Federal Employment Law Training Group

Training By Professionals For Professionals

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Introduction

A snow storm miracle happened to us here at FELTG recently. There was a government shutdown within the DC Beltway on March 5; six inches of snow area-wide. Unfortunately, that Thursday was the *Unacceptable Performance* day of our *MSPB Law Week* seminar, so we prepared for the shutdown on Wednesday by announcing that Deb, Ernie, and I would show up the next day, but we would understand if no one else managed to get there. Frankly, had I still been a federal employee, I would have welcomed the chance to sleep in and stay warm without feeling any guilt or suffering retribution. So it was with a degree of surprise and true admiration that when we counted heads Thursday morning, 39 of 42 participants sat in the classroom. Yes, 90% of the registered attendees risked life, limb, and certain death to learn more about holding civil servants accountable. We were once again reminded of how much we here at FELTG truly honor the work you do running the government. That's why the GAO article below really got us steamed.

Read it and be cold,

Bill

William B. Wiley,
FELTG President

UPCOMING WASHINGTON, DC SEMINARS

Workplace Investigations Week
April 6-10

Leave & Attendance Management and Performance Management
May 5-8

FLRA Law Week
June 1-5

AND, IN SAN FRANCISCO

EEOC Law Week
June 22-26

WEBINARS ON THE DOCKET

Merit Systems and Prohibited Personnel Practices: The Foundation of the Civil Service System
March 19

Significant Federal Sector Developments: The Latest and Greatest
April 16

Mediating Employment Disputes in the Federal Workplace: How to Make the Best of a Golden Opportunity
May 7

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GAO, OPM, MSPB: They All Let Us Down

By William Wiley

Oh, man, did the GAO mess up this one. And in doing so, it perpetuated a myth that should be offensive to every hard working civil servant in the federal government. It was in the newspapers, it was on national and cable news. "Get a federal job. You never have to worry about them firing you" one talking head said. Another pointed to individual examples of the horrific conduct and poor performance of specific civil servants as evidence that the government is incapable of holding employees accountable. To the typical news consumer, the obvious conclusion to be drawn from these reports is that the federal government is staffed with a bunch of incompetent, threatening, bozos who sit around all day looking at pornography on their fine government computers and who need serious oversight from Congress to be made even minimally productive and law-abiding.

The news media, I forgive, for the most part. What is supposed to be "news" these days has become more like entertainment, designed to capture the attention of readers and viewers rather than to present the facts in an unbiased way. For example, which of these articles would you rather read: "Federal Employee Spends Six Hours a Day Viewing Pornography at Work" or "Federal Employee Spends Eight Hours at Work Doing What He is Paid to Do"? Yes, pornography trumps government work most every time as entertainment.

But GAO, you get no such slack. Your work is supposed to be both factual and unbiased. Yet, you put out a report for Congress and the public that is based on horrifically incorrect information that also makes federal employees look like a collection of non-productive losers. Dated February 2015, you reported to the Chairman of the Senate Committee on Homeland Security and Governmental Affairs that it takes 170 to 370 days to remove a poor performer from government. Well, it certainly CAN take that long, but it certainly DOES NOT HAVE to take that long, if you (the employment law practitioner) know what you're doing and you (the agency) develop the practices and policies to cut this time to not much more than a month. Here are some of the major fallacies put forth in the report, found primarily in a nice flow chart on page 15 of the report, if you're interested:

1. **Time frame of 80-200 days to observe, monitor, and counsel the poor performer.** There is no practical need or legal requirement for an observation period to take this long. There is a case law requirement that an employee knows his performance standards for a "warm up" period; in other words, the supervisor cannot give an employee new standards one day, then begin a performance-based action the next. The employee must be given a reasonable time period to adapt to new standards, a period roughly of 30-60 days. In addition, there is no statutory or regulatory requirement that the employee be counseled or provided feedback during this period. Neither OPM through regulation nor MSPB through case law requires employee counseling prior to initiating a performance-based action. As federal employees are routinely provided performance standards at the beginning of each year, rarely is there a need to wait 60 days after the employee's performance is determined to be deficient. I would estimate that by this time of the calendar year, at least 95% of the federal workforce has had their standards in place for longer than necessary to satisfy the "warm-up" requirement. An agency may *choose* to counsel, and it may *choose* to tolerate poor performance for six months or more, but it is not *required* to do so. **Actual time required: 0.**

2. **Time frame of 50-110 days to document instances of poor performance, consult with human resources and general counsel, provide feedback and implement a Performance Improvement Plan (PIP) with the agreement of the employee.** There are three major misunderstandings contained in this hypothetical time frame:

a. There is no requirement to "document instances and work with Human Resources (HR), General Counsel (GC), and higher-level supervisor to determine next steps." In fact, it does not make sense to do this once the supervisor determines that the employee is performing unacceptably. That is because (with rare exception) the supervisor will never have to defend the decision to implement the next step, the initiation of a Performance Improvement Plan (PIP). That has been the law since 1978.

b. I routinely draft PIP letters in about an hour, maybe two hours for a complex position. And the employee does not have to "agree" with the PIP as stated in the report. The supervisor drafts the PIP initiation letter and hands it to the employee. If the employee does not like it, he has no recourse. A good PIP initiation letter is no more than two pages long; many are one page.

c. Once the PIP is initiated, the employee should be given 30 days to demonstrate acceptable performance, according to the US Merit Systems Protection Board decisions. And the "frequent feedback"

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suggested by the report can be satisfied with weekly meetings; perhaps even bi-weekly meetings. In these meetings, the supervisor has the obligation to clarify with the employee what he is doing wrong. The meetings and subsequent documentation usually take one to two hours each week. **Actual time required: 30 days for the PIP.**

3. **Time frame of 40 to 60 days to work with HR and GC to prepare removal notice, hear the employee's response, and make a decision as to whether to remove the employee**. The only officials who must consult at this stage are the immediate supervisor and a higher level manager. There is no requirement that HR or GC be involved to any great degree. The best practice is for HR or the GC to work with the supervisor during the progress of the PIP, thereby ensuring that the supervisor is providing the employee clarity of expectations, and simultaneously documenting incidents of unacceptable performance that occur during the PIP. If this is done, the proposed removal of the employee for failing the PIP can be issued the day after the PIP ends, at which time smart supervisors place the employee on administrative suspension and remove him from the workplace for safety reasons. By law, the employee continues to receive pay for at least 30 days after his removal is proposed, a period during which he can defend his poor performance to the higher-level manager who will be making the decision on the proposed removal. **Actual time required to remove the employee from the workplace after failure of the PIP: 1 day (although by law the employee continues to be paid for 30 more days).**

By the way, if you're looking at the graph in the GAO report, you should pen-and-ink correct the last step shown in the flow chart. If the deciding official upholds the proposal ("yes"), the employee then gets rights to MSPB. The chart shows it just the opposite.

4. **Side bar comment next to the flow chart regarding the possibility of a delay during the dismissal process due to a grievance, EEO complaint, or request for reasonable accommodation.** Of these three, the only one which actually requires a delay is a claim of the need for an accommodation of a disability; the other two actions do not require that the process be delayed.

The conclusion contained in the report that the total estimated time required to remove an unacceptable performer is 170 to 370 is wrong. In my practice, I routinely arrange for poor performers to be removed from the workplace for unacceptable performance in 31 to 35 days. It saddens me greatly that whoever provided the information to GAO on which its conclusion is based simply does not understand the Chapter 43 process that is used to remove poor performers, a process that has been in place nearly four decades and is clear both in regulation and case law.

But I can't stop with just GAO. Yes, those guys screwed up the facts on which their conclusions are based. However, GAO is not an expert on the civil service, whereas MSPB and OPM are. Hey, OPM Director Archuleta, GAO just said your system for holding government employees accountable for poor performance is an abomination. Where's your press release pointing out the mistakes in the GAO report, defending your regulations, and thereby demonstrating that civil servants can indeed be held accountable? Hey, MSPB Chairman Grundmann, where's your interview with Charlie Rose during his similarly-critical "Uncivil Servant" piece on *CBS This Morning*? You're supposed to be in charge of protection of the merit systems. The Chapter 43 performance removal process is a foundational aspect of a hugely important federal merit system. Why aren't you protecting it by defending it when it is attacked publically and unfairly?

I was proud to be a federal employee for over a quarter of a century. I expect that most every reader of this newsletter feels the same pride that I did (if you don't, stop reading and get back to work). When something like this GAO report goes public, accusing our system of failing to hold employees accountable, it hurts us all. Even though we might know that its facts and conclusions are incorrect, the public does not. And when those who are supposed to defend us don't, it hurts even more. Wiley@FELTG.com

Program Spotlight:
Workplace Investigations Week
April 6-10, 2015
Washington, DC

From employee misconduct to EEO investigations, it's important to know - and to carry out - the proper steps when conducting every type of employment investigation in the federal workplace. We've got you covered with William Wiley, Michelle McGrath and Ernest Hadley. In addition to providing you with practical investigative skills, we'll also give you detailed information on writing effective reports. Registration is open now. Visit www.feltg.com for details.

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Let Me Tell You a Story About My Briefs
By Deborah Hopkins

As attorneys and employment law practitioners, we are storytellers. We don't write fiction - at least, we aren't supposed to - but it is our job to tell our client's side of the story. While in hearing we have the opportunity to tell the story to the judge, but that doesn't always go perfectly. Opposing counsel interrupts with objections, the judge asks a question that halts your train of thought, or the witness doesn't say what you think she will say and it ruins your momentum.

That's why legal writing is so important to what we do. We don't teach FELTG's *Legal Writing Week* just for kicks (although Ernie and I are looking forward to bringing that class to San Francisco this December 7-11). A piece of writing is an optimal opportunity to tell your client's story to the judge without any external interruptions. In most cases the best opportunity to drive a point home is in the closing brief. It's your last chance to leave an impression on the judge.

You may be following the recent whistleblower-reprisal, Individual Right of Action (IRA) appeal of the 25-year MSPB employee that we've been covering in this newsletter. If not, you can find the archives on our website. Anyway, the closing briefs in this litigation provide an excellent, real-world learning opportunity on the various ways to execute legal writing.

Take a look at the opening text from MSPB's closing brief:

> As ordered by the Administrative Law Judge at the conclusion of the hearing that took place in the above-captioned appeal in December 2014, the Agency submits this closing brief.
>
> As discussed below, this appeal should be dismissed as Appellant has failed to satisfy all of his legal burdens under the law. Moreover, the Agency has demonstrated by clear and convincing evidence that it would have acted no differently in the absence of any alleged protected disclosures or activity by Appellant. As made apparent by the voluminous record and exhaustive witness testimony at the hearing, this appeal focuses largely on Appellant's prolonged personal disagreements with lawful agency policy and the corresponding actions of Agency officials. However, such claims cannot serve as the basis of any finding of illegal conduct by Agency officials under the Whistleblower Protection Act. Accordingly, for the reasons stated herein, this appeal should be dismissed.

And, here's what the appellant's representative opened with:

> "La-la-la-la-la, I don't want to hear this." This may be the single most telling statement in this entire case as it evidences the cultural bias against those who have the temerity to speak truth to power at the MSPB. Uttered by the Chairman of the Merit Systems Protection Board (MSPB) with a sing song voice, while her fingers were in her ears, these words show the attitude of the highest levels of MSPB leadership when being told about problems within the MSPB.
>
> The Appellant in this case has doggedly sought to fix problems with case processing within the Office of Appeals Counsel (OAC). He has done so verbally and in writing. The record is replete with the assertions and claims made by the Appellant and are laid out quite well in the Appellant's appeal in this case. We will not belabor them here.

Well, then. Which brief do you want to read first?

This comparison underscores a point we teach in all our programs: you don't have to write in legalese to make your point clear. Don't let the notion of sounding important or intelligent get in the way of telling your client's story. Don't belabor the facts unless there's a very good reason to do so.

That's a lot of don'ts. There are also some do's. Do make your writing interesting, if possible. (I admit, the fruit was ripe for taking on this one, because this was the spiciest MSPB hearing I have ever been to. I'm told by those who've been in the business since the CSRA to appreciate it because this will never again happen during my career.) Do put the important, memorable points right up front or at the end, not in the middle where they might be lost. Do use a witness' words, because direct quotes can be far more effective than paraphrasing what the witness said. Do write the way you speak; see your brief as a chance to have a conversation with the judge.

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I'm not saying the MSPB's brief was poorly written. There are some excellent segments and the writer clearly has extensive legal background. If you'd like to see for yourself, I'll forward it to you. It's 59 pages long though, so make sure you set aside a few hours to get through it. By contrast the appellant's brief is 20 pages long. An interesting point about that is the appellant's counsel, who wrote the brief, was an MSPB Administrative Judge for 21 years. My guess is, he wrote this as a story because that's the kind of brief he appreciated reading when he was on the bench. There are probably judges out there who disagree with this position, and would prefer a longer brief that rehashes the minutiae of the hearing. I'm just here, telling you what I know.

People sometimes accuse us at FELTG of being biased against the MSPB. That's just not true. We are biased, yes - but our bias is against injustice in the federal employment law arena, and when we need to make noise about it, we do. But don't misunderstand the point of this article. There's no injustice to be found in a wordy brief, and this article isn't meant to attack or highlight the merits of this case or to stomp on the Board for all its bad decisions in the past (yes, we still talk about the Terrible Trilogy during every MSPB Law Week). This is simply a comparison of two very different writing styles.

Now take a look at the closing paragraphs of each brief.

MSPB:

> For the reasons stated herein, Appellant cannot establish that his "disclosures" were protected, that any alleged protected activity was a contributing factor in any Agency decision, or that the Agency would not have taken the same action regardless of any protected activity. Accordingly, this appeal should be dismissed in its entirety.

Appellant:

> The Appellant, [redacted], is a good and honest man with a love of the law, his job and the Merit Systems Protection Board. He has worked hard for 25 years learning MSPB law and procedure and working to make the Board the best agency it can be. He has devoted himself to representing his fellow employees as an officer in the professional association. He has stood up numerous times when it was easier to sit. He has voiced hard truths to those in power when it would have been easier to stay silent. He has pointed out inconvenient truths to those who "don't want to hear this." He has risked a lot and, starting in July of 2013, he has paid a lot.
>
> He was not selected for a position for which he was more qualified than the candidate chosen, and the reasons for his non-selection are pretextual. He was proposed an overly harsh and lengthy 21-day suspension for doing nothing wrong, a proposed suspension longer than this very Agency upheld in other cases involving significant and costly misconduct. He had his responsibility for the case report taken away. He has suffered and has paid a dear price because he had the love and the courage necessary to stand up and speak truth to power.
>
> The Appellant has met his burden of proof. The Agency has failed to meet its burden of proof to persuade the trier of fact by clear and convincing evidence that it would have taken the same actions in the absence of the Appellant's protected disclosures. The Agency has retaliated against the Appellant in violation of the Whistleblower Protection Act. And so we ask that you find as such, and schedule a hearing on damages at the soonest time convenient to all parties.

Oh bright legal minds in our field, go forth and use these examples as a learning tool, to help expand the way you think about writing, and to break the mold when the proper situation presents itself. Hopkins@FELTG.com

Complainants Not On The Agency Payroll: When Private Sector Employees Have Standing To File Federal Sector EEO Complaints

By Deryn Sumner

What do employees of Booz Allen Hamilton, CACI International, and Lockheed Martin have in common? In the past year, all three were found to be joint employees of both their private sector employers and the federal

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government for purposes of being able to proceed with federal sector EEO complaints. Those of you who decide whether formal complaints should be accepted or dismissed are no doubt familiar with the factors relied upon to make this decision. Called the "*Ma* factors," after *Ma v. HHS,* EEOC No. 01962389 (May 29, 1998), they include 12 factors to be considered in determining whether someone is a joint employee for purposes of having standing to proceed with an EEO complaint. The information needed to make this determination includes whether agency employees provide the assignments, supervise the employee, approve their use of leave, provide performance feedback, and can take actions that result in the employee's termination (the vast majority of these cases deal with terminated contractors). Other factors include whether the work performed is simple or complex, if it relates to the mission of the agency, the length of the employee's assignment with the agency, whether the agency provides the work space and equipment, whether the employee receives leave or benefits from the agency, and if there is any intention of the parties as to whether the employee is a contractor spelled out in the contract or elsewhere. In reviewing a formal complaint filed by such an employee, the agency must examine each of these factors and determine whether the totality of the facts point to the existence of a joint employment relationship. And if the agency finds no standing and the complainant appeals, the Commission does the same analysis and more than half the time finds there is, in fact, a joint employment relationship and remands the complaint for processing.

Okay, so someone who is hired and paid by a private sector employer can proceed with a federal sector EEO complaint if enough of these factors apply. What about other people who don't receive a paycheck from the federal government, such as interns and volunteers? The Commission has issued guidance on that as well, specifically in the EEOC Compliance Manual, No. 915.003, Section 2: Threshold Issues. Generally, unpaid employees (including volunteers and unpaid interns) are not considered "protected employees" under Title VII. However, as always in the field of law, there are exceptions. There could be standing if an employee receives benefits that can be considered "significant remuneration" and not just the "inconsequential incidents of an otherwise gratuitous relationship." This less than clear language comes to us from a 1993 decision from the Fourth Circuit. Luckily the Compliance Manual provides some specific examples. If the agency provides benefits such as workers' compensation, a pension, group life insurance, or access to a professional certification, the person could be considered an employee for purposes of proceeding with an EEO complaint. The other avenue to protection is if the agency requires the employee to work as a volunteer to obtain regular employment or holding a volunteer position leads to regular employment with the agency. The complainant in *Complainant v. Veterans Affairs*, 0120133242 (February 6, 2014) initially had his formal complaint dismissed because he of his status as an unpaid Social Work Intern. The Commission overturned the dismissal because the complainant was required to complete the social work internship program in order to become a licensed social worker. Since the complainant fell under the exception, he was considered a protected employee and could proceed with a formal EEO complaint.

For those of you interested in reading the underlying decisions for the three employees mentioned at the beginning of this article, they are *Complainant v. Army,* EEOC No. 0120142750 (January 28, 2015); *Complainant v. Navy*, EEOC No. 0120141480 (August 13, 2014) and *Complainant v. DHS*, EEOC No. 0120122912 (April 29, 2014). Sumner@FELTG.com

Webinar Spotlight:

FELTG introduces a NEW ten-part webinar series especially for supervisors, and those who advise them: **Supervisory HR Skills: What You'll Need to Succeed.**

Join us every other Tuesday from 1:00 - 2:00 p.m. eastern, beginning April 14. Topics include accountability for performance and conduct, mentorship, handling difficult employees, leave issues, reasonable accommodation, and EEO essentials.

Dismissal for Refusing to Provide Medical Documentation

By Barbara Haga

Last time, we reviewed a case about ordering examinations in conjunction with trying to return an employee to duty from the workers' compensation rolls. This time, we will look at ordering an employee to produce medical information when he occupies a position with established medical requirements.

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A Military Disability Determination

Ellis Archerda v. Department of Defense, 121 MSPR 314 (2014), is an important case for several reasons. First, it was issued by the Board in July 2014. At a time when many of us probably look at MSPB decisions as more likely to chip away at management's authorities, this one backs up an agency's right to order an employee to produce medical information about a military disability determination which was germane to a medical determination regarding the employee's civilian position. Secondly, it is a precedential decision. And, last but not least, the steps the agency followed are a good template to follow if an agency is faced with issues related to failure to comply with medical examination requirements.

Archerda was a GS-7 Firefighter with the Defense Logistics Agency (DLA). Firefighter positions are part of a short list of white collar positions that have established medical requirements. If you would like to review them, the Firefighter requirements are available at: http://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/0000/fire-protection-and-prevention-series-0081/

Archerda was also a military Firefighter having been deployed with the Air Force Reserves. The decision notes that as a result of his overseas assignments he suffered from Post-Traumatic Stress Disorder (PTSD). Archerda was eventually granted a disability retirement from the reserve Firefighter position.

The PTSD affected his performance in his civilian position when he had to leave a DLA training session because of severe emotional distress. At that point, DLA restricted him from performing safety sensitive duties. He received in-patient psychiatric care at a VA hospital and continued in treatment after he was released from the hospital. He was returned to regular duty in February 2010. At that time he was taking medication to manage the PTSD and his VA physician indicated that there not any noticeable side effects.

In September 2010 Archerda had an annual medical examination. He reported that he had been granted disability retirement from the military Firefighter position and at that time he had a 50% VA disability rating because of the PTSD. Obviously this created concern on the part of the employer because the disability rating was very high and he had been retired from essentially the same military position as his civilian position. DLA clinic personnel allowed him to return to full duty without restriction with the agreement that he would provide the report for his new disability rating to the clinic personnel. He did not do so, and thus was restricted from safety sensitive duties again. In March 2011, he was given a letter asking that he provide this documentation to the clinic. When he did not comply, he was suspended in June 2011 for 14 days for failure to follow instructions.

After he served the suspension, his supervisor issued another letter requesting additional medical information. Archerda did not submit the medical report at this juncture. The agency proposed his removal for failure to follow instructions - which did not convince him to produce the report. Ultimately, DLA issued a decision to remove him effective December 7, 2011.

The View from the MSPB

Archerda appealed and the AJ overturned the removal finding that the agency did not have authority to require the employee to produce documentation related to his PTSD. In sum, the initial decision found that the agency's order was not proper. On petition for review, the Board found that the order was proper and that Archerda failed to comply with it, and thus the removal was sustained.

The Board's analysis reinforces the right to order medical examinations and to require additional relevant information from the employee. The Board's decision notes that 5 CFR 339.301(b) allows an agency to require medical examinations on a periodic basis when the individual occupies a position with medical standards of physical requirements which the Firefighter position did.

The agency was successful in establishing that the position required Archerda to function without supervision while under extreme stress in emergency lifesaving situations as the sole medical authority available. The position required the incumbent to assess emergency situations to establish medical priorities without advice or direction and to direct other personnel.

The clinic personnel testified that they had significant concerns regarding the PTSD and the disability retirement from the military position, noting that a disability rating of 50% based on PTSD "… represented a significant social and/or cognizant impairment for a chronic relapsing disorder." The agency physician testified that the employee "… was taking significant psychotropic drugs that could cause fatigue and affect coordination and cognitive memories." The physician indicated that the medical information Archerda had

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provided did not contain sufficient detail for the clinic to objectively evaluate his ability to perform safety-sensitive duties.

The Board found that the agency was entitled to require the employee to submit the military disability information as part of the periodic medical examination and that Archerda had a duty to cooperate in the examination in accordance with 5 CFR 339.102(c) which states in part, "An employee's refusal to be examined in accordance with a proper agency order authorized under this part is grounds for appropriate disciplinary or adverse action." The Board's decision notes that the agency did not run afoul of the Americans with Disability Act because the request for the psychiatric information was narrowly tailored, job-related and necessary to make a decision about Archerda's ability to meet the demands of his Firefighter position. Haga@FELTG.com

Program Spotlight:
Leave & Attendance Management and Performance Management
May 5-8, 2015
Washington, DC

These four days will give you the knowledge you need to effectively design and manage performance standards and plans and measure performance, and to advise managers on individual cases related to leave, attendance, and more. In addition to a focus on relevant laws, regulations, policies, and legal cases, the course will include multiple workshop-type exercises to give the student numerous practical takeaways. Registration is open now. Check out www.feltg.com for details.

You Won't Believe This One Simple Trick That Can Save Your Agency Thousands!

By Deryn Sumner

Note: Since I think it would be frowned upon to insert cute photos of baby hedgehogs to lure you to read my articles, I'm hoping the use of a bait title will. Alternative titles: *What Plaintiff Attorneys Don't Want You To Know About Offers of Resolution!* or *Five Unbelievable Things You Never Knew About Offers of Resolution!*

Let's talk about a very effective but underutilized tool to limit an agency's liability where there is clear litigation risk or limited recovery for the complainant – *offers of resolution*. Similar to offers of judgment in federal court, offers of resolution are included in the Commission's regulations at 29 C.F.R. 1614.109(c).

Offers of resolution can only be made during specific timeframes which differ depending on whether the complainant has an attorney. If the complainant is represented by an attorney, then an offer of resolution can be made anytime from the filing of the formal complaint until 30 days prior to the scheduled hearing. If the complainant is not represented by an attorney, then the offer of resolution can only be made from when an administrative judge has been appointed until 30 days prior to the scheduled hearing. One of the purposes of requiring these offers to be made 30 days prior to the scheduled hearing is judicial economy. *See Pearman v. Navy*, EEOC No. 07A40063 (November 18, 2004).

Offers of resolution must include certain items in order to be effective and not just a settlement offer.

- First, the offer must be in writing and must explain to the complainant what the consequences are for failing to accept the offer.
- Second, the offer of resolution must include all aspects of relief the complainant could receive if he or she prevails on the complaint. This includes non-monetary relief. For example, if the complainant has alleged that she did not receive a promotion because of discrimination, an effective offer of resolution must include placement in the same or substantially similar position with back pay, compensatory damages, attorney's fees, and any other applicable relief. This relief can be, but doesn't have to be, itemized. The downfall of most ineffective offers of resolution I've seen is the failure to include attorney's fees as an item of relief.
- Third, the offer of resolution must include 30 days for consideration of the offer prior to its expiration. Nothing prevents an agency from making subsequent offers of resolution if the complainant fails to accept the first one and the offer can be used as a jumping off point for typical settlement discussions.

You may be thinking to yourself, if the agency has to include all aspects of relief to a complainant anyway, how do they benefit the agency? If the complainant does not accept the offer of resolution and the relief ultimately awarded, from the administrative judge, the agency in a Final Agency Decision (FAD), or the Commission in an appeal to the Office of Federal Operations, is less than what the agency offered in the offer of resolution, then the complainant cannot recover attorney's fees for any work performed after expiration of the offer of resolution.

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There is an exception where the "interest of justice" would not be served by denying attorney's fees.

Chapter 11 of Management Directive 110 provides an example of this exception: "where the complainant received an offer of resolution, but was informed by a responsible agency official that the agency would not comply in good faith with the offer (e.g., would unreasonably delay implementation of the relief offered). A complainant who rejected the offer for that reason, and who obtained less relief than was contained in the offer of resolution, would not be denied attorney's fees in this situation." (As an aside, I recommend bookmarking MD-110, available on the Commission's website at http://www.eeoc.gov/federal/directives/md110.cfm, and reviewing it and citing it as a reference when making arguments regarding Commission procedures.) The Commission has upheld awards of attorney's fees where the entitlement to fees was cut off by rejecting an offer of resolution. For example, in *Williams v. Veterans Affairs*, EEOC No. 0120123334 (August 15, 2013), the complainant's attorneys sought $24,339.50 after prevailing on a case. The administrative judge noted that as the complainant had rejected an offer of resolution, there was no entitlement to fees after rejection of the offer. Therefore, the AJ only awarded $16,224.50, a decision the Commission affirmed. The agency representatives in that case saved the agency $8,115.00 by making the offer.

When should you consider recommending to your authority to make an offer of resolution? They should be considered in cases where the amount of relief to be recovered if the complainant prevails is very small. If the complainant is represented by an attorney for a claim alleging discrimination on a minor issue, such as the issuance of a letter of caution or a lowered performance appraisal, and there is little evidence of harm, it may make sense to offer to rescind the personnel action and pay a small amount of compensatory damages and the current attorney's fees. If there is a strong chance that the complainant will prevail at hearing and the agency will be on the hook for the relief, offers of resolution can limit the amount of the complainant's attorney's fees that would be incurred at hearing. Sumner@FELTG.com

MSPB Assumes the Role of Assigning Agency Work

By William Wiley

Pop Quiz: Who is responsible for deciding what work the agency should do?

a. Agency management
b. The US Merit Systems Protection Board

Sounds pretty basic doesn't it. The Board is the overseer of the merit system and the agencies decide what work is to be done. Sort of *Civil Service 101* if you're into basic college courses.

Unfortunately, on occasion the Board oversteps its responsibility in this area. Not on purpose, I don't think, but without full consideration for that it's doing.

Take the case of *Chavez v, SBA*, 2014 MSPB 37, a decision written about with fondness and in detail in a previous article in this month's FELTG Newsletter. SBA removed Mr. Chavez from the position of Public Affairs Specialist, GS-13. For reasons we may or may not agree with, the Board found removal to be unreasonable, and mitigated the action to a 60-day suspension and a one-grade demotion, to a Public Affairs Specialist, GS-12.

As we have written about before in this space, a 60-day suspension makes little sense, in either a managerial or psychological framework. The agency is disadvantaged when an employee is away from work for any period of time. There is no evidence AT ALL that a longer suspension is more likely to correct misconduct than is a shorter suspension. Therefore, suspensions that exceed a couple of weeks serve no legitimate purpose and harm the agency. Why the Board sees them as appropriate is beyond understanding.

But the more significant aspect of this mitigation is the demotion. Demoting an employee from a higher-graded position to a lower-graded position requires that the agency forgo duties at the higher level and accept duties performed at the lower level. That's how classification works. It violates OPM regulations (and common sense) to assign an employee to a lower-graded position, and then assign work at the higher grade.

When an agency selects demotion as a penalty, it is doing so with the knowledge that it will be accepting lower-graded duties, that it can forgo or reassign the higher-level duties that warranted the higher classification of the current position. However, when the

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Board mitigates a removal to a demotion as it did in this case, it does so without regard for and consideration of whether the agency can get by with lower-graded duties being performed. In other words, SBA has said it need a Public Affairs Specialist at the GS-13 level who doesn't send sexy emails to people, and the Board has directed the agency to accept the services of a GS-12 Public Affairs Specialist, whether that level of duties fulfills the needs of the agency, or not.

Of course, SBA could conclude in response to the Board's mitigation of the removal that it needs work performed at the GS-13 level, and choose not to implement the demotion aspect of the order (as the Board does not say what the penalty should be; only what the highest level of discipline can reasonably be). However, if it does that, it is forgoing a significant part of the punishment that the Board has said that Mr. Chavez deserves. Perhaps if the Board had taken note of the unavailability of lower level work (if indeed lower level work is unavailable), it would have found that with a demotion not being appropriate, perhaps the removal after all is within the range of reasonableness.

It certainly is not my place to lecture the Board as to how it should do its work. I was unbelievably lucky to work at MSPB for almost a decade, and that exhausted my chance to make things better. However, if you happen to be in a position to have a serious discussion with one or both of the remaining members, I'll pay for the drinks if you'll get them to try to think practically and not so darned judicially. The Lloyd-Lafollette mandated in 1912 that discipline meted out by the federal government should be in support of an efficient government. Suspensions of more than a couple of weeks without proof that they are better at correcting misconduct and demotions to pay grades that might not be consistent with the work that an agency needs to get done are simply not in compliance with that century-old requirement for efficiency. Wiley@FELTG.com

Hearing Practices: Best Practices for Responding to Discovery

By Deryn Sumner

So far in this series, we've discussed what to do when you first receive a case assignment and how to prepare for initiating discovery. Now let's talk about best practices for responding to the other side's discovery requests. You receive them, you review them, you may (depending on who is representing the other side or if they have a representative) have thoughts ranging from, "Did they even review the accepted issues before serving these blanket requests?" to "How on earth does that even relate to the facts of this case?" And then you put the document aside until the week the responses are due, right? Wrong! Responding to discovery in good faith takes time and you should start on your responses as soon as you receive the requests.

Now if you are representing the complainant, your job is a bit easier as there's typically just one source for the information (unless you need to provide medical records). Depending on your clients, you may be able to send the requests to them to do an initial draft, although some, depending on medical conditions or education level, may need more assistance. If you are representing the agency, your first step should be to determine who has the information and documents responsive to the requests. If you've conducted witness interviews as we discussed in January, you should already have a sense of who is involved and what documents they have in their possession. Since, during that call, you talked to them about what discovery is and how you will likely be contacting them again down the road, it should not surprise them when you come calling again with the actual requests. Err on the side of inclusion when requesting documents from witnesses. You are in a better position to determine if something is responsive, and no representative wants to be in the position of finding out about additional responsive documentation during a deposition of the witness or worse, after the close of discovery or on the eve of hearing. Once you have the information, confirm with the witnesses that everything they have provided is correct and obtain sworn declarations from them to that effect. Remember that as the representative, you do not (and should not) have first-hand knowledge of the information surrounding the case so you are simply providing the objections and formatting the responses and not providing the information sought. As always, there's an exception to that – requests for identification of witnesses and exhibits that your side intends on relying upon at a hearing are usually something of which you have knowledge.

A few other notes:

- Objections need to be sufficiently detailed so as to actually explain why the request is objectionable. No, you can't just say that something is overly broad or not relevant without explaining why. Your objection should focus on why the timeframe or scope is objectionable and you should offer to narrow down the request in order to provide the relevant information in good faith.
- If you object to providing some of the documents sought, you still have the responsibility to gather

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it. Why? Well, if the administrative judge compels you to provide it, you will likely only have 10 days to produce it. Second, do you really have a good faith basis to object on some grounds if you don't actually know what the documents say?

- Finally, if the information being sought or provided contains information that could be considered personally identifiable information or that you want only limited eyes to see (for example, your client's confidential medical information or personnel information relating to identified comparator employees) consider requesting the entry of a protective order, a filing we'll talk about in more detail next month.

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A Decision with Many Mini-Lessons

By William Wiley

One of the Board decisions that hit the proverbial fan late last year was *Prouty & Weller v. GSA*, 2014 MSPB 90. And by "hit the fan" I mean got a fair amount of press and transient attention from our lawmakers on Capitol Hill. In that decision, the Board overturned the removal of two SESers who were charged with being responsible to a degree for the agency's "lavish" spending on a big conference that resulted with all you wonderful federal employees being told to curtail conference attendance until things cooled down. Thank goodness that here at FELTG, we don't present "conferences," we present "seminars." And if any of you think that our seminar-supplied coffee and Danish are "lavish," you really need to get out more. Some days, I can hardly force the stuff down.

Although there was much gnashing of teeth by those in the media and on the Hill who tend to gnash teeth whenever there's a federal employee they think should get fired doesn't, in our little FELTG newsletter, we spoke out in defense of the Board's decision. Although the principles relied upon may not make sense to those in the private sector familiar with firing people with a snap of the fingers, the Board's analysis rested on firm established principles of civil service law. In no particular order, here are some mini-lessons in federal employment law that are discussed in *Prouty & Weller*:

- Senior managers high up the chain of command cannot be held accountable for the conduct of subordinate employees unless those managers have direct knowledge of the conduct and acquiesced. This concept is different from the colloquially accepted idea that "the buck stops here" and that whoever is in charge is liable for anything bad that happens below him. Yes, we see top managers quit on occasion because they take responsibility for what happened below them anywhere in the organization. But that's not an accepted principle of civil service law that can be used to fire someone. There has to be actual knowledge on the part of the senior manager.
- If you make statements of fact in a proposed removal YOU HAVE TO HAVE EVIDENCE TO ESTABLISH THOSE FACTS IN THE RECORD OR YOU LOSE. For example, the agency in this case charged the appellants with tolerating excessive expenses for the conference. Yet, it did not provide any evidence of what the expenses were. Rather, it submitted an OIG report of investigation into the matter without the supporting evidence.
- It appears that the agency may have felt that it was constrained in what evidence it could use in this case because there was an on-going criminal investigation. This is incorrect as a matter of law. Nothing requires that an agency withhold evidence related to a criminal investigation, and everything says that employees are entitled to know what evidence the agency is relying on to propose their removals.
- Sworn testimony at hearing trumps summary, unsworn, hearsay conclusions in an OIG report every time.
- To sustain discipline for misconduct, there has to be a rule that the employee broke. No rule – no discipline. If you're going to charge someone with something (in this case, allowing 70 employees to attend a conference), you have to explain how the charged conduct is actually rule-breaking MIS-conduct.
- Although SESers can be held to a higher standard of conduct, that does not mean that there is a parallel concept that says that SESers have a heightened duty to investigate actions of subordinates, or that less proof is needed to support discipline.
- If you say something in a decision letter not also in the proposal letter, you will probably violate due process, and thereby commit a Constitutional violation. Geez, how many times do we need to point that out? This has become the most common inexcusable mistake agency representatives have been making lately. Come to our famous *MSPB Law Week* seminar, next offered SEP 14-18, and we'll show you the pretty PowerPoint slide with all the colorful bubbles that will permanently burn itself into your memory, especially valuable for those of you who learn from pictures better than words.

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As we say when we want to dodge responsibility for something, when you read this decision you will see that “mistakes were made.” And of course, those mistakes are super-easy to see in hindsight as we have done with this article. But what's important, though, is that we all learn from our own as well as the mistakes of others. The shortcomings in *Prouty & Weller* are classic. Now that you've read this far, you no longer have an excuse if you make the same ones. Wiley@FELTG.com

Positions Available

The Law Offices of Gary M. Gilbert & Associates seeks a **full-time paralegal** to provide litigation support to attorneys at their office in Silver Spring, MD. Paralegals receive hands-on experience writing legal correspondence, interacting with clients on a frequent basis, and participating in litigation strategy discussions, in addition to duties such as serving documents and calendaring deadlines. The ideal candidate will have solid writing abilities, be detail-oriented with terrific organizational skills, and must thrive in a deadline-driven environment, often balancing multiple assignments at once. Paralegals must also be self-motivated and effective team players. Candidates proficient in Spanish are encouraged to apply.

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Applicants for either position should submit a cover letter, resume, and writing sample to the attention of Sean Riley, HR Assistant, by email to sriley@ggilbertlaw.com.

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