Federal Employment Law Training Group
Training By Professionals For Professionals

FELTG Newsletter Vol. VIII, Issue 6 June 15, 2016

Do you use Uber, the ride sharing way of getting around most major cities? One of the great aspects of that philosophy of providing a service is that you get to rate your driver right after the drive is completed (and he rates you as well, by the way). The scale is easy: one to five stars with five being the best rating. So if the guy picks you up right on time, is courteous, and drives sensibly, what do you give him as a rating? Well, if you're like me, you give him a five. He did exactly what you needed him to do, how and when you needed him to do it. Oh, he could have done more – a nice back rub perhaps – but that would be beyond expectations. So why do senior managers in agencies get all freaked out when a supervisor wants to give all of his employees a performance rating of Outstanding? Most every civil servant is selected via a merit system designed to employee the best and the brightest. If those employees do exactly what you need them to do, how and when you need them to do it, don't they deserve an Uber-like top rating? If you ran Uber, wouldn't you be thrilled if all your drivers got "5" ratings? The federal performance appraisal system is routinely mishandled and misapplied. Perhaps our new administration will have the foresight to bring into government some organizational psychologists who know the basic science and can help us come up with a better way to do things, maybe even Uber-ize performance appraisal. Just think; everyone who receives a service from a federal employee could use an app to rate that civil servant's service. Hey, I can dream, can't I?

Bill

COMING UP IN WASHINGTON, DC

Legal Writing Week
July 11-15

MSPB Law Week
September 12-16

Absence & Medical Issues Week
September 19-23

EEOC Law Week
September 26-30

OR, JOIN US IN HONOLULU

Managing Federal Employee Accountability
August 1-5

WEBINARS ON THE DOCKET

June 23:
Drafting Disciplinary Charges: How a Misplaced Adjective Can Cost You a Case

July 7:
The Latest Developments in LGBTQ+ Discrimination: What Agencies and Employees Need to Know

Do I Have to Grant an Employee with a Disability Her Accommodation of Choice?
By Deborah Hopkins

Last week, I was teaching a day on *The Federal Supervisor's Role in EEO* to a group of GS-14 and 15 supervisors at an agency in Atlanta. One of the topics that generated a lot of discussion – and about which there was some confusion – was reasonable accommodation for disabilities. Specifically, there were questions about what "reasonable" means, and whether the employee is entitled to the accommodation of her choice.

Now, just to make sure we're all on the same page, let's have a quick review. Federal employees (and applicants) are entitled to participation in the reasonable accommodation interactive process in two areas: physical or mental disability (under the Rehabilitation Act/ADA), and religion (under Title VII). Agencies must accommodate (1) the disabilities of qualified employees, and (2) the *bona fide* religious beliefs and practices of employees – unless doing so would create an undue hardship on the agency.

We won't get into the process of determining who is a qualified individual with a disability here today, so let's assume we have an employee who is qualified because she has a medical condition that causes severe back pain, and she needs an accommodation in order to perform the essential functions of her job.

A reasonable accommodation is a logical adjustment to the job and/or the work environment that enables a qualified person with a disability to perform the essential functions of the position without doing harm to herself or others. This does not mean the employee gets the best possible accommodation. Some options for accommodation might be:

- Accessible facilities
- Flexible starting or ending times, or brief break periods
- Telework
- Reassignment
- Special software
- Equipment or devices
- Furniture and office layout modifications
- Service animals
- Hearing interpreters
- Modifying job duties, without changing the essential job functions

In looking at what accommodations you might be able to provide and determining whether there's an undue hardship in providing the accommodation, you'll also want to take into consideration the overall size of your agency's program, the type of facilities, the size of your budget, the composition and structure of the workforce, and the nature of the accommodation. 29 CFR 1630.2 (p). Agencies beware, though – money is usually not a defensible reason to deny a reasonable accommodation, especially when another accommodation is not available.

Back to our hypothetical employee. The back pain she is experiencing means that she can't sit for more than 10 minutes at a time, and she has provided acceptable medical documentation that says as much. She generally takes a bus to work and the ride is about 20 minutes, but occasionally she will drive her car and that takes about 15 minutes. She has requested full-time telework in order to accommodate her disability. Do you have to give her full-time telework?

No, you don't. You might do that, and maybe it's a good idea, but remember you don't have to. You'd want to consider things like:

- Whether the essential functions of the job can be performed at home. If she works on computer systems or with sensitive information that aren't accessible off-site, telework won't allow her to perform the essential functions of her job.
- Whether she requires management oversight in order to meet her minimum performance rating. If the employee has demonstrated that she can't complete her

work unsupervised, you don't have to give her telework because she asked for it. *See Yearlings v. HUD*, EEOC No. 0320100021 (EEOC OFO 2010).

- Whether another accommodation would allow her to perform the essential functions of her job, at the agency. Things like ergonomic chairs, standing desks, frequent breaks to allow her to walk around the building to stretch her back, and other options might be better accommodations than the full-time telework she's requested.

The bottom line here is that and employee does not get to unilaterally dictate to the agency that she be granted the accommodation she prefers. That's why the process is called the *interactive process*; it suggests agencies and employees work together informally to find an acceptable outcome. 29 CFR 1630.2(o) (3). For more on this check out a recent case, *Complainant v. Department of Veterans Affairs,* EEOC No. 0120122961, (EEOC OFO 2015), in which the complainant requested a number of specific accommodations, and the agency provided alternative accommodations and prevailed in the EEO complaint.
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Do Not Extend the Notice Period for a Proposed Removal
By William Wiley

Cut us, we bleed efficiency. Okay, maybe too graphic. Come to our FELTG training and we will teach you how to quickly and effectively hold your employees accountable for performance and conduct while simultaneously providing all the rights the employee has under law.

Recently, we had a Human Resources participant in our fantastic *MSPB Law Week* seminar tell us that at her agency, during the proposed-adverse-action notice period (e.g., 30 days), the general counsel's office routinely granted employee requests to extend the response period by 30 days, for a total of 60 days. When our participant questioned the reason for the delay, she says the response she got is that GC wants to be sure the employee gets due process.

Well, that's a bad reason. I did some case law digging and could not find a single case in which an agency's refusal to extend a statutory notice period was found to be a violation of due process. Ever. The law says that 30 days is adequate time to respond with a representative. Congress has even identified a couple of situations in which a reduced seven-day notice period satisfies the Constitutional right to due process (e.g., the crime provision and the new quickie SES removals over at DVA). Since we know that 30 days has been defined as adequate, and that there's no case law contra, why would anyone extend the notice period?

Perhaps it's fear. In my experience if an employee's attorney asks for an extension of time, and that request is denied, the employee's attorney will let loose with a barrage of loud objections: *Due process! Right to a representative of his choosing! I'm such a good attorney that I don't have time to play around!* I've even seen appellant's counsel argue that Board decisions finding a denial of a time extension by a judge is somehow related to a denial of an extension by a deciding official. Yes, if you deny the request for an extension, you should be prepared for noisy complaints from the employee's lawyer (the same noises I would make if I were working that side of the bar). And if you don't like to be yelled at or otherwise objected-to by opposing counsel, then you may well decide to grant the extension.

Of course, if it was your money that was paying the extra salary required of by an extension, you might balance things differently. What does an extra 30 days cost the government; maybe $10,000 if you figure in the total compensation? That's not a lot of government money in perspective. However, if it was coming out of your personal checking account, maybe you'd think twice about granting an extension request. It's easier to say "yes" than it is to say "no," but that "yes" comes with a significant price tag when it's your personal money.

Perhaps it's not fear-of-counsel. Perhaps the extension-grantor is just trying to be nice to the employee, to allow him plenty of time to defend himself. Well, why? Who's the client for agency counsel? Obviously, it's the agency. And when you have a proposed removal out there, you have an agency official (the proposing official) who with the assistance of an employment law practitioner is taking the position that the employee should be fired. Therefore, your client has tentatively reached the conclusion that removal is warranted. As an attorney, your role is not neutral. Your role is to represent the interests of your client. That doesn't mean that you treat the employee unfairly, but it does mean that any decisions you make should be in the best interests of your client. It's hard to imagine a situation in which allowing more than 30 days presenting a defense to a proposed removal is in the best interest of the government. If an employee's attorney when confronted with a detailed proposal letter plus supporting evidence cannot develop a defense within a few days, perhaps that attorney needs an assistant, or another line of work.

In my practice representing agencies, if opposing counsel requests an extension of time to respond to a removal, I do not grant that request routinely. In fact, I routinely deny the request. However, as this is a line decision in my option, if the client-supervisor concludes that the employee's attorney has made a good case for needing more time (e.g., lightning strike, unexpected death in the immediate family, taken to the Mother Ship for unscheduled probing), I'm willing to grant the extension IF the employee will request LWOP to cover the extension period. If the employee's attorney's situation is dire enough to require additional time to prepare a response, let the employee pay for the additional salary expense. That way, it's not a matter of whether opposing counsel has a good excuse for needing more time. Rather, it's a matter of who pays for it. And if I'm agency counsel with a fiduciary obligation to my agency, it's not going to be the agency that pays.

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FELTG is Coming to The Big Easy

Managing Federal Employee Accountability
June 27 - July 1, 2016
New Orleans, LA

This week-long open enrollment seminar will cover all you need to know about the relevant law, policy, strategy and best practices related to critical supervisory skills in the government workforce.

Federal supervisors, HR practitioners and attorneys will all benefit from training on employee accountability, union concerns, the EEO complaint process, managing leave abuse and communicating effectively with employees.

It's filling up quickly. Check out our website www.feltg.com for all the details, and register before space runs out!

Sanctions: When the Agency Fails to Provide the Complaint File on Appeal
By Deryn Sumner

We've come to the end of the road in our series on when sanctions can be issued in federal sector EEO complaints. And fittingly, this month we'll discuss sanctions issued at the end of the road in the administrative process: appeals before the EEOC's Office of Federal Operations. Either party can file appeals of final actions to the Office of Federal Operations. The agency must submit the complaint file "within 30 days of initial notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency." 29 CFR 1614.403(e). Seems simple enough, right?

Well, every year for at least the past several years, the EEOC has issued sanctions against agencies for failing to comply with this regulation to submit the complaint file. For example, in *Amina W. v. Dept. of Energy*, EEOC No. 0120113823 (November 17, 2015), the EEOC issued default

judgment against the agency because it failed to provide copies of the hearing transcript and did not respond to the OFO's Show Cause Order as to why it hadn't. The decision notes that the agency had repeatedly failed to comply with the EEOC's orders in the case. As it did not have the hearing transcripts, the Commission concluded it was unable to review whether the administrative judge's finding of no discrimination was supported, and issued default judgment instead.

Yes, even though the agency won the case at a hearing, it ended up liable for discrimination because of a failure to provide the hearing transcript to OFO. Finding that the complainant established *prima facie* claims of discrimination, the Commission determined remedies were appropriate, including providing the complainant a retroactive promotion with back pay, an investigation into the complainant's entitlement to compensatory damages, and eight hours of in-person training to EEO staff "regarding their responsibilities concerning case processing and insuring that the EEOC is provided complete EEO complaint files." **[Editor's note: And once more we see why wise agency counsel settles an EEO complaint even when there is no basis on which to find discrimination. One simply cannot predict what will happen before EEOC. Join us for our *Settlement Week* seminar in November if you want to learn the tricks of the deal-making trade.]**

Similarly in *Complainant v. Dept. of Air Force*, EEOC No. 0120083446 (September 28, 2015), the EEOC overturned the administrative judge's decision finding no discrimination issued after a hearing and granted default judgment because the agency failed to provide the complete complaint file to OFO, including failing to provide the complete ROI, motions and pleadings from the hearing stage, and the hearing transcript. The agency also did not respond to the Order to Show Cause as to why sanctions should not be granted, even though someone from the EEOC called the agency to confirm it received the notice. As part of the grant of default judgment, the Commission ordered the agency to retroactively offer the complainant a position with back pay and to conduct an investigation into entitlement to compensatory damages.

So, we know what the worst-case scenario is if an agency fails to provide the complete complaint file to OFO. Let's look at what an agency can do to avoid such severe sanctions. The facts in *Denese L. v. Dep't of Interior*, EEOC No. 0120130297 (May 13, 2016) start off looking as dire to the agency as the cases discussed above. When the agency provided the complaint file, it did not include any deposition transcripts, the prehearing report, or discovery documents. After the EEOC emailed the agency about these omissions, the agency provided a copy of the complainant's deposition transcripts, but not the remaining transcripts and exhibits. The EEOC issued a Show Cause Order and unlike in the other two cases, the agency responded by submitting the missing documents and arguing that sanctions should not be imposed because it did not realize any other documentation was missing until February 2016, and it took a long time to obtain the missing documentation because it had to be retrieved from an archive.

The Commission did not credit the agency's argument that it did not realize until recently that documentation was missing, noting that the agency's iComplaints administrator received notice on May 19, 2015 and, regardless, the Commission's regulations require production of the complaint file. However, the Commission found, "because the Agency ultimately submitted the missing documentation, and the missing documentation was remotely stored in archives, we determine that sanctions are not appropriate in this case. However, the Agency is strongly reminded that failure to submit to the Commission the complete record, within the applicable time frame, may result in sanctions against the Agency in future cases. In particular, the Agency should especially focus on developing procedures that allow it to promptly locate and submit missing documents. Further, the Agency should take particular measures to ensure that it is accounting for and submitting to the Commission all documents from the hearing stage, whether an AJ has issued a decision or remanded the case to the Agency for a decision on the record."

The Department of Interior escaped with only a scolding because it provided the requested documentation and provided a reason as to why it did not do so prior. The best practice is to make sure you submit the complete complaint file in the first place. If facing a Show Cause Order, provide all of the requested information and hope you have a reason why the agency did not do so before. Sumner@FELTG.com

This One is Difficult to Report
By William Wiley

As some of you might remember, late last year here at FELTG, we embarked on a mission we had never undertaken before. We decided to conduct a highly-scientific survey of all the attendees at our training programs to try to get an answer to what I think we would all agree is a highly pressing question:

> *Why don't federal supervisors fire more bad employees?*

The impetus for our doing this was in large part a response to all the negative press we civil servants have been receiving recently relative to accountability. It's in the papers, on the evening news, and the subject of Congressional oversight committee meetings. Presidential candidates have campaigned about it. MSPB has dutifully reported the dismal numbers of successful removals and the extraordinary length of time it takes to make them happen. DVA and DoD have seriously looked into positioning their employees so that they would be outside of MSPB jurisdiction of removals, believing that the Board is the source of all the problems.

So we decided to survey you folks who are closest to the issue: you front line supervisors, union officials, human resource specialists, and agency legal counsel. Many of you see this stuff every day, and we thought it worthwhile that someone asks you what you think. Not that the opinions of the members of Congress are necessarily wrong. It's just that we think we should find out the answer from the horse's mouth (rather than some other horse body part).

Our survey was exceedingly simple. The single relevant question was phrased as follows:

> *Many people believe that agencies do not fire enough bad employees, that agencies should do more to hold employees accountable for conduct and performance. If you think this is probably true, how would you divide 100% of all the causes among the following categories?*

Following the question, we provided a list of about a dozen possible causes. Things like:

_____Lack of knowledge in the legal support staff
_____Lack of knowledge by senior management
_____Fear of reversal on appeal in human resources
_____Fear of reversal on appeal in the legal support staff
_____Desire not to hurt the employee by the front line supervisor
_____Desire not to hurt the employee by senior management

The survey takers (and our many thanks to those of you who took the time to give us a response) were asked to divide 100% among as many categories as were relevant. Some participants went with two or three categories, maybe 30, 40, and 30%. Others went into much more detail, ascribing 3-10% to almost every category. Amazing how people respond to surveys.

Well, the results are in. After collecting about 700 responses, figuring out how to use Excel, and then crunching the numbers, we came up with clear winners. And, my goodness, were they clear. Of the 100 percentage points that could have been award, 78 of those points were split between just two categories, in order of responses:

1. Lack of knowledge on the part of supervisors
2. Lack of knowledge on the part of human resources specialists

So why are these results difficult for us to report? Because here at FELTG, we make our payroll each month by teaching supervisors and HR specialists (and attorneys and union representatives) how to hold employees accountable. It is clear that we have a big bias, and I wouldn't blame a reader from thinking that our bias shows through. As my grandmother used to say, "Never ask a barber if you need a haircut." An obvious corollary would be, "Never ask a training company if you need training."

The best I can do is to tell you that we tried as hard as we could to be neutral. While I'll concede that maybe the answers would have been different if we had asked this question outside of a training room, of individuals who were not actively participating in training at the time of the responses. However, we don't have that luxury. We had to play the cards dealt to us, and classroom participants are who you dealt us.

Maybe our little survey will motivate those of you in a position to conduct your own survey, away from a classroom, to see what answers you get. This is not a question that should be answered from a gut feeling. It should be answered based on facts, facts that are perhaps different from agency to agency.

But until that happens, our FELTG answer remains the answer to disprove. We put on our big-boy and big-girl pants, asked the tough question, and got an answer that makes sense to us. If you can do better, go for it. And if you're a policy maker, until you get a better answer on your own, maybe you should consider throwing some resources into training your supervisors and your advisors. Because that's what the most recent highly-scientific survey says you should do.

FELTG operators are standing by: 888-at-FELTG. Wiley@FELTG.com

We Gotta Have a Rule
By William Wiley

Questions, we get wonderful questions here at FELTG. This one is from a somewhat frustrated practitioner that doubts that MSPB knows what "abuse of authority" really is. And it involves an area commonly misunderstood, right at the heart of our merit system.

Dear FELTG-

Here is a brief summary of what occurred in a case that recently went bad. I could use a little help in understanding why MSPB did what it did:

> Appellant was the selecting official for the positions filled by the two applicants. The vacant positions were not announced on the USAJOBS web site or otherwise publicly posted. Appellant did not check to see if there were any qualified preference-eligible veterans who might be noncompetitively hired for the positions. Instead, Appellant contacted the two applicants – and, only the two applicants – and encouraged them to apply for these unannounced and unposted positions.
>
> Appellant knew the two applicants when they worked together previously. The two applicants are not veterans and, at the time of their hiring, they had no prior or current federal service. When appellant contacted one of the applicants, [the applicant] told appellant that his application for a previous police officer vacancy with the agency, which was announced on the USAJOBS web site, had been rejected. Appellant testified that he assumed that the applicant's application for this previous vacancy had been rejected because he is not a veteran.
>
> Appellant advised the two applicants to apply for the unannounced police officer positions using Schedule A and sent them an example of a

Schedule A letter. Schedule A is a noncompetitive hiring authority and only severely disabled individuals qualify for a Schedule A appointment. Office of Personnel Management regulations, found at 5 C.F.R. § 213.3102(u), state that Schedule A appointments are reserved for individuals "with intellectual disabilities, severe physical disabilities, or psychiatric disabilities." This section defines the term "intellectual disabilities" to mean "only those disabilities that would have been encompassed by the term 'mental retardation' in previous iterations of this regulation and the associated Executive order." 5 C.F.R. § 213.3102(u)(2).

After sending the two applicants example letters to qualify them as noncompetitive Schedule A applicants, appellant gave them further advice on their noncompetitive applications for the positions. In a series of e-mails referenced in the initial decision, appellant reviewed one applicant's resume and told him to remove appellant as a reference because it "wouldn't look good and could be looked on as per-selection [sic]." The applicant also told appellant in another series of e-mails that he had asked his treating physician to complete a Schedule A letter, but that his physician "didn't feel comfortable saying I was disabled because my lung issue is a mild one." After the applicant asked appellant to "Let me know if there is a way around this, or if there is something else I can do," appellant responded "I would get another doctor then. *The only way in is with that letter*." (emphasis added).

Appellant testified that in stating that the "only way in" is with a Schedule A letter, he knew that he could not hire the applicant without the Schedule A letter. Appellant further testified that he knew that the applicant was not otherwise eligible for this unannounced vacancy because he is not a veteran. As appellant directed, the applicant obtained a Schedule A letter, which was completed not by his treating physician, but by a physician at an urgent care facility. The two applicants then provided appellant their resumes and completed Schedule A letters, and Appellant hand-delivered the documents to the Human Resources Specialist handling the hiring for these positions. Appellant admitted hand-delivering the applications to the HR Specialist. The Specialist testified that in his experience no supervisor other than appellant had ever handed him a Schedule A letter on behalf of an applicant.

Appellant told the Specialist, at the time he handed him the documents, that he would like the two applicants to be considered for these vacant positions. Because appellant had not announced the positions, the Specialist testified that he understood that appellant wanted a non-competitive referral for the vacant police officer positions. Appellant selected the two applicants the same day he received the certificate and without interviewing them.

The Board states in the final decision "On petition for review, the appellant argues that the agency failed to show that there was anything improper about the assistance that he provided to [the applicants] and that it

therefore failed to show that he abused his authority. We agree."

What else would an agency need to prove to show favoritism, pre-selection, and, ultimately, an abuse of authority as a selecting official??

And our FELTG response:

Thanks for your patience on this one. Here's what you've run up against.

As we teach in our *MSPB Law Week* (and *UnCivil Servant* onsite seminar for supervisors), an agency needs to satisfy five requirements to be able to take an adverse action:

The Five Elements of Discipline are -

1. There is a rule (because we define misconduct as violation of a rule),
2. The employee knows the rule,
3. The employee broke the rule,
4. The penalty is reasonable, and
5. The agency provided the employee due process.

The agency got tripped up here at No. 1. There is no rule against favoritism or pre-selection in the civil service. I know, hard to believe. But this has been the context since I started in the '70s. In fact, the old Civil Service Commission even had a point paper it circulated back then that said that pre-selecting individuals who were especially trained and favored by the selecting official for the purpose of affirmative action was completely in line with the merit system AS LONG AS the eventual selectee was qualified on merit for the position.

That's the danger of taking an adverse action without having a black-and-white rule we can point to. Without a rule, we have to fall back on what the employee *should have known* the rule to be, and then we get into this vague, undefined, never-never land of what the employee believes, what the Board believes, and what we as management believe.

So you and I might agree that pre-selection is bad. But this supervisor has never been told that. Separately, there's no case law to support a presumption that pre-selection is bad, and especially important is that there are no federal laws or regulations that specifically outlaw preselection. Therefore, we've failed to satisfy Element One and we are doomed.

Your agency could make a rule that prohibits preselection and favoritism. If it did, then it could hold employees accountable for violating that rule, and thereby abusing their federal authority. But it has not. Therefore, in part because it has always taken this position, MSPB held that preselection is not inherently a violation of a rule, and cannot be the basis for discipline.

Hope this helps for the next time.
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Registration is open now and the series discount ends Thursday, June 16. You won't want to miss it!

Supreme Court Rules on When 45-Day Time Limitation Begins for Initiating EEO Contact on Claims of Constructive Discharge
By Deryn Sumner

I previously wrote about the Supreme Court's grant of certiorari in the case of *Green v. Donahoe* in May 2015 as well as the oral arguments heard by the Justices in December 2015. The Court took up the case to address a circuit split as to when a federal employee must contact an EEO counselor to allege a claim of constructive discharge: when an employee resigns (as the First, Second, Fourth, Eighth, and Ninth Circuits held), or at the time the employer commits the last act alleged to be discriminatory (as the Seventh, Tenth, and D.C. Circuits held).

To recap the facts of the case, Mr. Green worked for the U.S. Postal Service and filed an EEO complaint in August 2008, arguing that he was not selected for a promotion because he was African-American. He filed another formal complaint alleging retaliation in May 2009. After he filed his formal complaint, the Office of Inspector General began investigating him for delaying the mail. The IG ultimately concluded that Mr. Green did not commit misconduct; however, his managers placed him on emergency off-duty status after the interview anyway. A few days later, Mr. Green and the Agency entered into a settlement agreement which provided that he would use leave to stay on the payroll until March 31, 2010, after which time he would either retire or accept a downgrade to a position 300 miles away. Mr. Green subsequently contacted an EEO counselor to allege that the agency constructively discharged him by forcing him to retire under the settlement agreement. After exhausting his administrative remedies, he filed in U.S. District Court and it concluded he had not made timely EEO counselor contact. Mr. Green appealed the decision to the Court of Appeals for the Tenth Circuit and the Court of Appeals agreed that Mr. Green's EEO counselor contact was untimely because it was beyond the 45-day timeframe.

In a 7-1 decision issued on May 23, 2016, the Supreme Court vacated the decision of the Court of Appeals and held that the 45-day window begins running only after the employee resigns.

The majority opinion began its analysis by reviewing the Commission's regulation at 29 CFR 1614.105(a)(1), which states, "An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." The Court did not find that regulation helpful, noting that the reference to "matter" does not identify whether that means the employee's actions (here, an employee's resignation) or the employer's actions (here, the settlement agreement).

Looking to Black's Law Dictionary and other canons of interpretation, the Court concluded that the "matter alleged to be discriminatory" in cases alleging a constructive discharge claim includes the date of the employee's resignation. The Court provided three reasons for this holding: (1) that in a constructive discharge claim, a resignation is part of the "complete and present cause of action" necessary before the 45-day time limit begins to run; (2) the regulation at 29 CFR 105 does not contain any language that is contrary to this idea; and (3) a catch-all of practical considerations, which the Court identified as not making it difficult for a layperson to invoke the protections of the civil rights statutes, to support this conclusion.

Justice Sotomayor delivered the opinion of the Court. Justice Alito filed a concurring opinion and Justice Thomas issued a dissenting opinion. The Court vacated the grant of summary judgment and remanded the case for further proceedings. And thus ends, for now at least, the excitement of the Supreme Court delving into the quirky EEO federal sector process. Sumner@FELTG.com

MSPB's Statistics for 2015
By William Wiley

The Board published its annual summary of cases decided a couple of months ago. Normally, I dig into those win/loss tables with glee, separating the agencies who won most of their appeals from the pitiful losers who are wasting the government's money. Yes, we are not happy here at FELTG unless we are pointing out where someone else made a mistake. **[Executive Director's note: Bill's comments are not necessarily the views of FELTG as an organization.]**

Unfortunately, in this report, there was no joy in Mudville. That's because most of the agency-specific data mixed furlough appeals with other adverse actions such as removals. And because there were many, many furlough appeals, with agency success rates hovering in the 99% range, we really couldn't tell which agencies were doing a good job of holding employee's accountable for misconduct, and which ones were not. So no opportunity for us to write a snarky finger-pointing article about the Biggest Loser agencies for 2015. Poop.

However, the report did give us some across-the-board numbers of interest to those of us who care about federal employment law, numbers that exclude the anomaly of all those furlough appeals. When we use that filter to look primarily at removals, here's what we find:

- 80% is a repeating statistic. In non-furlough removals, MSPB upheld the agency's action in 80% of the cases in which a decision was issued. Similarly, the Board members agreed with their judges' outcomes in 80% of appeals in which there was a petition for review filed. As you've read in this newspaper, FELTG takes the position that after 40 years of learning this law, the Board should be upholding agency removals close to 100% of the time. Federal agencies should not be making critical mistakes in one out of five dismissal actions.
- Half of 80% is 40%. And that's the share of MSPB's non-furlough case load devoted to reviewing removals (and a few long suspensions and demotions) for misconduct.
- About 10% of the Board's caseload is devoted to protecting veterans' rights (USERRA/VEOA) and another 10% of the caseload is devoted to protecting whistleblower rights (IRA). You readers who are purists recognize that I'm doing some generalization here, but I know that you'll cut me some slack as the point here is relativeness, not specificity.
- About 60% of all initial appeals settled, a statistic that is steady year in and year out. That's why, among other reasons, here at FELTG we've decided to offer an open enrollment seminar in the fall specifically to teach settlement options and skills. We may think of ourselves as litigators, but the numbers say that we actually are more likely to be deal-makers.

The above is relatively typical for MSPB, with no great surprises in the statistics. However, there are a few findings that are worth an extra degree of thought:

- About 5% of the Board's non-furlough caseload last year was probationary terminations. Even though the appeal rights of terminated probationers are severely limited, smart agencies will have documented for the record why the employee was released during probation. You don't need much in the way of post-employment misconduct/performance procedures to terminate a probationer, but you still will want to have a legitimate reason documented in the file, both for the possible MSPB challenge as well as the inevitable EEO complaint.
- Only 2% of the Board's decisions resulted in mitigation of the penalty. With all the whining many of us do about comparator employees and judges making management penalty decisions, you'd think that number would be higher. Well, it's not.
- About 3% of the caseload in 2015 involved appeals of unacceptable performance removals under 5 USC 432. This lowly statistic has been relatively steady for maybe 20 years. With the frustration shown by Congress and certain members of the public directed toward "bad civil servants

who can't be fired," one might think that this number should be higher, mightn't one?

The big number for MSPB last year was the overall production rate. The Board issued over 28,000 decisions including all those furlough appeals. That's a higher volume than produced by MSPB since the appeals of all those striking PATCO employees back in the early 80s. Once more, the good people who work at the Board hunkered down and dispensed justice both expediently and (usually) fairly. We may not agree with all their opinions and procedural quirks, but we have to admit: they know how to do what they're being paid to do. Wiley@FELTG.com

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Non-Pecuniary Compensatory Damages Awards in 2015: A Brief Overview of Trends
By Deryn Sumner

As I promised last time, here are some facts and figures from decisions awarding non-pecuniary compensatory damages issued by the EEOC's Office of Federal Operations in calendar year 2015. I'll start with a caveat. This is based on my review of the decisions issued by the EEOC's Office of Federal Operations which I rely on Westlaw to accurately provide to me. Although I briefly review every decision that makes it to Westlaw for publication to find the notable ones, it's entirely possible, and rather likely, I missed a few.

By my count, in 2015, the Office of Federal Operations issued 40 decisions addressing awards of non-pecuniary damages in either Final Agency Decisions (FADs) or final actions issued after decisions from administrative judges. The lowest award was, not surprisingly, $0 (*Gregg Y. v. TVA,* EEOC No. 0120132920 (November 17, 2015)) and the highest award was $250,000 (*Augustine S. v. DHS,* EEOC No. 0720110018 (October 22, 2015)). Nineteen decisions addressed appeals of awards issued by agencies in FADs and 21 addressed appeals filed by either party regarding awards issued by administrative judges (AJs). Of the 21 decisions addressing awards issued by AJs, the Commission affirmed them with three exceptions: in *Complainant v. Dep't of Transportation,* EEOC No. 0120120933 (February 20, 2015) the EEOC increased an award from $45,000 to $60,000 and in *Complainant v. DHS,* EEOC No. 0720130035 (October 20, 2015), the EEOC increased an award from $55,000 to $125,000.

The only decrease of an award occurred in *Complainant v. Dep't of Air Force,* EEOC No. 0720090009 (June 5, 2015), where the EEOC decreased an award from an administrative judge of $100,000 to $25,000, finding the AJ's award was improperly "punitive" in nature.

In the 40 decisions addressed, the EEOC increased the award of compensatory damages in fifteen of those cases. Twenty-four decisions awarded $50,000 or less in compensatory damages. Only eight of the decisions awarded non-pecuniary compensatory damages of $100,000 or more. There were some common awards as well, which to me highlighted the imprecise nature of trying to compensate people for emotional and physical harm with money. Four decisions awarded $10,000; five decisions awarded $50,000; and four decisions awarded $60,000. Did these employees suffer exactly these specific amounts of harm? Of course not. The process is imperfect and based on assumptions and guesswork.

The biggest monetary change as a result of an appeal was *Brendon L. v. USPS,* EEOC No. 0120141161 (February 3, 2015), where the Commission increased an award of $13,000 issued by an agency in a FAD to $175,000. Other notable increases were *Complainant v. TVA,* EEOC No. 0120133384, 0120133385 (September 15, 2015) (increasing an award from $1,000 to $35,000); *Complainant v. Dep't of Veterans Affairs,* EEOC No. 0120140216 (February 25, 2015) (increasing the award from $30,000 to $100,000); and *Complainant v. USPS,* EEOC No. 0120141161 (February 3, 2015) (increasing the award from $13,000 to $150,000). These cases reflect an agency's tendency to undervalue claims of damages when issuing awards in FADs.
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Welcome, Kristie Haag!

Meet FELTG's newest staff member. Kristie joined the FELTG ranks as Registrar in early April. She brings well over a dozen years of professional experience to the position.

If you're attending any of our upcoming events – in person or on the web – you'll get a chance to work with her, either over the phone or by email. She'll also be moderating a number of upcoming webinars.

Next time you call, be sure to welcome her to the FELTG family!

MSPB Fails to Understand Its Role in Adjudication
By William Wiley

Once again, I willingly choose to engage in the crime of lèse-majesté. Consider the following exchange:

> ***Bill:*** *Hey, Deb, how did you get to work today?*
> ***Deb:*** *Well, I drove my Ford, as usual.*
> ***Bill:*** *You're lying. I saw you driving a truck.*
> ***Deb:*** *I wasn't lying. I drove a Ford like I said; it just happened to be a truck.*
> ***Bill:*** *No, when you said a "Ford," I decided that you really meant to say "car." When I saw that you weren't driving a car, I concluded that you were lying.*

Doesn't seem quite fair, does it. Deb said one thing; Bill re-characterized it as something else; then Bill decided that Deb was lying about the something else. It would seem that a person should be held accountable for doing what she says, not what someone else thinks she meant when she said it.

And that's exactly what the Board said almost 20 years ago in *Otero v. USPS*, 73 MSPR 198 (1997). In that seminal opinion, the judge had re-characterized the agency's charge into something he thought better fit the circumstances, and then found that the re-characterization was not proven. In its wisdom, the Board said the judge was wrong to re-characterize. Noting that 5 USC Chapter 75 states that the agency must tell the employee the "reasons" for the removal, and that the narrative paragraph the agency used states facts that are a statutory "reason," the Members faulted the judge for the re-characterization and reversed his logic as unsound. That rationale is very much like the rationale that leads to the conclusion that Bill's logic is unsound and unfair when he says that when Deb said "Ford," she meant to say "car."

Unfortunately, the Board appears to have reverted to the pre-*Otero* unfair way of doing things. Here was the charge and some samples of the specifications in a recent removal, *O'Lague v. DVA*, 2016 MSPB 20:

Charge: Inappropriate Conduct

> *Specification 1:* On 4 February 2015, you recorded in the VA Police Daily Operations Journal (VAP DOJ) that, at 0330 hours, you conducted a vehicle patrol of all parking lots, roads and grounds. However, Officer Bright testified that he and Officer Brad Huffman-Parent had possession of the keys for both VA Police vehicles at that time and

> you could not possibly have conducted such a patrol.
>
> *Specification 2:* On 4 February 2015, you recorded in the VAP DOJ that, at 0358 hours, you conducted a vehicle patrol of all parking lots and roads. However, Officer Bright testified that he and Officer Brad Huffman-Parent had possession of the keys for both VA Police vehicles at that time and you could not possibly have conducted such a patrol.
>
> *Specification 3:* On 4 February 2015, you recorded in the VAP DOJ that, at 0600 hours, you conducted a vehicle patrol of all parking lots, roads and grounds. However, Officer Bright testified that he and Officer Brad Huffman-Parent had possession of the keys for both VA Police vehicles at that time and you could not possibly have conducted such patrol.

On appeal, the judge, then the Board, concluded that these seven specifications actually were charges of "making false statements" EVEN THOUGH THERE ISN'T A SINGLE FREAKING "F" WORD IN SIX OF THE SPECIFICATIONS! And once that unjustified leap of conclusion-drawing is made, the agency was held accountable for not only proving the facts (the "reasons") in the specifications, but also the elements of a Falsification charge:

1. That there was false information,
2. Knowingly provided,
3. With the intent to deceive the agency, and
4. For personal gain.

Hey, Board. If DVA had wanted to charge "Falsification," it knows how to charge "Falsification." It clearly did not intend to charge *falsification* because it labeled the misconduct with the generic charge of "Inappropriate Conduct" followed by specific factual statements as to what the employee did that was inappropriate, as clearly allowed for in *Otero*. The Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency; the Board may not substitute what it considers to be a more adequate or proper basis. *Gottlieb v. DVA,* 39 MSPR 606 (1989). With all due respect, you are not in the charging business.

While I'm on a roll lecturing the Board, would you guys please stop talking like a bunch of lawyers who fell asleep during the *Plain English* class? How about "reasonable" instead of "did not exceed the bounds of reasonableness," "serious" instead of "nonfrivolous," and "lied" instead of "not credible"? We're about to get a new President, and it may be someone who prefers simple words. Make America strong again by using plain English.

Some might say that since the Board eventually upheld the charges in *O'Langue*, no-harm no-foul. Well, those some would be wrong. This is an ugly road for the Board to go down. MSPB's role in this business is and always has been to adjudicate the charges brought by agencies, not to come up with charges on its own, and then decide whether they have been proven. Agencies should live and die by their characterization of the charge. MSPB has long held that an agency is bound to prove what it charged, not what it could have charged (e.g., charge "Theft" and you'd darned sure better have proof of an element of permanent deprivation because the Board will not re-characterize your charge to some lesser charge such as "Unauthorized Removal"). The Board is out of line when it labels acts of misconduct differently from what the agency labeled them, thereby retroactively changing the agency's proof burden after the removal is taken. You can't change the rules after the game has been played (unless, of course, you're running a political convention).

By the way, if an agency charges "Inappropriate Conduct" and the Board on appeal re-characterizes the charge into "Falsification," has the Board not violated the employee's right to due process? MSPB sure beats up on Deciding Officials who testify on appeal to regarding a charge that was not noticed. Does not the same logic apply when the Board comes up with a new non-noticed charge? Hmmm.

In *O'Lague*, DVA said the employee was driving a Ford. The Board said that the agency was wrong, that a Ford is not a truck. And the Board is thereby driving me freaking crazy. Wiley@FELTG.com.

Stranded on a Sand Pile: Vehicle Misuse – Charges Sustained
By Barbara Haga

In the past two columns we reviewed cases where misuse of the government vehicle was not sustained. This month we will look at a case where the Board, and the Federal Circuit, upheld the disciplinary action.

Stranded on a Sand Pile

This case is relatively recent and has been discussed in some MSPB updates at training events that I have attended. But, the journey to a sustained removal was a difficult one for the Army, and the facts are so intriguing.

The details of the events and the charges are contained in the Board's decision *Hoofman v. Department of the Army*, SF-0752-11-0266-I-1 (2012). The Federal Circuit sustained the Board's ruling in a non-precedential decision titled *Hoofman v. Department of the Army*, 2013-3029 (Fed. Cir. 2013). Hoofman was a Construction Control Representative with the U.S. Army Engineer District in Anchorage, Alaska. Late one night, Hoofman was driving home in a government vehicle when, through a chain of events that are not quite clear, he stranded the vehicle on top of a sand pile.

He tried to free the vehicle from the sand pile by switching the gears back and forth but was unsuccessful. In a statement, Hoofman gave an account of what had happened. He said he was driving alone and had not been drinking when the car became stuck. When he could not get the vehicle off the sand pile, he walked to his apartment nearby. He admitted that he consumed alcohol at the apartment. At about 1:00 a.m. he was walking back to the truck and met two individuals and asked for their assistance to get his truck unstuck. The two agreed to help if Hoofman would give them a ride afterwards, to which he agreed. They could not get the vehicle unstuck. Hoofman could not recall when the two individuals got into the vehicle.

The police arrived at the scene at around 1:30 a.m. and observed the vehicle, Hoofman, and two other passengers inside the stranded vehicle. Hoofman refused to submit to a chemical breath test. The next day Hoofman pled guilty to a charge of Refusal of Breath Test, which resulted in the Alaska court revoking his driver's license, requiring him to use an ignition interlock system and to spend time in jail. The following morning, he contacted his supervisor and requested two weeks of leave due to personal family reasons, but at that point did not tell his supervisor about stranding the government vehicle, the fact that it was impounded, or his arrest. That information was not disclosed until he returned to work nearly two weeks later.

The agency removed Hoofman based on four charges:

- **Charge 1**: Driving a government vehicle while under the influence of alcohol
- **Charge 2**: Using a government vehicle for other than official purposes
- **Charge 3**: Loss of his driver's license for one year and having to use an ignition interlock device for one year after regaining the privilege to drive
- **Charge 4**: Attempting to deceive his supervisor.

The Board's decision noted that Hoofman's job required him to travel to remote places and to work independently.

In a surprising twist, the AJ did not sustain any of the four charges. The agency used an affidavit from the charging officer who responded to the scene to address charges one and two, and the AJ ruled that that was hearsay and had little probative value and did not sustain those charges. The AJ did not find Hoofman's request for leave for family reasons as a deception; she ruled that it did not meet the definition of "deceive" and that Hoofman did not personally gain from not providing the information after the vehicle and his arrest when he contacted his supervisor about the leave. The AJ

found that, although Hoofman's license was "revoked" for one year, he did not "lose" his license for one year as charged by the agency because the appellant held a valid driver's license, albeit one limited to driving with the interlock system, within approximately five months of the incident.

It seems that the AJ made some unusual rulings in this case, but there is a lesson to be learned about properly writing charges in this case. The agency petition for review only challenged the rulings on three of the four charges. The Army did not challenge the AJ's decision on the charge regarding loss of the driver's license. Charging loss of the license *for one year* and adding in the use of the ignition device made the charge complicated beyond what was necessary to show that he would not be able to drive for work purposes.

The MSPB overruled the AJ and sustained Charges 1 and 2 based on admissions made by the employee. The Board relied on the definition of driving under the influence as defined in Alaska's statute. The key factor here was that Alaska's courts had defined the term "operate" a vehicle to mean more than driving the vehicle, but the actual physical control of a vehicle with the motor running. The Board noted that this definition did not require that the vehicle be capable of movement. Hoofman did not dispute that he was in the driver's seat with the engine running when the officer responded. He also admitted that he attempted to remove the vehicle from the sand pile after he had been drinking by engaging the drive and reverse gears. The MSPB also found that there was ample evidence that the employee was under the influence of alcohol based on the fact that he admitted that he had been drinking and declined to take a breathalyzer test. The Board also relied on the charging police officer's affidavit, which noted that the appellant had bloodshot and watery eyes, slurred speech, a swaying stance, and a strong odor of consumed alcohol.

Charge 2 regarding use for unofficial purposes was supported because Hoofman acknowledged that he offered to give a ride to two unidentified individuals in exchange for their assisting him in removing the vehicle from the sand pile. The Board noted that the fact that he was unable to free the vehicle from the sand pile and complete the unauthorized trip did not disprove the charge.

The Board also found Charge 4 was supported because the AJ misconstrued the agency's charge. The AJ likened the charge of attempting to deceive the supervisor as a falsification charge, but the Board found it more similar to a lack of candor charge. The decision states, "We find that the appellant should have told his supervisor about his arrest and the impounding of his government-owned vehicle in order to make his stated reason for requesting leave 'accurate and complete.'" The Board also found that although Hoofman eventually told his supervisor about the incident before the supervisor could find out for himself did not change the fact that the appellant had concealed the matter from him for nearly two weeks.

Based on the three charges the Board sustained the removal, and in a brief decision, the Federal Circuit supported the Board's ruling.
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Webinar Spotlight:
Drafting Disciplinary Charges: How a Misplaced Adjective Can Cost You a Case
June 23, 2016

Time and time again, agencies lose charges – not because they can't prove the charges, but because of easily-avoided mistakes in the words they used to draft the darn thing.

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