performance

Registration is open now. Make plans to attend, before it's too late!

The "Gambler's Fallacy" at Work in Civil Service Law
By William Wiley

Pop Quiz: You have flipped a coin five times and it has come up five heads five times in a row. If you were to bet on the next flip, what would you pick: heads or tails?

A lot of people would pick tails, believing consciously or subconsciously that the fact that the coin has previously landed on heads several times somehow is evidence that the next flip is more likely to be tails. And when doing so, they would become victims of "The Gambler's Fallacy." You see, there's a tendency in humans to see patterns, to look for balance in an otherwise unbalanced world. The next time you're in a big casino in Las Vegas **[Note to self: a great location for an FELTG seminar!]**, look closely at the video screen next to the roulette wheel. When you do, you'll see that a lot of casinos will track how many times red or black has come up in a row and display that number for all the future gamblers who might not otherwise bet on the spin of the wheel, but who start pulling out the Benjamins when they see that *noir* or *rouge* has shown itself five or six or ten times in a row.

And that's why big casinos have a lot of your money; those guys paid attention during the first day of statistics while you were checking your Facebook page for the most recent updates by Justin Bieber. Statistically speaking, the act of flipping a coin at this very moment results in a 50/50 chance of either side coming up, regardless of which sides have come up previously. The past does not control the future of a random event such as coin tossing or roulette wheel spinning.

But not so for the decisions of judges. In one recent study, investigators reviewed over 150,000 decisions by immigration judges in cases in which the individual appearing before the judge was seeking asylum. The results show the subconscious application of the Gambler's Fallacy to those decisions by those judges. If the immediately previous case resulted in the judge granting asylum, the next case was about one percent less likely to result in an asylum grant. If two cases in a row resulted in a judge granting asylum, the judge was five percent less likely to grant asylum in the third case. Daniel Chen, Tobias J. Moskowitz, and Kelly Shue, "Decision-Making under the Gambler's Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires," Fama-Miller working paper, March 2015.

You see, judges have memories whereas coins do not. Judges know that they are hired to make decisions, and they subconsciously apply the Gambler's Fallacy to their decision-making, working to bring order to an otherwise disordered world. If some applicants deserve asylum, then there must be others who do not, or we wouldn't need judges to make the distinction.

I first ran into this phenomenon way back in 1992. The Board had been issuing decisions for over ten years by that time, ironing out word by word what the "new" Civil Service Reform Act was directing

agencies to do when firing bad employees. Upon reviewing MSPB's annual reports for each of those preceding years, I noted that the Board was upholding removals at the rate of about 78% each year. In an article I wrote (for a lesser newsletter) that year, I opined that this trend didn't make sense. Yes, during the early '80s when the CSRA was initially being interpreted, you'd expect agencies to be making mistakes. There were a lot of new terms and procedures to be understood, and it's only through trial and error that terms and procedures come to have a definitive definition in a business based on adjudicatory oversight such as our civil service. My surprise was that the appellate loss rate for agency removals did not drop each year during the decade as we all came to learn what the CSRA was all about.

And my surprise has not diminished in the quarter-century since that original epiphany. In this past year, and in fact every year since that time, the agency success rate on appeal hovers right around 78%. Why has it not improved since that time? Why are we no better at removing bad employees today that we were back in the early '80s when the Board's decisions could be read from first to last over a weekend? And if you're a real purest, why does an agency EVER lose a case on appeal? Have any of you readers ever been involved in a case in which the agency fired someone with full knowledge that it had somehow removed the employee incorrectly?

Could it be … Gambler's Fallacy? All labor relations specialists know that it is black letter law in the arbitration community that an arbitrator will not stay in the arbitration business very long if she always holds for management *regardless of the merits of the cases brought to her*. Is it possible that the Board and its judges are subconsciously prone to sometimes set aside agency removals because if it ALWAYS upheld the agency, it would be seen as not doing its job? It only makes sense that if some agency removals should be upheld, others should not or otherwise we wouldn't need judges.

And it only makes sense that if a coin has come up heads five times in a row, the next flip is more likely to result in a tail. Of course, that's undeniably wrong, but it still makes sense. As does a flat Earth, ghosts, and lucky charms.

There is a treatment for Gambler's Fallacy among judges that has been shown to reduce the effects of its bias:

1. Publicly acknowledge that the bias exists, thereby encouraging the judge not to succumb to it.
2. Assign judges different types of cases in a dispersed order, thereby reducing the carry-over effect from one removal case to the next.
3. Periodically review decisions to evaluate if the Gambler's Fallacy is having an effect on decision-making and provide feedback to the judges as to how they are doing relative to the bias.

We are starting to learn that a LOT of our biases are subconscious, and that we have them even though in our hearts we believe we do not (yeah, I'm looking at you, Presidential Candidates). MSPB and EEOC would do the country a service by assessing their own judges for the tendency to give in to the Fallacy bias and to take steps to reduce it. Wiley@FELTG.com

OFO Case Law Snapshot: Three Procedural Dismissals Addressed in One Day
By Deryn Sumner

As 2016 continues to truck along, let's check in on the latest (or the most recent Westlaw has released) from the EEOC's Office of Federal Operations. On one day in particular, January 8, 2016, the EEOC addressed three dismissals of formal complaints and remanded two out of the three of them for processing. Given the length of time cases can take to be remanded for further processing, improper dismissals can be dangerous for agencies. Investigations taking place after a several-year delay can reveal that documents were destroyed and recollections are gone, which can impact an agency's ability to sufficiently articulate legitimate, non-discriminatory responses to allegations. So protect your agency by getting it right the first time.

First, in *Clemente M. v. Department of Homeland Security*, Appeal No. 0120152854 (January 8, 2016), the agency dismissed a formal complaint for being filed one day beyond the fifteen-day time limit pursuant to 29 C.F.R. 1614.107(a)(2). The complainant appealed and admitted that he did file his complaint one day late, but requested that the delay be excused. The complainant proffered that "due to a transmission error, he had lost the initial draft complaint form that had been sent to him and that he was unable to receive and sign a new complaint form and transmit it by email to the Agency until the day after the formal complaint was due." The Commission found there was adequate justification and no prejudice to the agency because of this slight delay, and remanded the complaint for investigation.

Next, in *Ashlee P. v. Department of Defense*, Appeal No. 0120152362 (January 8, 2016), the Commission addressed the agency's dismissal of a complaint filed by a guidance counselor for an overseas elementary school. The complainant filed a formal complaint alleging discrimination based on race, sex, and reprisal when she received a letter of caution and was subjected to harassment, including five articulated incidents. The agency dismissed the formal complaint alleging that the complainant did not respond to additional requests for information and further alleged that the complainant "failed to make 'good faith' effort to cooperate in the pre-complaint counseling process by intentionally withholding requested information in order to reach appellate review before the Commission more quickly." Sound like an accusation from someone unaware of the glacial pace that the Office of Federal Operations operates at. Despite the agency's efforts, the Commission found that although the agency asserted that the complainant did not present her claims to the EEO counselor, the EEO counselor's report reflected that she provided sufficient information to identify the events and actions on which her claims were based, as well as the identity of the responsible management officials, and the timeframes at issue. This was sufficient for the agency to accept the claims for investigation and conduct an investigation. The Commission remanded the complaint for such an investigation.

And finally in *Myrna S. v. Social Security Administration*, Appeal No. 0120142595 (January 8, 2016), the Commission addressed the complainant's argument that the agency's dismissal of her formal complaint for untimely EEO contact should be reversed because she had been hospitalized during the 45-day timeframe. The Commission disagreed, and took a careful look at the timeframe at issue. The complainant filed a formal complaint on May 13, 2014 alleging her first-line supervisor subjected her to harassment when they engaged in an affair from August to December 2011. The agency dismissed the formal complaint as the complainant did not contact an EEO counselor until years later on March 16, 2014. The complainant argued on appeal that she did not contact an EEO counselor within the 45-day timeframe because she suffered from anxiety, depression, and was hospitalized. She also claimed she forgot about the EEO training she received in 2010, which would have included information about the 45-day timeframe. The agency opposed the appeal by arguing that EEO posters including this timeframe were prominently displayed in the complainant's office. The Commission reviewed the time period in question and noted that the documentation the complainant submitted about her hospitalizations revealed she was in the hospital for approximately 18 days, between January 2012 and March 2014. The Commission found that the complainant did not demonstrate she was so incapacitated during the relevant, several-year timeframe so as to excuse her untimely EEO contact. The Commission affirmed the final decision dismissing the formal complaint. Sumner@FELTG.com

Rumor has it, FELTG is coming to Honolulu.
Save the dates, August 1-5, 2016!

Discipline is Different in a Unionized Environment
By William Wiley

So you think you know how to discipline an employee, do you? You've read the law, the regulations, and your agency's policies regarding misconduct. You're familiar with the requirements of the Merit Systems Protection Board. If you work for an agency and you've been to our FELTG seminars, you know you need to prove by a preponderance of the evidence the Five Elements of Discipline to defend an adverse action based on misconduct (and if you work for the union, you know to make sure these are present):

1. There has to be a rule (we define "misconduct" as violation of a rule).
2. The employee knows the rule (you can't enforce secret rules).
3. The employee broke the rule.
4. The penalty is reasonable (*Douglas* Factor analysis).
5. The agency provided due process (the Deciding Official considered only the proposal & response).

If these concepts are unfamiliar to you, without untoward delay, PLEASE get yourself to some training. Because if you don't grasp this fundamental concept of the Five Elements, you cannot do you job. Seriously. The next opportunity you have for open-enrollment training with FELTG on this topic is March 7 through 11 in Washington, DC. Do it now: http://feltg.com/event/mspb-law-week/?instance_id=107 .

These elements are fundamental to every disciplinary adverse action in government. However, if the employee is in a collective bargaining unit, the agency has other requirements that have to be met.

First, the experienced practitioner will look to the collective bargaining agreement (CBA) to see if there are any procedural requirements to implementing discipline within the bargaining unit (BU). For example, the CBA may require notice to the union of any proposed discipline. Or, there may be a provision of the CBA that extends the notice period beyond the regulatory minimums. When working with BU employees, practitioners on both sides need to be intimately familiar with the CBA and any sidebar agreements relative to it (New to labor relations? Come learn this stuff in our next labor law seminar, *FLRA Law Week*, May 2-6, Dupont Circle, DC, http://feltg.com/event/flra-law-week/?instance_id=103).

Next, both agencies and unions need to be prepared for a case of discipline to be grieved and thereby taken to arbitration. Arbitrators are hired judges who will apply the law and the CBA to the facts of an adverse action case and decide whether the discipline was administered for "just cause," a concept similar to MSPB's review, but significantly different.

For example, there is no principle in MSPB law that requires an agency to investigate prior to discipline. The only requirement is that the agency has evidence to support the discipline. Arbitrators, on the other hand, look to principles of "industrial due process". In doing so, they look to sources of arbitration authority other than the CBA. "Just cause" and industrial due process include the requirement that management conduct a fair investigation prior to assessing discipline, *Elkouri & Elkouri*. One common element of this requirement is that the employee and witnesses are interviewed prior to making the decision to take the disciplinary action. *Brand & Biren, Discipline and Discharge in Arbitration, AFGE v. USDA*, Fed. Arbn. 0-AR-5160 (2015), *CBP & Nat. Border Pat. Council*, Fed. Arb. 0-AR-5109 (2105).

So you fire a BU employee without interviewing the miscreant. You concluded you didn't need to because you had him clearly on video loading the stolen computers into the trunk of his car, then blasting through the gate with guns drawn and singing "God Bless America" while simultaneously asserting his Constitutional rights to seize federal property.

Appeal to MSPB: Removal sustained.
Grieve to an Arbitrator: What? No interview with the employee? A violation of industrial

due process! Removal set aside (at least possibly, with some arbitrators).

Finally, you owe it to your client to explain how arbitration works. MSPB judges can stay employed for years without ever reversing or mitigation an agency's adverse action. Their performance standards do not require any particular distribution of outcomes in their decisions. They are hired by the Board, a neutral agency intent on applying the law, however the law turns out.

On the other hand, arbitrators are hired by the parties: the union and the agency. If an arbitrator always holds for the agency and never mitigates or reverses an adverse action, do you think the union is going to agree to employee that arbitrator in the future? [Insert your own answer in this space.] So expect to see some highly attenuated, questionable legal rationales when it comes to the assessment of an agency's burden and the elements of proof in an arbitration award. The arbitrator's role is different from that of an MSPB judge. Not necessarily bad; just different. Wiley@FELTG.com

[Editor's Note: I'm certain that some of you readers have gotten to the end of this edition of our newsletter only because you are looking for the monthly article written by Deb Hopkins, one of the star writers for FELTG. Sadly, you will not find an article from her for this month because Deb has been in semi-isolation while studying for her upcoming bar exam. We all miss Deb's insights and wit, but we also acknowledge that we can endure missing an article in exchange for giving her a little extra time to study. And for all you non-attorneys out there, keep this in mind: Once Deb officially becomes Deborah J. Hopkins, Attorney at Law, she also becomes the Admissions Director for the FELTG School of Law, to be offered online sometime before the end of this decade. So let's all send Deb our best legal thoughts, thereby helping her answer these stupid riparian rights questions on the bar. Hopkins@FELTG.com]