Federal Employment Law Training Group
Training By Professionals For Professionals

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Introduction

This week marks the 36th anniversary of the effective date of the Civil Service Reform Act of 1978, the legislation on which many of our careers rest and which provides deep and broad protections to most all federal employees. Here at FELTG, we are continually fascinated by the federal civil service. Google employees get free gourmet food 24/7, haircuts, massages, juice bars, coffee, laundry services, and the employee health insurance covers the freezing of eggs for women who want to defer childbearing until later in life. In the Fed, the Government Accountability Office ruled last month that federal agencies may not provide plastic forks for employees at lunch.

And the US Office of Personnel Management laments the fact that millennials are staying in government only 3.8 years. Well, duh.

Crazy stuff, this word of the federal civil service. And we strive every day of our FELTG existence to help you understand and maneuver some of its many intricate aspects. Come to our training classes, read our newsletter, and hopefully you will be the better for it. We even provide forks for the munchies.

Enjoy your reading,

Bill

William B. Wiley,
FELTG President

UPCOMING WASHINGTON, DC SEMINARS

Legal Writing Week
January 26-30

Absence & Medical Issues Week
February 9-13

MSPB Law Week
March 2-6

Workplace Investigations Week
April 6-10

Leave & Attendance Management and Performance Management
May 5-8

WEBINARS ON THE DOCKET

Federal Labor Relations Meetings: From *Weingarten* to *Brookhaven* and Everything in Between
January 22

Performance Appraisal Systems: From Design to Implementation to Accountability
February 11

Correcting and Preventing Sexual Harassment in the Federal Workplace
February 26

FELTG Practitioner Certification Program

FELTG is proud to announce the launching of a new program for 2015 and beyond. For full-week participants in our foundational open-enrollment seminars, FELTG will offer certification as a trained practitioner in the following specialized areas of federal employment law:

- MSPB Law and Practice
- FLRA Law and Practice
- EEOC Law and Practice

Frankly, we had hoped that the Office of Personnel Management would offer this certification, or perhaps one or more of the oversight agencies would as part of their outreach programs. However, as we have been unsuccessful at convincing The Powers That Be that continuing education and testing in this field are vital and in the best interests of America, we have decided to do it ourselves. Here's how it works:

- The program is open to all attorneys, human resources or labor relations specialists, and union officials who participate in all five consecutive days of one of our foundational open-enrollment seminars.
- In the first day of the program, each participant will be given the choice as to whether to become a candidate for certification, or to forgo the opportunity and to complete the program without the certification option.
- Those who choose to become candidates will participate as is usual in our seminar. The primary difference is that at the end of each day, for those who have chosen to become certification candidates, our instructors will administer a written test covering the topics that were presented during the day.
- Candidates who successfully complete each of the five daily tests will receive a special "Certified Practitioner" certificate and lapel pin at the end of the program to denote their unique accomplishment. Those who do not complete each test successfully are, of course, welcome to return for refresher training and another chance at certification when the program is repeated later in our calendar.

For the successful candidates in the FELTG certification program, we will stand behind you whenever your knowledge in the field of federal employment law becomes a relevant issue. For example, if you apply for a position that requires a particular skill in an area of federal employment law, upon request we will provide a statement to the selecting official as to exactly what you have demonstrated your knowledge in by completion of the testing process. Or, perhaps you are looking for an accomplishment that demonstrates the high level of performance you have attained during a particular appraisal year. Becoming certified as to your proficiency by an outside organization might well be the difference in a summary rating between "Exceeds Expectations" and "Outstanding." If nothing else, the cool certification lapel pen will serve to strike fear and wonder into those with whom you come into contact professionally.

We hope you will give professional certification serious consideration. It's one thing to call yourself an employment law specialist; it's another thing altogether to prove you deserve that characterization. Join the best of the best. Become FELTG-certified good at what you do.

An Introduction

By William Wiley

I'd like to introduce and welcome a new contributor to our newsletter, Deryn Sumner. For those of you who haven't attended one of the trainings she does for FELTG, or been across the table from her in litigation, Deryn works as an attorney with The Law Offices of Gary M. Gilbert & Associates. She helps oversee the firm's federal sector EEO practice group and represents both employees and employers before the EEOC and the MSPB. When she's not doing that, she works with us as an Instructor teaching sessions on disability discrimination, compensatory damages, settlement, improper medical inquiries, and other topics. She also co-authors several books on EEO law, including *Representing Agencies & Complainants Before the EEOC* (3rd Edition) and the *EEO Counselors' and Investigators' Manual* (2nd Edition), both which she co-authored with Ernie Hadley, and the annual *Consolidated Federal Sector EEO Update*, which she co-authored with Gary Gilbert. Any other free time she has left is likely spent planning or going on her latest travel adventure. Deryn will be contributing articles to the newsletter on practice before the EEOC and on anything else that she finds to be worth writing about.

The MSPB Hearing (Not) Heard 'Round the World

By Deborah Hopkins

You may have heard by now that I recently attended a hearing for a unique IRA appeal - one in which the Chairman of the MSPB was named specifically for her role in alleged reprisal against a 25-year Board employee who had a flawless performance and conduct record.

First, allow me to set the scene. The hearing was held the second week of December at MSPB headquarters on M Street NW in Washington, DC. I entered the fifth floor lobby to find a lovely holiday display complete with Christmas tree, menorah, lights and gifts. The atmosphere in the hearing room was decidedly less festive. The air was cold - probably below 60 degrees - and there was a palpable tension among the few people inside. This hearing was a Big Deal and everyone in the room knew it.

The MSPB Hearing Room

I took a seat in the row along the back wall, from the vantage point of the picture above, and surveyed the scene before me. To my right were the appellant and his counsel. To my left were the two attorneys serving as MSPB counsel: the General Counsel and a Labor and Employment Counsel. Directly ahead was the bench where the ALJ sat. The ALJ was on contract from the Coast Guard, since it would be a *slight* conflict of interest for the Board to preside over a hearing in which a Board employee was challenging a personnel action taken by Board management. To the ALJ's right sat his law clerk - something I have never seen in a hearing - and to his left sat the court reporter. Amazingly, I was the only observer there. I guess MSPB kept this one especially quiet, and after sitting through three days of this hearing, I certainly understand why they did so. More on that later, but suffice it to say that in this case bad press would NOT be better than no press.

Allow me to boil down the basic facts presented by the appellant at the hearing: said employee, who is in the words of his colleagues a "great guy" and an "outspoken union officer who always stands up for what he believes in," brought to the attention of the higher-ups that some petitions for review had been sitting in the Board's Office of Appeals Counsel for over 1,000 days. This revelation, referred to in our world as a "protected disclosure," makes the employee a whistleblower because it is an assertion of gross mismanagement, and under the Whistleblower Protection Enhancement Act, whistleblowers are guaranteed protection from reprisal for the disclosures they make.

Back to my story. If you're familiar with the MSPB's "rocket docket" approach, then you know how unacceptable this is. For each case that is delayed, someone's life and well-being hangs in the balance (along with increasing potential back pay) while the case sits…and sits…and sits. From this employee's perspective he saw that nothing was done about the delays and the backlog, so he made some more noise about it during staff meetings and union meetings. When cases sit for no observable reason and people find out about it, it makes the whole darn office look bad. And when the whole darn office looks bad, responsibility falls on the people who head up the office. And no supervisor likes to be embarrassed, or to have attention drawn to his or her flaws. Uh-oh. (If you're thinking this is not going to be pretty, you're right.)

At some point during all this activity above, said employee, who was a GS-14 senior attorney, altered some boilerplate language about the MSPB standard of review in a template for a case he was responsible to review. He cited to the same regulation as listed in the boilerplate, but cut out some language he considered to be unnecessary. I never saw the original template or the amended template, so I can't give you details on what exactly he changed. But I know he cut out some words he considered "superfluous" and that the regulation he cited was the same. So, after said employee made the changes to the boilerplate the case was approved up through his chain of command, through the Front Office (that, I learned, is the in-house term for the Board Members' offices), and all the way to the clerk's office before anyone even called attention to the change. Then, the Board found two other cases in which said

employee had also changed the boilerplate language in the same manner. The Board decided to change the template back to the standard boilerplate before issuing all three of those decisions.

So, you might be wondering what happens to said employee as a result. Maybe he's given a directive that he shouldn't change that sentence about the standard of review in the boilerplate template? Maybe he's asked a question about why he didn't think that "superfluous" language was necessary? Seems reasonable, right? After all, the guy is a GS-14 and has ZERO prior discipline. Just about all of his performance evaluations reflect Exceeds Expectations or Outstanding on the critical elements. So, give him the benefit of the doubt, wouldn't you?

WRONG. Instead, how does a proposed 21-day suspension sound? That's right, it's not a typo. Even though there was no written or verbal policy regarding this boilerplate language, even though other parts of the boilerplate were routinely changed, and even though senior writing attorneys are given broad discretion in how they write cases, a 25-year employee with a flawless record gets a proposal for 21 days without pay, for changes that his peers agreed were not substantive. (The proposed 21-day suspension is another article in itself. I digress from that, for now.) Witnesses testified that many other writing attorneys had made changes, not to this particular boilerplate but to cases, creating substantive changes or even citing law that has been overruled, and nobody had ever received proposed discipline for any of those changes.

Oh, but that's not all. We also have a non-selection at issue. Said employee, also during the course of the events above, applied for a promotion to a Team Lead position, and ultimately was not selected because, according to the selecting official, the majority of his previous management experience was supervising paralegals and law clerks. Only one year of management experience involved supervising attorneys. Never mind that witness testimony indicated two other individuals in other Team Lead positions (I believe there are about four in the office) had less than a year of ANY management experience whatsoever. I can't say for sure whether said employee was the best qualified candidate, nor can I say that the person who was selected was not the best qualified, but given the totality of these circumstances it all smells a little fishy to me.

Oh yes, I also forgot to mention that said employee had been writing the MSPB Case Report for years, and that articular job responsibility followed him around every time he was detailed to another office, yet after he made his protected disclosure this responsibility was taken from him and handed over to a different department. The MSPB chief of staff said he made the decision because the Office of Appeals Counsel (OAC) needed its attorneys to write more cases to help bring the backlog down. And maybe that's so - it makes sense from a logical perspective. Those backlogged cases needed to move. But, in light of everything else going on here, the employee's counsel suggested there might be another reason altogether. It certainly makes me wonder, anyway.

I have so much more to say, and I will, in other articles. But now you have the basic premise, admittedly more from the appellant's perspective. As far as MSPB hearings go, this one was about as exciting as it could get. Think about this: an allegation of whistleblower reprisal against the Chairman of the MSPB - the same MSPB that exists to protect the rights of federal workers against such nasty things as whistleblower reprisal. You can't make this stuff up.

In my next several articles this spring, I'm diving deep in to some of the content these three days covered. I hope you'll join me!

New Year, New You? Establishing Good Habits in Your EEO Practice

By Deryn Sumner

It's January and that means everywhere people are talking about making resolutions for 2015. The turn of the calendar year seems to inspire lots of people to focus on improvements, everything from what they eat to how they spend their money. So what better time than FELTG's first newsletter of 2015 to talk about implementing good habits. No, I'm not going to teach you the secret to actually making it to the gym (I'll leave that to FELTG's resident athlete, Deb). However, in the spirit of this goal setting season, I'm sharing some ideas for good habits to implement in your practice before the EEOC.

Good Habit #1: *Ask key witnesses if they have any plans for retirement.* Unlike the MSPB, the EEOC does not have any subpoena authority. That means if witnesses retire or otherwise leave federal service, an EEOC administrative judge cannot compel them to appear for a deposition or hearing. Yes, they can always voluntarily decide to do so, but let's be realistic. Once a government employee leaves federal service, she may not want to volunteer to come back for free and subject herself to hours of examination and cross-examination. So what should you do if a key witness does tell you that he or she has upcoming retirement plans? First, notify the complainant and his or her representative or attorney as soon as you find out.

Failure to do so may expose the agency to sanctions. If obtaining this witness's sworn testimony is key to your side's case, consider noticing and taking a deposition *de bene esse* (in anticipation of future need). Once the other side finds out about the impending separation, it may notice one as well. Notice to the other side and preservation of witness testimony prior to separation is key to protecting the agency's interests in litigation.

Good Habit #2: *Conduct discovery, especially on damages, even if your evaluation of the case shows little risk of losing.* Those of you who have attended Day 4 of FELTG's *EEOC Law Week* when we talk about compensatory damages have heard me make this point. Sure, we've all had cases that look like sure bets. You review the case file and think, "There's no way we could lose." Famous last words. Witnesses who appear credible on paper can come across completely differently during live testimony. Sanctions can be issued for discovery deficiencies, destruction of documents, or an untimely investigation. Don't be in a position of having to tell your authority that the agency has or will lose the case, but that you are not able to estimate the potential exposure because you did not conduct discovery on damages. If back pay is a potential remedy, you need to ask what efforts the complainant made to find other work and what income, if any, they earned after the termination. You need to know what evidence the complainant has in support of a claim for compensatory damages (pecuniary and non-pecuniary) and if there were pre-existing conditions or external events going on in a complainant's life that could impact their entitlement to damages. Complainant's counsel should think about what damages discovery is needed from the agency as well. At the very least, don't you want to know what the agency plans on using at a hearing to respond to your client's claim for damages? If you don't ask, you could be surprised by evidence you didn't know the agency had. Also, think about documents such as leave records. If your client is no longer employed by the agency, he or she might not have access to these records which would make an accurate claim for leave restoration tricky. Dedicating a few interrogatories and document requests to damages is a good habit to have in every case.

Good Habit #3: *Conduct early witness interviews.* Yes, you have their affidavits from the Report of Investigation (ROI) and you know (hopefully) what each witness is going to say. Still, pick up the phone and schedule an interview with each of your key witnesses soon after being assigned the case. Introduce yourself and explain your role in the case. If you think depositions will be noticed, ask about any scheduling conflicts they have during the discovery timeframe. Ask them the questions the EEO Investigator may not have thought of, or ask them the questions again and identify any potential credibility issues when they answer. Explain to them that you'll likely be contacting them to get information to respond to interrogatories and document requests and start asking them to gather documents related to the case. And hey, you can even use that opportunity to ask them if they have any plans for retirement.

Ordering Medical Examinations

By Barbara Haga

In *HR Current* we've been looking at issues related to insubordination, and there is a particular type of order that I want to explore in depth. Last time I wrote about an order to undergo a fitness for duty examination which was not sustained. We are now going to look at a case where the Board found that a removal was proper because an examination was properly ordered under the OPM regulations and the employee failed to report multiple times. Before we do, there is some background information on these examinations that we should review.

OPM Regulations on Medical Examinations

5 CFR 339.301(b) specifies when an agency may require a medical examination. This section of the regulations applies when an individual has applied for or occupies a position which 1) has medical standards or 2) physical requirements or 3) is part of an established medical evaluation program. The ability to require examinations applies when there are medical standards; examples would include positions such as law enforcement officers, various types of blue collar workers, or firefighters. Physical requirements are usually set for a position when not covered in the series as a whole; for example, perhaps a supply clerk has to drive a straight shift truck to pick up and deliver supplies to a particular agency location. Most supply clerk positions would likely be sedentary, but this one might have physical requirements in the position description (p.d.) such as "Ability to lift and carry boxes of supplies of up to 35 pounds" and "Ability to operate a motor vehicle with a manual transmission." Section 203 mandates that the physical requirement be documented in the p.d. A medical evaluation program might include nuclear workers, those who work around asbestos or certain types of chemicals, etc.

There are a variety of circumstances where examinations may be required under 301(b). These include: 1) Prior to appointment or selection (including reemployment on the basis of full or partial recovery

from a medical condition), 2) on a regularly recurring, periodic basis after appointment; or 3) whenever there is a direct question about an employee's continued capacity to meet the physical or medical requirements of a position.

Before we go further it is important to note that the OPM regulations specifically state that any examinations ordered under 301(b) must comport with EEOC regulations and highlight issues related to pre-employment inquiries and standards and requirements that would screen out individuals with disabilities. Unfortunately the OPM regulations have been around since 1989 and they refer to 29 CFR 1613. But, they are the authority for conducting examinations in situations such as screenings of tentatively selected applicants for positions with medical standards/physical requirements and for routine, yearly physicals as are often seen with positions such as law enforcement officers and firefighters.

This section also provides authority for obtaining medical information from an agency-designated health care provider when an employee appears not to be able to meet medical standards or physical requirements that are in the p.d. For example, an Aircraft Mechanic brings in a series of medical slips over several months from an urgent care center indicating that he has back problems and cannot meet the pulling, lifting, and climbing requirements of his position and must be in a light duty status because of a non-job-related condition. The prognosis is unknown and there is no specific diagnosis. In this situation the agency might order an examination with an orthopedic specialist to find out the extent of the problem and the expected duration for the need for light duty.

The last two examples of situations where medical exams may be ordered are less well known but important. Section 301(d) allows an agency to order an examination for an employee who is released from his or her competitive level in a reduction in force (RIF). This applies when the position to which the employee has reassignment rights has medical standards or specific physical requirements which are different from those required in the employee's current position. Perhaps in his early career an employee held a position of Electrician but moved up into a white collar Quality Assurance (QA) Specialist position. The Electrician would have medical standards but the QA position is less physically demanding. In a RIF the best offer the agency can make to this employee is to put him back to an Electrician position. The agency could require examination to make sure that he could meet any requirements that were more rigorous than the QA job.

Finally, Section 301(c) provides that an agency may require an employee who has applied for or is receiving continuation of pay or compensation as a result of an on-the-job injury or disease to report for an examination to determine medical limitations that may affect placement decisions. Note that this section is not restricted in any way to any particular job with or without requirements. This section allows the agency to determine whether a particular position or set of duties satisfies that employee's current medical restrictions. This does not require anything from the Office of Workers' Compensation Programs (OWCP) - which is a good thing since they are often slow to respond.

What does this look like in the real world? An employee has a traumatic injury with significant back pain as a result. The treating physician indicates that for the foreseeable future the person is not able to lift and/or carry more than 10 pounds, must be able to take breaks from sitting at least once per hour, and may not travel by common carrier or car unless breaks at a minimum of every hour can be assured. The current position requires the employee to develop training materials, provide advice and guidance to clients, and to lead training classes at training venues throughout the country (sounds like a FELTG job to me!!!!).

Next time we will look at the process the agency might use to find out if the employee could perform modified duties in the current position or in a different position – and what happens if the employee doesn't cooperate.

Please, Folks: Come to the Classes, for the Sake of the American Taxpayer

By William Wiley

A lot of what happens in the world of federal employment law flies under the radar for the American public. Few appeals make it to the media, and you can bet they are big ones when they do.

A couple of recent MSPB decisions that were all over the papers last month were regarding the appeals of two senior managers at GSA who were fired for their alleged participation in an extravagant conference put on for GSA employees. The day before Christmas (released then no doubt so that there would be less media attention, given all the falderal about Santa Claus), we found out that the Board supported its two judges who had ordered the removals cancelled and the employees

restored to their old jobs. After all the fuss Congress made about the lavish expenditures related to the conference and the related "Off with their heads!" outcries that followed, my bet is that there are a number of legislators who are now wondering just what this Board is all about. Clearly somebody should be held accountable, clearly GSA management did its job to find and punish those who caused the problem, and clearly the US Merit System Protection Board must be made up of a bunch of empty-headed do-gooders who never saw a federal employee who deserved to be fired, and who collectively believe that a federal civil service job should be for life, accountability be damned.

And clearly, that would be wrong. Let's take a look at how this case went down the tubes.

First, we'll start with some fundamentals. In our FELTG seminars in which we teach the framing charges of discipline (next offered as part of the famous and fabulous - but never extravagant - seminar *MSPB Law Week*, March 2-6) we teach the following. In fact, we teach it with such gusto that it may be the most important thing we tell people all day:

> *Never, ever charge ANYTHING for which you don't have proof.*

Sometimes I'm a little embarrassed when we get to this principle in the seminar because it seems so obvious that I occasionally wonder why we spend time on it. But we do. In fact, we even recommend a trick that I learned in grade school, I think it was the fourth grade. When crafting a charge (or writing a 4th grade paper):

1. **Use no more words than necessary**. This is important in a charge because the Board has held consistently for 35 years, if you put a word in a charge and are unable to prove that word, you lose the charge and thereby the action (assuming you have only one charge; if you have more than one charge and lose a charge, you lose the right to decide the penalty). Therefore, the fewer the words, the less chance you have of failing to prove something you have articulated.
2. **Relate every word to a source.** In a charge, this means that for every word you use, you want to be able to put your cold clammy hand on the evidence in the record that supports that word; e.g., the proof that what the word is claiming is indeed fact. In the 4th grade, it meant we had to indicate the page number in the textbook on which the answer was found. Same-same.

In our *MSPB Law Week* seminar, we teach that practitioners should list in the left-hand column on a piece of paper every word in the draft charge (or every "element of the charge" if you prefer the vernacular of the Board). Then, go down the list, put your finger on the word, and ask yourself, "Do I need this word?" If the answer is "no," then you strike the word. If the answer is "yes," then in the right-hand column opposite the word, you write down where in the record (or the expected testimony) you plan to introduce as evidence to prove that word. When going through this exercise in class, I sometimes cringe discreetly, feeling as if I'm talking down to the attendees by using such a basic elementary-school approach.

Well, I will cringe less in the future. In one of the more publicized Board decisions of 2014, the Board schooled the agency in this basic principle of Board law, *Prouty & Weller v. GSA*, 2014 MSPB 90 (DEC 24, 2014):

- Although the agency charged the appellants with having knowledge of the misconduct related to the conference, it "failed to establish" that knowledge.
- Although the agency charged that the expenses were excessive, there was "no evidence in the record of the actual costs and expenses" (i.e., "failed to submit any evidence") or any proof that the expenses were "excessive."
- Although it charged that one of the appellants should have acted to investigate the number of planning meetings, "the agency failed to show that [the appellant] knew or should have known about the number of planning meetings."
- "The agency failed to submit into the record most of the evidence underlying the OIG's conclusions."
- "The record is devoid of any evidence that [the appellant] was involved in procuring food for the conference or had knowledge of the procurement contracts …"
- "The record is devoid of any evidence that [the appellant] had any actual knowledge about any expenditure …"
- The "agency failed to prove this element of specification 3 [that coins procured for the conference were mementos rather than performance recognition awards] and, in turn, failed to prove that specification by a preponderance of the evidence."
- "As to the fourth specification … the agency submitted insufficient evidence to prove actionable misconduct."

- The agency "provided no evidence or explanation as to why this number of conference attendees [70 out of a potential 700] should be deemed untoward or excessive."
- "The agency "failed to offer any evidence to establish that [the appellant] was actually responsible for that decision."
- Although charged with procuring graphic branding to be worn on vests at a formal affair, "there is no evidence that the vests, in fact, had branding on them." **[Editor's snarky side-comment: "Vests for a FORMAL AFFAIR!?!" Good lord, I was a Presidential appointee under four Presidents. The closest I came to having to wearing a vest was the day I worked as a crossing guard for an inspection team touring a Navy facility. And that day, my branding was "canary yellow."]**
- The Board summarized much of its conclusion by saying that the agency "abandon[ed] its duty to produce evidence in support of its charges against the appellants" because it "failed to submit into the record most of the evidence underlying the OIG's conclusions, any evidence as to the actual costs and expenses for employees' attendance at the dry run, any evidence that [either appellant] was involved in procuring food for the conference, any evidence that [either appellant] knew that [another region] engaged in improper procurement and contracting activities, any evidence showing that the number of conference attendees … was excessive, and any evidence that [either appellant] was involved in procuring food for the conference. We do not speculate as to what the result might have been had the agency submitted sufficient evidence in support of its charges. We find only that it failed to do so."

Whew. Had the agency representatives just made out a left-column/right-column chart like we teach in our seminars, the Board would not have to speculate what the result might have been. It would know the result because the proof would have been in the record to support the charges.

Before the judge, the agency acknowledged that it did not have the information in the record to support the facts it was alleging because of an on-going criminal investigation not involving the appellant. I do not claim to be an expert in criminal investigations, but as a generalist, I do not see how an on-going criminal investigation somehow precludes an agency from using material information in its possession to defend itself in a removal action. Without addressing this issue (unfortunately), the judge ruled that even if the criminal investigation precluded the agency from introducing evidence into the record, it had the option of requesting a stay of the appeal. Too bad … I'd really like to see adjudication of the criminal-investigation/evidence-preclusion question.

On a wholly separate matter, another rock-bottom principle we have taught here at FELTG since the cooling of the Earth is that you never ever want to put something substantive in the decision letter (or argument on appeal) that is not in the proposal letter. Those of you who have been to a recent offering of our *MSPB Law Week* seminar might remember the colorful "bubbles" graphic we use to represent that the agency's "bubbles" (i.e., claims) should be identical from the proposal through the decision through the testimony of management witnesses, and including the agency's legal arguments, all the way to the Supreme Court. This concept goes way back to the Magna Carta, the development of the concept of "due process." In this context, even though the agency argued that the appellants as SESers had a heightened duty to initiate an investigation relative to the conference expenses, "importantly, neither notice of proposed removal alleges that the appellants engaged in misconduct because of a failure to perform a heightened duty to investigate and inquire." Pop, there go those bubbles.

And then later relative to this same due process problem, MSPB notes that although the agency on appeal argues that conference participation itself should have put one of the appellants on notice that the conference expenditures were extravagant, "this aspect of the agency's charge, while referenced in the decision letter, was not expressly included in the appellant's notice of proposed removal." Pop, pop, pop.

Finally, the agency ran afoul of yet another fundamental principle of defending a disciplinary action on appeal. As we teach in the first few hours of *MSPB Law Week* and our famous onsite training program for supervisors, *UnCivil Servant: Holding Government Employees Accountable for Performance and Conduct*, there are Five Elements that an agency has to be ready to prove in any adverse action it takes. The first of these elements, and the element that precedes all the others, is that for there to be actionable misconduct, the agency must be ready to prove that there is a rule (e.g., an order, a policy, a law … something specific) that precludes the conduct at issue. Because, by simple definition, misconduct is the violation of a rule; i.e., without a rule, you cannot have misconduct.

Here, the agency argued that the appellants had violated the rule that *members of the SES have the heightened duty to investigate and inquire into questionable matters in the workplace*. Yet when pressed by MSPB for the source of the rule, the agency had none. The most the agency could do was to suggest that the Board should require such a rule. Unfortunately for the agency, MSPB declined to create such a rule or infer it from the higher standard of conduct expected of SESers. Instead it held that the agency "fails to cite to any evidence or authority concerning the source or scope of such a duty." Another way to put it is that the agency failed to prove Element One of the Wiley-Way© to defend a disciplinary action.

In summary, this outcome cannot be blamed on a pro-employee Board. Instead, this decision reinforces three of the most basic principles we have been teaching here at FELTG from the very beginning of our existence:

1. Do not put anything material in a charge you cannot prove,
2. Do not put anything substantive in a decision letter not in the proposal letter, and
3. Do not fail to have a rule that precludes the misconduct at issue.

Folks, please. Come to the classes. We FELTG-ians are here to help you guys run a better, more fair government. Learn from our mistakes and our experience. Yes, there are reasons an agency might lose a case every now and then. But failing to prove words in charges and violating due process … my 4th grade teacher would keep you in at recess for basic oversights like those.

By the way, the "extravagant" conference that caused all the uproar cost the American taxpayer $823,000. Anybody want to guess what it cost the American taxpayer to adjudicate these two appeals? Let's think it through:

- The two removals were effected June of 2012. So we're looking at 2 ½ years of backpay for two SESers. That's roughly $750,000.
- Lawyer fees from the two fine law firms that are involved in this case, maybe $100,000 (wild guess).
- Salaries for agency counsel (I count at least three) directly responsible for the case, maybe $75,000.
- Salaries for the Board's judges, Board members, hearing rooms, and HQ support staff, maybe another $100,000.

I'm not very good at math, but without even adding this all up, I'd say that the American taxpayer was better off with the conference than with the related litigation.

Plus, at the conference, at least somebody got breakfast. They don't feed you at Board hearings (although sometimes you get eaten up, if you know what I mean).

Lead Me, Counsel, Lead Me
By Deborah Hopkins

I attended a recent MSPB hearing where a number of the witnesses for the appellant were also on the agency's witness list. We discuss in depth what happens in this type of situation during FELTG's *MSPB & EEOC Hearing Practices Week*, next offered November 2-6 in Washington, DC. Another thing we talk about is the art of direct and cross-examination of witnesses. What happens, then, when you marry the two?

The Federal Rules of Evidence (FRE) are not controlling over MSPB but they may be cited as persuasive authority, and an Administrative Judge (AJ) may choose to follow the Rules in an MSPB hearing. One of the topics that comes up during our training, and when our instructors prep witnesses before hearing, is the leading question. A leading question is one that contains within it the answer that the questioner wants to receive from the witness.

Here's an example of a leading question: "You were at Stetson's Bar on the night of December 21, weren't you?" This inherently suggests the witness was at Stetson's on the night in question. The question, rephrased in a non-leading way, might be, "Where were you on the night of December 21?" This non-leading format allows the witness, not the attorney, to control the response.

The general rule on direct examination, when the party that calls the witness establishes that witness' testimony, is that leading questions should not be used except as necessary to expeditiously develop the testimony. FRE 611(c). In other words, using leading questions to establish simple facts (educational background, job duties, length of time at the agency, relationship to appellant or complainant) on direct examination is permissive, but the remainder of the questions on direct should not be leading. FRE 611(c) also cites exceptions to prohibiting leading questions on direct; exceptions include questioning witnesses who are very young, very old, or have memory problems. On cross-examination, leading questions are permitted - and are an important part of legal strategy.

Back to what I was saying about the recent hearing I attended. When a witness for the appellant is also a witness for the agency, the party first calling the witness may request that the AJ note the party may be adverse, and may request permission to treat the witness as hostile and, citing FRE 611, use leading questions on direct examination.

The truly unique thing that happens here occurs on cross-exam. Generally, cross-exam is limited to the scope of the questions asked on direct exam. But, because both parties have an interest in the witness, on cross-exam counsel may expand the scope of questioning beyond direct exam to cover details it also wants to be sure are covered in the record. Beyond that, re-direct and re-cross are limited to the scope of the first two rounds of questioning. The primary reason for this departure from the traditional format of direct and cross is to promote judicial efficiency - it saves time by preventing a witness from having to testify twice about the same set of events.

An important distinction exists between leading questions and objectionable questions. Most leading questions are answerable by a "yes" or "no" response, but not all questions requiring a yes or no response are leading. Some questions that appear to be leading are actually objectionable because they contain implicit assumptions, and no matter how the witness answers, the answer will not be favorable to him or her. For example, if counsel asks a witness, "Have you stopped stealing money from your ill grandmother?" this question is not leading, because the questioner is not expecting a specific response. In fact, the question is objectionable because it unfairly implies that the witness 1) has an ill grandmother, and 2) has at some point stolen money from her. These facts have presumably not been established, so the question is objectionable on grounds that it is argumentative.

Oh, what a fun legal world we live in. These nuances make for enlightening dinner party conversation, don't you think?

2014 Year in Review: Six-Figure Compensatory Damages Awards

By Deryn Sumner

As Bill mentioned in his introduction, one of the books I co-author is a yearly compendium of notable decisions from the EEOC's Office of Federal Operations (OFO). I've worked on this book in some role or another for years and I'd rather not think about the number of hours of my life spent reading the OFO decisions, trying to pick through endless boilerplate language to find those cases that actually say something. But the upside is that this exercise keeps me up to date on the latest Commission case law. And to keep you in the know on what the OFO is doing, be sure to sign up for the webinar Bill and I are doing on April 16 titled *Significant Federal Sector Developments: The Latest and Greatest*. Here are some of the highlights from last year's decisions on high dollar awards of non-pecuniary compensatory damages, including two cases where the six-figure awards were affirmed, and one where the award was significantly reduced:

In *Complainant v. USPS*, Appeal No. 0720120027 (April 2, 2014), the Commission addressed a decision out of the Los Angeles District Office (the first three numbers in the EEOC hearing number reveal which district or field office handled the case). There, the administrative judge awarded $210,000 in non-pecuniary compensatory damages. The complainant has a fascinating back story. She was an elite track and field athlete who immigrated in 1997 from the Ivory Coast in Africa. She competed in the Olympics multiple times and held several records in the Ivory Coast. The complainant became a U.S. citizen in 2008 and intended to try out for the United States Olympic team. In the interim, she started as a casual employee with the Postal Service in Los Angeles in 2010 and experienced harassment based on her race, sex, and EEO activity. Although the only issue on appeal was the appropriateness of the award of compensatory damages, the decision goes into great detail about the underlying harassment, as the severity was used to support the high award. The decision talks about co-workers who called the complainant "voodoo and ghetto" and told her that she smelled, that she looked like a man, and told her to go back to Africa to make friends. Evidence even included observations of an employee pushing a 500 pound container of mail at the complainant. The supervisor was no better, as she would ask her why she stuck her butt out when she walked, would touch and kick her in her butt, and hugged her very tightly for a long period of time. The supervisor also called her, "my girl" and "bad girl" and when the complainant told the supervisor the conduct was unwelcome, the supervisor assigned the employee to work alone in an isolated space doing the work load of seven or eight people. Things got even worse when the complainant filed her EEO complaint. The supervisor discussed it with other employees, who started a petition to try to rebut the complainant's claims, and management discussed her complaint during a stand-up meeting attended by 20-25 employees.

At hearing, the complainant submitted evidence from her husband, psychologist, and track and field coach about how she became "deeply troubled, anxious, depressed, lonely, vulnerable, suspicious, mentally unfocused, highly emotional and volatile, with reduced self-esteem." She also experienced "weight loss, hair loss, difficulty in

sleeping and bouts of tearfulness, crying, dizziness, and chest pains" some of which were still on-going. In the decision, the administrative judge noted the difficulty the complainant was having achieving her prior athletic prowess, although there were other life stressors included the death of her sister and a miscarriage. On appeal, the agency argued that the award should be reduced to $125,000, noting that the complainant did not suffer significant physical harm and that "Complainant's schedule, age, pulled hamstring, and wedding affected Complainant's running career, which was not the result of discrimination." The Commission disagreed and affirmed the award of $210,000, noting the egregious behavior by management in the case and that the administrative judge had the opportunity to observe the damages witnesses in person and found them credible.

In *Complainant v. DHS*, Appeal No. 0720130039 (August 7, 2014), the Commission affirmed an award of $200,000 issued by the Atlanta District Office where the complainant and others testified that the agency's actions led to the deterioration of the complainant's physical appearance including weight loss and visible damage to her skin and hair, and change to a state of anxiety, depression, helplessness, humiliation and anger, which led to the demise of her marriage. The Commission also noted the impact of the discrimination on the complainant's economic status, as she provided primary financial support for her children and had to relocate to find work and incurred damage to her professional reputation due to the agency's termination action. Based on all of this evidence, the Commission affirmed the award of $200,000.

However, the complainant in *Complainant v. USPS*, Appeal No. 0720100036 (May 13, 2014) did not fare so well. In addressing a case out of the Chicago District Office, the Commission found that a high award of damages was appropriate because the complainant presented evidence of experiencing anxiety attacks, withdrawal from society, depression, elevated heart rate, sweating, chills, loss of appetite, fatigue, and weight loss due to the agency's actions. The complainant sought medical attention from a physician and a therapist, and was prescribed antidepressants and blood pressure medication. However, the Commission found the administrative judge's award of $210,000 to be too high and reduced it to $120,000. The Commission reasoned that the administrative judge did not explain in detail how he arrived at the amounts awarded to the complainant, which he split up as $70,000 for the period of 2003-2004; $35,000 for 2004-2005; $70,000 for 2005-2006; and $35,000 for 2006-2007, and did not provide citations to the specific evidence relied upon in arriving at these amounts. The Commission noted that the complainant filed two other EEO complaints for events that occurred in 2005 and 2006, on which he did not prevail, and credited the agency's arguments that the worsening of his emotional state during this timeframe could be attributed to the events raised in these cases as well as the stress of an EEOC hearing in those cases. The Commission also determined that the administrative judge's conclusion that he would have remained in his position with the agency for four years if the agency had not removed him was speculative. Finally, the Commission noted that the complainant only requested $120,000 at the hearing and that the evidence presented supported that amount.

A final note about this decision -- the complainant filed his formal complaints in 2003 and 2004. The Commission referenced testimony about damages the complainant provided during the hearing in December 2009, and a decision issued by the judge in March 2010. The agency appealed seeking affirmation of the April 2010 final order rejecting this award. This decision issued in May 13, 2014, reduced by $90,000 the award of damages the complainant received more than four years prior. One has to wonder how much justice is being served to the complainants by the lengthy delays that continue to plague the Commission and federal sector complaints processing.

Hearing Practices: You've Been Assigned a New Case, Now What?

By Deryn Sumner

Over the next several newsletters, I will be presenting some tips and tricks I've picked up over the years, both in my own practice and from observing and working with other attorneys, for preparing and litigating federal sector EEO cases. With all the greatest respect to very experienced practitioners like Gary and Ernie, when someone reaches a certain point in their legal career, you are less "in the weeds" with much of the day-to-day preparation of cases and I hope to provide some insight from someone still very much buried in them. (Okay, this might only hold true with Gary. When I've co-counseled with Ernie at hearing, I found the experience a delight due to his organization and preparation.)

So let's start off, as all things do, at the beginning. You receive a new case assignment. The agency has (hopefully) timely completed the investigation and an administrative judge (AJ) has issued an Acknowledgment & Order (A&O). What should you do first? Well yes, of course, you should calendar all of the deadlines contained in the A&O. And when you do that, you should carefully read the A&O to check for any special requirements set by the AJ. Yes, for many of you, you've dealt with dozens if not hundreds of A&Os over the years and know the drill. You can calculate the 20 days you have to initiate discovery in your sleep. You should still carefully review the Order as some judges have special requirements (for example, notifying the AJ in writing that a party has initiated discovery or serving a copy of every filing on the AJ by email to her personal Gmail address – both requirements I've seen). And

speaking of carefully reviewing those A&Os – some of you may have cases in the EEOC's Pilot Program. Those cases require an even more careful review and significant time spent preparing for the initial status conferences being scheduled under this program. Do not go into these conferences unprepared. You should know exactly what you need in discovery, why you need it, and how long you need to get it and be prepared to present all of this to the AJ during the call.

Once you've taken care of that (and of course notified the AJ and the other party of your role as the representative), there are some other steps you can take to prepare for the case during the first few days and weeks. First, confirm the timeliness of each filing. The agency's Office of Civil Rights did this when issuing the acceptance letter, but sometimes people make errors. Make sure the complainant made EEO contact timely, filed the formal complaint within 14 days of receipt of the notice of right to file, and that he or she timely requested a hearing.

Also, review the Report of Investigation (ROI) for sufficiency. If it's a non-selection case, are the relevant applications included? What about interview notes and emails and memorandums that articulate the legitimate, non-discriminatory reason for the selection? If the ROI is clearly deficient, think about whether the agency should proactively supplement with the necessary documents. Ensuring the record is complete will help ward off arguments to the contrary by the other side and can help convince the AJ that a hearing is not needed to further develop the record.

Next, look at the accepted issues themselves. Do they each state a claim or is there a basis to move for dismissal under 29 C.F.R. 1614.107? You can file such a motion at any time. Finally, find out who your settlement authority is and provide him or her with a briefing on the case and your preliminary assessments as to its merits and weaknesses. We'll talk next time about preparing for and conducting discovery.

Not Commandments, but Suggestions

By William Wiley

A couple of weeks ago, someone sent me a list of "Ten Commandments" for those who do not subscribe to a particular religion. From a philosophical aspect, I found it interesting and applicable in a number of situations in life, five of which with some paraphrasing, apply to the field of federal employment law. Since here at FELTG we can't command anyone to do anything, I thought I'd send these along as suggestions, reducing them to five, in the spirit of the thrifty thought that we teach in our legal writing programs:

1. Be open-minded and willing to alter your beliefs when you are confronted with new evidence or argument.
2. Strive to understand what is most likely to be the correct approach, rather than believing what you wish to be the correct approach.
3. Legal research and formal training are the best ways to understand the field of federal employment law.
4. Every supervisor has the right to decide the best course of action given a particular situation, as long as that decision is allowable by law.
5. Many times in our business, there is no one right way to accomplish an objective.

I am reminded of these on occasion when someone in a class or by email asks me to explain something I've said in a training session. As our recurrent readers know, here at FELTG, we love getting your questions because it feels so good to know that we might be contributing to a better more-efficient civil service, and because we get to charge outlandish hourly fees to those who become our legal clients. ☺

The best request for an explanation goes something like this:

> "Hey, Bill. You are super-smart and very attractive. I get goose bumps when I hear your insightful comments in a webinar or read them in an article. But I'm having a little trouble understanding your thought regarding blah, blah, blah, and wonder if you could explain it in more detail?"
>
> "Sure, you poor under-educated newbie. I'd be delighted to impart to you a portion of the wisdom I have accumulated over the eons I have been in this business. Regarding blah, blah, blah, the answer which you seek is …"
>
> "Wow, thanks, Bill! I've got it now."

Frankly, I don't necessarily believe that the questioner has "got it." As far as I know, she is just being nice, continuing to adhere to her misdirected view of the issue, but realizing that further exchange on the matter will do neither of us any good. Contrary to what some might believe, I don't really care if anyone agrees with me. Here at FELTG, we don't see it as our job to convince our participants of anything. Rather, it is our job to teach the conclusions we have reached based on many years of experience and study, and let you the student decide whether you agree or disagree. If you agree, fine. If you disagree, that's fine, as well. Continue

on your (misdirected) ways and let the consequences be what they may.

However, on rare occasion we will bump into a participant who does see things this way, and who apparently sees it a responsibility to convince us that one of our instructors has said something that is wrong. Here's an example of how one of those discussions goes:

[Me]: "In this situation, I'd suggest that you do X based on Y authority."
[Participant]: "X is wrong. Z is the right answer because:

1. I've always done Z,
2. I was taught to do Z in a class I took years ago,
3. I called my headquarters and they said that Z is the right answer,
4. I heard a judge say that Z is correct,
5. OPM regulations don't say you can do X,
6. I heard about a case in which the agency did X and it lost,
7. I've been in this business as long as you have, and I've concluded that X is wrong, and (my favorite)
8. I don't like X."

Oh, poor participant. If only he would adopt the Five Suggestions, he might actually improve the performance of his craft. Be open-minded that there might be a better way to do things. Just because he's always done something one way doesn't mean it's the only way. Look for more efficient approaches, not just the approach that he believes to be best. Consider new evidence, that being the conclusion of our instructor based on a lot of training and experience. Research the case law and read the statute and don't rely on some case you read about in the newspaper.

Here are a few sample issues that have caused recent controversy, accompanied by our FELTG position on the matter:

- An agency can unilaterally suspend an employee without taking away his pay and then count the suspension as progressive discipline.
  - FELTG: An agency and an employee can enter into an agreement where a "paper" suspension equates to a prior act of discipline for progressive discipline purposes. However, the law requires there to be a loss of pay for there to be a suspension cognizant under Chapter 75.
- An agency needs a lot of proof of unacceptable performance to initiate a Performance Improvement Plan (PIP).
  - FELTG: An agency has to reach a judgment that the employee's performance is unacceptable before initiating a PIP, but it will not have to prove the PIP was warranted in an appeal to the Board of an eventual removal for PIP failure.
- Douglas factors should not be included in the proposal letter, only the decision letter.
  - The employee is entitled to have the Douglas factors in the proposal letter according to the *Douglas* decision itself, and to satisfy due process.

If you disagree with any of these, that's OK here. We'd just hope that you could learn to keep an open mind and do the research yourself for support of an alternative answer. If you'll do that, we'll keep answering your questions as best we can based on our experience and education. But if you get all loud and disagreeable in our face about something, be prepared for us to shut down. We respond well to good questions; not so much to disagreeable ones.

Program Spotlight:
Absence & Medical Issues Week
February 9-13, 2015
Washington, DC

Daily Agenda

Monday - **Leave Use & Abuse Overview**

Tuesday - **FMLA Law & Policy**

Wednesday - **Medical Issues under the ADA**

Thursday - **Labor Relations & OWCP**

Friday - **Approved Absences Management**

Registration is still open. Check out www.feltg.com for details.