Federal Employment Law Training Group
Training By Professionals For Professionals

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Did you ever have friends over for dinner, enjoy a nice time, and then everyone goes home, except one couple? They enjoy your company so much (and your good wine) that they are just getting started with the evening when others are looking for their coats and their car keys. You politely hang in there, propping your eyes open with toothpicks, listening to their never-ending hilarious (to them) stories about themselves, silently praying to The Gods for a power outage so you'll have a reason to shoo them out of your living room. Not only do you want them to leave, your preference would be that you never invite them back again. Well, do you know who feels that way about you, that you've overstayed your welcome and it would be best if you never returned? The judges at MSPB. Yes, they conduct your little hearing and adjudicate your little case. But if it were up to them, you'd be smart enough to get rid of problem employees without having to do something that can be appealed to the Board. It's not that they don't like you or respect your role in government to hold employees accountable. It's that they have a lot to do and you're causing them more work when you fail to find an alternative to a formal removal. And that's why I have to believe that the MSPB judges are thrilled to see that here at good old FELTG, we are offering a program the first week of November to teach you how to implement removal alternatives, to get rid of your problem employees without having to defend the agency in an appeal to the Board. So come to the party. Make a Board judge happy. Learn to take care of business, and then be done. Join us for *Settlement Week* October 31 through November 4 and never have to bother another Board judge again.

Take care,

Bill

COMING UP IN WASHINGTON, DC

Employee Relations Week
June 6-10

Legal Writing Week
July 11-15

MSPB Law Week
September 12-16

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

June 9:
Dealing With Medical Issues Under the ADA

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

Agency that Subjected Employee to Racially Motivated Hostile Work Environment Liable for $125,000 in Compensatory Damages

I think that it is worthwhile for practitioners who represent employees and employers to be aware of cases awarding higher awards of compensatory damages. Although $300,000 is the maximum award under the Civil Rights Act of 1991, most non-pecuniary damage awards fall in the range of $5,000 to $50,000 (something I'll be talking about in more detail in next month's newsletter). Having examples of what it takes to actually get a six-figure award can be helpful for agency representatives talking to complainant's counsel about what may be unrealistic settlement expectations and complainant's counsel talking to their clients about…well, likely about their unrealistic settlement expectations. Further, agency representatives should know about these higher awards so that where complainants do present substantial evidence of damages, the agency representative can competently provide a litigation risk assessment to the agency.

Let's consider the recent Commission case of *Vaughn C. v. Dept. of Air Force*, EEOC No. 0120151396 (April 15, 2016). This decision addressed an agency's award of $20,000 in non-pecuniary compensatory damages, issued after the Commission previously found in EEOC No. 0120123332 (September 10, 2014) that the complainant had been subjected to six months of egregious racial discrimination by co-workers, including use of the n-word, which caused him to resign. The Commission found the agency was liable for the harassment as the first-line supervisor failed to take prompt and effective action to address the harassment, and further found that the harassment resulted in making the complainant's work environment so intolerable, a reasonable person would have felt compelled to resign. After entering a finding of discrimination, the Commission remanded the complaint to the agency for investigation of the complainant's entitlement to compensatory damages.

The agency instructed the complainant, through his attorney, to submit evidence in support of his claim for compensatory damages. The complainant submitted a statement saying that as a result of the harassment, he "had difficulty concentrating, a loss of appetite, high blood pressure, severe headaches and increased anxiety. He said his physical and emotional relationship with his wife was affected, and that he was frequently short-tempered with her, taking out his issues at work on her. In April 2011, he began to see a professional counselor to help him deal with the effects of the harassment at work." The complainant also provided notes from his counselor which "indicated that Complainant's mental status had changed. He worried about work often; felt anxious; developed insomnia; experienced a change in appetite and drinking resulting in a 15-20 pound weight gain; had difficulties with fatigue and focus; and had feelings of hopelessness. He also feared that the coworker would become physically violent towards him and his family, and gave family members pictures of the coworker and told them to make sure they did not allow her into the house and made sure all doors and windows were locked. He even devised a "safety plan" to make sure the coworker did not harm his family. The counselor also noted that the complainant would avoid going to the parking lot until after the coworker left work.

Based on this evidence, the agency found an award of $20,000 to be appropriate, and complainant appealed, seeking an increase of the award to $300,000. After consideration of the evidence presented by the complainant, the Commission found an increase to $125,000 to be appropriate to compensate the complainant for the physical and emotional harm he suffered as a result of the agency's actions. The Commission found that the complainant provided support for his claims and the award was consistent with prior Commission precedent.

Now, given my reading of other compensatory damages cases, the award does seem a bit high given that the complainant only provided a statement from himself and notes from his counselor. I would have expected to see more medical documentation and statements from family members, friends, and perhaps a psychiatrist or psychologist in support of the award. Keep in mind that when assessing claims for damages, we do not look at the underlying conduct, although the egregiousness of the conduct can sometimes be a factor, but rather the nature of the harm as a result

of the conduct. The Commission found $125,000 appropriate and given the egregious and hateful conduct at issue here, I have no doubt that the complainant suffered from substantial physical and emotional harm as a result of the workplace harassment. Sumner@FELTG.com

BIG NEWS: Title 42 Employees Now Entitled to Appeal Removals to MSPB
By William Wiley

OK, it's BIG NEWS if you have any employees hired under the authority of Title 42 (rather than under Title 5), the authority that allows agencies to appoint special consultants without regard to any civil service laws. 42 USC 209(f). Since the cooling of the Earth, the Board and OPM have concluded that this language means that a Title 42 employee is without civil service protections and may be removed summarily without Board appeal rights.

Well, no more. As of Wednesday last week, if an agency fires a Title 42 employee, that employee gets to file an appeal with MSPB, just as would a regular Title 5 employee who has more than a year of service. *Lal v. MSPB*, Fed. Cir. 2015-3140 (May 11, 2016). And as we read 5 USC Chapter 75 (adverse action procedures) and 5 USC Chapter 43 (unacceptable performance procedures), agencies will be required to use those procedures to effectuate a Title 42 removal. OPM has room for a say as to the coverage of Chapter 43 for Title 42 into the future, but as their regulations are currently written, our best legal guess is that there's coverage unless there's a regulatory change.

The court's reason in large part was straight out of Law School 1-A. Title 42 says that individuals may be "appointed" under Title 42 without regard to the civil service laws. A different statute gives agencies in another context when dealing with certain non-Title 42 employees the authority to "appoint[ ]…and remove[ ]… without regard to the provisions of title 5…" Reasoning that Congress saw a significance in the latter situation to include the authority "to remove" and that Congress did not specifically include the authority "to remove" in Title 42, Congress did not intend for Title 42 removal authority to be without regard for civil service protections.

Most Title 42 employees work in HHS, with a few scattered among other agencies (e.g., EPA). Therefore, most of the civil service is unaffected by this decision. However, for those readers who employ Title 42 employees, it is a new day. Whether it is a bright new day or a dark one, we leave that up to you to decide.

Here at FELTG, we teach supervisors how to hold Title 42 employees accountable for their performance and conduct just as we teach how to do that for Title 5 employees. We hope you'll consider us if you now feel you would benefit from a little procedural education. Wiley@FELTG.com

Vehicle Misuse
By Barbara Haga

Last newsletter, we looked at a case where the supervisor authorized an employee to use a government vehicle for something unofficial, and the supervisor was disciplined for the authorization. This time we are looking at a case where the use was not authorized by any official within the agency. Here the administrative judge (AJ) did not sustain the charge, but the Board reversed and then, the Federal Circuit overturned the Board's decision.

It was a Really Good Reason

Here is the story behind the case. The appellant, Kevin Kimm, was a GS-13 Criminal Investigator with ATF. According to the Federal Circuit decision, he was a highly decorated investigator. The events in question happened during August of 1992.

His wife was pregnant. She had suffered previous miscarriages and was having contractions roughly two months before her due date. During the first week of August, his wife's doctor ordered her to avoid all stressful activity, but then revised the order on Tuesday of the following week ordering her to remain on bed rest at all times. The Kimms were the parents of a three-year-old son. Normally, the mother transported the son to day care but after the change in the doctor's orders, she was not able to do this.

Kimm transported his son to and from day care three or four times during the first week that his wife was on bed rest. Her parents arrived and took care of that thereafter. The deviation in his route to go by the day care center was 2.6 miles each way. If you do the math, making this deviation twice a day four times a week resulted in about 21 miles of extra driving. Assuming he was driving a big SUV, we are talking maybe two gallons of gas used. But, I digress.

It is not clear in the decision how the issue came up, but ATF learned about this. In the ensuing investigation Kimm admitted that he had used the vehicle for this purpose. He stated that he thought he was maximizing the use of his time in using his assigned government vehicle (GOV) during the period where he was working a lot of overtime and involved in a dangerous investigation. He also noted that being in the vehicle meant that he could be available on the encrypted radio and making the detour in the GOV would allow him to get to work much faster since using a personal vehicle and returning home and then getting in the GOV would have resulted in a 40-minute delay because of heavy commuter traffic.

The ATF charged Kimm with "willful use of a GOV for other than official purposes" and suspended him for 30 days.

The Initial and Board Decisions

The AJ decided that the suspension was not warranted, finding "… that the appellant had a good faith belief that he had the discretion to rectify a family emergency and simultaneously maximize the time that he was available to perform his agency functions, and that his belief was not in reckless disregard of the agency's regulations." The AJ also found that the use was "minor personal use."

The Board took a different perspective relying on the specificity of the agency's directive regarding use of official vehicles. In this case the directive was very specific to the use in connection with law enforcement activities. The directive said that the use of the vehicle to carry an individual only if it was "… deemed essential to completion of the official mission." Those circumstances were further explained as follows:

> Determining whether the transportation of a particular person is essential to the success of the mission demands the exercise of good judgment which will be guided by the following rules: 1) Transportation is not to be furnished to anyone unless the vehicle is being used on an official mission and the presence in the vehicle of each person transported is essential to the completion of the mission. 2) When foreseeable arrests and seizures are to be made, no private person will be transported in a Government vehicle unless there is an emergency and the help of such person is necessary for the protection of the special agent engaged in these activities.

The agency further explained in another document that family members and Bureau employees were not deemed essential. The agency did provide that deviations could be authorized by a special agent in charge or higher official. Kimm did not request such authorization.

The Board did not accept Kimm's explanation that he was making the most efficient use of his and the agency's time nor was the use judged to be minor personal use. The Board reinstated the 30-day suspension. (*Kimm v. Treasury*, 64 MSPR 198, 1994)

The Federal Circuit's Take

The Federal Circuit's decision records matters to which the appellant testified. Kimm's answers included the information about the deviation of a total of roughly 21 miles and his reasoning that saving 40 minutes each day while he was essentially on an around-the-clock investigation. He also testified that there was room under the regulations for minor deviations. "He testified that it was standard practice, for example, to make minor deviations to find a place to eat dinner while on a mission, or to alter one's route to and from the office, if a death threat had been received. He also testified that the agency was lax in the enforcement of its GOV regulations, and cited a number of incidents that he believed had occurred to support this belief."

The Federal Circuit found that the AJ's determination that Kimm did not have actual knowledge that the agency would find the use as nonofficial was persuasive based on the appellant's straightforward testimony and an improbable case put on by the agency. The Federal Circuit ruled that the MSPB did not articulate a reason for finding otherwise. The Federal Circuit also found that the agency policy left room for judgment by an employee about official use and determined that Kimm properly exercise that judgment. *Kimm v. Department of the Treasury*, 61 F.3d 888 (Fed. Cir. 1995).

The Federal Circuit did not find reckless disregard in this case nor was it found in the *Felton* case reviewed last month. There was unofficial use of a vehicle in both cases, but the *per se* violations did not meet the requirements for imposing the statutory penalty contained in 31 USC 1349. Word to the wise! **[Editor's note: Another word to the wise. Never, ever suspend for 30 days under 31 USC 1349. It does the agency no good, locks the management advocate into satisfying the statutory definition of GOV misuse, and requires that the agency defend its action before MSPB. As we have taught for over a decade in out FELTG seminars, the best practice in a situation like this is to charge "Unauthorized Use of Government Property" or the generic "Violation of Agency Procedures" and suspend for 14 days or fewer to avoid MSPB. Had that been done here, Treasury would have won this case.]** Haga@FELTG.com

Sanctions: When a Party Generally Just Fails to Follow the Administrative Judge's Orders
By Deryn Sumner

So far in this series on sanctions in federal sector EEO complaints, we've talked about the EEOC's authority to issue sanctions against either party, and three different situations that can give rise to sanctions: agencies failing to timely complete investigations, agencies failing to complete thorough and appropriate investigations, and either party failing to cooperate during discovery. This month, let's talk about when sanctions are appropriate for a party's general failure to comply with an administrative judge's orders in a case and look at some recent cases where administrative judges issued such sanctions.

In *Gilbert B. v. USPS*, EEOC No. 0720150008 (March 18, 2016), the Commission affirmed an administrative judge's issuance of sanctions where the agency representative failed to properly serve the complainant with a request to continue a settlement conference. The choice of service was an issue because the agency requested to reschedule the settlement conference just two days prior and served the request by mail to the complainant and his attorney who lived in Guam. The administrative judge also issued sanctions against the agency for failing to cooperate in settlement discussions in good faith. The agency argued, after the fact, that it had a policy of not voluntarily participating in a settlement conference with an administrative judge who also served as the presiding judge. The Commission agreed that the sanction, attorney's fees the complainant incurred by not being notified of the change in the settlement conference date and time, to be appropriate.

In *Eyrn O. v. Dept. of Veterans Affairs*, EEOC No. 0120131752 (January 8, 2016), the Commission affirmed the administrative judge's sanction against the complainant by dismissing her hearing request where the complainant failed to show good cause for her failure to file a prehearing submission or to attend the prehearing conference. The complainant did not dispute that she had received

notice of the deadlines, but did not notify the parties that she would not appear, nor did she request an extension before the deadline.

And finally in *Marquitta B. v. USPS*, EEOC No. 0120140518 (December 17, 2015), in a case where I'm just glad I wasn't involved, the Commission affirmed the administrative judge's award of sanctions against the complainant because the decision was "supported by an extensively documented record of contumacious conduct on the part of Complainant and her counsel. That conduct included: failure to respond to an instruction to file a motion to amend her complaint; attempting to utilize an unauthorized court reporter to transcribe a pre-hearing teleconference; repetitive, excessive, and overbroad discovery requests; abusive behavior by counsel; resubmission of a motion that had already been denied in a way that expressed contempt for the AJ's authority; and most important, failure to appear at the hearing itself. Under these circumstances, we find no abuse of discretion on the part of the AJ." The Commission affirmed the sanction of dismissal of the hearing request and remand of the case for issuance of a FAD.

Remember, the EEOC provides broad discretion to its administrative judges in conducting hearings. As MD-110 Chapter 7 states, "The Commission has the authority to issue sanctions in the administrative hearing process because it was granted, through statute, the power to issue such rules and regulations that it deems necessary to enforce the prohibition on employment discrimination. *See Waller v. Dep't. of Transportation*, EEOC Appeal No. 0720030069 (May 25, 2007), *request for reconsideration denied*, EEOC Request No. 0520070689 (Feb. 26, 2009). In this respect, the Commission has determined "'that delegating to its Administrative Judges the authority to issue sanctions against agencies, and complainants, is necessary and is an appropriate remedy which effectuates the policies of the Commission. *Id*.'" Ignore the orders of the administrative judge at your own peril.
Sumner@FELTG.com

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Prior Discipline Continues to Lose Respect at the Board
By William Wiley

My initial training in this business was in July 1977. Back in the day, the old Civil Service Commission ran weekly academies year-round in Washington, DC, with an academy devoted to each major personnel discipline: classification, staffing, training, labor relations, and employee relations. To practice independently in your chosen field, by CSC policy, you had to attend the academy and pass the final test for your discipline. If you attended and did not pass the final exam, you were sent home without the ability to work independently, and had to return to retake the program at a later date. Serious stuff.

One of the principles I remember clearly being taught in my employee relations academy was that of progressive discipline. Although not mandatory, employing progressive discipline was presented to us as a way to give an employee a fair chance to prove whether she could obey rules and pull her weight as a federal civil servant. And if she could

not, progressive discipline laid a good foundation to show that the agency had been fair to the employee, and that the employee continued to be a problem.

The concept of progressive discipline is exceedingly simple: first offense = reprimand, second offense = suspension, and third offense = removal. Of course, there was room for an agency to decide to do something less, but that would be up to the agency's discretion. The philosophy of progressive discipline was to initially use a warning (a reprimand) to try to correct the employee's behavior. If the employee engaged in a subsequent act of misconduct, he was demonstrating that the reprimand did not work, because if it had worked, he would have obeyed the rules and not have engaged in more misconduct. As the reprimand didn't work, the supervisor was empowered to move up to more serious discipline in an attempt to correct behavior, and that's where the suspension became an appropriate penalty - a negative reinforcement of taking away pay to motivate rule-obeying conduct.

Then finally, if the employee engaged in yet another act of misconduct subsequent to the suspension, with rare exception, the last stage of discipline was removal. By engaging in a third act of misconduct, the employee was demonstrating that a suspension was inadequate to correct the bad behavior. If a reprimand didn't work and a suspension didn't work, the only option left was a removal. As I remember one instructor putting it so eloquently, "The government does not have to retain in its employment an individual who does not respond to discipline."

And to me, that makes perfect sense if we think of discipline not as punishment for the sake of punishment, but as a tool for correcting behavior. If it doesn't satisfy the objective of correcting behavior, then the non-responsive employee can go work elsewhere. The civil service deserves rule obey-ers, not rule breakers. That philosophy explains why agency penalty tables list only three offenses. Because in most cases, by the third offense the employee has demonstrated an inability to be corrected, and won't remain employed any longer where he would get a chance to commit a fourth or fifth offense.

Unfortunately, today's MSPB didn't attend that academy. As far as I can tell, the Board expects an agency to tolerate indefinitely an employee who does not respond to discipline. If not indefinitely, it hasn't given us any clear signs as to when enough is enough. Take, for example, MSPB's recent decision in *Ballard-Collins v. Navy*, SF-0752-13-0617-I-1 (2016)(NP). In that case, the appellant three years previously had been suspended for 7 days, then later that same year, had been suspended for 14 days for subsequent misconduct. You would think that by those two actions, the employee would have been given a fair chance to learn that misconduct would not be tolerated; i.e., to correct her behavior.

Well, you would be mistaken. Even after these two suspensions the appellant committed yet another offense (disrespectful conduct) and was fired. On appeal, although the Board characterized the disrespectful conduct as a serious offense – particularly so because the appellant was a team leader – it mitigated the agency's removal to a five-day suspension.

No kidding. Even though the appellant had demonstrated that suspensions don't work on her to get her to correct her behavior, even after losing 7 and 14 days of pay as negative reinforcement, MSPB somehow reached the conclusion that maybe a 5-day suspension would get the employee to obey the agency's rules.

Well, that's just crazy; crazy IF you believe that an agency should not have to tolerate a rule breaker. You see, suspending the employee hurts the agency as it does the employee. The employee loses pay, and the agency loses the services of the employee for the duration of the suspension. The old Civil Service Commission gave us an end to this problem by teaching that ours is a three-strike game. The Board, on the other hand, gives us no clear guidance, effectively saying that an agency may have to tolerate a misbehaving employee indefinitely, suspending over and over again, regardless of the lack of effectiveness of the

suspensions to correct behavior and the loss of productivity the agency suffers.

You want more crazy? I got more crazy. When coming up with a 5-day suspension, MSPB used this reasoning:

1. The prior 7-day suspension was for discourtesy. The prior 14-day suspension was for failure to follow instructions.
2. This last act of misconduct was properly characterized as discourtesy. Therefore, we have a second act of discourtesy.
3. The agency's penalty table provides for a range of penalty for a second offense of discourtesy to be a one to five day suspension. Therefore, a five day suspension is warranted.

Notice how the Board ignored two critical aspects of this "second offense":

- The agency issued a seven-day suspension for a first offense of discourtesy. One would think a second offense of something warrants more severe discipline than that administered for a first offense.
- The Board COMPLETELY IGNORED the fact that in addition to the prior suspension for discourtesy, the employee had been suspended for 14 days for failure to follow instructions. It's as if the Board is saying that when we consider prior discipline, we are to consider only prior discipline for misconduct in the same category as the most recent misconduct. Well, that's just ridiculous. If we go down that dark road, an employee would have to be disciplined progressively for each category of misconduct. In a typical penalty table, that would be dozens and dozens of categories. Expecting progressive discipline in each of them could add up to double that many of suspensions before we had finally plugged all the holes and were able to eventually fire the multitasking bad employee.

Ask yourself this philosophical, but critical, question: *Which of the following makes for a better government?*

A. A civil service in which employees who do not conform their behavior to agency rules after two formal attempts at correction normally can be removed.
B. A civil service in which employees who commit acts of misconduct can retain employment indefinitely regardless of the number of attempts at correction as long as each act of misconduct is of a different nature from the other.

This break from the old school three-strikes-and-you're-out approach defies common sense and leaves us without any framework in which to assess whether prior discipline carries any weight when selecting a penalty for a particular current act of misconduct. This is exactly the kind of decision that makes it appear that the Board is overly protecting employees at the expense of an efficient, orderly, civil service discipline system. This was a third offense. The agency had administered two significant prior suspensions. The idea that only a five-day suspension is warranted as a maximum reasonable penalty now is unreasonable and strikes at the heart of the concept of federal employee accountability. Wiley@FELTG.com

Don't Come to Mediation if You're not Willing to Budge

By Deborah Hopkins

Mediation is an interesting thing. Most disputes resolve without litigation, but for some reason we don't seem to talk as much about that as we do about the cases that get to hearing or the courts. Obviously, the cases that go to litigation also provide us with our case law so we would be remiss if we didn't spend a lot of time and energy teaching that stuff.

But, we want to make sure we spend some time talking about other methods of dispute resolution. I recently attended mediation for a private sector employment dispute. While a few of the details were different than what a federal sector

employment law dispute would cover, the general formula is the same.

The mediator was a former circuit court judge in Virginia, and he has been an attorney for 49 years. Can you imagine that? What a long time to be an attorney! In his opening script he stated that he believes the objective of finding a "mutually agreeable resolution" is a misstatement, and that the better way to look at things would be to aim for a "mutually disagreeable resolution" since neither party was going to get exactly what it wanted. He also explained that his success rate was a whopping 97%. Little did the parties (or at least, one of the parties) know that this mediation would fall into the remaining 3%.

Why did the mediation fail, you might ask? Well, it's because one of the parties arrived that morning completely unwilling to budge from its position. The outcome: after seven hours, the only people who benefited were the attorneys (who got paid) and the mediator (who got paid). Neither side was anywhere closer to a resolution because one party refused to consider anything less than what he wanted from the beginning. He was so stuck on his position (being "right') that the mediation proved to be a complete waste of time. **[Editor's Note: Some agencies exacerbate this problem by *mandating* that line supervisors are required to participate in the mediation of discrimination complaints. As Deb well points out, it is a waste of everybody's time and money when one side or the other has no intention to compromise. Mediation should be voluntary on the part of all parties. If it is not, then it is not going to work.]**

There are two primary types of negotiation: position-based and interest-based. Let's a take a quick look at each:

Position-Based Negotiation (PBN)

This type of negotiation focuses on the stances taken on each side of the dispute. Each party takes a position, and then spends its time arguing from that position. Throughout the process, each side makes concessions until an agreement is finally reached. Benefits to taking this approach include clarity of standpoint, strong anchoring during stressful negotiations, and clear, defined roles of the parties.

But, there are some major downsides to classic PBN:

- Any final agreement may not be very wise; it may instead be a product of the interactions of the negotiators rather than the logic of the arguments pro and con whatever is being negotiated.
- The more the parties argue position, the more they become committed to the position, thus impacting flexibility and open-mindedness to alternative resolutions. (The more attention is paid to position, the less attention is paid to underlying concerns. This = bad news.)
- PBN can be inefficient. Because they know they'll likely end up meeting somewhere in the middle after making a series of small concessions, parties in these cases are tempted to start off with extreme positions.
- It strains relationships. Often involving a contest of wills, in PBN one side generally wins, which means the other side loses. Being nice is not a good answer to this problem, because then the goal switches from reaching a wise agreement to just reaching any agreement. Plus, it's rare that both sides act nicely, so the nice people generally get taken advantage of in these scenarios.

Position-based negotiation has its place, for sure, but is not always the best approach.

Interest-Based Negotiation (IBN)

Sometimes called Interest-Based Bargaining (IBB) This type of negotiation approach is drastically different because the parties separate the people and relationships involved from the problems that are in contention. Rather than present a position on why they should prevail, the parties instead discuss their interests and what is important to them. IBN is based on assumptions of mutual gain and is designed to generate high-quality solutions while

enhancing relationships. Sound like a pipe dream? Well, believe it or not, it sometimes works.

Interest-based negotiators provide a variety of resolution options before the parties decide what to do, and generally set timelines to promote efficiency. Strengths in the IBN process include greater confidence and self-esteem, more control, and influence over strategic decisions.

IBN is not perfect, though. Sometimes the partnership process can be slow. Other times, IBN's use is limited to softball issues and not major points of dispute. For example, parties have encountered problems dealing with contentious issues – such as the types of issues normally handled through adversarial bargaining – and management and the union sometimes have divergent views of how negotiations should work. When considering this approach, then, it makes sense to think about the issues to be addressed, the parties concerned, and their relationships.

One of the primary requirements for a successful mediation is for each party to come with an open mind. If either party is uncooperative, then it's a waste of time for everyone – not to mention expensive. Productive negotiations during mediation have a few similarities:

- They result in a wise agreement
- They are efficient
- They do not damage the relationship between the parties (and in some cases, they improve it)
- They focus on the future, not the past

The mediation I attended was derailed by one party that would not abandon its position. A learning experience, to be sure. I'll likely attend the upcoming trial, so stay tuned for my observations on that! Hopkins@FELTG.com

Attorneys Should Not Make Management Decisions
By William Wiley

Here at FELTG, we do a LOT of training for supervisors. We really enjoy helping front line managers learn the procedures the law provides for dealing with poor performers and civil servants who don't follow the rules. And during those sessions, we hear a LOT about what supervisors think about their legal and human resources support staffs.

One of the more common comments we get, and perhaps the most infuriating, is this: "Bill, I'd like to do it that way, by my solicitor won't let me." Man, oh man, does that comment make us cringe. With rare exception – and I mean *really* rare exception – the authority to hold agency employees accountable is delegated to the line managers who have been hired to run the place, not to the lawyers who are responsible for providing advice. Where do lawyers (or human resources specialists) get off telling line managers what to do when it comes to initiating discipline and performance removals?

> *Perhaps it started in law school, when the attorney-in-training took all those management classes.*

Ha, ha, ha. That's a little joke. Nary a law school in the country requires that its students take courses in how to manage a federal agency. OPM doesn't have any minimum training requirements for staff attorneys to take management classes once hired into government. So your typical agency attorney, though perhaps highly competent in the skills necessary to be a lawyer, has zilch formal education in the science of management.

Well, maybe those skills necessary to be a highly competent attorney are easily transferrable to the field of agency management. Perhaps whatever it takes to be a good lawyer is also what it takes to be a business manager.

No, they aren't. In fact, the skills necessary to be a good lawyer are sometimes antithetical to what it takes to be a good manager. Take risk-avoidance for example. Lawyers are trained to do whatever it takes to reduce the risk involved in an action, to consider every possible bad outcome, no matter how remote, and to include language in the contract or argument in the brief to cover that possibility. In the world of federal employment law, that means a lawyer would be likely to want to

avoid the possibility of losing an appeal, even if that possibility was slight.

In the business world, hesitation can cost a company a lost opportunity. Nobody wants to lose, but risk of loss in the management of an agency is sometimes worth the benefit of the gain that can result from success. When I was a baby in this business back in the '70s, I remember trying to talk a Navy commanding officer into settling an appeal because if we were to lose, it might cost the Navy "over ten thousand dollars." He gave me one of those over-the-spectacle looks that seasoned people give to newbies and said, "Young man [I knew I was about to be put in my place when he started off with that], last month I spilled $30,000 worth of fuel refueling my jets. Do you really think that I care about another ten grand?" He was making a business decision for which I did not have a perspective. And that's exactly what he was supposed to do.

Last year, I was lassoed during a break in one of our open-enrollment seminars by an attorney who worked in an agency for which FELTG recently had been doing a lot of onsite supervisory training. She was upset that we were teaching her agency's supervisors what accountability options were available without considering "the culture" of the agency. In other words, we were telling supervisors what they could do, and her office (the Office of Culture, I'm guessing) didn't want them to know what they had the authority to do.

On another occasion when I was speaking to a group of agency attorneys in an onsite course for an agency, I stressed (as I always do) how important it is to get the employee out of the workplace once a removal has been proposed. One of the attorneys in the group promptly informed me that "We don't do that here" because "it would look bad in the papers" to have an employee on administrative leave during the 30-day notice period. She was making her decision on what "we do" based on her view as an attorney safely ensconced down the hall in her office behind a locked door. The poor line manager, who should by all rights be making the decision, would be the one sitting around the corner from the about-to-be-terminated employee, directly in the line of fire, should the employee snap and become violent.

Line managers should be making line management decisions, not agency attorneys and human resources specialists. Our job is to provide advice and counsel, not to direct and tell. The concept of "HR won't let me do that" should disappear from the workplace. We are a service entity, not a line component. If we are advising a line manager who wants to do something we think to be bad for the agency, our job is to run that issue up the chain of command of that manager, not to interject our own style of management into our client. And I stress the word "client" as that should be the nature of our relationship with the manager.

Think of yourself in private practice. How much income do you think you would have if business people came to you for your legal counsel and you instead took it on yourself to tell them how to run their business and how to make business decisions? If you want to decide what "we do" around here or what "the culture" should be, start a business and become accountable for your decisions. Until then, if you are an agency advisor – attorney or otherwise – do America a favor. Fulfill your consultant role to the best of your ability and allow line managers to make the decisions that are their role to fulfill.

Take it from someone who has been on both sides. It's easy to tell someone what they cannot do. It's much harder and more important to help them do what they've decided to do. Wiley@FELTG.com

EEOC Continues to Focus on Protecting Transgender Employees from Discrimination in the Federal Workplace

By Deryn Sumner

Since its decision in *Macy v. Dept. of Justice*, EEOC No. 0120120821 (April 20, 2012), the Commission has continued to push the law forward to protect transgender employees from discrimination in the federal workplace. Last year saw the issuance of the Commission's decision in *Lusardi v. Dept. of Army*, EEOC No. 0120133395 (April 1, 2015), where the Commission found the

agency subjected the complainant, who had transitioned from male to female, to disparate treatment and harassment based on her sex. There, the agency had restricted her from using the common female restroom until she could provide "proof" of her complete transition, and her third-level supervisor referred to her by male pronouns and made hostile remarks after she announced her transition.

The latest decision from the Commission addressing claims of sex discrimination raised by a transgender employee came a few weeks ago when the Commission issued *Hillier v. Dept. of Treasury*, EEOC No. 0120150248 (April 21, 2016). The complainant, a transgender female, worked as a GS-13 Revenue Officer in Richmond, Virginia and was part of an agency employee organization named Christian Fundamentalist Internal Revenue Employees (CFIRE). This organization met weekly on agency property for Bible study. The complainant attended these meetings and at some point, informed the leadership of this organization that she was transgender and identified as a female, but attended the group meetings presenting as a male. Complainant asked if she could attend the weekly meetings "in the attire of the gender I believe I am: female" and the organization's president denied the request. A few weeks later, the organization's president, in response to complainant's request to present at a meeting, responded, "I cannot allow the CFIRE platform to be used to promote your transgender lifestyle." In response, the complainant stated that she was not planning on presenting anything relating to transgender issues (she sought to present on "a play she recently saw and discuss Judas' role in God's plan, and what it means for Christians today") and would not make the presentation dressed as a woman. The organization's president still refused the request and the complainant filed an EEO complaint. The agency dismissed for failure to state a claim, claiming that the organization's president, not agency management, took the action at issue and therefore his acts were not the actions of the agency.

The complainant appealed and the Commission vacated the dismissal, reinstated the formal complaint, and remanded it for investigation. Now some of you may be thinking, why should the agency be liable for the conduct of an employee who was acting in his capacity as an officer of an employee organization? The Commission addressed that argument in its decision, finding that although the agency viewed the complaint as one of disparate treatment, it should have been framed as a harassment claim, noting that the complainant checked a box marked "harassment (non-sexual)" on the EEO counselor's report.

The Commission further noted that agencies can be liable for harassment by a co-worker under a theory of harassment and the actions of this organization were related to the complainant's employment noting, "CFIRE is an employee organization created and recognized under the Agency's Employee Organization Policy, and sponsored by an executive member of the Agency. In accordance with this policy, employees of the Agency were permitted to organize as a group and use Agency facilities, meeting rooms, interoffice mail, and Agency newsletters. CFIRE members were also permitted to attend conferences and receive compensation by the Agency for travel expenses. As a result, any alleged discrimination from CFIRE and its officers or members is reasonably related to Complainant's employment with the Agency."

The Commission then found that the complainant stated a viable claim of harassment, noting "[w]e find that not allowing someone to dress as the gender with which they identify is severe enough to constitute a hostile work environment, as a reasonable person would find it hostile or abusive...Not allowing an employee to dress as the gender with which they identify and forcing them to dress as a gender with which they do not identify can be humiliating and dehumanizing, and it certainly unreasonably interferes with an employee's work environment. Further, not allowing an individual to present on any topic simply because that individual is transgender causes further alienation and reasonably interferes with an employee's work environment. Finally, the CFIRE President's use of the term 'transgender lifestyle' can reasonably be perceived as offensive, as it is indicating that transgender people somehow are different from others and have a different lifestyle than others, and as a result, they should be treated differently. Therefore, we find that this complaint states a claim of sex-based harassment." **[Editor's Note: This employee claimed "non-sexual harassment" and EEOC found "sex-based harassment." Apparently, the employee's**

claims don't really matter when it comes to the conclusion EEOC will reach to do justice.]

The Commission further disposed of the agency's arguments that CFIRE's actions were an exercise of religion, noting that an employer is not required more than a *de minimis* burden to provide religious accommodation in the workplace. The Commission remanded the complaint for investigation within 150 days of when the decision became final. Sumner@FELTG.com

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What is the Role of the Union Official in Statutorily-Defined Meetings?
By William Wiley

Questions, we get wonderful questions here at FELTG. And the one below from a well-respected senior practitioner raises a couple of issues of importance to all you unionized readers out there: the difference in union rights between a formal discussion and a *Weingarten* investigation. The FELTG responses to the questions are in **bold.**

Dear Beloved FELTG-

This whole business of representation at investigatory examinations has me utterly confused. For a long time – and please correct me – I've distinguished between formal and investigatory meetings by telling folks this: Union representation in formal meetings flows from the Union; Union representation in investigative examinations flows from the employee.

That is, in formal meetings the agency gives the Union a "heads up" (prior notification) and a chance to attend.

In investigatory meetings, 7114(a)(2)(B)(ii) places the burden of exclusive representation on the *employee*, not the union. That's how I've always read the statute. So I've told supervisors and investigators long ago if the employee does not request, no need to notify the union. Q: Was (or am) I right? **Yes.**

Folks who tell me a Union is entitled to representation in investigatory meetings without the employee's request or permission drive me crazy. **They are wrong. There is no authority for that position.** But I'm more than willing to grant my ignorance of case law on this matter. But why does the Statute distinguish between the two if there were no difference? **There IS a difference.** In formal meetings, the employee has no reasonable belief he might suffer discipline (might be irrational belief). In investigatory interviews, the employee may well reasonably believe, "Uh oh, this may not turn out well for me…"

I'm told the Authority gives great latitude to the "reasonable belief" clause **Correcto**, even granting representation when the employee has no reasonable belief personally. But this does not speak to the exclusive representative's alleged institutional right to attend uninvited to an investigatory examination. **There is no institutional right for the union to attend an investigatory interview.**

In its "Guidance on Meetings," the Authority cites the high court's justification for representation by the following rationale:

> The Court also reasoned that by attending the interview, the exclusive representative "protects the 'interests of the entire bargaining unit'" and is "able to exercise 'vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.'" (Guidance, 17-18)

This language tells me the union has an institutional interest in attending an investigatory examination **FLRA has never reached this conclusion. Note the "also" in the statement. That indicates that this is a secondary purpose of the Weingarten right, separate from the primary purpose of allaying fears the employee might have**, not solely to protect the interest of the employee under investigation. Hence, it has a right to attend even if the employee does not request? **No, there is no case law that says that, and the statute specifically requires an employee REQUEST: "and requests representation." 5 USC § 7114(a)(2)(B).**

The *Weingarten* decision from the Supreme Court itself states, "The right arises only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." 420 US 251, 257 (1975). If the Supremes say that the employee can participate in the interview without the union, that's good enough for me. There simply is no separate union right to be present independent of the employee's request, although if the employee requests union representation, such representation provides the secondary benefit of the union protecting the interest of the BU.

In clarifying 7114(a)(2)(B)(ii), the Authority does not address my burning Q of whether the exclusive representative can attend uninvited or even at the expressed opposition of the employee (pp 20-1). **Put out the fire. The union has no right to attend without the employee invoking *Weingarten*.**

Q: So is it a violation of the statute if the agency honors the employee's silence or tells the agency (even the Union) he does *not* want representation? **No. Absolutely not. If there were such a union right, we would have a case on point by now. We do not.** Is it a ULP to exclude the exclusive representative from the investigative interview? **We don't *exclude* the union because the union has no right to be there. Exclusion comes only if there is a commensurate right to be present (e.g., once the employee invokes his right to a union rep in an investigatory meeting, the union has a right to be represented by whoever it chooses.) Therefore, if management were to exclude the chosen union rep, that would be a ULP; e.g., *FCI Englewood*, 54 FLRA No. 133 (1998).**

And additionally, suppose the employee wants his own representative (attorney or not) not affiliated to the union or not approved by the union? **The employee can want chocolate cake for breakfast. However, there is no right to it. If the agency decides to allow him a rep even though there is no entitlement, the employee can choose whoever he wants, whoever is willing to do it, and whoever the agency will allow.** What then? Must the representative be necessarily approved by the exclusive representative? **No, because the primary purpose of Weingarten is to provide protection to the employee, not to benefit the union.**

As always, we hope this helps.

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