Federal Employment Law Training Group
Training By Professionals For Professionals

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Introduction

I bet you've seen this guy at the airport. He's dragging along two suitcases the size of Humvees, toting a "carry-on" that is about as likely to fit in an overhead compartment as I am to fit into my Navy dress blues that looked damned good on me 40 years ago. He's packed everything in his closet because he hasn't planned what he will need when he gets wherever he is going. Me? I'm the guy who can do four weeks touring Europe with three shirts, two pairs of pants, and a jacket: done. Unfortunately, some employment law practitioners put together cases the way Mr. Humvee packs; everything plus the kitchen sink because they really don't know what to put in a case. And like our inexperienced traveler, they will have to pay extra baggage fees in the sense that they will have to produce more evidence because they have put more facts into their case. In addition, like our unprepared traveler, their case will be a confused mess once the judge looks inside. Me? I fire like I pack; one-page charge, two-page *Douglas*, three-page sentence rights: done. Come to our next *MSPB Law Week* seminar (March 7-11, 2016) and you, too, can travel like Rick Steves.

Oh, and if you see the *Civil Service Reform Act* around anywhere this week (probably heading to Capitol Hill to be dismembered by Congress) be sure to wish her a happy birthday. This week is the 37th anniversary of her passage. Here at FELTG, we celebrate. Do you?

William B. Wiley, FELTG President

UPCOMING WASHINGTON, DC SEMINARS

MSPB & EEOC Hearing Practices Week
November 2 - 6
Only one spot remaining!

FLRA Law Week
November 16 - 20

Absence & Medical Issues Week
February 1-5, 2016

AND, IN SAN FRANCISCO

Legal Writing Week
December 7 - 11

WEBINARS ON THE DOCKET

Handling Within-Grade Increases: Eligibility, Denials and Appeals
October 22

Legal Writing for MSPB Practitioners
October 29

Significant Federal Sector Developments: The Latest and Greatest
November 12

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

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

This month we are going to look at a two removal cases that were sustained on charges of, or including, credit card misuse.

Did it Really Mean "For Official Government Travel Only"?

This case includes a free lesson on who is covered under 5 USC 75 and what to do when things don't go your way the first time. The case is *Davis v. Navy*, 468 Fed. Appx. 967 (Fed. Cir. 2012) (NP).

Navy gave Davis a temporary appointment in the competitive service as a statistical assistant in 2006. On April 1, 2007, she obtained a career appointment with the Navy as a mathematical statistician. This career appointment was subject to a one-year probationary period. On March 26, 2008, she was terminated for misconduct based on use of her government credit card for personal expenses unrelated to official government travel.

The Board did not accept jurisdiction on the termination, agreeing that Davis was in a probationary period, but the Federal Circuit remanded stating that the temporary statistical assistant appointment time should be counted toward the probationary period. *Davis v. MSPB,* 340 F. App'x 660 (Fed. Cir. 2009). After the AJ overturned the termination action, the Navy restored Davis to her original position, awarded her back pay, and placed her on administrative leave. In May 2010, the Navy issued a notice proposing Davis' removal based upon misuse of a government credit card. The AJ sustained the removal and the Board denied the petition for review.

Of course, Davis argued double jeopardy which didn't work. She claimed discrimination on various bases which was not proven.

She argued that she was inadequately trained on the proper use of her government credit card. She contended that she "never knew that the travel card was to be used for government travel only," and that the Navy was "unable to present any documents to substantiate that" she had been informed that she could not use the card for personal use.

For those of you not familiar with Statistician positions, these positions are included in the OPM Professional and Scientific qualification standards. You need 15 semester hours in statistics (or in mathematics and statistics) and another 9 hours in something like the physical or biological sciences, medicine, education, or engineering to qualify.

Now, back to the argument that "I didn't know that it wasn't provided for personal use." The AJ did not find that argument credible, dispensing with it by stating that a simple reading of the card application and agreement make it clear that the card was not a personal credit card account and that it was not a benefit of her employment. This is a point worth remembering in case you don't have actual documents to introduce that say, "I have read and understood that this is for official use only."

Davis also argued that removal was an unduly harsh penalty for her offense. She said that she paid the balance on the government credit card out of her "personal funds" (I should hope so since they were personal charges) and that her improper use of the card did not compromise her ability to do her job. "Her supervisor testified that he concluded that removal was an appropriate penalty given the seriousness of her offense and the fact that her job as a statistician required her to perform her duties in a responsible and accurate manner." He also testified that he found her claim that she did not understand to be "incredible," and "… that her misconduct caused him to lose confidence in her ability to properly perform her job responsibilities." She might have done better to argue something other than that she didn't know it was wrong.

When it is all Going Downhill

In *Callaway v. DoD*, DC-0752-13-0004-I-1 (2013), an Electrician Leader WL-10 was removed and the action was sustained by the AJ for testing positive

for an illegal drug (PCP) and for misuse of his Government Travel Charge Card (GTCC). The PCP use was identified in a random drug test in September 2011. Callaway's first explanation that he was in a car where two others were using PCP didn't convince the Medical Review Officer that he had not used the illegal substance. He gave a statement later where he admitted the use and further claimed that he was intoxicated and received a ride home from a club by two women he had never met before when he used the PCP. (There's a lesson there he should have learned early on – never accept rides from strange women!)

The second charge arose after a past due account notification was issued regarding his GTCC in December 2011. He was 115 days past due with a balance of $1,357.36. Callaway's last official travel was over a year earlier in the fall of 2010. The GTCC charges that were overdue were incurred during May and August of 2011. The 2011 unauthorized transactions looked like regular travel charges and included vendors such as Enterprise Rent-A-Car, US Airways, Priceline.com, and various cash advance merchants. There were two unauthorized purchases in May and eight in August of 2011.

Why it took until April 2012 to issue a proposed removal is not clear but the dates are specifically covered in the footnotes because Callaway continued to engage in misconduct. On April 30, 2012, the day before his reply to the proposed removal was due, Callaway attempted to obtain a cash advance using his GTCC. The transaction was declined, however, as the account had been suspended due to his previous misuse. The Deciding Official indicated that while Callaway admitted that his use of his GTCC was inappropriate and intolerable, he doubted the sincerity of Callaway's contrition given that he continued to misuse his GTCC even after his proposed removal was issued. The Deciding Official also stated that he did not believe Callaway's contention that his "last" misuse of the GTCC was due to mistaking the government card for his personal credit card. **[Editor's Note: As we teach in ALL of our supervisory training, when a proposed removal is issued, the best practice is: a) remove the individual from the workplace (so he doesn't kill somebody), b) cut off his access to the agency's computer system (so he doesn't download a bunch of saleable secret information and replace it with a bunch of nasty computer viruses), and c) retrieve all of the government property in his possession (so he doesn't try to use his government credit card, among other obvious reasons).]**
Haga@FELTG.com

How I Got to Be So Smart
By William Wiley

OK, maybe "smart" isn't the best word. But often I

find myself wondering how come the answers to a lot of our employment law questions are as clear as they can be to me, yet I sometimes encounter other intelligent, well-educated individuals who disagree, who think that their answer is better than mine. Many times these disagreers are attorneys with extensive legal experience and several degrees from really important law schools. While the answers are so obvious to me that I have trouble understanding the disagreement, they hold fast to what they believe to be the right answer. For example:

> "Agencies can reassign employees only when the employee wants to be reassigned. " Wrong. The agency can reassign whoever it wants wherever it wants for a legitimate business reason.
>
> "Deciding Officials should do a fulsome *Douglas* Factor assessment even though the Proposing official has done a different one." Wrong. The DO violates due process when he starts bringing new facts and judgments into a case of which the employee has not been advised.
>
> "All employees should be treated the same." Wrong. Supervisors are being paid to differentiate among employees (*i.e.,* to treat them differently) based on merit.

Look. I know I'm hardly ever the smartest lawyer in a room. Heck, I'm not even a real lawyer because I didn't go to law school; I just read for the law and

passed the bar exam. The state of California awarded me a Juris Doctorate for doing that, but I think that the Department of Education just felt sorry for me. How could it be that I am so often right and other much more brilliant lawyers are sometimes so wrong?

And then while mulling over this question one dark evening as I sat alone in some non-descript bar nursing my last-call whisky, it suddenly came to me: *I learned employment law backwards!* Think how most people become employment lawyers. They get an undergraduate degree, go to law school for three years learning IMPORTANT LEGAL PRINCIPLES, and then get hired into a federal agency where they are thrown into defending the agency in removals and discrimination complaints. They take their law school training, apply those IMPORTANT LEGAL PRINCIPLES to the cases assigned to them, and slowly but surely start to become employment lawyers.

I came at this backwards. I started out as a psychologist, got removals and discrimination complaints assigned to me because no one else had the time to do them, and learned the law by reading every decision issued by the "new" Merit Systems Protection Board starting in 1979. After ten years of that, THEN I passed the California bar exam, and THEN I started applying all those IMPORTANT LEGAL PRINCIPLES that my brother and sister attorneys had started out with.

And there's the difference. Because of their legal education, some employment law practitioners answer a question based on those IMPORTANT LEGAL PRINCIPLES. I, on the other hand, answer questions based on whatever the Board or EEOC has said in the past. While an attorney well-grounded in IMPORTANT LEGAL PRINCIPLES might know what the answer "should" be, I base my answer on what the answer actually is, in recognition that the Board members over the past 35 years have been given the responsibility of making those decisions (whether I agree with them or not).

For example, one of the things we teach in our fabulous FELTG seminars is to charge down and prove up, a trick we learned from our friend and colleague, Renn Fowler. The principle is that the Board requires the agency to prove EVERY FRIGGING WORD in the upper "charge" part of a proposal letter, but will forgive an agency if it does not prove something said in the lower "*Douglas* Factor analysis." In pointed example, it's smart to draft a non-intent charge (*e.g.,* lack of candor), then in the *Douglas* Factor analysis, argue that a severe penalty is warranted because the misconduct was intentional. That way, if you are unable to prove "intent" on appeal, you do not automatically lose the case. In comparison, if you were to charge "falsification" (defined as an intentional act) instead of lack-of-candor, and you failed to prove "intent," you automatically lose the case. This principle has been affirmed by the Federal Circuit and has been a part of Board black-letter case law for at least 25 years.

I received an email several months ago from an employment lawyer who expressed his disagreement with this principle. He said that it makes no sense that an agency can avoid proving something in a difficult part of a proposal letter, then again introduce it into a later easier-to-prove part of the same letter. He concluded by saying that I was wrong, the Board was wrong, and thereby the Federal Circuit was wrong.

Well, la-de-da.

Look. I admit I am occasionally wrong. And I certainly point out when I think that the Board is wrong. But it IS the Board, and IT gets to decide our rules, like them or not. I may well agree with the emailer that applying IMPORTANT LEGAL PRINCIPLES to this situation should result in a conclusion that an agency cannot hide intent down in Douglas and get away with it. But IMPORTANT LEGAL PRINCIPLES do not control our business, the Board's decisions do.

So what does all my soul searching and having a life-explaining epiphany have to do with you, the day-to-day employment law practitioner? This:

> *When you give advice to a supervisor, you should base your advice on what the Board has said, not on what the Board should*

have said based on your interpretation of IMPORTANT LEGAL PRINCIPLES.

If you cannot point to a Board decision that backs you up on something you've said, you are running the risk of giving out advice that you think is "appropriate," but is not actually controlling. Luckily, I learned the law backwards so that the controlling law approach comes naturally. For those normal people who learned the law the way it is supposed to be learned, I'm here to help you overcome the disadvantages of a legal education.
Be smart. Read the cases. Wiley@FELTG.com

Called to the Stand: Rules for Being an Effective Witness
By Deborah Hopkins

I remember the day clearly, as if it was just last week. I was in eighth grade. I was wearing a white t-shirt and a black and white patterned skirt. I was sitting in Mr. Scott's history class (fourth row, third desk back) and someone from the principal's office came in to class and said the principal wanted to see me. Despite that I was a ridiculously good kid and had no reason to fear -I didn't fight, didn't cheat on tests, didn't steal other kids' lunches - I got a pit of anxiety in my stomach as I marched from the third floor of Monroe Junior High School down to the first floor administrative offices. I was forced to wait about 30 minutes and I remember sweating bullets. I felt like I was in BIG TROUBLE and I was trying to figure out why.

Finally, after what seemed like forever, I was called in to the office. The principal asked if I knew why I was there and I said no. She stared at me for what felt like an hour but was probably half a second before she explained that I was called to her office because I was a witness to a fight that had happened in the hallway the day before. Relief coursed through my veins and I breathed a sigh of relief before I told her all I'd seen, which was almost nothing. Being a witness is a scary experience.

At some point in your federal civil service career, you might be called to testify as a witness in a hearing before the MSPB or EEOC. This is a nerve-wracking experience regardless of how small your role might be. There are a number of best practices to follow - in fact, Rock Rockenbach and I are in the process of developing some training on this topic for non-attorneys and non-practitioners. Allow me to share just a few rules to remember.

Listen to the question. Whether it's the agency representative or opposing counsel asking, wait for the complete question. Don't anticipate the question. Answer only the question you are asked, and then pause and wait for the next question. It's tempting to fill the silence with more words but resist the urge. Be patient.

Remember that this hearing is being done for the judge. To the extent it's possible, direct your answers to the judge. Even though she's talking to you, try not to look at the attorney asking the questions, or to other counsel or any observers in the room. Look at the judge when you're speaking.

Stop talking if there is an objection. The moment you hear the word "objection" stop speaking, even if you're mid-sentence. Both counsel will be given an opportunity to argue the objection t the judge. Also, it is possible that you may be asked to leave the hearing room while the attorneys make their arguments. Don't be worried if this happens; it's normal. And whether or not you're excused from the room, wait until the judge rules on the objection before proceeding. If the objection is sustained you won't have to answer the question. If the objection is overruled then you will be directed to answer the question asked.

Don't answer a question if you don't know the answer. If you truly don't know the answer, then "I don't know" or "I don't recall" is the answer. If you don't understand the question, say that and counsel will rephrase. Avoid speculating on the answer and avoid saying what you think you should say. Also, don't use "I don't know" or "I don't recall" as a ploy on cross-examination.

Always tell the truth. This one speaks for itself.

These rules apply in depositions and when you're on the stand. There are several additional rules for witnesses, which we cover during *Workplace Investigations Week* (being held next week in DC, then back again in April 2016). But, until you attend one of those sessions, these tips should get you started on the right track if you're called to be a witness in an administrative hearing. Good luck out there! Hopkins@FELTG.com

Webinar Spotlight:
Handling Within-Grade Increases: Eligibility, Denials and Appeals
October 22, 2015

If you are looking for detailed information on WIGIs, join FELTG's Barbara Haga on Thursday, October 22, for the 90-minute webinar on the topic. During this session, Ms Haga will give you a primer on WIGIs, complete with detailed references to relevant MSPB decisions.

She'll also discuss eligibility for WIGIs, when a WIGI decision may be delayed, properly handling the notice of an acceptable level of competence determination and the reconsideration decision, and successfully defending the appeal.

Register your site today and get ready to assist supervisors and managers at your agency to properly act on WIGI determinations.

Employees With Disabilities Can Be Held Accountable For Misconduct
By Deryn Sumner

Last week while providing an onsite training in Anchorage, Alaska about how to conduct investigations into employee misconduct (yes, FELTG really will go wherever our services are requested; USAREUR, give me a call! 844-at-FELTG), the question came up about whether employees with disabilities can be held accountable for misconduct. Yes, it can be more difficult, and supervisors may be wary, but the Commission is clear that employees with disabilities should be held accountable for misconduct if two criteria are met: the conduct standard must be job-related and consistent with business necessity and the employer must treat the employee with a disability similarly to employees who are not disabled. The Commission in its Guidance on the Americans with Disabilities Act and Psychiatric Disabilities provides some great examples:

> **Example A:** An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard -- a prohibition against employee theft -- that is job-related for the position in question and consistent with business necessity.
>
> **Example B:** An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard -- a rule prohibiting intentional damage to equipment -- that is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.
>
> **Example C:** An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing

> increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The employer's company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.
>
> The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.
>
> Available at http://www.eeoc.gov/policy/docs/psych.html.

As with so much in this area of law, context matters and facts are often determinative of the outcome. Employers considering disciplining employees with disabilities for misconduct must consider whether the conduct is in fact related to the job. An employee who does not work in a forward-facing role may not need to meet the same conduct requirements as someone who often interacts with the public. Further, if you are going to hold an employee with a disability accountable for conduct, cursing in the workplace for example, best be sure you would hold another employee who swears around the office to the same standards. Or else, you might be left explaining why you treated two employees, one who is a member of a protected class, differently. Sumner@FELTG.com

[Editor's Note: Keep in mind that while EEOC holds that a disabled employee can be disciplined the same as a non-disabled employee for the same misconduct, MSPB expects you to consider any medical condition related to the misconduct – disabled, or not – as a mitigating factor under *Douglas* when selecting a penalty.]

FELTG Pedictions Come True, Darn It
By William Wiley

It started with the SESers at DVA. Congress deservedly got all bunched up about our poor vets not getting timely appointments at VA facilities, especially when the DVA secretary went to the Hill and claimed that the civil service protections kept him from holding bad managers accountable.

You know what we thought about that here at FELTG. That secretary got some bad legal advice from one or more of our federal employment law practitioners. Shame, shame, shame.

In response, Congress whipped up some legislation to allow DVA to fire SESers with essentially zero due process prior to removal and a truncated appeal right to MSPB that stopped at the administrative judge level in about six weeks. The White House voiced no objections as to making it easier to fire miscreant senior managers, so the bill became law and off we went.

Our FELTG prediction was easy to come up with. Hey, if it's good enough for SESers, what about all those lower level baddies at DVA keeping our veterans from getting the health care they deserve? And when the secretary again pointed to those civil service protections as a barrier for holding the non-SESers accountable, the House quickly passed a bill that essentially extending the no-procedures procedures to everyone at DVA. Senator Rubio introduced parallel legislation in the Senate, thereby greasing the skids for the bill to become law if he (or Jeb Bush, as I understand things) becomes President.

Interestingly, things slowed down a bit when our friends on the union side went public and objected to a reduction in civil service protections for all those bargaining unit (BU) employees at DVA. Subsequently, even though the White House seemed not to object to making it easier to fire SESers, the President now is threatening a veto if a bill reaches his desk that would make it easier to fire DVA BU employees. Politics at work? Inside the Beltway? How dare you think such a thing. I'm sure that the President sees a necessary distinction between the rights that should apply to SESers and non-SESers, and I'm sure I'll learn what those are from one of you astute readers who keeps up on things like that.

And our FELTG prognostications carried this easy-fire concept beyond just one agency. Hey, if it's good for DVA, why isn't it good for other agencies? What's so special about the employees there that the law should allow them to be fired with ease while the rest of the Title V government is wrapped up in all those "civil service protection"? President Obama has said he's against easy-fire for BU employees, but does he really mean it?

Apparently not. Of, if he does, he forgot to tell SecDef. As part of the Obama-decreed pre-decisional process, DoD has announced that it hopes to implement the following easy-fire process for its employees. If initiated at the Principal Staff Assistant level or above:

1. Immediate no-notice no-limit suspension if it appears removal or demotion may be warranted.
2. Within 15 days of being suspended, the employee can request an investigation.
3. Within 30 days of being suspended, the agency must provide the charges to the employee.
4. The employee has 7 days to defend himself in writing OR orally.
5. SecDef issues a decision.
6. Removals can be appealed to good old MSPB. DoD will "work with" MSPB and EEOC to get appeal decisions out in 60 days.

As justification for these contemplated changes, the civilian personnel reform proposals make reference to several facts:

1. There appears to be a lack of willingness on the part of federal managers to remove bad employees.
2. Removing an employee "can take well over a year."
3. Management training does not explain all the options for handling poor performers.

Here at FELTG, we cannot resist asking, just who is responsible for training, advising, and holding managers accountable at DoD? I'm guessing that it's the same folks who think that legislative changes are needed to fix the system.

Space constraints limit my ability to address these procedures, and it's probably not worth the time anyway because they are just pre-decisional aspirations. But so were the DVA easy-fire concepts when they were first developed. And it is not the procedures that are so important at this stage of the game for most of us. It's the messed up, slowly-evolving controversy as to just how easy should it be to fire civil servants? To us here at FELTG, this is the biggest deal to come down the civil service pike in nearly 40 years. Yet, there does not appear to be a consensus of thought or a focus of fact-based decision-making. Hey, new President-to-be-elected! Why don't you do what President Carter did in 1977, the first year of his presidency? Appoint a top-level committee involving leaders of the entire executive branch to come up with overhauling changes to the civil service? Call it "Civil Service Reform" and ask that group to put forth a proposed Act (aka another Civil Service Reform Act, the third in our history). Top to bottom, based on real science and statistics, applicable to our entire federal government.

Regardless of the philosophy as to how our civil service should work, at a minimum, it should be consistent. Wiley@FELTG.com

EEOC Modifies Decision To Redact Employee's Names In OFO Decisions, But Not For The Better
By Deryn Sumner

As Bill mentioned briefly in last month's newsletter, the EEOC has changed its policy as to how it will refer to complainants in decisions issued by the Office of Federal Operations. Two years ago the EEOC, without any request for input, decided to redact the names of federal employees and only refer to them as Complainant. Long time readers of this newsletter surely read Ernie Hadley's numerous railings against this decision. FELTG even launched a campaign to ask the Commission to reconsider, distributing buttons imploring the EEOC to "Bring Back the Names." Sadly, FELTG's campaign didn't work. Instead, the EEOC decided to "Assign Completely Random Names." As the EEOC stated in an October 5, 2015 statement on its website, starting on October 1, 2015, all decisions will use a randomly generated name which "will consist of a first name and last initial." How will these names be generated? Will the Commission be relying on the Social Security Administration's list of popular baby names? Are we doomed to a parade of cases featuring Madison F., Sophia L., and Olivia Z.? Will the names reflect the varying ages, national origins, and races of the employees who file discrimination claims? As Bill noted last month, now that transgender status is a protected category, will there be problems with a traditionally feminine or masculine name being assigned to such cases?
An employee who wishes to be identified by his or her name may submit a written request to the EEOC's Office of Federal Operations. **[Editor's Note to EEOC: Hey, Commission, how about doing us all a favor and reversing the election? The default position is that the name will be published, but the complainant can opt out and go anonymous? Still not good, but better.]**
However, the announcement does not specify if such requests should be made when the appeal is first filed or after the decision is issued. I appreciate that the Commission has provided this option, but sincerely question if the Office of Federal Operations should be taking on another bureaucratic process when it is already overwhelmed with issuing decisions on appeals that have been languishing for years. The Commission must acknowledge appeals when they are filed, assign an appeal docket number, respond to requests for extensions, and ensure the agency has actually provided the complete complaint file. And that's before anyone actually sits down to review the merits of the appeal.
It does not appear that the Commission will be backtracking on its decision to redact employee names. So for now, I look forward to the day when I can discuss the "Kenny G." case at a FELTG training. Sumner@FELTG.com

FELTG Open Enrollment Training Seminar

Legal Writing Week
December 7-11
San Francisco, CA

Join FELTG on the west coast this December for Legal Writing Week. Whether or not you've been to law school, this seminar is essential because it focuses on writing specifically for the MSPB and EEOC.

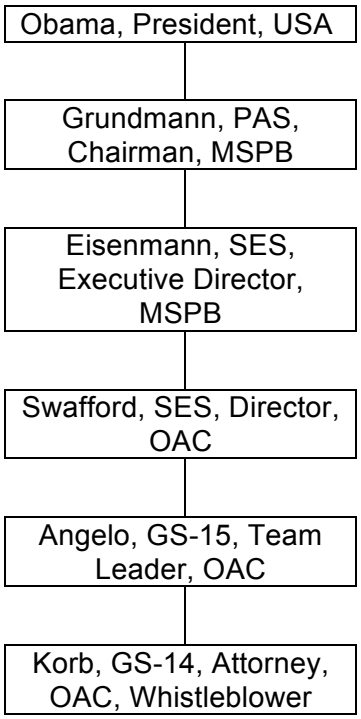
This session starts you off with the fundamentals of good legal writing and then builds on those basics with sessions targeted to material organization, persuasive factual narratives, writing for your audience and drafting specific documents for the MSPB and EEOC. Analysis and evaluation of writing exercises allows you to receive immediate feedback from the experts.

Understanding the Whistleblower Reprisal Finding Against MSPB
By William Wiley

Recently, Deb reported on an ALJ's finding that MSPB senior management reprised against one of the Board's employees because that employee blew the whistle on Board gross mismanagement. Although the decision is provisional with the issue of damages still outstanding, the finding of whistleblower reprisal is firm. So let's take a look at

how this oversight agency, created in part to protect whistleblowers from mistreatment because of their whistleblowing, managed to mistreat one of its own employees because of the employee's whistleblowing.

First, it's important to appreciate the chain of command involved in this case. You can't know who the reprisers are without a score card. The case began with Attorney Timothy Korb in the Board's Office of Appeals Counsel, that part of the Board responsible for reviewing initial decisions issued by MSPB judges, then drafting final Board decisions for consideration by the three Presidentially-appointed Board Members.

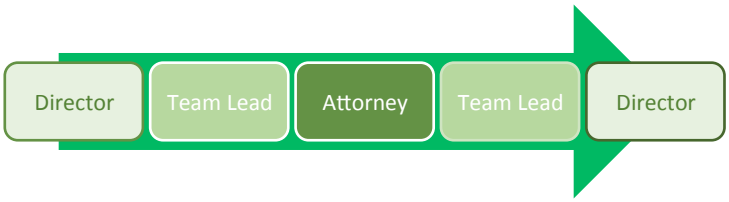


In January 2013, Swafford was promoted from a GS-15 supervisory attorney to be the SES director of OAC. This position is the most mission-critical SES position at MSPB, in my opinion, as the OAC Director controls both the flow of cases to the Board members and the content of the legal recommendations presented to the Board. In my days at the Board, the OAC Director was sometimes referred to as the "Fourth Board Member." Under some administrations, this position is occupied by a non-career, political appointee. Under the current Board Chairman, this position is part of the career civil service.

Swafford's first year as OAC director was unimpressive. Some would say worse than that. According to Board published statistics for that first year, MSPB failed to meet its processing time goals by a wide margin. As most appeal processing time occurs within OAC, one would think that monitoring the time that it took cases to move through that office would be critical in managing the Board's case load. However, even though the Board's internal case tracking system monitored the time it took appeals to move from the clerk to OAC to the offices of the three members, for reasons I do not understand, that case tracking system did not track the length of time it took for a case to move within OAC.

Here's how case movements are tracked at MSPB, as I remember it:

Here's how cases move untracked within OAC:



One would think that if one were interested in how efficiently cases were moving through a system, one would track all movements of the cases. However, if cases are slow coming out of OAC, one cannot tell without tracking whether it is the slowness of the staff attorney who has drafted the case decision or the Team Lead or the Director who is reviewing that draft.

And that, in the *Korb* case, was the birth of the whistleblow. Attorney Korb gathered information from other staff attorneys as to their experience with where cases were slowing down in this process and reported those findings to Board management. And those findings suggested that the slowness in case processing was the result of delays by the Team Leader, not within the staff attorney population.

Separately, Korb established that he had assisted another employee in her pursuit of a grievance. As attendees at our famous *MSPB Law Week* seminar have learned, the law prohibits an agency from reprising against an employee for a) whistleblowing (5 USC 2302(b)(8)), and b) assisting someone else in the exercise of a grievance right (5 USC 2302(b)(9)). The Board acknowledged in its defense at the hearing that Korb assisted a coworker who had filed a grievance, but that because the grievance had no merit, he should not have standing to assert that he was reprised against for assisting under (b)(9).

Yeah, it took Judge Jordan about a minute to rule that the lack of success of a grievance does not affect whether the grievant's assistant has engaged in (b)(9) protected activity.

Timing is critical when evaluating whether an agency's actions are a personnel action taken in reprisal for whistleblowing or grievance-assistance. Here's the timeline in this case:

1. JUL 18, 2013: Whistleblow (gross mismanagement)
2. JUL 18, 2013: Grievance assistance provided
3. SEP 25, 2103: Proposed 21-day suspension, Neglect of Duty (a personnel action)
4. NOV 26, 2013: Whistleblower files with OSC claiming reprisal
5. FEB 11, 2014: OSC concludes that whistleblower reprisal did not occur
6. FEB 20, 2014: Removal of significant duties from whistleblower's responsibility (another personnel action)

So far, we have findings regarding the initial necessary elements in a reprisal case: Korb engaged in protected activity that preceded the problematic personnel actions close in time, and the action officials had knowledge of the protected activity. Now, it becomes the agency's burden to prove by clear and convincing evidence that it would have taken the same personnel actions even in the absence of the whistleblowing. When assessing the Board's evidence, Judge Jordan used the three factors laid out in *Carr v. SSA*, 185 F.3d 1318 (Fed. Cir. 1999):

1. **Justification for the personnel actions taken:** There was no evidence that Korb's actions that were the basis for the Neglect of Duty charge actually constituted misconduct. It appears that other OAC attorneys believed that what Korb did was within their professional judgment to do. As for the duties reassignment, ostensibly it was done as part of a resource distribution intended to deal with a backlog of cases. However, once the backlog situation was resolved, the other resource distribution steps were undone, but not the assignment of Korb's duties.

2. **Motive to retaliate:** Korb's disclosures reflected poorly on the performance of both the Team Leader and the OAC director who were instrumental in the taking of the two personnel actions at issue in this case.

3. **Actions taken against similarly-situated non-whistleblowers:** Aside from claims it would have taken similar actions against other OAC attorneys who engaged in similar conduct, there was nothing in the record to support those claims. [As we have written about before in this newsletter, it's hard to imagine what evidence an agency can submit to show what it hypothetically would do if a similar situation arises in the future, if the situation has never arisen in the past.]

Interestingly, the whistleblower protection laws are so pro-employee, to find reprisal, the judge does not have to conclude that a desire to reprise was either the sole reason for the personnel actions, or even the main reason if there are several reasons involved. It's up to the agency to submit evidence to establish a "firm belief" (*i.e.,* by clear and convincing evidence) that it would have taken the two personnel actions even if Korb had not blown the whistle or assisted a coworker with a grievance. Applying the *Carr* factors, Judge Jordan found that the Board failed to produce evidence at this level to support its actions, thereby concluding that MSPB

management engaged in reprisal for grievance-assisting and whistleblowing.

So where does this case go from here? Well, the decision is identified as an Interim Decision, leaving open further litigation (or settlement) relative to an appropriate remedy for Korb. Once a final ALJ decision is issued, theoretically the Board could appeal claiming that its managers did not reprise against Korb. But there are a couple of rubs along the way:

- MSPB can review the decision of an administrative judge in a regular non-Board-employee case if the AJ made an error of law. However, MSPB has set a higher bar for its review of the decision of an administrative law judge regarding the appeal of a Board employee: "The Board will not disturb initial decisions in those cases unless the party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law." 5 CFR 1201.13. If the Board were to appeal Judge Jordan's finding of reprisal, it would have to argue that his decision was really, really wrong.
- If the decision were to be appealed in spite of this high bar of deference, who could hear the appeal? Would Chairman Grundmann conclude that she could participate in the adjudication even though it is her most senior managers who have been implicated by the decision? If she recuses, we are left with only one Board member due to a vacancy in the Vice Chairman's office, and a single member cannot issue Board decisions – it takes at least two.
- If the Board appeals the ALJ's decision and the Chairman recuses, can the petition for review sit in the Board's headquarters office awaiting the appointment of a third Board member? What if the new appointee has already been involved in Korb's situation? Would that new member also have to recuse?

Separately from the matter of appealing the judge's finding of reprisal, this decision raises broader issues:

- The Special Counsel on review of Korb's claims of whistleblower reprisal did not find cause to go forward with the case. In light of the ALJ's findings, did that office make a mistake?
- The ALJ's decision makes factual findings relative to some of Korb's gross mismanagement disclosures. Who should be held accountable for that mismanagement? How?
- The commission of a prohibited personnel practice (*e.g.,* whistleblower reprisal) is an act of misconduct. Should the Board be contemplating disciplinary action against the identified reprising managers?
- The Board's policies provide that when there has been a finding of whistleblower reprisal, as here, the case will be referred to OSC for consideration of whether disciplinary action should be proposed against the offending managers by OSC. That office has already concluded that reprisal did not occur in this situation. Can it now be objective in its supplemental investigation?

What a sad, sad mess. Although here at FELTG we have not hesitated to criticize the Board for some of its loopy decisions, we take no pleasure in seeing all of this go down. On a personal note, the Board has held against me in a series of annuity appeals I had to file against OPM, called me out by name as an evil attorney in a case in which I was providing legal advice, and had me kicked off the speaker's list of an annual employment law conference. Yet even *I* find no joy in these circumstances.

We all want the Board to be well-managed. We all want Board employees to be treated fairly. And we all want this situation to heal itself so that we can continue to develop a civil service to make our citizens proud. Hopefully, the individuals at MSPB responsible for righting this ship will have the class and the foresight to make it work.

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EEOC Hearing Practices: Preparing for the Prehearing Conference
By Deryn Sumner

Last month we discussed tips for preparing your prehearing submissions. This month, let's chat about preparing for the prehearing conference itself. First of all, make sure you know who is initiating the call and that you have correct contact information for all parties if you are the one coordinating the conference. Even better, set up a conference line and provide everyone the call-in information so there's one less logistical hurdle to starting the call on time.

Prepare to talk about why you need to call the witnesses you listed in your prehearing submission. I like to notate which witnesses are joint witnesses, and for witnesses not being called by my side, I note any potential objections and arguments in support of the objections I want to make during the prehearing conference. Some judges will want to know the anticipated length of time each witness will take. When providing your estimate, factor in time for objections and any arguments about them, and any re-direct that may be needed after cross-examination. Also be prepared to talk about witness order. It's best to have discussed and hopefully reached an agreement with the other side as to the order prior to the conference. If there are still any pending motions, make a list of those and request rulings during the conference.

If you have not already submitted exhibits as part of the prehearing submissions, clarify how and when the judge would like you to submit them. The judge, especially if he or she is traveling to the hearing site, may ask the parties to bring copies for his or her use during the hearing. If you've already submitted exhibits, think about any objections you may want to make to their introduction, although the judge may not address such objections until the document is submitted for admission into the record.

If you are representing the agency, you are responsible for arranging for a court reporter and paying for it pursuant to 29 CFR 1614.109(h). If the hearing is only a few weeks away, make sure the court reporter has been confirmed and knows the hearing location. Speaking of the location, the agency is responsible for that as well, unless the administrative judge has scheduled the hearing to take place at the EEOC. The room must be "appropriately sized" under Chapter 7 of the MD-110. If possible, also arrange for a smaller room nearby (but not within earshot) where witnesses can wait before they are called to testify.

Of course, agencies are also responsible for securing the appearances of any witnesses who are still federal employees, even if they've moved to another agency. As a best practice, notify all witnesses as soon as you received the hearing date and confirmed their availability to testify. Prehearing conferences are a great time to ask any clarifying questions before the hearing. Will the judge allow the parties to make opening statements? What about closing statements – will they be allowed and if so, will they be oral or written?

Some judges will continue the hearing late into the evening in order to finish in the allotted time. Be prepared for that possibility, or raise any reasons why that would not work during the conference (for example, if access to the building where the hearing will be held is limited to certain hours). Finally, be prepared to let the judge know where the parties are on settlement. Nine times out of ten, the judge will ask in the hopes that the case can be dismissed as settled. Even if prior discussions were unsuccessful, it's not a bad idea to give your settlement authority a head's up that you may be receiving an updated settlement proposal and might be giving them a call to discuss it. Sumner@FELTG.com

Congratulations, Judge Palmer
We at FELTG want to be among the first to congratulate EEOC's Chief Administrative Judge Mary Elizabeth Palmer for her success in earning the Silver Medal in the Venice Cup (the women's World Bridge Federation Championships) that finished on October 10 in Chennai, India. Judge Palmer was a member of the USA-2 team which lost to France (the Gold medal winners) in an exciting and close final match.