Federal Employment Law Training Group
Training By Professionals For Professionals

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Introduction

If you keep up with the national news relative to federal employees and listen to our leaders on Capitol Hill, you've probably noticed a recurrent theme: Our citizens and our Congress think you agency folks are not firing enough people. You never see an article that leans the other way, do you, *e.g.*, "EPA Criticized for Too Much Discipline" or something like that. No, you see just the opposite: a finding by some Inspector General or some other watchdog group that it takes some agency too long to discipline for misconduct or remove for poor performance, often accompanied by a calculation as to how much tax-dollar-wasting administrative leave was involved (21,000 hours for 8 employees in one recent report). But these reports always stop short of identifying where the problem lies: is it the line managers who are hesitant to discipline because they are too soft and like wasting government money or is it the legal and human resources staff who don't know what they are doing? If it's the former, we've got no help for you, other than suggesting periodic testosterone injections for all supervisors and energy drinks in all the vending machines. However, if it's the latter, we at FELTG exist to bring you into the light. Do you know how to remove a non-performing employee from the workplace in 31 days? We do, and we teach how to do it 365 days of the year with guaranteed results. Come to our seminars. They are a lot more fun than having to go to the head of your agency to explain away some tough-love article in a local newspaper.

- Bill

William B. Wiley,
FELTG President

UPCOMING WASHINGTON, DC SEMINARS

Supervisory HR Skills Week
July 13-17

Employee Relations Week
July 27-31

MSPB Law Week
September 14-18

AND, IN SAN FRANCISCO

EEOC Law Week
June 22-26
(Sold out! Register early for ***EEOC Law Week*** in Washington, DC, September 21-25)

WEBINARS ON THE DOCKET

Understanding the Family Medical Leave Act: What Practitioners Need to Know - Parts II and III
June 25 and July 9

The Truth About Charges: Drafting Appeal-Tight Disciplinary Documents
July 23

Getting the Best from Employees: The Supervisor's Responsibility in the Process
By Deborah Hopkins

At FELTG, we do lots of supervisory training. In addition to covering the parts of the law that supervisors need to know (according to OPM and also according to FELTG instructors, who have been working with federal managers since the dawn of the CSRA), such as accountability, managing leave issues, understanding EEO, and supervising unionized employees, we also cover topics on managing difficult employees. In fact, we're covering all these topics in an open enrollment program just for supervisors - Supervisory HR Skills Week - coming up July 13-17 in Washington, DC.

One of the topics we cover that week is what federal supervisors should do to get the best from their employees. Not just the star employees, but the average employees and even the below-average employees. How does a supervisor motivate a workforce that probably includes people with various education levels, demographics, physical locations, skills and abilities? You'll have to come to the training for the full answer, but a quick preview is that it is absolutely essential you reinforce your expectations so your employees know exactly what they need to be doing. Here are a few tips on why reinforcing your expectations will make your work life as a federal supervisor *that much* easier.

Getting the Best, Tip 1: Reinforce your expectations through simplicity. Most employees appreciate knowing what to expect in the workplace. Make your expectations clear and understandable to your employees, in plain English. Write them out, send them in an email, post them on a wall, or verbally state them at a time and in a place where it is clear to the employee what you expect - and where you can get affirmation the employee heard and understands what you said. Include important facts, and any applicable deadlines.

Also key is to not assume your employees already know everything they should be doing. How often is a position description (PD) reflective of the actual job? And even if it is, how many employees have ever actually read their PDs? Taking a few moments to set those expectations, using simple words, ensures understanding and eliminates the "I didn't know" or "You never told me that" excuse. Plus, it will be really nice to have the work actually done, the right way, when it needs to be done.

Getting the Best, Tip 2: Reinforce your expectations through repetition. This tip may annoy some supervisors who think, "I told them once, and once was enough." Well, it's absolutely your right as a supervisor to have that attitude and act accordingly. But it might make your life easier to be a little bit repetitive, especially with your more forgetful employees. A gentle nudge, through something as simple as even an email or a quick verbal reminder, will greatly increase the chances you'll prevent a stressful, last-minute all-nighter when a deadline has passed and the project is not complete. Repetition is a key factor to getting the best from your employees. And most employees appreciate the reminder.

Getting the Best, Tip 3: Reinforce your expectations through direct communication. It's amazing what a direct conversation, phone call or email exchange can accomplish. This seems like such a simple concept, yet every week we hear about supervisors failing in this area. As a supervisor, you just can't assume your employees are doing what you think they should be doing. This is why Tips 1 and 2 are so important and tie in to tip 3 here. Your employees probably cannot read your mind. If you have employees who are newer, they may not understand your leadership style yet, so they'll need the benefit of Q & A time with you. As a supervisor, you'll be amazed at how productivity increases when employees feel like they can approach you and talk to you. Maybe you're thinking, "Of course my employees know they can talk to me about anything." Well, have you told them that directly? Don't just assume they know they can. Tell them.

Getting the best, bonus tip. Below are two tested ways supervisors can reinforce their expectations to employees through simplicity, repetition, and direct communication. These tips came from your colleagues during the last iteration of *Supervisory HR Skills Week*:

- *Hold regular meetings with employees*. Before you start thinking, "I have no time! I can't schedule regular meetings with all my employees!" finish this paragraph. These meetings don't have to be extensive - even a 15-minute time block might be enough. These meetings don't have to be every week - once a month might suffice. But over time, you'll save yourself (and your employees) hours because you won't have to retroactively fix problems that you might've caught in advance, during those regular meetings. Trust me. At one of my past jobs I met with my employees individually, on a bi-weekly basis, and it made a world of difference in the workplace, especially as it relates to productivity and positive employee attitudes.
- *Outline methods for reporting problems*. Sometimes employees don't know what to do when they see a problem in the federal workplace. Set up some type of process, procedure, or step-by-step guide for them to follow, so they're clear on what to do when they experience an issue, whether it's a problem with a co-worker, a customer, or a superior.

Supervisors, we salute what you do every day. Keep up the good work! Hopkins@FELTG.com

Common Sense and SES Performance Measurement
By William Wiley

Say you have a job that requires the employee to touch the ceiling in the office. Then, let's say you required that people who apply for the job be at least 7 feet tall. Once you hired a dozen or so people for the job and they each were able to reach out and touch the 8 foot ceiling, what would you rate their performance? Yes, that's right; you would rate their performance as whatever the top of your rating scale is (Fully Acceptable, Outstanding, Super-Duper, whatever). When you hire really tall people and you require them to do something that really tall people can do, they should be rated acceptable for doing that while you should be rated acceptable for hiring the right person for the right job. There is no benefit to distinguishing among the tall employees based on anything other than the criteria you set for the job: touching the ceiling.

Okay, let's tweak this a bit. Let's say you create a job that requires employees to do really good work. Then, let's say you required that people who apply for the job to be the best and the brightest. Once you hired people for the job and they were each able to do really good work, what would you rate their performance? Yes, that's right; you would rate their performance at the top of your rating scale. When you hire the best and brightest and you require them to do something the best and the brightest do, they should be rated acceptable for doing that. It makes no sense for you to try to sort your employees into different groups given that they have all accomplished what you asked them to do: really good work.

Finally, one last tweak. Let's call the work that needs to be done "senior management of the federal government." And let's call the group of employees you have hired to do this work the "Senior Executive Service." Given that admission to the SES is highly competitive and based on a strenuous and valid selection program designed to bring the best and the brightest into these positions, you would expect the incumbents of these positions to perform exceptionally well.

If you have followed along with this rationale, then why in the world do the Office of Personnel Management and Government Accountability Office get their respective undies in a bunch because most senior executives receive high performance rankings? For goodness sakes, if you set up a system to select top performers, why would you be upset that the people you select are top performers? It defies common sense or any

scientific basis that would say otherwise. Yet OPM's SES reform initiative focuses critically on the high percentage of SESers who receive top ratings. And GAO joins in the discussion by pointing to the "anomaly" that 85% of career SESers are rated in the top two of five performance categories. With all due respect, given the effort that the government puts into hiring only the best and the brightest for these positions, would not the "anomaly" be if this were NOT the case?

There are a number of things in the government personnel system that need to be fixed. The high ratings generally given to members of the SES is not one of them. Trying to find distinctions among a group of homogenous individuals is not only a waste of time, but has a detrimental effect on the motivation and management of these people. Yes, fire the bad ones. But don't find fault when the good ones perform well. There may be problems with rating individual SESers, but the problem is not systemic. Wiley@FELTG.com

Four Agencies Release Joint Guide on Protections for LGBT Federal Employees
By Deryn Sumner

In recent years, the federal government, particularly EEOC, has expanded and clarified the rights of federal government employees to bring claims of discrimination based on sexual orientation, gender identity, and sexual stereotyping. In 2011, the Commission broke new ground when it held in two cases, *Castello v. USPS,* EEOC Request No. 0520110649 (December 20, 2011) and *Veretto v. USPS,* EEOC Appeal No. 0120110873 (July 1, 2011), that allegations of discrimination based on sexual orientation can be viewed as sex stereotyping cases and therefore state claims under Title VII. The decisions were based on the analysis that claims of sexual orientation are really claims that an employee fails to conform to stereotypes of the male or female sex, which the Supreme Court had found states a claim of sex discrimination back in 1989 with the seminal decision, *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). There, Ann Hopkins's supervisor told her she was not being promoted at Price Waterhouse not because of the quality of her work but because she didn't conform to gender norms as she didn't wear makeup and jewelry, dress femininely, or walk femininely.

These 2011 Commission cases were followed by the Commission's ground-breaking 2012 decision in *Macy v. Dept. of Justice,* EEOC Appeal No. 0120120821 (April 20, 2012), finding that intentional discrimination against a transgender employee because that person is transgender is discrimination based on sex and violates Title VII. The Commission has recently reiterated that sex discrimination can result if, for example, an employee is subjected to harassment for failing to conform to gender stereotypes of masculinity. *See, e.g. Complainant v. Dept. of Veterans Affairs*, EEOC Appeal No. 0120120387 (January 28, 2015); *Complainant v. USPS*, EEOC Appeal No. 0120132452 (November 18, 2014). Recently, and as I discussed in last month's newsletter, the Commission found discrimination where a transgender employee was restricted from using the common female restroom and her supervisor referred to her using male pronouns, *Complainant v. Dept. of Army*, EEOC Appeal No. 0120133395 (April 1, 2015).

Given these developments in the case law, a clearly written guide to protections for lesbian, gay, bisexual, and transgender (LGBT) federal employees was in order and on June 3, the EEOC in conjunction with OPM, OSC, and the MSPB delivered. The four agencies jointly issued a guide on LGBT discrimination protections for federal workers, available at www.opm.gov/LGBTGuide. The guide outlines the responsibilities of agencies under Title VII of the Civil Rights Act of 1964, the Civil Service Reform Act of 1978, and other applicable policies and procedures as well as the protections employees have against discrimination because of their sexual orientation or gender identity.

The guide is clearly written and states it should be distributed widely to employees. It emphasizes that employees who wish to bring such claims of discrimination must contact an EEO counselor within 45 days, just as with any other basis, and it briefly outlines the federal sector EEO process. The guide then turns to protections under the Civil Service Reform Act of 1978, specifically provisions that provide protections for individuals who believe

they have been subjected to prohibited personnel practices based on sexual orientation or gender identity. The resource guide notes that OSC can undertake an investigation and that employees have the right to file an MSPB appeal under certain circumstances. The guide also mentions that employees may have additional rights under negotiated grievance procedures or agency internal processes for claims of sexual orientation outside of these statutes. Importantly, the guide notes that an individual may need to make an election of remedies among the different forums. The guide ends with a chart comparing the bringing of a claim before EEOC and OSC, including statutes of limitations (OSC does not have one), what remedies are available, and noting that EEOC cannot pursue disciplinary action against federal employees, although OSC can. The guide is concise, well-organized, and should serve as a good resource to civil rights and EEO practitioners, as well as employees, on these rights.
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Discipline in a "Gotcha" World
By Barbara Haga

Delving further into the topic that I started last month, I want to address another aspect of discipline not being private any more in terms of the impact that has on outcomes and process.

Caught in the Act

Caught in the Act is the title of a National Geographic Channel show which broadcasts the videos of amateur and professional photographers who have captured wildlife in its natural setting. The show's website describes it this way: "Each episode is a hodgepodge of daring rescues, competitions over food, maternal instincts, dramatic battles and tragic endings…" and that unbelievable instant has been recorded.

There's a lot in there that is applicable to discipline Federal employees in today's world. Maybe not so much the competition over food and demonstration of maternal instincts, but we definitely have some daring rescues, dramatic battles, and tragic endings not exactly captured on film, but definitely showing up in the news and shared on the Internet.

Case in point: the hack of the OPM-held personally identifiable information that was the main topic in all of the publications that focus on Government service last week. The title of an article in the NextGov CIO Briefing (a companion publication of Government Executive) on Friday, 6/12/2015 was *Whose Job Is On the Line After the OPM Hack?* Those words make me think of blood in the water and sharks. Is there some actionable misconduct in this breach? Shouldn't we know that before there is a decision that someone should be fired?

Please don't misinterpret what I am saying. I am not soft on dealing with misconduct – I just think we should get it right and do it for the right reasons.

Don't you think we should get the statements first?

Any of you who are reading this column who have attended training on discipline with me have heard me use the statement in this heading. It usually comes after discussion of this type of scenario: Someone sees or hears something about behavior which appears to be misconduct on the surface. That gets reported up the line to senior management, and the next thing that happens is an edict from the front office that so and so should be fired. We haven't even begun to investigate to figure out what really happened, but there is already a penalty selected.

I understand responsibility of high level officials for things that go on in their units even though they may not have been present or known about it. I worked for the Navy for most of my career, where there is this concept that the captain is responsible for everything that happens on the ship. But, we are dealing with a different situation with discipline and there is this little thing called due process that needs to be observed. And knowing what actually transpired is really important before managers start making decisions on discipline.

The political reality though is that the public and Congress and the media expect to see heads roll immediately when something happens. In fact, it seems to me that this reaction is snowballing with every new mistake or failure that shows up in the news. The article about the OPM hack is not unique. We have seen it time and time again in the past few months. Why hadn't someone at DVA already been fired over making veterans wait so long for service? Why didn't the head of DEA take swift action to remove agents who were partying with prostitutes? Why wasn't that EPA employee separated immediately for watching porn on the work computer?

I can appreciate that senior level managers need to be seen as taking decisive action. Who wouldn't after the DEA Chief ended up announcing her retirement just a few weeks after her testimony before Congress in April; she told the lawmakers that suspensions of two to ten days were all that she could effect to discipline agents who had admitted they had participated in sex parties with prostitutes paid for by drug cartels. Clearly, I was scratching my head on that one, since law enforcement personnel should be held to a higher standard. I think most of us would think something much more serious could have been sustained on those charges, but we don't know the facts and what they could actually prove, of course.

This veil of political interest that has fallen over any kind of reported misconduct is a serious problem in my mind. It can easily interfere with a few little things like 1) a full and complete investigation (do we really need one since we already know what the penalty is going to be?), 2) delegation of authority (the authority on paper rests with a particular official but the penalty has in reality been directed by someone higher in the chain of command), and 3) due process (does the deciding official have the power to make a decision, a' la security clearance cases).

A little chuckle

When the politicians go crazy about why not faster, why wasn't something done, why does due process take so long, why couldn't a stronger penalty be sustained, etc., it makes me chuckle. After all, where are those due process requirements written? Where is the authority of the MSPB to review cases enacted? Could it be something that Congress passed at some point???? If they don't like it …. well, you know what they could do about it.

Check back next month. There's more about the "gotcha" world to come. Haga@FELTG.com

Program Spotlight:
Supervisory HR Skills Week
July 13-17 2015
Washington, DC

This week, targeted especially to federal supervisors, covers a range of topics including holding employees accountable for performance and conduct, managing FMLA and other leave scenarios, EEO and disability discrimination, effective workplace management and leadership skills, and supervising unionized employees.

Join instructors William Wiley, Barbara Haga, Richard "Rock" Rockenbach, and Deborah Hopkins, for this not-to-miss training event!

A Distasteful Part of Our Work Here at FELTG
By William Wiley

As everyone knows who has attended one of our *UnCivil Servant* or *MSPB Law Week* programs, we FELTGians are huge fans of the unacceptable performance removal procedures found at 5 CFR 432. As our colleague and the FELTG instructor emeritus Peter Broida has often said, "If someone comes into my office and asks what to do about being issued a PIP initiation letter, I tell him to 'Get back to work and work as hard as you can!' because there is no way I can defeat a properly-constructed 432 removal." Them's powerful words coming from the pre-eminent appellant's counsel in federal employment law.

As a reminder, here's how easy it is for a supervisor to PIP an employee. Once you have an

OPM-approved performance plan in place for a couple of months, the supervisor should:

1. Hand the employee a one-page memo that tells him what assignments to accomplish during the next 30 days,
2. Meet with the employee weekly to give constructive criticism, then
3. Hand the employee a one- or two-page proposed removal that lists all the mistakes the employee made during the 30-day PIP.

If you think that there are more requirements than this, you are mistaken (or you suffer under a devious collective bargaining agreement). And this has been the law for 37 years. *See White v. DVA*, 120 MSPR 405, ¶ 5 (2013).

Unfortunately, agencies don't always handle these things correctly, and fired individuals get their jobs back on appeal, not because there performance was acceptable, but because whoever put the case together made technical errors. Here's a recent exhaustive example for us all to learn from:

- On appeal to MSPB, the agency's response to the acknowledgment order, "where supporting evidence is typically found, contained none whatsoever."
- The only other documentary evidence that the agency provided consisted of a few email messages that bore no apparent relation to the allegations in the notice of proposed removal.
- The agency adduced no testimony at the hearing (although the appellant's supervisor testified for over seven hours) to shed any light on the significance of these emails. The appellant's supervisor provided only "fleeting" testimony regarding a couple of the specifications in the notice of proposed removal.
- Counseling memos relied upon by the agency related to matters that occurred before the PIP. As everyone who has participated in our FELTG training knows, generally the only performance that matters is that which occurs DURING the PIP. Proof of pre-PIP unacceptable performance is unnecessary and irrelevant.
- Written statements included by the agency in the file as evidence of unacceptable performance were too general and were unsworn. Oh, how we FELTG-pound away at the need for SPECIFICITY in removal actions. Plus, the Board is well-known for being relatively dismissive of unsworn statements as compared to those that contain the no-perjury statement at the bottom before the signature.
- The supervisory annotations on documents submitted to show unacceptable performance were replete with unexplained acronyms, codes, and abbreviations. The annotations were in red, but that's not good enough. We have been teaching for decades to avoid abbreviations, acronyms, and other government-ese confusion because the Board is not as versed in your lingo as are you. As a result of this untrained mistake, the Board said, "Any errors that these documents may contain are not apparent on their face, and the annotations themselves do little to clarify the matter. Nor does the agency attempt to link these documents to the allegations in its notice of proposed removal — the allegations that it is required to support by substantial evidence in order to carry its burden in this appeal."
- The judge was unable to connect the documents contained in the agency's prehearing submissions to any specific allegations found in the notice of proposed removal. We teach in our *Legal Writing Week* seminar that each charge or instance of unacceptable performance in a proposed removal letter should be followed by a specific reference to any supporting documentation; *e.g.*, "On May 22, 2015, you submitted a weekly report that contained twelve typos and lacked an appendix (Attachment 4)."
- On Petition for Review, the agency submitted 500 pages of new documentary evidence. *Pop Quiz*: Will the Board accept new evidence submitted along with a PFR,

or does the record close at the end of the hearing when the judge whacks her desk with the gavel? Yeah, I bet you know the answer to that one without reading the decision.

- On appeal, the agency submitted the testimony of the supervisor that a certain number of feedback meetings occurred during the PIP even though some of the meetings were not conducted by that supervisor, but by other personnel. When the appellant testified that those other meetings did not occur, the agency did not provide rebuttal testimony from the other personnel. Therefore, the Board reached the conclusion that the meetings did not occur. Classic *Hillen* Factor assessment.
- By instituting a 60-day PIP rather than the FELTG-recommended 30-day PIP, the agency obligated itself to having a bunch of periodic meetings and producing proof that those meetings occurred. At FELTG, we recommend a 30-day PIP to cut the burden of meetings and proof of those meetings in half (or better). Also, we recommend follow-up emails after each meeting to document that they occurred. The agency in this case doubled its work, doubled the chances it would make a mistake, and got no commensurate benefit from all that extra effort and risk-taking.
- On PFR, the agency's representatives argued that the judge must have had an anti-agency bias because he rejected the agency's credibility arguments. As we teach in FELTG's *Hearing Practices Week* (next offered NOV 2-6 in DC), you are not going to win an argument that a Board judge is biased without smoking gun evidence, of which there is never any. And few judges will forget that you essentially accused them of judicial malfeasance. Most mistakes that a representative makes at hearing are limited to the results of that hearing. This is one that can follow you in your career for a loooong time.

I don't like this part of our job here at FELTG, plowing through someone else's work to point out errors that they have made. None of us likes criticism, even when it's warranted (a message to you typo-pointer-outers who occasionally feel a need to do your thing with one of our articles). But we do it because doing so is for the greater good, so that others can avoid the same errors and that employees can be treated with all the fairness guaranteed to them by law. *Thompson v. Army*, 2015 MSPB 31.

Please. Get trained. Don't think you can do this work just because you passed a bar exam or are otherwise very smart. This is not hard law, but it is specific law. Know your limitations and learn from those with experience. Because if you don't and if you make a bucket of technical mistakes, we'll write articles about your work, and you just might not get that big Presidential Rank award you've been contemplating. Wiley@FELTG.com

Hearing Practices: Preparing To Depose Witnesses
By Deryn Sumner

Last month we discussed how best to prepare witnesses for deposition where you will be defending the deposition. But this month, let's chat about how to prepare to take depositions of your own.

First, sit down (or stand up at your standing desk that are all the rage these days), and think about the purpose of the deposition. Are you an agency representative planning to file a motion for summary judgment? Then think about what's missing from the record in order to make your arguments and start your outline there. Other reasons for taking a deposition include to preserve a witness's testimony in case he or she is not available for hearing (although that purpose should be clearly identified and known to both parties), to assess how a witness will come across when testifying at hearing, to ask follow up questions about the information already obtained in written discovery, or to pin down a witness's answer on something to either use in filing or responding to a dispositive motion or to later use for impeachment purposes if the answer subsequently changes.

Once you have your goals jotted down, think about how you want to structure your questions. Attorneys prepare for depositions differently and I'd

hazard a guess that the amount of preparation decreases in proportion to the number of years of practice. If writing out each question works for you, go for it. You may find after you take a few depositions that a more loosely structured outline will also work. Same goes for order of questions. Some attorneys jump around to different topics and some proceed chronologically. Similarly, some attorneys start out asking the tough questions right away while others ease the witness in with some softballs that may result in witnesses letting their guard down a bit. As you take more depositions, you will find a style that works for you, and your style may change depending on the type of witness you are dealing with.

A common mistake I see are attorneys who focus too much on their outlines to the detriment of asking the obvious follow-up questions. If you don't follow up immediately, mark down a point you want to go back to when the witness responds and be sure to review your notes before ending the deposition. If possible, it can be very helpful for a colleague to sit in with you to catch these inevitable follow-up questions during your first few depositions.

Think about the documents you may want to use during the deposition. Make sure you have enough copies to provide one each to the witness's representative, the witness, and the court reporter to mark the document as an exhibit. However, if the document is already in the Report of Investigation, you can save your client some money and simply refer to it clearly in the record without entering it. Sometimes it makes sense to have these exhibits in separate folders (one for each exhibit) and sometimes a binder works better. Figure out what works for you. Just make sure to clearly mark any copy you've scrawled notes on as you don't want to hand that over to anyone else.

I like to mention to attorneys preparing for their first deposition that they are in control of the proceeding. That means that if you need to pause to consider how to phrase your next question, take as much time as you need. The reality is that the silence is never as long as it may seem in the moment. Also, sometimes witnesses keep talking even when there's no question pending and what they say could be helpful. The same thing goes for breaks. If you need to take a breather to review your notes before ending the deposition or to consult with a colleague, go off the record and take a break.

Oh yeah, and don't forget to schedule a court reporter. Without a court reporter (or a pre-agreed understanding that the deposition will only be tape-recorded with a notarized oath given), you're not going to get too far in your deposition.
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Sometimes It Takes a While for Things to Sink In
By William Wiley

Somebody wise once said, "If you stop changing, you might as well be dead." Well, here at FELTG we may be a lot of things, but dead is not one of them.

The case that has led us to changing a recommendation we have made for years in our famous *MSPB Law Week* seminar is almost 6 months old. However, it took a restatement of the holding in that case found in the Board's excellent recent report, *What is Due Process in Federal Civil Service Employment?* before things really sunk in. The situation involved doesn't happen, often, but it appears to us now that there's been a significant shift in thinking at MSPB since this case was issued.

Here is the advice we used to give:

> If a deciding official in reviewing a proposal concludes that more severe discipline is warranted than that proposed, the best thing to do is to have the deciding official cancel the proposal and then re-propose at a higher level of discipline. In most agencies, that would result in the third level supervisor becoming the deciding official.

And here's the problem with that advice given the Board's recent decision and explanation of that decision. Quoting from the Board's report,

> "Title 5 empowers the ***agency*** to take an adverse action. If agency leadership chooses to delegate the proposal or decision authority to lower levels, then it

> cannot interfere with the decision-making process of those delegees. But, prior to the assigned decision-maker's involvement in a particular case, current statutes permit delegations to be abandoned or modified by the agency at will."

As the authority for this proposition, the report relies on *Goeke and Bottini v. DoJ*, 2015 MSPB 1. In that case, the Board set aside the decision to suspend the two appellants because the original proposing official had been replaced by another proposing official when upper management decided it did not like the conclusion reached by the original proposing official. This act breached a specific policy that the agency had that specified who should be the proposing official in a situation such as the one in that case. Upon first reading the decision back in January, I thought that the Board's conclusion was based on the fact that this particular agency had a unique official policy that said that a *nonsupervisory* employee would be the proposing official in certain types of cases. When replacing the original proposing official, the agency had selected a *supervisory* individual as the new proposing official, in violation of its policy.

The restatement of the holding in the Board's report reaches a broader conclusion. As I understand it, in *Goeke and Bottini* it's not so much that a nonsupervisory was replaced by a supervisor, but that a proposing official was replaced after that proposing official had "become involved" in a particular case. In other words, I had thought that in *Goeke and Bottini*, the agency would have survived reversal by the Board had it reassigned the duties from the original nonsupervisory proposing official to another nonsupervisory proposing official. Upon reflection, I now think that the Board is saying that once a proposing official "becomes involved" (whatever the devil that means), the deciding official is bound to impose discipline no more severe than in the proposal letter and cannot cancel the proposal.

Of course, I could be mistaken. An MSPB report does not carry the same precedential value as does a precedential opinion and order issued in a real case. However, I note that the Board's report was issued in the name of both the Chairman and Member of the Board, the two individuals who would be voting in a precedential case should one arise relative to this issue. And from my experience at the Board, I know that draft reports are routinely circulated among the offices of the members for review prior to publication. Therefore, in an abundance of caution we will be changing the advice we give in our seminars and suggest that agencies forbear removing a proposing (or deciding) official after that official becomes "involved" in their roles in the case.

For those of you in a position to influence the policies of an agency, you might want to give some thought to modifying any existing policies that allow for no flexibility in the proposing and deciding official delegations. For example, I think that if the following policy language had it been in play in the *Goeke and Bottini* situation, it might have saved the case, and my do the same for you should you have a rigid policy regarding proposing and deciding discipline:

> "Normally, the proposing official in an adverse action will be the first line supervisor and the deciding official will be that individual's immediate supervisor (the second-level supervisor). However, this designation does not prevent the deciding official from canceling the proposal and reassigning the proposing duty to another management official when circumstances so warrant."

As you more educated readers know, nothing in law nor regulation requires that there be two management officials involved in reaching the decision in an adverse action (by law there must be two involved in reaching a decision in an unacceptable performance action, by comparison). In other words, that agency is free to have a policy where a single manager both proposes and decides whether an adverse action should be taken. In my experience, most every agency in government has decided to use two levels of decision-making in an adverse action even though the requirement is only for one. For many years I understood that as being a wise thing to do from

the perspective of reducing the potential for bias in a decision.

The Board's approach to due process is making me reconsider whether that is a good idea. Primarily, that comes from the direction that MSPB is taking relative to information the deciding official relies upon that is not included in the proposal letter drafted by the proposing official. When that happens, the Board will set aside a removal based on a violation of due process. My thought is that if a single individual was both the proposing and deciding official, there would be a reduced chance that the deciding official will rely upon something other than what was in the mind of the proposing official.

If I am correct relative to the direction the Board seems to be going in *Goeke and Bottini*, I now have another reason for thinking that perhaps using a single individual as both the proposing and deciding official is the better approach to take.
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Webinar Spotlight:
The Truth About Charges: Drafting Appeal-Tight Disciplinary Documents
Thursday, July 23, 1:00 - 2:30 p.m. eastern

If you've ever attended a FELTG seminar, or have read our newsletters, you know how important we believe word selection is in framing charges of misconduct. It's so important, in fact, that on Thursday, July 23, FELTG President and attorney at law William Wiley will conduct a 90-minute webinar on the best practices for drafting disciplinary documents that will withstand even the harshest scrutiny by the Merit Systems Protection Board or an arbitrator.

Among other things, this program will cover:
• The four mandatory rules of charging
• The three optional styles of charging
• The world of specifications and label elements
• The primary charging strategy; why less is so much better than more
• The specific words to use - and to avoid

Register now!

Religious Accommodations: The Other Definition of "Undue Hardship"
By Deryn Sumner

Earlier this month, the Supreme Court issued its decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. __ (June 1, 2015). In an 8-1 decision authored by Justice Scalia, the Court reversed the 10th Circuit's holding that had awarded summary judgment in Abercrombie's favor. The case concerns Samantha Elauf, a Muslim woman who applied to work at Abercrombie and who was not hired because her headscarf would have violated a dress code that prohibits "caps." Now, I haven't stepped foot in an Abercrombie in years (my niece is more of an Aeropostale fan), so I don't remember any hats being worn by employees although I do think heavy cologne might have been a requirement of the dress code. Ms Elauf went to EEOC which took on her case and represented her all the way to the Supreme Court. And the result is a great one for those of us who represent employees. The Court rejected the 10th Circuit's holding that it could not be held liable for failing to accommodate Ms Elauf because it did not have actual knowledge of her need for religious accommodation. The Court found that Ms Elauf only had to show that her need for Abercrombie to accommodate her was a "motivating factor" in the decision not to hire her.

Putting aside this victory, it's important to note that although the term "accommodation" is used both in religion and disability discrimination claims, the two legal frameworks are different. Assuming an employee with a disability can show that she is qualified to perform the position, has provided sufficient documentation (if needed) to demonstrate the need for the accommodation, and there are not alternative effective accommodations that would allow her to perform the essential functions, an agency can only escape from providing the accommodation by showing that it would be an undue hardship. In that context, undue hardship is defined as "significant difficulty or expense including:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability

of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."

See 29 CFR 1630.2(p)(2)

However, undue burden in cases of requests for religious accommodation are much less of a "burden" for an agency to bear. There, anything more than a *de minimis* cost can be used to justify a refusal to accommodate an employee's need to absent to accommodate their religious beliefs. *See* 29 CFR 1605.2(e).

The cases we see from the Commission where findings of failure to provide religious accommodation are upheld usually occur where the agency made no attempt to see if someone could swap shifts with the employee to accommodate a religious need. For example, in *Complainant v. USPS*, EEOC Appeal No. 0120141486 (August 15, 2014), the Commission reversed a FAD and found the agency discriminated against the complainant on the basis of his religion when it denied his request for religious accommodation to not work on Saturdays and issued him a letter of warning for failure to maintain regular attendance. The agency's downfall was its failure to even ask for voluntary substitutes for the Saturdays the complainant had to work. The Commission also noted that the agency's contention that granting his request would have left the facility short staffed was only based on speculation.

If an agency is found to have failed to provide religious accommodation to an employee, the same remedies apply as if there was a finding under another basis (other than age): pecuniary and non-pecuniary compensatory damages, attorneys' fees, restoration of leave, posting of notice, training, consideration of discipline, and any other appropriate remedies. So although the burden to show undue hardship is lower, agency representatives should still make sure there's evidence to support that burden.
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EEOC Finds Reprisal Whether It's There or Not
By William Wiley

Sometimes it seems that the Equal Employment Opportunity Commission is going to find reprisal whether the facts are there to support it, or not. I guess if you establish a federal agency, fund it to find discrimination, and criticize it when it does not find discrimination, it's going to find discrimination. That's the only way I can make sense of some of the "rationales" put forward by EEOC when it issues findings of discrimination.

Case in point: The supervisor in this case issued a letter of counseling (LOC) to an employee based on three incidents of allegedly disrespectful and argumentative misconduct. The supervisor issued the LOC three months after the employee had testified in an EEOC hearing in which the employee alleged that the supervisor had discriminated against him by not selecting him for a position 12 years previously (that's not a misstatement; it took EEOC and the EEO complaint investigation process 12 years to get the employee to a hearing regarding an alleged age-based non-selection) (holy moly).

In a claim for retaliation for testifying in an EEOC hearing, the Commission is bound by precedents from the Supreme Court:

- In a situation such as this, the agency must articulate (not prove) a nondiscriminatory reason for its actions. *Texas Dept. of Community Affairs v. Burdine*, 450 US 248 (1981).
- Agencies generally have broad discretion to carry out personnel decisions. They should not be second-guessed by the Commission absent evidence of unlawful motivation. *Burdine*, 450 US at 259.
- The employee has the burden of proving by a preponderance of the evidence that any explanation (articulation) given by the agency is pretextual [false]. *St. Mary's Honor Center v. Hicks*, 509 US 502 (1993).

Incident 1: The employee sent an email to a coworker questioning the coworker's authority and told her to stop giving him additional duties. The LOC states that the employee was counseled for this incident. EEOC found this articulation to be pretextual because there was no evidence in the record to support the statement that the employee was counseled regarding the email.

The employee does not deny the incident; the email is a matter of record. In its rationale, EEOC states, "contrary to" the supervisor statement that the employee had been counseled, there is no evidence that the counseling occurred. Well, the fact that there's *no* evidence is not *contrary* evidence. I think they teach that in the first week of Evidence in law school. Besides, the issue is not whether the employer was counseled, but whether he sent a disrespectful argumentative email. The email he sent is in the record. It is argumentative. The employee does not deny he sent an argumentative email, but rather characterizes it as "correcting" false statements made by the coworker, making inquiry, and pointing out examples of changes for improvement. EEOC makes no finding as to whether the employee's characterization of the email is in fact the better characterization. It concludes simply that the agency is giving a false reason because it does not include in the record separate evidence of a counseling. This makes no sense.

Incident 2: The employee and a coworker engaged in a discussion about a work-related matter. The coworker reported that the employee had become argumentative and that the employee had made a problematic statement to a member of the media. The employee denied making the problematic statement, but from the record does not deny that he was argumentative. As the coworker's statement was not sworn, EEOC dismissed it and thereby concluded that the statement regarding this incident was a false reason.

Incident 3: The supervisor asked the employee to volunteer to work on a special project. The employee declined to volunteer. The LOC stated that this refusal to volunteer demonstrated a lack of teamwork and bordered on insubordination. EEOC concluded that the statement "bordered on being insubordinate" was "disingenuous" because it was a voluntary activity. Therefore, although the refusal to volunteer might have reflected a lack of teamwork, EEOC concluded that this incident as well as the previous two was pretextual and false reasons for the LOC.

Well, doesn't "bordering on" insubordination mean it is not insubordination? And cannot an employee's act of refusing to volunteer be reflective of a lack of that old teamwork spirit? Geez.

Incident 4: The employee and a coworker engaged in a loud verbal exchange. The employee does not deny, according to the record, that there was a loud verbal exchange. However, EEOC found this reason for issuing the LOC to be false because there is no evidence that the coworker also was disciplined for this exchange (nor is there evidence that the coworker was *not* disciplined based on this exchange). Remember, the agency does not have the burden of proof in this situation according to the Supreme Court. It's the complainant who has the burden of proof. However, because EEOC does not find proof of the agency's allegations, it concludes that the allegations are false.

Other factors affected EEOC's conclusions that all four incidents were pretextual:

- The agency's Supervisory Resource Guide states in reference to suspected misconduct, "Always interview the employee about the situation." Because the supervisor apparently did not interview the employee relative to these four incidents, EEOC finds that this failure to abide by the guide is evidence pointing toward pretext. A major component of the Civil Service Reform Act of 1978 was to do away with the reversal of agency actions based on errors that are not harmful. Although EEOC is not controlled by this common sense philosophy when evaluating agency articulations for pretext, the philosophy still makes sense. Assuming that it is an error not to abide by the mandate of the agency's resource guide, you would hope that EEOC would look to see if that is in some way harmful. It did not.
- The annual performance appraisals given to the employee during this period mentioned good things that the employee had done and did not mention these acts of misconduct. EEOC seems not to understand that performance evaluations are based on performance standards, not conduct. Separately, EEOC notes that the performance evaluations state that the employee gets along well with others outside of the agency. Somehow EEOC concludes that this statement is in conflict with the statements in the LOC that the employee does not get along with coworkers.
- Although there were several statements that complainant did not get along with much of the staff, there was a single statement from a colleague of the employee that he got along with his coworkers.

I draw no conclusion as to whether this employee deserved a letter of counseling. However, I feel comfortable drawing a conclusion as to whether EEOC's rationale supports a finding that the agency's reason for issuing the LOC were false: it does not. The commission has done us all a disservice by issuing a decision inconsistent with law and unsupported by the evidence. *Complainant v. NOAA,* EEOC No. 0120120157 (March 24, 2015).

Separately, this decision serves as a reminder of something we have taught in our FELTG seminars for over a decade. Agencies should avoid doing more than they have to with employees because doing so allows the employee to file discrimination complaints like this one. Think how much government effort was exhausted in the adjudication of this discrimination complaint. All over a stupid letter of counseling. An LOC has no legal value when it comes to disciplining an employee. The supervisor in this case could have gotten just as much traction by sending the employee an email laying out all the incidents that the supervisor believed amounted to misconduct. It's a lot more difficult for an employee to show that an email amounts to an action that "a reasonable employee would have found might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006).

And with all due respect to our friends at NOAA, why in the world does your supervisory resource guide define disciplinary actions to include "oral counseling" and "written memorandum of counseling"? Note that the resource guide does not even contemplate a Letter of Counseling. Where did these come from? Why are they of value? Look what you're having to pay to defend them and they are unnecessary. Folks, this work is challenging enough without us adding extra work. Hopefully this case will serve as a reminder to all of us to focus on the minimum that needs to be done. It's better for America, it's fairer to the employee, and it keeps you away from the craziness over at EEOC.
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