Federal Employment Law Training Group
Training By Professionals For Professionals

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As many of you readers know, the Federal Employment Law Training Group, LLC, began as a tiny little company, started by a bunch of guys who liked hanging out with each other, who thought it more fun to play with PowerPoint than to actually practice law. However, in the 15 years that have passed since that memorable "business plan" was scratched out on the back of a cocktail napkin, we've grown into a small-ish, but powerful, force in the federal civil service community. The White House frequently calls us for advice, both MSPB and EEOC pass their draft decisions through us for editing prior to issuance, and the Queen of England has asked us to take over as her social secretary. Yes, we've moved up in the world quite a bit and now, and unfortunately, are expected to act like a real business. And as real businesses have something called a *Mission Statement*, we decided that we would develop one, as well.

So in case anyone ever asks you for our objective as a company, you can tell them this: *To contribute to the improvement of the quality and efficiency of the government's accountability systems.* Sounds sort of grown-up, doesn't it. We'll use it the next time we're asked to testify before Congress or if we're ever nominated for the Nobel Peace Prize. Explicit, open-ended, flexible. Down-right mature, and we hope you are dutifully impressed. However, please keep in mind that our second objective, the one with which we actually founded this group, is to be sure we have enough income to cover the various bar bills of our instructors. So help us with that and we'll continue to help you with the official Mission Statement. Check out www.FELTG.com for our upcoming seminars, register early and often, and we guarantee that the civil service will be a better place with us than without us.

Bill

COMING UP IN WASHINGTON, DC

EEOC Law Week
April 4-8

Workplace Investigations Week
April 18-22

FLRA Law Week
May 2-6

Supervisory HR Skills Week
May 16-20

OR, JOIN US IN SAN FRANCISCO

MSPB Law Week
June 13-17

AND, HOW ABOUT HONOLULU?

Managing Federal Employee Accountability
August 1-5

WEBINARS ON THE DOCKET

March 24:
Dealing with Technology Issues in the Federal Workplace

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

Use and Misuse (and Beware March Madness)
By Barbara Haga

Looking at the broader topic of misuse seemed a good segue this month, since we have spent a few months on credit card misuse. As you can imagine, Federal employees have misused a lot of things. Credit cards, vehicles, agency mail systems, and computers easily come to mind, but there are other cases regarding misuse of agency systems or the information contained in those systems, credentials, and more.

Remember, with misuse cases the required proof is that the "thing" was used for purposes other than those for which the property is made available or other than those authorized by law, rule, or regulation. There is no requirement to prove intent. So to paraphrase the famous Detective Joe Friday (and if you are too young to know who that is, my apologies), we "just need the facts, ma'am." For misuse to be sustained, we need to show that the thing belonged to the government, its value if it is a thing that is consumed or damaged, what rules controlled its use, and that the employee did something else with it or to it.

But, before we get in to that, it only seems prudent to mention a potential for misuse that it is present with us at this moment.

The NCAA Basketball Tournament

I am getting caught up in March Madness. My team is doing really well this year and expected to be a first seed in the tournament. Many years ago I remember taking leave to be able to get home to watch tournament games, but now with online access staying up on developments is much easier. This year, I have watched them play on a TV in my office while I am "working." But, I am not a Federal employee anymore and there are no rules that prevent me from trying to do two things at once! But, for those of you who spend time dealing with misconduct issues, this has the potential to create some problems in the workplace. (I'm not even going to touch telework!)

It's not a small thing. Government Executive ran an article entitled "Feds: Put That NCAA Bracket Away and Get Back to Work" on *March 19, 2014, reminding employees of the issues related to gambling in the workplace. Some agencies send reminders to employees to avoid this seasonal mental illness on premises and during work hours.*

There are a couple of MSPB decisions that mention the tournament. An EPA Attorney-Advisor was removed for five charges, which included misuse of government equipment and misuse of official time, and lack of candor. The misuse of the equipment involved e-mails of a sexually explicit nature and also e-mail relating to private legal work which were sent during work hours. The amount of time utilized in those activities was apparently significant, but there was specific mention of the office basketball pool. The employee argued that removal was improper, because other EPA employees and supervisors misused government time and equipment by participating in the annual pool. The arbitrator upheld the removal. The Federal Circuit, in a non-precedential decision, affirmed the arbitrator's decision. *Jones v. EPA,* 2012-3167 (Fed. Cir. 2013)

One employee blew the whistle on his boss regarding an illegal tournament gambling pool that was conducted using government resources. Once again, these were not low-level employees but Economists. The allegations regarding the pool were a small piece in a much larger whistleblower case, but this scenario does point out that not everyone is caught up in March Madness and some of those folks could report the activity to the IG as this employee did. This whistleblower case went to the Federal Circuit and the court vacated the decision to sustain the removal and remanded it to the Board. *Whitmore v. DoL,* 680 F.3d 1353 (Fed. Cir. 2012).

Credentials and Misuse of Agency Information System

The case of Stanley Mungaray is an interesting one in that he was in trouble for misuse of more than one thing. He was a GS-14 Customs and Border Patrol (CBP) International Officer in the Office of International Affairs at their headquarters. Talk about being held to a higher standard – he was in the enforcement business, working in Internal Affairs in their headquarters organization. His appeal is actually an involuntary retirement appeal since he retired prior to the removal action being effected. When the Board reviews this type of involuntary separation case part of the analysis is whether the agency had reasonable grounds for threatening to take the adverse action, so the decision goes into detail about the charges.

Mungaray was charged with misuse of the Treasury Enforcement Communications System/Automated Targeting System to perform unauthorized searches on his wife and his son-in-law. These are systems that keep track of individuals entering and exiting the country and of individuals involved in or suspected of being involved in crimes, and are used in targeting, identifying, and preventing potential terrorists and terrorist weapons from entering the United States. In addition to these charges, there was a lack of candor charge because when interviewed by Internal Affairs about the inquiries conducted using his unique log-in he said he didn't believe he had searched records on his wife and denied making a search on his son-in-law.

The other misuse issues involved use of his credentials. There were two different charges. The first involved using his badge to get out of a traffic ticket. He was pulled over in Loudon County, an area northwest of Washington, DC. While retrieving his registration information, he displayed his government badge to the officer:

> He did not receive a citation for speeding as a result of displaying his badge, but the Loudoun County Sheriff's Department has a practice to request the phone number of the supervisor of any law enforcement officer found to be in violation of local traffic laws and, as a condition of not being cited, to notify the offending driver's supervisor of the traffic violation. Nevertheless, it is a misuse of position for a CBP employee to identify himself as a law enforcement officer as a means to avoid being ticketed, even for routine traffic stops.

Apparently Loudon County followed through on their policy because the decision mentions "record evidence" of Mungaray's use of his credentials in this situation.

The fourth infraction while not specifically a misuse charge is a close cousin. The charge was failure to safeguard those same credentials. He lost them in a grocery store, but did not report the loss for four days, which violated the agency's policy.

Mungaray didn't reply to the proposed removal and did not produce any evidence that the charges were unfounded and thus the Administrative Judge found no jurisdiction over the claim of involuntary separation. *Mungaray v. DHS,* DC-0752-15-0622-I-1 (2015)(NP). Haga@FELTG.com

EEOC Files Two Private Sector Lawsuits Alleging Sexual Orientation Discrimination Based On Theory Asserted in Federal Sector Case

By Deryn Sumner

Although most of us interact with EEOC on the federal sector side of the house, EEOC is also responsible for investigating charges of discrimination filed against covered private sector employers and for filing lawsuits in U.S. District Court on behalf of employees if it finds discrimination but is unable to settle the case after making a finding. This month, EEOC announced that it has filed two lawsuits alleging that private sector employers subjected employees to sex based discrimination under Title VII because of their sexual orientation, a theory the Commission articulated in last year's Office of Federal Operations' decision, *Baldwin v.*

Department of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015).

The first lawsuit is against Scott Medical Health Center and alleges that the employer subjected a male employee to harassment because of his sexual orientation, including subjecting the employee to anti-gay epithets and comments about his sexuality and sex life in the workplace. The suit alleges the employee's supervisor did nothing to respond to the employee's complaints of harassment and the employee quit after the conduct continued for weeks. The EEOC filed suit in the U.S. District Court for the Western District of Pennsylvania.

The second lawsuit is against IFCO Systems and is filed in the U.S. District Court for the District of Maryland, Baltimore Division. There, the lawsuit alleges that a supervisor made numerous comments to a lesbian employee regarding her sexual orientation, including, "I want to turn you back into a woman" and "you would look good in a dress." The supervisor is also alleged to have blown a kiss at the employee and circled his tongue at her in a suggestive manner. The employee was terminated just days after she called an employee hotline to complain about the harassment.

The EEOC's decision to bring these lawsuits under a theory of sex discrimination continues its position articulated last year in *Baldwin*. In that decision, after lengthy analysis and detailing of the history of sex discrimination claims, EEOC concluded that as sexual orientation discrimination involves treating employees differently because of their sex, it should be considered sex based discrimination under Title VII. EEOC's press release announcing these lawsuits references the *Baldwin* decision. It also mentions the guide the Commission released in 2015, in conjunction with OPM, OSC, and the MSPB, for federal agencies on how to address sexual orientation and gender identity issues in the federal government, which we discussed in the June 2015 newsletter.

Using the concepts of sex stereotyping to argue sex-based discrimination is not a new theory. The Supreme Court's decision from 1989 in *Price Waterhouse v. Hopkins*, 490 U.S. 228, held that the employer violated Title VII when it denied a promotion to Ann Hopkins for her lack of adherence to gender norms, including that she did not walk femininely, talk femininely, dress femininely, wear make-up, style her hair, or wear jewelry. EEOC has relied upon this theory that claims of an individual failing to identify to gender norms (such as marrying someone of the opposite sex, *see Veretto v. USPS*, EEOC Appeal No. 0120110873 (2011)) necessarily relate back to sex and are covered by Title VII. We'll be waiting to see how these district courts respond to the Commission's theory. Sumner@FELTG.com

Webinar Spotlight:

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

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

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

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

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

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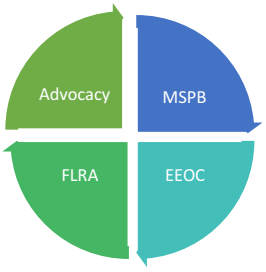
The FELTG Certified Practitioner Program



Have you heard about FELTG's Certified Practitioner program? For full-week participants in our open enrollment seminars, FELTG now offers certification as a trained and tested practitioner in the

following specialized areas of federal employment law:

- *MSPB Law and Practice*
- *EEOC Law and Practice*
- *FLRA Law and Practice*
- *MSPB & EEOC Hearing Advocacy*

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

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

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

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

MSPB Attorney-Whistleblower Officially Wins IRA Appeal

By Deborah Hopkins

You may have been following the articles I've been writing since late 2014 about the *Korb* case, which detailed the journey of a 25-year employee at MSPB who filed an Individual Right of Action (IRA) appeal alleging whistleblower reprisal. It presented a unique situation because the MSPB is the agency which, according to its website, is the guardian of merit principles, yet with *Korb* it reprised against him in direct violation of one of those principles.

Well, big news a few days ago: the initial decision has arrived. *Korb v. MSPB*, MB-1221-14-0002-W-1 (March 2, 2016). In the first paragraph of decision, the judge writes, "[T]he Appellant made a protected disclosure and engaged in protected activity. While these were not the sole factors in the Agency's decision to take personnel actions against him, they were nevertheless contributing factors and the Agency did not prove by clear and convincing

evidence that it would have taken the same personnel action in the absence of any protected activity or disclosure."

Before we get into the facts of a case, let's do a quick review of the whistleblower process for federal employees under the Whistleblower Protection Act (WPA).

1. Agency employee "blows the whistle" and makes a disclosure about a violation he sees. If the violation fits in to one of these four categories below, it is considered a protected disclosure and the agency may not retaliate against the employee for blowing the whistle.
    a. Violation of law, rule, or regulation
    b. Gross mismanagement or gross waste of funds
    c. Substantial and specific danger to public health or safety
    d. Abuse of authority
        i. A protected disclosure is generally made to a supervisor, the OIG, law enforcement, the Office of Special Counsel, Congress or the media. (Note: a disclosure to a co-worker is not protected under the WPA.)
        ii. In general, employees of certain agencies – most within the intelligence community – do not have whistleblower protections.
2. If the agency takes an adverse action or a performance-based action against the employee, it must prove by *clear and convincing evidence* that it would have taken the same action even absent the whistleblowing. This standard of proof is high and is intended to protect whistleblowers from retaliation by the agency.

Now that we have a crash course on whistleblower reprisal (covered in detail during the Friday of *MSPB Law Week*, next held in San Francisco June 13-17), let do a quick review of what exactly Korb, a GS-14 Attorney-Advisor at MSPB, did:

- Made a protected disclosure when he submitted a document containing evidence of significant delays in the processing of MSPB appeals. There was no valid reason for the delays and MSPB had no internal tracking system to ensure the appeals were moved in a timely manner. Korb independently gathered information to track the cases that had been sitting in the office, and provided the information to his supervisors in the Office of Appeals Counsel (OAC). This information was not well-known outside of his office so the judge determined that Korb's disclosure was more than just a policy disagreement, so it was protected as whistleblowing activity (under the category of gross mismanagement).
- Korb also engaged in protected activity when he assisted a co-worker in filing a grievance.

Here's what MSPB did to Korb in response:

- Charged him with misconduct for altering boilerplate language in a case writing template, and proposed a 21-day suspension for the alleged misconduct.
- Reassigned one of Korb's significant job duties (writing the MSPB Case Report) to another office.
- Did not select Korb for a promotion.

In the decision, the judge found that the disclosures Korb made to his OAC supervisors and the MSPB Chairman about the delay in case processing times reflected poorly on higher management at MSPB found that MSPB leadership was motivated to take a personnel action *because* Korb had engaged in protected activity, and that they would not have done so had the appellant not engaged in that protected activity. The agency did show by clear and convincing evidence that it would not have selected Korb for the promotion, so on that allegation MSPB prevailed.

The damages issue has not been decided and there are currently settlement discussions happening about that issue, but a few corrective actions have been ordered and acted upon:

- The duty of writing the MSPB Case Reports has been returned to Korb, and his performance standards have been adjusted to reflect what they would have been prior to the reassignment of that duty to another department.
- The Notice of Proposed Suspension has been removed from Korb's OPF.

Interestingly enough, this case is non-precedential but I guarantee, we don't see cases like this every day. Each party has until April 6 to decide if it will file a Petition for Review (PFR) of the judge's decision. If either side does, it will be interesting because PFRs generally go to the Board members for review. Because the Board Chairman was named in this complaint and because the Board is a party to this litigation, there is an apparent conflict of interest. We will have to wait to see what the Board members do if a PFR is filed. None of the options are particularly attractive. Stay tuned. Hopkins@FELTG.com

Accommodating the Disabled Commuter
By William Wiley

One of the confusing areas of disability accommodation law is the issue of how far does an agency have to go to accommodate a disabled employee who cannot travel to the workplace each day to do his job. A major reason that this is confusing is that several federal courts have reached a conclusion different from that of EEOC. According to the rationale of some circuits, if the employee cannot get herself to the workplace, she does not meet the definition of "qualified" because commuting to work is an "essential function" of every position. Therefore, the employer need do nothing regarding the accommodation of her commuting problem. On the other hand, EEOC has taken the position that the ability to commute to work is NOT an essential function of many positions, and that therefore a government agency DOES INDEED have to attempt to accommodate the commuting problems caused by an employee's disabilities.

EEOC's approach causes significant problems for the federal employer. When confronted with a demand for accommodation of a commuting limitation from a disabled employee, the agency has to prove that the accommodations required regarding commuting are not possible (are an "undue hardship" if you're in to exacting legal language). If the employee's work can be done primarily from his home, then part-time or full-time flexiplace often is the accommodation that satisfies EEOC's expectations.

But what about the situation in which there is no claim that the employee has to physically be at the worksite to get the job done? If the guy can't drive, walk, or take public transportation, does the agency have to send a driver to transport him from home to work?

Fortunately, we now know that the answer is "no."

In a recent case, EEOC had to deal with a complaint in which the disabled employee claimed a right to accommodation of his commuting problems caused by a constellation of medical infirmities when his agency changed his work location two days a week to a facility 30 miles away:

- Sleep apnea
- Spinal cord injury
- Monocular vision
- Carpal tunnel syndrome

When the agency failed to accommodate the employee's disability, EEOC found no disability discrimination based on the following:

1. The change in work locations was based on legitimate management reasons.
2. Non-disabled employees were adversely affected by the change as well as was the disabled complainant.
3. The agency considered the complainant's accommodation requests "seriously and timely."
4. The agency need not provide a driver for the complaint to commute twice a week because doing so would require the expenditure of funds not provided for by Congress. Federal agencies are not permitted to use appropriated funds to get an employee to work. Describing the complainant's commuting costs as personal expenses, the Agency asserted that they were not payable from appropriated funds,

> absent specific statutory authority and it relied on 17 Comp. Gen. 1 (1947); 16 Comp. Gen. 64 (1936). The Agency also argued that 31 U.S.C. § 1344(a)(1) limited the use of appropriated funds for passenger vehicles to "official purposes."

More broadly stated, the Commission held specifically that the agency "had no responsibility to provide transportation to Complainant for his commute." Perhaps EEOC has held this before. However, it cites to no specific prior holding directly on point, and this may be the first time it has so held. For those of you in the business of dealing with employee requests for disability accommodation involving their commute, this one might be a decision worth remembering: *Gerald L. v. DVA*, EEOC No. 0120130776 (2015). Wiley@FELTG.com

Sanctions: Holding Agencies Accountable for Deficient EEO Investigations
By Deryn Sumner

As promised, we're going to continue to dive into our discussion of when sanctions can be awarded by EEOC by turning to instances where agencies fail to produce a complete report of investigation (ROI) during the formal complaint stage. Let's start at the source. Under the Commission's regulations at 29 CFR 1614.108(b), an agency must "develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint." So what does "impartial and appropriate" actually mean? For that, let's turn to Management Directive 110, Chapter 6 (remember, MD-110 underwent substantial revisions last year so check your citations before cutting and pasting from past filings). "An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred." MD-110, Ch. 6. Specifically, "the investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees, if any; and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant." *Id*. For example, if it's a non-selection case, the investigation needs to include documents and evidence related to the selection process, any interview notes, affidavits from the panel members, and copies of the relevant applications in order to be appropriate.

Okay, now that we have some more specifics of what is included in an appropriate factual record, let's turn to what complainants can request if the investigation does not meet this standard. The EEOC's Handbook for Administrative Judges, although it dates back to 2002, is a great resource. (It's available at http://www.eeoc.gov/federal/ajhandbook.cfm) It provides:

> If the Administrative Judge reviews the investigative report and finds that the agency did not sufficiently comply with its obligation under 29 C.F.R. 1614.108(b) to develop an impartial factual record from which a reasonable fact finder could determine whether discrimination occurred, or if no investigation has been conducted, the Administrative Judge retains jurisdiction over the complaint. In order to develop the

> record, the Administrative Judge may order the agency to complete an investigation within a particular time period; allow the parties to develop the record themselves through discovery; issue orders for the production of documents and witnesses; or consider appropriate sanctions. The parties shall initially bear their own costs with regard to discovery, unless the Administrative Judge requires the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation as required by 29 C.F.R. 1614.108(e) or has failed to investigate the allegations adequately pursuant to EEO MD-110, Chapter Six.

Handbook for Administrative Judges, Ch. 1, Part I(D)(2) (July 1, 2002).

Turning back to MD-110, sanctions are also referenced as the appropriate response to a deficient record:

> Where it is clear that the agency failed to develop an impartial and appropriate factual record, an Administrative Judge may exercise his/her discretion to issue sanctions. In such circumstances, the sanctions listed in § § 1614.109(f)(3) are available. *See Petersel v. U.S. Postal Service,* EEOC Appeal No. 0720060075 (Oct. 30, 2008) (Administrative Judge properly drew an adverse inference against the agency when the investigative report failed to include any comparative data on other employees); *Royal v. Dep't. of Veterans Affairs*, EEOC Appeal No. 0720070045 (September 25, 2009) (finding that the agency's delay in completing the investigation within the 180-day regulatory period is no small noncompliance matter and warrants a sanction). *Even when an agency eventually completes the investigation during the hearing stage an Administrative Judge may issue sanctions in appropriate circumstances.*

See MD-110, Ch. 6, Part XII (emphasis added).

Now, before you get too worried, here's some saving grace:

> Before an Administrative Judge may sanction an agency for failing to develop an impartial and appropriate factual record, the Administrative Judge must issue an order to the agency or request the documents, records, comparative data, statistics, or affidavits. 29 C.F.R. § 1614.109(f)(3).…The notice to show cause to the agency may, in appropriate circumstances, provide the agency with an opportunity to take such action as the Administrative Judge deems necessary to correct the deficiencies in the record…Only on the failure of the agency to comply with the Administrative Judge's order or request and the notice to show cause may the Administrative Judge impose a sanction or the sanctions identified in the order or request.

So what should you do as an agency representative when you realize the ROI is deficient? I suggest proactively seeking to supplement the record with the missing information before sanctions are requested. And, as we discussed last month, if the administrative judge is set on sanctioning the agency, argue for a lesser sanction. And don't think about hiding behind your agency's use of a contractor to complete investigations. The Commission has held that an agency's use of a contractor to investigate EEO complaints does not excuse the agency's responsibility for the timeliness and content of these investigations. *See Adkins v. FDIC*, EEOC Appeal No. 0720080052 (January 13, 2012) *citing* MD-110, Chapter 5; *Cox v. Social Security Admin.*, Appeal No. 0720050055 (December 24, 2009). Sumner@FELTG.com

Sometimes I Just Want to Sit Down and Cry
By William Wiley

Here at old FELTG, we get some pretty attenuated questions; e.g., "But Bill, what if the individual is actually the hybrid spawn of a space alien and married to a retired federal employee? Is he still entitled to survivor benefits EVEN THOUGH HIS ALLEGIANCES GENETICALLY SPEAKING CLEARLY ARE TO ANOTHER SOLAR SYSTEM???"

Yes, there are some really far out issues in the field of federal employment law, issues for which any answer is just an educated guess. And then, every now and then, we get a question about something so basic, so fundamental to our business, that it makes us consider giving up the fight. How can we maintain a protected civil service when some of the people who are supposed to know, don't know even the fundamentals? Recently, we got a question from a FELTG-Friend who is trying to do the right thing, but is catching a load of resistance from some smarty-pants up the chain of command who thinks he knows better. Here's the question and our response.

Question:

> Dear FELTG - I am getting pushback on whether the proposing officials are required to conduct a *Douglas* Factor Analysis. We have been doing that for a long time and I believe you have taught this in your classes.
>
> 5 CFR 752 states, (b) Notice of proposed action. (1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.
>
> Your thoughts?

Our Answer:

Dear Concerned Reader - Always nice to hear from you. However, it saddens (and angers) me greatly that after all these years, you would get pushback on something this basic. Here's the deal.

1. Thirty-five years ago, back in 1981, the *Douglas* decision itself said that the *Douglas* factors should be included in the Proposal Letter (thereby requiring the proposing official to do a *Douglas* factor analysis). Here's a direct quote from *Douglas*:

> Moreover, aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors …

The "advance notice" is what we call the proposal latter, so there it is in black and white. Occasionally, I run into a practitioner who wants to argue that only the "aggravating" *Douglas* factors have to be included in the proposal letter, not ALL of them. Well, that's correct. But do I really want to get into a fight about whether a particular factor is aggravating or mitigating? For example, is an eight-year length of service aggravating or mitigating? The smartest thing to do is include all the *Douglas* factors in the proposal, thereby satisfying the mandate in *Douglas* without the risk of mistakenly calling something mitigating when a judge decides it was actually aggravating.

2. Due process requires that we notify the employee why his removal is being proposed (thereby allowing him to defend himself), then make the decision. That notice goes into the Proposal Letter, followed by a decision on the proposal in the Decision Letter. In 2009, the Board said that it was OK for the Decision Letter to contain penalty factors not in the Proposal Letter, reasoning that due process did not require prior notice of facts related to the penalty, only to the actual misconduct. Well, the Federal Circuit Court of Appeals thought that was stupid and reversed the Board, thereby ruling

that the employee must be put on notice of any penalty factors on which the Board is going to rely in making its decision. *Ward v. USPS*, 2010-3021 (Fed. Cir. 2011). If you think about it, it just makes sense. The employee should be allowed to defend himself, to correct the record BEFORE a decision is made. If the Proposal Letter does not contain the *Douglas* factors, and the Deciding Official relies on an incorrect *Douglas* factor (e.g., mistakenly believing that the employee has poor performance or did not apologize for the misconduct), the employee has been denied the opportunity to defend himself.

3. Given that *Douglas* requires that the penalty factors be in the Proposal Letter, and that *Ward* prohibits the Deciding Official from considering any penalty factors not in the Proposal Letter, here's the best practice that we now teach:

a. The Proposal Letter analyzes all 12 *Douglas* factors in great detail using an attached *Douglas* Factor Worksheet.
b. The employee responds and defends herself.
c. The Deciding Official considers only the proposal and the response in making his decision.
d. If he agrees with the *Douglas* factor analysis of the proposal, he says nothing extra about the penalty assessment. Instead, the decision letter says something like this: "I have considered the penalty assessment factor analysis contained in the Proposal Letter, and I concur." That way, he avoids a *Ward* mistake.
e. If he disagrees with the assessment of the *Douglas* factors in the Proposal, or wants to consider other penalty facts that were not in the proposal, the safest thing for him to do is to notify the employee of these extra ruminations, and allow her to respond. Otherwise, he runs a risk of a due process violation. He may get away with not taking this extra step, but I don't believe in taking chances when I can avoid them. I am a careful man, at least when it comes to defending a removal.

Hope this is helpful. Again, I cannot stress how much it bothers me that someone in a position to know better is giving you push back on an issue this basic. Our famous *MSPB Law Week* seminar is coming up in June in San Francisco. Maybe give the guy FELTG's toll-free number so we can register him: 844-at-FELTG. Lord knows he needs it, and so does our great country.

(In a related vein, separate from this emailed question, last week in one of our FELTG seminars, a participant asked me if her agency was making a mistake with the *Douglas* factor analysis. As she explained it, the Proposal Letter policy in her office was simply to identify each of the 12 factors as either "Aggravating" or "Mitigating" without any detail as to the facts relied upon by the Proposing Official to reach that conclusion. I almost cried. How anyone in our business could possibly think that relying on secret facts to determine a penalty satisfies the Constitutional requirement for due process is simply beyond my ability to grasp. Friends, I realize that it would be additional work. But we need practitioner certification. And we should allow only *Certified Practitioners* to make these sorts of decisions. You don't learn this stuff in law school. You can't possibly learn all that needs to be learned by on-the-job experience because you won't take enough adverse or performance removals in a career to cover all the bases. For the sake of our Great Country (or our soon-to-be great again country, depending on your politics), please get trained. And, feel sorry for people who are not.)
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EEOC Seeks Public Comment on Proposed Regulations Related to Increasing Employment of Individuals with Disabilities in the Federal Government
By Deryn Sumner

Over the past year or so, EEOC has sought public comment regarding revisions to the regulations at 29 CFR 1614, as well as its guidance regarding workplace retaliation. It now seeks public input regarding a proposed amendment to the regulations concerning the employment of individuals with disabilities in the federal

government. This continues the administrative rulemaking process started in 2014 when the EEOC issued an Advance Notice of Proposed Rulemaking. At that time, EEOC sought general comments on how the regulations could be improved to highlight the federal government's priority in serving as a model employer of individuals with disabilities. According to this latest posting, EEOC received 89 comments, of which 80 were generally supportive of the Commission's proposal to amend its regulations. The Notice of Proposed Rulemaking (NPRM) issued recently seeks to simplify the directives and guidance contained in the Americans with Disabilities Act of 1990 and its implementing regulations, Management Directive 715, and various executive orders. The NPRM also seeks to modify the goals for federal agencies in hiring individuals with disabilities and would change the MD-715 reporting requirements accordingly.

I think the most interesting aspect of the NPRM is the inclusion of personal services. As the summary explains, "Personal services allowing employees to participate in the workplace may include assistance with eating, drinking, using the restroom, and putting on and taking off clothing. For many individuals with targeted disabilities such as paralysis or cerebral palsy, full participation in the workplace is impossible without such services. The lack of PAS in the workplace and/or the fear of losing personal services provided by means-tested assistance programs are stubborn and persistent barriers to employment for individuals with certain significant disabilities."

The proposed rulemaking notes that agencies *would not be required* to provide such personal services as reasonable accommodations. However, these changes *would require* agencies to provide personal services as part of the agency's affirmative action plan as long as doing so would not cause an undue hardship. **[Editor's Note: Feels a bit like EEOC is making a distinction without a difference. Does an agency have to employ someone to provide personal services for a disabled employee? No, not as a reasonable accommodation; yes, as part of the agency's affirmative action plan.]** This requirement can be fulfilled by hiring employees to perform personal services along with other duties, or to hire personal assistants who would assist more than one individual with a disability. The summary notes that agencies could consider having a pool of personal assistants throughout the agency or at a particular location, and notes that many agencies currently use such a pooling system to provide sign language interpreters.

The EEOC's NPRM comes after OPM issued a report to the President on October 9, 2015, noting, "By the end of Fiscal Year (FY) 2014, total permanent Federal employment for people with disabilities had increased from 234,395 in FY 2013 to 247,608, representing an increase from 12.80 percent to 13.56 percent. New hires with disabilities totaled 20,615, representing an increase from 18.18 percent in FY 2013 to 19.74 percent in FY2014." The full report is available here: https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/disability-report-fy2014.pdf if you are interested in seeing how your agency stacks up. The comment period closes on April 25, 2016 and comments in response to the NPRM can be submitted here: https://www.federalregister.gov/articles/2016/02/24/2016-03530/affirmative-action-for-individuals-with-disabilities-in-the-federal-government.
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FELTG is coming to Honolulu August 1-5
Managing Federal Employee Accountability
Registration is open now!

Learning Points Can Be Good or Bad
By William Wiley

Several months ago, I wrote an article regarding a Board case in which the agency won the appeal in

spite of there being significant mistakes in the proposal and decision letters, *McCook v. HUD*, MSPB No. SF-0752-14-0389-I-1 (August 3, 2015) (NP). I learned a couple of things from publishing that article:

The Good Learning Point: If you're trying to get folks to read your articles, mention their colleagues by name.

The Bad Learning Point: Readers don't always understand what we intend to say in the articles we publish. If you need to re-read the *McCook* article, you can find it on our website in the September 2015 Newsletter. My intent in the piece was a) to point out that the proposal letter was deficient because it did not specifically address the relevant *Douglas* factors, b) to highlight that the decision letter was problematic because it mentioned several *Douglas* Factors not in the proposal, and c) to get the attention of the shakers and movers at HUD (and other agencies) to make some changes so that these sorts of basic mistakes don't occur again. The only potential shakers or movers I could identify in the Board's decision were the three attorneys who represented HUD on appeal. My hope was that some reader would know them, point out to them that in my opinion attaching a *Douglas* Factor Worksheet to the proposal would have taken care of the difficulties in this case, and that HUD would take steps to make sure that things were done better the next time.

Man-oh-man, did I get that wrong. Instead of my hearing from someone at HUD that their procedures now would ensure that a *Douglas* Factor Worksheet is attached to every proposed removal letter, I got a long letter from a supervisory attorney explaining the hard work his staff had put into defending HUD in this appeal, and how that should have been the point of my article. I responded to his letter with my explanation of the point of the piece; not being to criticize the legal work his attorneys put forth to defend the agency in the appeal, but to criticize the system that allowed whoever was the (no doubt well-intended) practitioner who drafted the proposal and decision letters to make mistakes that have been mistakes since 1981.

Another Bad Learning Point: I thought that with a personal clarification of the point of the article, the matter would be put to rest. Perhaps because this was all happening around Christmas week, I was in a particularly optimistic mood. So foolish of me. After receiving my response, the supervisor called me early one morning to tell me the following:

- People who read the article saw it as a criticism of the legal work done by his attorneys.
- I should publish his letter to me.
- He has never read our newsletter before.
- It is the fault of the managers who signed the discipline letters, not the practitioners who drafted them, that a proper *Douglas* assessment was not a part of each letter.
- He does not know of any affirmative steps that have been taken within HUD to make sure that in the future a *Douglas* Factor Worksheet is attached to every proposed removal.

I was heartbroken. My hope in writing the article was that readers would understand the important of complying with *Douglas* and thereby avoid the mistakes that were made in this case. Instead, I am told that the article was seen as an unjustified criticism of the legal work done by the agency representatives in this appeal. So let me do the best I can to clarify what we here at FELTG are saying about the *McCook* decision:

1. The proposal letter should have had a *Douglas* Factor Worksheet attached so that the Board did not have to dig around to find the penalty factors in the proposal.
2. The decision letter should not have referenced ANY penalty factors not in the proposal because that is almost always a violation of due process.
3. Nothing in this Board opinion suggests that the three agency attorneys who defended HUD in this appeal are anything other than super-duper hard-working lawyers with superior litigation skills.

So, my apologies if my article hurt someone's feelings or made anyone feel singled out. That was certainly not my intent. We publish our FELTG newsletters to help agencies and those who defend employees know the mistakes that are made in this business and the best practices to protect employee rights. For those readers who do not read our articles that way, who do not see them as helpful but rather as critical, perhaps you shouldn't read our newsletter any longer.

For those of you who read our articles for legal analysis, best practices, and traps to avoid - stay with us. Yes, we knock MSPB, EEOC, FLRA, OPM, OSC, and Congress when they do something we think is bad for America, and we occasionally call out employer agencies that should be doing things better. Heck, we even point out mistakes made personally by one of us who writes or teaches for FELTG. Our newsletter is an instructional tool, not a congratulatory make-you-feel-better column in the back section of your local newspaper.

If you want to learn how to do your job better, here we are with our articles and our courses. Otherwise, we wish you the best of luck.
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Monday – Administrative Investigations - The Substantive Basis:
- Relevant MSPB and EEOC law, as a foundation for the rest of the week

Tuesday – Conducting the Investigation, Part I:
- Evidentiary principles
- Role of the investigator
- Planning the investigation

Wednesday – Conducting the Investigation, Part II:
- Questioning types and techniques
- Union representation
- Conducting the interview

Thursday – Conducting the Investigation, Part III:
- Handling difficult witnesses
- Assessing credibility
- Testifying at hearing

Friday – Writing the Investigative Report
- Report writing style
- Organization
- Report writing conventions

Registration is open now. Trust us, you don't want to miss this seminar!