Federal Employment Law Training Group
Training By Professionals For Professionals

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Introduction

I got an email from my sister the other day. She still lives in the rural community where she and I grew up in Louisiana, and on occasion she likes to remind me of what I left behind. This time, she sent me a birth announcement from the local paper in which some proud parent proclaimed that her newest child will carry the first name "K_M." Instantly, I thought, "Oh, my lord. They've put EEOC in charge of naming children." As frequent readers of our newsletter know, a couple of years ago EEOC decided to no longer identify its decisions with the name of the complainant, but instead just refer to every complainant as "Complainant." FELTG Founder and Brother Hadley justifiably railed long and hard against such silliness, and as Deryn recently explained to us, EEOC has now relented a bit, agreeing to assign gender-appropriate fake names to complainants (ignoring the potential push-back if they guess the wrong gender, come up with an ethically offensive name, or overuse "Pat"). Turns out I was mistaken. They have not (yet) turned over child-naming to the federal government. As EEOC remains free to engage in ridiculous renaming practices, folks in the little town where I was born remain free to engage in whatever naming practices they believe to be warranted. And EEOC, if you're still building your random-name list, K_M is now available for assignment to one of your decisions. I'm sure that little "No-L" would be honored.

Bill

William B. Wiley, FELTG President

UPCOMING WASHINGTON, DC SEMINARS

Absence & Medical Issues Week
February 1-5

MSPB Law Week
March 7-11

Leave & Attendance Management and Performance Management
March 14-17

EEOC Law Week
April 4-8

AND, IN SAN FRANCISCO

MSPB Law Week
June 13 - 17

WEBINARS ON THE DOCKET

Managing a Mobile Workforce: How to Make Telework Work
November 19

Managing Difficult Employees: What to Do When it's Not Poor Performance or Misconduct
December 3

Whistleblower Reprisal: What Agencies and Unions Need to Know About the WPEA
December 10

Where Does It Say I Can Reprimand?
By William Wiley

Questions, we get questions. And here's one that goes to the fundamental nature of an agency's authority to do anything:

Dear Genius-Level Brains at FELTG-

> What is the Statutory or CFR basis that gives Management the authority to issue written reprimands? I've reviewed USC Chapter 5 and 5 CFR 752 as well as more OPM webpages than I thought could exist. I see lots on suspensions (<14 days and >14 days) but nothing that seems to give Agency Management the right or authority to issue written reprimands. Do you know of any CFR reg that addresses an Agency Head's authority to issue written reprimands for the efficiency of the service?

And our sparkly little FELTG answer:

> There's no specific statutory or regulatory authority to issue reprimands. Rather, the authority comes from the statutory delegation of the authority for the general administration of personnel within an agency to the head of the agency, 5 USC 302(b). Issuing a reprimand is part of the "general administration of personnel." Therefore, it is delegated to the head of your agency.
>
> It is a common misunderstanding to look for the authority to do something specific in government. Rather, this broad delegation of general administration authority effectively allows you to do anything related to personnel administration that you deem necessary, unless there is a prohibition against it. The better way to approach the issue is to ask, "Where does it say I cannot issue a reprimand?" As it does not say that anywhere, then you can.

An analogy would be, "Where does it say in law or regulation you have the right to breathe?" It does not. That right is embedded in the right to "the pursuit of happiness" that is found in our Constitution.

As for the content of a reprimand, generally the belief is that a reprimand was first defined for the practical purposes of progressive discipline in *Bolling v. Air Force*, 9 MSPR 335 (1981). Subsequently, buckets of Board decisions have relied on the fact of a reprimand being in the record to support progressive discipline. *Black's Law Dictionary* defines a reprimand as "to censure formally, especially with authority." The head of your agency has the authority to administer personnel. Therefore, you can reprimand.

By the way, nothing requires that a reprimand be for "the efficiency of the service." That is a requirement set forth in statute only for 5 USC 7513(a) actions: suspensions, demotions, and removals. Rather, we are bound to take a personnel action (e.g. reprimand) only on the basis of conduct that adversely affects the performance of the employee or others, 5 USC 2302(b)(1). A reprimand is based on misconduct. Therefore, this standard is satisfied.

Hope this helps. Best of luck- Bill
Wiley@FELTG.com

Discipline in the Public View – Credit Card Misuse IV
By Barbara Haga

Arbitrators are expected to apply the same standards in reviewing a disciplinary case as the MSPB would apply if the matter was appealed. In *Cornelius v. Nutt,* 472 U.S. 648 (1985), the Supreme Court wrote those words citing reports from the

House and Senate about the intent of the Reform Act provisions related to cases where an employee had a choice between pursuing an action through a grievance procedure and then to arbitration or appealing to the MSPB.

The credit card misuse case I am focusing on in this column was decided by an arbitrator. At the end of this article you will have an opportunity to answer whether you believe that the Supreme Court's expectation was achieved in these cases.

What is Personal Use?

In a 2005 decision, *National Air Traffic Controllers Association, AFL-CIO and Federal Aviation Administration, Fort Worth, Texas* (2005), arbitrator Diane Dunham Massey did not sustain a charge related to misuse. *(*Note: This case was reviewed by the Authority in 0-AR-4037, but the exception was related to attorney's fees which is not relevant to the discussion here.)

The grievant Ingram had worked for the FAA since 1991 and had advanced through the ranks from Security Assistant, GS-5 to the position of Drug Abatement Inspector, FG-1801-13 with the FAA's Drug and Alcohol Compliance Enforcement Division. She was removed for personal use of a government sponsored travel card and two other charges - falsification of her employment application and careless work.

An agency investigation revealed that the grievant had made 11 large ATM withdrawals using her travel card in violation of policy. She had been suspended a few years earlier for personal use of the card but that agency discipline did not involve ATM advances. In this case the grievant testified that the withdrawals were necessary to keep her payments on the card current because the agency was slow in reimbursing her after she submitted travel vouchers. Apparently, the agency travel claim process was cumbersome and the employee frequently traveled and so there could be multiple claims awaiting payment at a time when the payments to Citibank were due.

Ingram also testified that she had not been briefed on the ATM Policy and did not know its terms, and the agency did not rebut her testimony. In fact, the decision notes that her supervisor apparently did not recognize the ATM Policy when the matter was brought to his attention and, when asked if he had trained the employee on it, replied that he had not.

The arbitrator accepted Ingram's explanation that using the card to get cash advances to pay the bills was not personal use. At the end of the day the arbitrator did not sustain any part of the charge related to the credit card and, in fact, only sustained the careless work charge. The arbitrator mitigated the removal to a letter of warning.

Different Standards?

This arbitration decision points to some significant issues. First, the standard of what the employee should have known in this case seems quite different than what we saw in the last column with *Davis v. Department of the Navy*, 468 Fed. Appx. 967 (Fed. Cir. 2012) (NP). Davis was a newly hired Statistician not too far past the completion of her probationary period. Her removal for credit card misuse was sustained. When Davis said that she didn't know that she was supposed to use the card for only official purposes, the AJ did not find the argument credible, saying that a simple reading of the card application and agreement made it clear that the card was not a personal credit card account. So, if a newly hired Statistician who was probably a GS-9 or 11 should have read the documents and known what to do, where should that leave us with a Drug Abatement Inspector with 20 years of service?

We should also revisit *Johnson v. Treasury,* 15 MSPR 731 (1983), that I covered in the newsletter two months ago. He was downgraded from a GS-14 Supervisory Criminal Investigator to a GS-12 non-supervisory position for using his government charge card to purchase gas for his personal vehicle that he was using for official business. His removal was mitigated to the downgrade because there was nothing in the record indicating that Johnson was on notice that his conduct was in violation of any agency regulations and the

deciding and proposing officials testified that they never discussed the proper use of a government credit card with Johnson and "assumed" that he knew how a government credit card was to be used.

The facts in *Johnson* are similar to those in the arbitration case above – two high level employees in jobs that involved investigatory/drug interdiction work with "reasons" that the use of the card wasn't "personal." In each of these cases there was as issue that the employee was not on notice not to do it. The difference is that in the arbitration the charge was thrown out completely and Johnson was downgraded two grades.

What's the Answer?

I think most of us who have acted on the agency's behalf in these types of cases knew what the answer to the question at the beginning of this article would be. If the union didn't think there was something to be achieved by going to arbitration, why would they spend thousands of dollars to go there? Of course, they are hoping for an arbitrator's ruling that would be more generous to the employee than what they might obtain in the "free" one from an MSPB judge. In the FAA case I think that is what happened. Now it is your turn! Haga@FELTG.com

As We Dance in Doom's Twilight …
By William Wiley

I'm sure you regular readers are getting tired of hearing it from us: "The sky is falling! The sky is falling!" Except we keep saying: "We're losing our civil service! We're losing our civil service!" The fact that so many policy makers on Capitol Hill and the Campaign Trail are calling for the heads of civil servants, and thereby the abolishment of their protections, just freaks the Be-Jezus out of us. So get used to it. We're going to keep highlighting subversive issues until they pry our cold dead fingers from our keyboards.

Case in point: *Bess v. Air Force*, DE-0752-14-0280-I-1 (2015) (NP). As we've written about this decision elsewhere recently, there are some things that bother us about the way that MSPB is moving on a few matters in this performance-based removal opinion.

Unattainable Standard: From time immemorial, the law has been that an agency could not set a standard of performance that could not be attained. Oh, you could always set a high standard, a standard that only the best and brightest could reach, but you had to submit evidence that the standard was indeed attainable; that somebody could do it. Otherwise, you lose.

The burden of proof in a performance removal is only substantial evidence, "Evidence a reasonable person might accept [not WOULD accept] to support a conclusion relevant in an unacceptable performance action, even though others may disagree." 5 CFR 1201.56(c)(1). Historically, agencies have met this burden regarding attainability by having the proposing and/or deciding officials testify that in their professional opinions, the standard was do-able. This has always been an important point of proof because just about every employee who has been fired for poor performance has argued that he had been given too much work to do.

In *Bess* (in part because the agency unwisely used a six-month PIP), the appellant successfully argued that her standards were unattainable because her

support staff had been reduced from five to three during the PIP. Although the Deciding Official (apparently) believed the standards to be attainable even with this reduced staff, the judge reached the conclusion that the appellant's performance standards were "unreasonable and impossible" under these circumstances. In other words, the judge weighed the testimony of the appellant against the testimony of the manager and concluded that the manager was wrong and the appellant was right. Even though the agency needed only "substantial" proof.

Alternatively, the Board and the judge reasoned that a change in support staff during the PIP was a change in a performance expectation. That conclusion would have reached the same end and have been more defensible than discounting the testimony of the manager relative to the adequacy of the support that the appellant had. By evaluating the competing testimonies in a performance case and finding for the appellant, the adequacy of the lower substantial evidence standards seems to have been undermined.

Unacceptable Performance as a Whole: It started with *Muff v. Commerce*, 2012 MSPB 5, when the Board reversed a performance removal because the agency failed to prove "genuinely unacceptable performance." Oh, yes, there was unacceptable performance alright. But it wasn't "genuine" enough to satisfy the Board, whateverthehell that means. In *Bess* again the Board found that the agency proved that incidents of unacceptable performance occurred. However, because some of the other incidents of unacceptable performance charged by the agency were NOT proven, MSPB concluded that the agency had failed to prove that the appellant's performance was unacceptable "as a whole" under two critical elements.

In large part, this finding is the result of the agency failing to define exactly what it considered to be unacceptable performance "as a whole" under each element: one failure, two failures, all failures identified in the proposal … whatever. And if the Board had said, "We are unable to determine whether this single failure constitutes unacceptable performance because the agency failed to specify what constitutes unacceptable performance "as a whole" for this critical element, that would have been fine. But it did not. Instead, it said, "We agree with the administrative judge's conclusion that the appellant's unacceptable performance on Example L did not warrant an unacceptable rating on either critical element 3 or 5 as a whole." The difference is subtle, but hugely important. Who should decide what constitutes unacceptable performance: the agency or the Board? Both *Muff* and *Bess* suggest that it is the Board. And if that's the case, these decisions take us even deeper into the world of agencies finding it difficult to hold employees accountable for poor performance. We are going to lose our civil service if we keep going this way.

Non-Precedential Decisions: I realize that these issues are down in the weeds; that they deal with subtleties that I may or may not have grasped properly. But for the sake of argument, let's say that I'm right and that they signal a major management-adverse change in proof burdens in unacceptable performance cases, thereby making it more difficult for agencies to fire bad employees. How could an agency challenge the Board and get Federal Circuit review of something so precedential and significant, as intended by the Civil Service Reform Act's oversight structure?

It can't.

That's because the only cases that an agency can challenge by appealing the Board's decision to court are those that have a "substantial impact" on the federal service. As a non-precedential decision, by definition it does not have a substantial impact on MSPB's body of law. But do you think the Board's judges are not reading these things to find out what the members will do with one of their cases? If so, you don't know what's important to an MSPB judge: avoiding a remand or reversal of an initial decision. With non-precedential decisions, the Board has developed a way (intentionally or unintentionally) to create unreviewable pro-appellant case law ("pro-appellant" because an appellant can always challenge a Board decision in court; it's only agency management that is bound to the "substantial impact" standard).

Case Number: Finally, my last whining complaint, one that probably matters only to a weenie like me. The docket number the regional office at MSPB assigned to this case is DE-0752-etc. The "752" designates this as an adverse action case, whereas this is clearly a "432" unacceptable performance case (with a PIP and a substantial evidence burden of proof). When the initial appeal was filed, the intake person in Denver made a mistake and designated it as a 752 appeal. I can forgive a mistake like this as that same intake individual was probably buried under a mountain of stupid-sequestration furlough appeals that same day. However, what I just can't let go of, something I cannot see ever happening when I was at the Board, is that at every subsequent step of the appeal process, from the region through Board HQ, no one bothered to correct the case designator. Somewhere along the way, someone should have said, "Oh, my goodness. Those poor over-worked folks in the Mile High (☺) City slipped up. I'm going to change the case designator in this appeal to DE-0432-14-0281-I-1 (formerly DE-0752-14-0280-I-1) so that our annual reports will be accurate."

Inexplicably, no one did that. I guess I should not be surprised to see the law drifting a bit in this decision if the Board can't even take the time to get the darned docketing number correct. Of course, once we lose our civil service, none of this Wiley-Whining© will matter. Wiley@FELTG.com

Top 10 Mistakes Agencies Make Responding To Reasonable Accommodation Requests
By Deryn Sumner

In representing both agencies and employees where reasonable accommodation requests are at issue, I see some common mistakes committed by agencies in responding to these requests. So this month, let's chat about the top 10 mistakes agencies make when responding to employees' requests for reasonable accommodation.

1. Requiring extensive medical documentation and discussion where the disability and need for accommodation are obvious;
   The EEOC's regulations are clear – if the disability and need for accommodation are obvious, the agency should provide it without requiring the employee to provide medical documentation or engaging in extensive analysis. The example in the appendix to 29 C.F.R. 1630 is of an employee who uses a wheelchair who needs her desk raised to accommodate the arms of the wheelchair. There's no need to engage in any kind of process, just do it!
2. Not requiring medical documentation to be produced where the disability and need for accommodation are not obvious;
   On the flip side, there are some medical conditions where either the limiting nature of the condition or the need for accommodation are not clear. If that's the case, the agency should make a narrowly tailored request for medical documentation in order to determine if the employee is an individual with a disability, qualified to perform the job with or without an accommodation, and if there's a nexus between the medical condition and needed accommodation. **[Editor's Note: An agency does not have to accept medical documentation that is conclusory or non-specific; e.g., "Bill is disabled and needs to telework full time." At least, according to MSPB: *See Clemens v. Army*, 2014 MSPB 14.]**
3. Focusing too much on substantial limitations to major life activities;
   The 2009 Amendments to the ADA make pretty much every bodily function a major life activity. Yet, agencies still persist in focusing on the major life activities more commonly used prior to the Amendments (standing, lifting, eating, etc.). In the post-ADAAA world, pretty much everything is a major life activity and agencies shouldn't focus too much on this part of the analysis.
4. Failing to identify the essential functions of the position;

Too often agencies rely on the written position description instead of talking to the supervisor and the employee about what the essential functions of the position actually are. Sure, the PD might say that extensive travel is required, but the reality may be the employee hasn't traveled in years because of sequestration, or meetings previously held in person are now conducted using VTC.

5. Not considering alternative accommodations that may also be effective;
   If the requested accommodation isn't feasible but the employee is otherwise a qualified individual with a disability, the agency has an obligation to provide an effective accommodation. Denying the request without providing alternatives is opening up the agency to liability for failing to accommodate the employee. Look at what's needed and offer alternative accommodations.
6. Not keeping the employee apprised of the status of the response to the request;
   Sure, you might be working on responding to the request, having meetings, and gathering information, but if you don't keep the employee informed as to how you are working to respond, he or she is going to assume the agency is ignoring the request. Let him or her know that you're working on it and provide a timeframe for when the agency will provide a response.
7. Not considering interim accommodations while working on responding to the request;
   Credit for this tip goes to Gary Gilbert, who teaches this to FELTG audiences every year. If the agency needs some time to put together a complete response to a request or get items such as special furniture ordered and in place, it should provide an interim accommodation, such as teleworking or leave, to help carry the employee until the accommodation is in place.
8. Not involving the employee and the first-line supervisor in the decision-making process;
   Who is in the best spot to provide information about what the position actually entails and what's feasible? The employee and the first-line supervisor, of course! So involve them in the interactive process as much as possible.
9. Allowing informal and unwritten accommodations;
   We see it again and again – one supervisor allows an employee to telework, or work a flexible schedule, because of a disability, but doesn't put anything in writing memorializing this agreement. Then the supervisor moves on, only to have a new supervisor start and deny the employee what had been provided for years. It is hard for an agency to argue an accommodation is an undue hardship if it has already been in place for years.
10. Settling EEO complaints by providing reasonable accommodation as the only consideration.
    Again, a qualified individual with a disability is entitled to an effective accommodation. Requiring an employee to withdraw an EEO complaint with the only consideration being something they have a right to receive does not an enforceable settlement agreement make. Sumner@FELTG.com

Does the Employee Have Rights to Agency Files During the Response Period?
By William Wiley

In my practice, I run into this every now and then. The employee receives a proposed removal with an opportunity to respond. Following the FELTG advice intended to save your life, the proposing official sends the employee home on administrative leave during the notice period so that he will not remain in a federal workplace after he has been told he is about to be fired. During the response period, the employee asks to be allowed to access the files on his office computer so that he can defend himself to the deciding official.

I've run into some agency representatives who go to lengths to allow file access in this situation. One practitioner told me that his agency allows the employee to return to the workplace to access files on the agency's network, but with an IT specialist watching over his shoulder the whole time to make sure that nothing dastardly happens to the network. Another practitioner told me that he personally goes through the files the employee asks to be accessed, makes copies of those files to a CD, then mails the CD to the employee.

Oh, if only I were so accommodating.

In my world, the employee gets the proposal letter with attachments that are "the material relied on to support the reasons for action given in the notice." And nothing more. That's what the regulation says, 5 CFR 752.404(b)(1). You want other documents from the agency files? You can ask for them in discovery once you file your appeal. The essential requirements of Constitutional due process for a tenured public employee are notice of the charges against him, with an explanation of the evidence, and an opportunity for the employee to present his account of events. To require more prior to a termination, "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Cleveland Board of Education v. Loudermill,* 470 US 532, 546 (1985).

Unfortunately, we don't have any published Board law squarely on point. In other words, we've not had a case in which the employee asked for access to agency files during the response period, was denied access, and then the Board set aside the removal for violation of due process (or vice versa).

Even more unfortunately, we have a recent Board opinion that had the opportunity to address this issue, but side-stepped it awkwardly, leaving the question wider open than it should be: *Brady v. Navy,* AT-0432-14-0389-I-1 (2015) (NP). In that case, on appeal to the judge, appellant's able counsel argued that the agency's failure to allow the appellant access to the files on the agency's computer during the response period violated due process. It would have been helpful to us all if the judge had simply pointed out that the employee has no statutory, regulatory, or Constitutional right to those files prior to removal. Instead, the judge (and subsequently, the Board) dismissed the due process violation claim by saying that there was no proof that the employee actually asked to access those files during the response period.

Well, that doesn't help us one bit. If anything, it suggests that if the employee had indeed asked to access the agency's network during the response period, the agency would have been obligated to let him do so. And it's hard to make policy based on suggestions, particularly so when the suggestion seems to go contra to the law.

In my work, I'll continue to deny any requests by an employee to access agency files during the response period. The risk is significant if the employee is allowed back into the workplace, and I have better things to be doing than searching files and burning CDs. If the Board wants to create case law that requires that file access by an employee about to be fired is a requirement of due process, then and only then would I give in and do it.

I realize that many adjudicators take the position that narrow rulings are the best way to create law, that a judge should decide only those matters that are necessary to be decided to rule in a case. But Board, the agency folks just want to do the right thing, and they can do that only when you tell them

what the right thing is. Dodging the issue in this opinion is simply a missed opportunity to help the government run more smoothly.
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I Learn Something New Every Time
By Deborah Hopkins

A couple of weeks ago I attended an MSPB hearing at the Board's Washington Regional Office. If you haven't been to a hearing I strongly recommend you go, because it always proves to be a learning experience. If you have a hearing in the future, you definitely should go observe, and it's especially helpful if you can observe a hearing before your assigned Administrative Judge (AJ). But even if you have no desires/plans/dreams of litigating a case before the Board, you should go see what all the hoopla is about. I've shared my impressions in articles past, and this time I'd like to add a few new lessons to the growing list.

Bring a snack - or three. This hearing was in front of an AJ who does not give lunch breaks. He's very amenable to restroom breaks but don't expect you'll get an hour to run for a slice at *Peace a Pizza* in Crystal City, because you might not get it. Judge Thayer is not the only AJ who limits breaks to times of necessity only. So, I'd suggest you bring beverages, snacks and maybe even a lunch that you're capable of scarfing down in 5 minutes' time. There is a small convenience store on the concourse level of the building where the Board's Washington Regional Office lives, but its offerings are quite limited. *And, it's cash only.* So, be prepared. If you have a tendency to get hangry like I do, bring lots of food with you. 'Cause when your stomach's growling, that's the only thing in the world that matters.

Plan to go long. I talked with the agency attorneys before the hearing started, and asked them how long they anticipated the hearing would go. They both thought we'd be finished by noon, or 1:00 p.m. at the latest. Little did we know, the employee's counsel would cross-examine one witness for nearly four hours. Yes, four hours. So, forget the noon ending time; we got out at about 5:15. Many AJs don't end the day at 4:30 or 5:00 p.m. and will continue late into the evening. Our AJ told us he would stay until 8:00 that night if necessary, and the only reason he would end it then was because he has a prior commitment at that time. Again, this is where snacks come in handy.

Don't be a jerk. In this particular hearing, I was shocked, horrified, disgusted and appalled at the behavior exhibited by the appellant's attorney. I'm all for zealous advocacy and creative lawyering, but when that turns into blatant disrespect for opposing counsel, witnesses and even the judge, it becomes a problem. One of the worst offenses made by this particular attorney was when on cross-exam the judge sustained the agency counsel's objection, and the appellant's attorney looked at the judge, rolled her eyes, said, "Are you *serious*? This is *such* a waste of time." Good thing I'm not a judge because I think I would have kicked her out at that point. See 5 CFR 1201.43(d) (A judge may exclude or limit the participation of a representative or other person in the case for contumacious conduct or conduct prejudicial to the administration of justice. When the judge excludes a party's representative, the judge will afford the party a reasonable time to obtain another representative before proceeding with the case.) See also MSPB's *Judges' Handbook*, Ch. 10, section 11, p. 42.

Be prepared. The agency attorneys had a number of hearing notebook binders, in which they had the exhibits listed in numerical order. They had one for each agency witness, and one for each of the appellant's witnesses, in fact. It might seem like overkill but it's really not. During the course of direct and cross, the exhibits might be referenced a number of times. Imagine how smoothly your questioning will go when you open the notebook and the exhibit is in its proper spot, right where it needs to be. Now imagine you only have one notebook and after each witness you have to ask for time to reorganize the exhibits, put the pages in order, put the documents into the correct tabs, and

be sure each page is accounted for. That presents the makings of a mini-nightmare. Imagine how nice it is instead, after the witness is dismissed, to gather all those papers in a pile, and stick them off to the side, then call your next witness and have a brand new notebook from which to pull exhibits. Smooth sailing, my friend. And that's what you want in a hearing.

Did I mention that I learn something new every single time I observe an MSPB hearing? These hearings are open to the public, but they're not posted on the MSPB website - all you have to do is call the main number at your regional office, and the nice person who answers the phone will be happy to tell you when the next hearings are scheduled. Now go forth and learn! Hopkins@FELTG.com.

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Another Change to the Appeal Rights Notice Language
By William Wiley

Back in 2012, MSPB began to require agencies to add a bunch of stuff to that part of a decision letter that tells the employee what his rights are to appeal the agency's decision. However, rather than give us model language, the Board just said in general what an agency is supposed to include, thereby leaving it up to us to guess at how to word the appeal rights section to comply with whatever we guess the Board wants us to say. How unhelpful.

In response, going where MSPB fears to tread, we here at FELTG provided you readers sample language that we guessed would be adequate, got your input, then provided you improved language based on your responses. Months later, we had to tweak the suggested language again because the Board issued a decision that explained that it wanted a lot more in those decision letters especially for bargaining unit employees. That was in 2013.

And now we see we need to tweak again. In a case this past summer, the Board was dealing with an appellant who had filed both an MSPB appeal of a removal at the same time he filed an EEOC complaint about the removal. There's an issue of timeliness in both appeals, so the judge will have to work with the case some more. However, in passing the Board noted that this poor appellant cannot be blamed for being confused regarding the duplicity of his appeals because although the agency dutifully gave the employee both MSPB and EEOC rights, it did not tell him that he is precluded from filing both. *Brewer v. Army*, SF-0752-15-0216-I-1 (2015) (NP).

So we're still guessing at actually what conforms to what the Board wants as a boilerplate rights-notice, but we've now got another hint: When you tell them their rights, be sure to tell them they can't file both ways. You'll see our newly-recommended language below with the addition in **bold** for emphasis for you readers. And speaking of you readers, if any of you have any additional ideas as to what MSPB expects in the way of appellant hand-holding, please let us know (especially if you happen to be a Board member).

FELTG recommended appeal rights language as of the fall of 2015:

> You have the right to appeal this decision to the US Merit Systems Protection Board. An appeal must be filed no later than 30 days after the effective date of this action, or 30 days after the date of receipt of this decision, whichever is later. The address for filing an appeal is US MSPB, Washington Regional Office, 1901 S. Bell St., Suite 950, Arlington, VA, 22202. MSPB's regulations and appeal form (copy attached) may be found at www.mspb.gov. If you do decide to file an appeal with MSPB, you should notify the Board that the agency contact official for the purpose of your appeal is:
>
> Deborah Hopkins, Acting General Counsel
> US Federal Employment Law Training Group
> 1825 R St NW
> Washington, DC 20009

Telephone 844-at-FELTG, FAX 206-350-2880, Hopkins@feltg.gov

Alternatively, you may seek corrective action before the US Office of Special Counsel, www.osc.gov. However, if you do so, your appeal will be limited to whether the agency took one or more covered personnel actions against you in retaliation for making protected whistleblowing disclosures. You will be forgoing the right to otherwise challenge this removal. Finally, you have the right to file a complaint with the US Equal Employment Opportunity Commission consistent with the provisions of 5 USC 7121(d) and 29 CFR 1614.301 and 1614.302, www.eeoc.gov. **You may not file with both MSPB and EEOC.**

If the employee (soon to be "appellant") is in a bargaining unit, add:

If you have filed a grievance with the agency under a negotiated grievance procedure, you may ask the Board to review the final decision on the grievance if you allege before the Board that you are the victim of prohibited discrimination. Usually, the final decision on a grievance is the decision of an arbitrator. A full description of an individual's right to pursue a grievance and to request Board review of a final decision on the grievance is found at 5 U.S.C. 7121 and 7702. Your request for Board review must be filed within 35 days after the date of issuance of the decision or, if you show that the decision was received more than 5 days after the date of issuance, within 30 days after the date you received the decision. You must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

(1) A statement of the grounds on which review is requested;
(2) References to evidence of record or rulings related to the issues before the Board;
(3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and
(4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing.

Please keep in mind, this truly is just our best guess as of today. Be sure to stay tuned, in case the Board decides to add other twists and turns as the case law develops. Wiley@FELTG.com

EEOC Affirms That Nassar Does Not Apply To Federal Sector Retaliation Complaints
By Deryn Sumner

In 2013, the Supreme Court issued a decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013), holding that in order to prevail in Title VII retaliation claims, employees must demonstrate that the protected activity was the "but for cause" of the action claimed to be retaliatory. This "but for" standard had previously been applied to claims of age discrimination raised under the Age Discrimination in Employment Act by the Supreme Court in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009).

Agency lawyers welcomed the heightened standard employees were required to meet to succeed on their claims of retaliation, and agency representatives before the EEOC argued that the *Nassar* standard applied to federal employees who filed formal complaints of retaliation. Although district court case law is not controlling before the Commission, Supreme Court case law is. Therefore, it seemed logical that the EEOC would be forced to adopt the *Nassar* "but for" standard.

However, the EEOC found a way to distinguish the Supreme Court's holding, as set forth in a footnote in *Nita H. v. Dept. of Interior*, EEOC App. No. 0320110050 (July 16, 2014):

> In the Commission's view, the "but for" standard ("but for" its retaliatory motive, the employer would not have taken the adverse action, meaning that the retaliatory motive made a difference in the outcome) does not apply to retaliation claims by federal sector applicants or employees under Title VII or the ADEA [Americans with Disabilities Enhancement Act] because the relevant federal sector statutory language does not employ the "because of" language on which the Supreme Court based its holdings in *University of Texas Southwestern Medical Center v. Nassar,* 133 S. Ct. 2517 (2013) and *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167 (2009) (requiring "but for" causation for ADEA claims brought under 29 U.S.C. § 623). These federal sector provisions contain a "broad prohibition of discrimination rather than a list of specific prohibited practices." See *Gomez-Perez v. Potter*, 553 U.S. 474, 487-88 (2008) (holding that the broad prohibition in 29 U.S.C. § 633a (a) that personnel actions affecting federal employees who are at least 40 years of age "shall be made free from any discrimination based on age" prohibits retaliation by federal agencies); see also 42 U.S.C. § 2000e-16(a) (personnel actions affecting federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin").

The Commission has maintained this position since and recently affirmed this holding in *Augustine S. v. DHS*, EEOC No. 0720110018 (October 22, 2015) (also discussed as one of the latest six-figure compensatory damages awards from the Commission elsewhere this month). The Agency argued that the administrative judge erred in failing to apply the "but for" standard to the claim of retaliation. The Commission rejected this argument, citing back to its 2014 decision. To be fair to the Agency representative who made the argument, when the appeal was filed in the fall of 2013, the Commission had not yet issued its position on the decision. But going forward it's clear. The Commission holds the position that *Nassar* does not apply to federal sector claims of retaliation. **[Editor's Note: In practice, here's what this means. Under *Nassar*, if the manager considered the employee's 40+ age when making a personnel decision, but would have made the same decision regardless of age, no discrimination. Without *Nassar*, if the manager considered the employees 40+ age when making a personnel decision, discrimination, even if the manager would have made the same decision without consideration of age. Bottom Line: More finds of discrimination with EEOC's approach articulated here.]**

Hide the Ball, Board-Style
By William Wiley

I try not to take this work personally, but sometimes I wonder. Being seen by some as a pain in the backside by a few of the oversight agencies we on occasion complain about here at FELTG, I guess I should not be surprised at the following. Keep in mind that agencies general have 20 days to produce a document requested under the Freedom of Information Act, particularly if the request is targeted and a few pages in length:

APR 8, 2014: OSC filed complaints with MSPB alleging that three Department of Homeland Security managers had committed prohibited personnel practices.

APR 24, 2014: I FOIA-requested a copy of those complaints from MSPB. I thought that FELTG class participants would like to know what they look like.

MAY 9, 2014: MSPB referred my FOIA request to OSC as OSC had originated the documents. The Board has been dodging FOIA requests for the past five years by referrals like these to originating agencies, even though they also have the documents in their files. Tacky.

DEC 2014 (yes, that's eight months later): MSPB decided to withdraw the referral of my FOIA request to OSC and instead "consulted" with OSC as to how to respond to my request.

SEP 30, 2015: OSC notified me of its consulting action in DEC of last year and alerted me that MSPB will be responding to my APR 2014 request directly.

AS OF TODAY: Nothing yet, other than an acknowledgement by the Board that they are thinking about what to do.

Yeah, I'm holding my breath on this one.

Both MSPB and EEOC have lost sight of their responsibility to the public. MSPB for the past five years has refused to produce documents that historically it produced without hesitation in response to FOIA requests. Instead of producing documents that we, the public, can review and learn from, the Board leadership has decided without explanation to "refer" FOIA requests to originating agencies. Those agencies retain the documents in files not routinely open to the public the way that MSPB hearings and adjudication have been. Therefore, the agencies refuse to comply with the requests due to privacy concerns, and MSPB manages by these referrals to keep the documents out of the public light.

EEOC has decided to hide the names of complainants and management officials accused of civil rights discrimination. The Commission's latest approach of assigning fake randomly-generated names for complainants would be laughable if it were not so frustrating.

One of the great strengths of our society is the open nature of our government. When governmental oversight agencies take steps obviously intended to frustrate that openness – to hide government activity and wrong doings from public scrutiny – they undermine the integrity of our civil service. No wonder that many of our citizens are so frustrated with government that they are willing to put non-governmental people in charge of the executive branch. Wiley@FELTG.com.

The Latest Batch of Six-Figure Compensatory Damages Awards from EEOC
By Deryn Sumner

It's true, some discrimination claims do not have merit. Okay, fine, many discrimination claims do not have merit. But for those people who are victims of discrimination, the impact on their lives can be permanent and staggering. As I tell attendees of FELTG seminars and clients alike, you couldn't pay me any amount of money to go through what these complainants went through to end up with these six-figure damages awards, which are usually issued years and years after the fact. If you are representing an agency in a case where there's real liability, you need to conduct discovery to determine what types of damages are at issue. And if you represent your agency in a

case where the complainant has substantial evidence of damages (visits to medical care providers, diagnoses of depression and anxiety, and friends and family ready to testify in support of a claim for damages) you need to be armed with what the potential monetary exposure to the agency could be.

And with that in mind, here are some of the latest decisions out of the EEOC's Office of Federal Operations regarding six-figure awards of non-pecuniary compensatory damages.

In *Complainant v. DHS*, EEOC App. No. 0720130035 (October 20, 2015) (a case discussed elsewhere in this newsletter for the Commission's affirmation that *Nassar* does not apply to federal sector EEO complaints), the Commission increased an award of non-pecuniary compensatory damages from $55,000 to $125,000. Evidence in support of the award included that the harassment lasted almost four years; and the complainant received diagnoses of depression, anxiety, acute stress disorder, PTSD, and suffered exacerbation of his diabetes. The complainant provided testimony that he suffered panic attacks, vomiting, diarrhea, debilitating headaches, and chronic nightmares. The complainant's wife testified that she feared the complainant would commit suicide, and that the agency's actions and the attendant aftermath almost caused them to divorce. She testified that she only remained married to the complainant because of their daughter, whose relationship with her father was also damaged.

In a case where the agency challenged the finding of discrimination, but not the award of damages, the Commission summarily affirmed an award of $210,000 in *Complainant v. Dept. of Justice*, EEOC App. No. 0720140035 (September 10, 2015). In that case, after the agency failed to adequately separate the complainant from her harasser, the harasser physically attacked her. The Commission summarizes the attack as follows, "[the co-worker's assault] included repeatedly punching her face and arm, repeatedly stabbing her face with a car key, grabbing her hair and slamming her head against the concrete surface of the parking garage, and kicking her." As a result of the attack, the complainant was out of work for approximately three months, was diagnosed with PTSD, and received one year of psychiatric treatment. Further, the complainant experienced fear for her safety and the safety of her children and pain from the assault years later.

And finally in *Augustine S. v. DHS*, EEOC App. No. 0720110018 (October 22, 2015), the Commission affirmed an AJ's award of $200,000 to a complainant rendered unable to work as a result of the agency's failure to accommodate him. The complainant presented testimony that the agency's failure lasted a decade and a result, the complainant was depressed, suffered from sleep disturbances, became fearful of others, and suffered from "excruciating joint pain and swelling." Although the agency attempted to be excused from liability by claiming that it attempted to accommodate the employee in good faith, the Commission didn't buy it, citing the ten years the complainant worked without accommodation before he was forced to leave on disability retirement.
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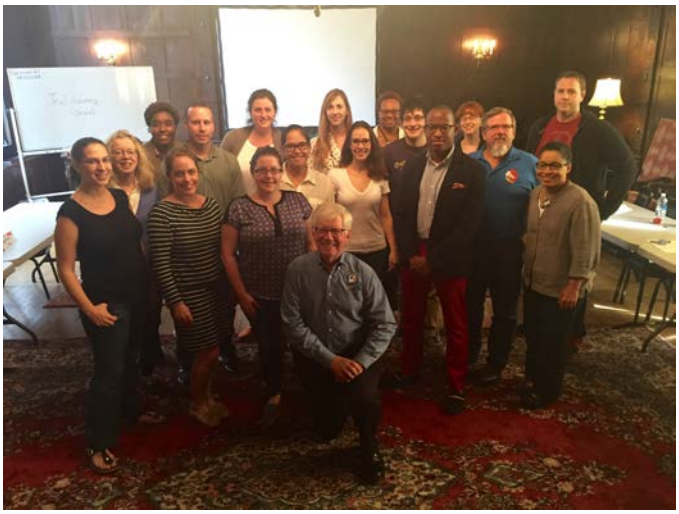
Take a look at the newest class of FELTG Certified Practitioners:



These folks successfully completed the requirements for certification in **MSPB and EEOC Hearing Practices** on November 6, 2015.

Congratulations, everyone!