Lucy Kellaway of the *Financial Times* recently wrote an article predicting the increasing irrelevance of human resources in large corporations. Her premise in large part is that more and more companies will come to abandon the "bureaucratic backward-looking charade" of annual performance appraisal. She predicts that employees "will no longer have to submit themselves to the cumbersome process in which they set a dozen meaningless goals and are rated on obscure things like 'displays pro-active inclusivity.'" *The Economist*, "The World in 2016" December 2015. I bet that example rings a bell with more than one of you wonderful readers, that you have already reached the conclusion that annual performance appraisal is among the biggest government wastes of time ever invented. Ms Kellaway goes even further, asserting that historically HR departments have sought to justify their existence by dreaming up increasingly tiresome initiatives for managers to implement without any corresponding benefit. As an additional example, she suggests the pointless training forced on many managers, asking them to identify, "If you were an animal, what would you be?" Fortunately, if you hang with us here at FELTG, you'll never have to worry about these "tiresome initiatives" taking up your training dollars. We teach you to write performance measurements that ignore inputs and capture outputs, because that's how you hold a civil servant accountable. And when it comes to being an animal, we don't ask you; we tell you. You're a darned tiger. Now, go hold someone accountable.

Bill

William B. Wiley

Claims of Retaliation Have a Broader View of Coverage than Discrimination Claims
By Deryn Sumner

Although I do represent a few federal agencies, I consider myself first and foremost an advocate for employees. But even I, upon reviewing a formal complaint from an employee, will sometimes think to myself, "How on earth can someone possibly feel aggrieved by this minor workplace slight?" And of course, under the *Diaz* standard set forth in *Diaz v. Dep't of Air Force*, EEOC Appeal No. 05931049 (April 21, 1994), only those claims that show a harm or loss that effect a term, condition, or privilege of employment are considered adverse actions. However, this just applies to claims of discrimination. Remember that the Commission views claims of retaliation under a "broad view of coverage" and claims that might not pass muster as claims of discrimination could be found to state claims of retaliation. The Commission often cites to Section 8 of the EEOC Compliance Manual, first published in 1998 and available at http://www.eeoc.gov/policy/docs/retal.html, in support of this position. Although the terminology used in the Compliance Manual relates to the Commission's role in investigating private sector charges of discrimination and litigating claims in federal court, the same standard - that adverse actions do not need to be "ultimate employment actions" or materially affect the terms or conditions of employment to constitute retaliation - applies to the federal sector.

There are key illustrations of this in the Commission's regulations and case law. For example, under 29 C.F.R. 1614.107(a)(5), proposals to take a personnel action do not state a claim of discrimination, but they can state a claim of retaliation.

The Commission has held that being subject to an internal investigation does not state a claim of discrimination, as it found in *Heard v. Dep't of Justice*, EEOC Appeal No. 0120092680 (August 27, 2009). However, the same incident can state a claim of retaliation, as the Commission found recently in *Bryant F. v. Dep't of Interior,* EEOC Appeal No. 0120121828 (December 11, 2015). Noting prior cases where similar claims did not constitute adverse actions for purposes of establishing a claim of discrimination, including *Heard*, the Commission noted that retaliation claims "are not restricted to those which affect a term or condition of employment" but rather anything "that is reasonably likely to deter protected activity."

In *Tamara G. v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120112387 (December 3, 2015), the Commission held that receiving a rating of "highly successful" could reasonably deter someone from engaging in protected activity. The Commission found that even if the rating is positive, the employee's receipt of a lower evaluation could "create a chilling effect on an employee engaging in protected activity in the future."

So remember, when looking at whether allegations state a claim, look at whether the allegations are being raised under a theory of retaliation and be sure to apply the correct "broader" standard. Sumner@FELTG.com

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

Now that the holidays are over and credit card bills are arriving in mailboxes around the country, it seems like a good time to return to looking at credit card issues in Federal agencies.

"Saving Federal Dollars" Closer to Reality

I mentioned in the first credit card misuse column published in August 2015 that another bill designed to ferret out misuse in the Federal government had been introduced in Congress. That bill, Saving Federal Dollars Through Better Use of Government Purchase and Travel Cards Act of 2015 (S.1616), was passed by the Senate on December 16, 2015. It's probably not exactly what most Federal employees would have included on their lists for Santa, but the Senate delivered something new for agencies to play with anyway.

This version of the bill is different than what was originally proposed. The original bill would have set up a specific office in GSA to manage these efforts but that was eliminated; however, the Senate version charges GSA with working with OMB on creating data analytics for managing both travel and purchase card programs across government. Agencies will have a requirement to review questionable transaction reports issued by credit card companies. There would be an interagency group that would meet to look at these matters and, of course, there are required reports to Congress a year after enactment for agencies, too.

Purchase Cards

While most card-misuse cases that come across the average Employee Relations practitioner's desk will involve an employee's travel card, purchase cards can also be misused. Congress has that in their sights since the "Saving Federal Dollars" specifically covers both types of cards. The case of *Sedita v. Department of the Army* (1998) is a case in point.

Sedita was removed from the position of Facility Management Officer, GS-13 in 1998. His job required him to monitor the work of contractors and to certify to work performance so that payments could be issued for work completed. He was also responsible for purchasing items for facilities under his care using a government commercial credit card. The limit for purchases on the card was $2500 at that time. The relevant guidance on the use of the card specifically prohibited splitting large purchases into smaller purchases to circumvent those monetary limitations.

Sedita's removal was based on charges related to both aspects of his job, but those relevant here are related to his use of his credit card to split purchases. One specification covered his use of the card to purchase and install one dehumidifier each for sixteen different agency locations for a total amount of $10,944.00. He originally submitted the request to the procurement office to contract for the purchase and installation of sixteen dehumidifiers, but it was near the end of the fiscal year and procurement office responded that there was not enough time to process the contract before the end of the year. Sedita alleged that he was advised to split the order by the Contract Specialist, but no evidence was produced on that point. Sedita purchased the same items and services from the same contractor and thus violated the credit card processing Standard Operating Procedure.

Another specification involved more work for the same contractor. That job involved work to convert a large office into four smaller ones. The total value of the work was $7,920. Sedita purchased the work with four separate credit card purchases. He contended that the installation of each wall and door was a separate job for which a separate invoice was prepared. The CAJ did not accept that explanation, finding that Sedita knew or should have known about this limitation because he was an experienced Facility Management Officer. It was noted that he might have been concerned that the funds for this work would have been lost if unused before the end of the fiscal year, but that did not excuse his violation of the purchase card procedures.

Travel Cards

Have you ever pulled out the wrong credit card and used your government card for a personal purchase? You don't really have to answer that. Others have said they did, and indeed it has come up in more than one credit card misuse case. One was *Callaway v. DoD*, DC-0752-13-0004-I-1 (2013), which I covered in the October newsletter.

Another employee testified that she fell victim to this same failure to distinguish which card she was actually using in *McFall and USDA, APHIS, Plant Protection and Quarantine*, Federal Arbitration 008-50341, 108 LRP 37192 (2008). McFall, a Plant Health Safeguarding Specialist,

was suspended for 14 days for misuse of the government travel card. She stated that she normally kept her travel card in the office safe but for some unknown reason had not returned it there after a prior trip. She used her government card to purchase four meals while not on travel and also purchased several items at Walmart using the card. The total value of the charges was less than $500.

She also argued that she had not had adequate training on use of the credit card and was not aware of a zero tolerance policy on misuse.

Arbitrator Hecht sustained the suspension. He concluded that McFall's failure to take the usual precautions to safeguard the government card and separate it from her personal card more likely contributed to the misuse than any lack of training. He found her excuse of confusing cards possible on one occasion, but explained that it was her responsibility to ensure that would not happen on four occasions.

One thing that caught my eye in this decision was the guidance introduced in the record for dealing with misuse situations. The decision quotes OMB Circular A-123 indicating that instances of misuse should be included in performance evaluations. The Circular was revised in January 2009, but maintains the same language (OMB Circular A-123, Appendix B, Attachment 5). It states:

When initiating administrative or disciplinary actions for card misuse and/or for instances when account delinquency is discovered, charge card managers should, in addition to consultation with agency human resources professionals:

- *Initiate verbal counseling and warning;*
- *Provide written warning;*
- *Suspend or revoke charge card privileges;*
- *Suspend or revoke employee security clearance;*
- *Include misuse or delinquency occurrence in employee performance evaluations;*
- *Suspend or terminate employment;*
- *Ensure consistent enforcement of penalties; and*
- *Publish actions taken by the agency for misuse of charge cards.*

This list is such a mixed up jumble of things I wish they had never written down that I don't know where to start. So, we will pick up here next month! Haga@FELTG.com

[Editor's Note: OMB may know numbers, but they don't know the federal performance appraisal program. If you are going to consider card misuse when assigning the employee's annual performance appraisal, you'd darned sure better have something about using cards when you established the original performance plan. Otherwise, you can't just insert it at the end of the appraisal year because OMB thought it was a good idea. And if you include it in the original performance plan, keep in mind that you are taking something that normally would be a MISCONDUCT issue and incorporating it into

a possible PERFORMANCE case. There's nothing that specifically prohibits that, but some agencies avoid mixing misconduct with performance for policy reasons.]

Sorry, but Your Illegal Agency Accommodation Policy Doesn't Supersede the Law
By Deborah Hopkins

Can an agency policy overwrite existing law, if it's specialized to a very small group of employees? In a word, nope. This article provides a review of reasonable accommodation requirements, courtesy of TSA. Two issues are central to this case: (1) reasonable accommodation requirements for individuals with disabilities, and (2) internal agency policies that conflict with the law.

In 2011, TSA subjected an employee to discrimination based on disability because it missed a crucial step in the required accommodation process under the Rehabilitation Act. Here's a quick recap of the facts in *Marielle L. v. TSA*, EEOC No. 0720140024 (October 22, 2015):

- A Transportation Security Officer (TSO) had a medical condition and made the agency aware of the condition
- The medical condition meant that she could not lift 70 lbs, which was a requirement for the position as per the Aviation and Transportation Security Act (ATSA)
- TSA declared that the employee was not qualified to do the job and no accommodation would allow her to lift 70 lbs; the employee agreed
- Rather than consider reassignment, TSA gave the employee an application for retirement
- The employee didn't want to retire; leadership told her to request LWOP or else she'd be placed on AWOL
- Employee was eventually terminated for physical inability to perform

The agency missed an important, legally-required step in the accommodation process when they did not consider available reassignments. Let's review the requirements.

When making an accommodation request, an employee must show that (1) She is an individual with a disability, (2) She is a qualified individual with a disability, and (3) The Agency failed to provide a reasonable accommodation. From there, the agency is required to accommodate the employee unless doing so would cause an undue hardship, or no accommodation is available.

But, it doesn't stop there. If the agency cannot provide a reasonable accommodation or no accommodation is available for that job, the agency must next consider reassignment as an accommodation – and this is where TSA messed up. The agency must look for a vacant, funded position for which the employee is qualified, and not just within the agency but all the way up to the Department level, which in this case would mean DHS-wide. If no vacant, funded position is available at the employee's grade level the agency must look for lower-graded positions for which the employee is qualified. Once these options have been exhausted and no position is available, only then may the agency remove the employee for inability to perform.

Here's where issue 1 (consider reassignment) meets issue 2 (internal policy that violates the law). The agency argued that they could remove the employee because the ATSA specifies that if an employee does not meet the requirements of the TSO position, that employee may be removed. The ATSA also specified that the TSO who cannot perform is not eligible for accommodation, including reassignment. The AJ told the agency that internal policy did not supersede the Rehabilitation Act requirement of considering reassignment as an accommodation and that the policy be modified to reflect the law. The agency argued that the AJ's authority did not include a requirement that TSA change a national policy, but the EEOC disagreed, because changing the policy would simply reflect "the obligation [TSA] already has – to offer a reasonable accommodation in the form of reassignment, when appropriate, to TSOs."

There you have it. Internal policies cannot override the law. Therefore, the agency had to pay out compensatory damages, attorney fees and costs for discriminating against the employee.

This stuff is important and even though it may seem basic, it's clear from the case above that agencies get it wrong because they don't know the law. We teach a whole day on Reasonable Accommodation Under the ADA and Rehabilitation Act during Absence & Medical Issues Week, next held February 1-5 in Washington, DC. Or, bring FELTG onsite and we'll teach you all about it on your home field. You can't afford to make a mistake like this! Hopkins@FELTG.com

Do Not Put Prior Poor Performance Examples in the PIP Initiation Letter
By William Wiley

Questions out the wazoo. And this one goes to the heart of an issue that when I was a puppy, I went the other way. Now that I am older (and some would say wiser, but what do they know), I have found a better way. As for the question and then our answer:

> Good morning FELTG Spiritual Leaders,
>
> I have an agency that wants us to draft a very general PIP Notice. The agency does not want us to include examples of the employee's deficiencies. While I understand there is nothing against this method in the CFR, I have concerns that the PIP will not be strong enough if the agency decides to take a performance based action and remove the employee (if the employee fails the PIP). Also, while I was researching on cyberFeds, I found contradicting guidance. Do you have any thoughts over which process is better? I really appreciate your time and any feedback you may have for me.

Dear Concerned Reader, Trying to do the Right Thing:-

Very nice to hear from you. As for your question, we teach in our *MSPB Law Week* seminar NOT to include in the initiation letter the incidents of prior unacceptable performance that caused the PIP to be instituted. Here's why:

1. Prior incidents aren't required and provide no legal benefit. As you may have picked up from our newsletter articles over the years, we believe strongly that the best discipline

and performance letters are the ones that say the least. That's because the more you put in:
    a. The more chance you have to say something that is incorrect, and
    b. The more you give the employee to attack on appeal.
2. If you put in examples of prior poor performance, the employee isn't going to believe them. Or, the employee is going to be defensive and feel that he's being treated unfairly. This is a common human reaction that we teach about called the Dunning-Krueger Effect (or "optimism bias"). Therefore, the employee is going to want to challenge each of the incidents of "alleged" poor performance, either through the grievance procedure or EEO (although as you no doubt know, even though an employee usually cannot file an EEO complaint about a PIP initiation letter, some agency EEO offices accept the initial complaints anyway). This challenge is bad because:
    a. It causes the supervisor extra work, and most importantly,
    b. It distracts the poor employee so that she puts her energies into attacking the PIP when she needs to be putting her energies into working her tail off during the PIP. You actually disadvantage the employee by listing incidents of poor performance in the PIP initiation letter.
3. MSPB has never ever held a 432 removal to be any stronger because prior poor performance was included in the PIP letter. Ever.

In fact, MSPB through its report-producing arm has listed the following as the components of a good PIP:

> A good PIP typically will: State in clear detail what performance is expected from the employee and how it will be measured. Specify the assistance the agency will provide (on-the-job training, formal class training, mentoring by a more successful employee, etc.). Specify a person who is responsible for helping the employee through the performance improvement period and indicate how often this person will meet with the employee. (The person tasked with guiding the employee is often the supervisor, but it could be a team leader, co-worker, or other appropriate person.) Explain to the employee that if the employee has questions or does not understand something, the employee has the responsibility to notify a particular person (often the supervisor) and ask for help. State how long the PIP will remain in effect. State the possible consequences if the employee's performance does not improve. http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=445841&version=446988&application=ACROBAT, p.8.

Notice that the Board does not include a listing of prior poor performance as a component of a good typical PIP. Neither do we here at old FELTG.

However, experience teaches that even though an employee usually cannot challenge the initiation of a PIP, he can sometimes challenge it by claiming the PIP is an incidence of reprisal (whistleblowing or prior-EEO-activity) or part of a continuing series of discriminatory events. Therefore, our advice to supervisors in our supervisory training is to contemporaneously draft a narrative of the incidents of unacceptable performance that precede and warrant the PIP, but not give it to the employee when the PIP is issued. Stick it in a file somewhere. Then, if a

reprisal investigator comes knocking wanting to know why the PIP was initiated, the defense is in the file.

Hope this helps. If you need more, let us know. PIPs are fun and easy if you know what you're doing, and now you do. Wiley@FELTG.com

Tips for Drafting EEO Settlement Agreements
By Deryn Sumner

So after months (okay, or maybe hours) of negotiation, you've agreed on terms and reached a settlement in principle to resolve an EEO complaint? Great! Now comes the next hurdle: reducing the terms to writing and getting everyone to sign off on the darn thing so the Administrative Judge will dismiss the case and you can get it off of your desk. Here are some tips to make this next stage as pain-free as possible.

First, if you represent an agency, you likely already have boilerplate language it uses in every settlement agreement. I like to have a draft of that boilerplate agreement already prepared with the case caption on top and as many blanks filled in besides the actual terms before going into a mediation, settlement conference, or even the hearing. Remember, the vast majority of cases settle instead of being decided on the merits so there's a good chance such preparation will come in handy at some point in the litigation. While you work on drafting the language for the specific terms agreed upon, give a copy of an agreement with the rest of the language to the complainant and his or her representative to review. It saves everyone time and helps you focus on how best to draft the language of the terms, while someone else is explaining what "OWBPA" language is the complainant. (Speaking of the OWBPA, it's a good practice to put it in every agreement where the complainant is 40 years old or older, regardless of whether age has been raised as a basis). **[Editor's Note: That's the "Older Workers Benefit Protection Act" for you newbie's out there. That law is based on the assumption that if you are 40 years old or older, you don't think too fast. ☺]**

Include a reference to the requirements at 29 C.F.R. 1614.504 in the agreement itself so the complainant knows what to do if there's a problem with compliance. To make everyone's lives a little easier,

To avoid problems with compliance, think through each of the things both parties are agreeing to do under the settlement agreement with "who, what, when, and how" as your guide. To whom does the Complainant need to submit documentation of attorneys' fees? What exactly is each party agreeing to do? (Neutral references can mean many different things, and don't forget to require the Complainant to actually withdraw his or her complaint as a term). When is the payment going to be made? How should the Agency distribute any payments between the Complainant and his or her attorney? If someone not involved in the negotiations were to pick up this agreement and make sure everything was completed, how would they know that was the case? Remember that everything the parties intend to happen should be contained within the four corners of the agreement and should not require looking at any other documents to determine the intent of the parties. If there are any outside documents included as part of the terms, such as a written letter of reference or an SF-50, reference it and include it as an attachment to the agreement.

And finally, I'm sure none of our esteemed FELTG newsletter recipients would make such a mistake, but make sure the agreement actually has consideration for the Complainant in exchange for withdrawing his or her claims. No, agreeing to treat employees with "respect" or giving them an accommodation they are otherwise entitled to is not valid consideration. It's something every employee is otherwise entitled to receive in the workplace.
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Acronyms Matter When it Comes to Veterans' Rights
By William Wiley

Everyone knows that you can't mistreat military veterans in the federal workplace because of their military duty. In fact, Congress has passed two separate and independent laws somewhat recently to protect the rights of veterans, and there's an important difference between the two. First, the laws, in abbreviated form:

USERRA (Uniformed Services Employment and Reemployment Rights Act): Prohibits an agency from discriminating against an individual because of that individual's status as a military veteran relative to any benefit of employment.

VEOA (Veterans Employment Opportunities Act of 1998): Prohibits an agency from violating a veteran's rights to preference over non-veterans in certain hiring and RIF situations.

Sometimes I see practitioners sort of lump these together into a no-veteran-discrimination concept, and I can understand that. If an agency abides by the merit systems principles and regulations in everything it does, it will automatically not violate either USERRA or VEOA. However, there is an important difference between the two protections if the employee chooses to push back against an agency decision by filing an appeal with MSPB. Let's see if you know it.

Pop Quiz No. 1: What should an agency representative do if an employee files a USERRA appeal?

Pop Quiz No. 2: What should an agency representative do if an employee files a VEOA appeal?

[Pause for you to formulate you answers. Keep in mind, you longer remember pop quiz questions you miss than those you get right. I'm still carrying with me a wrong answer I gave to a pop quiz question in physics class in high school, in case anyone needs to know the name of the force that keeps a satellite in orbit.]

…

Pop Answer No. 1: Prepare for a hearing. An individual who brings a USERRA appeal has an unconditional right to a hearing on the merits. *Kirkendall v. Army,* 479 F.3d 830 (Fed. Cir. 2007).

Pop Answer No. 2: Review the appellant's appeal to determine if there are any material allegations with which you disagree. If none, file a Motion for Summary Judgment with the judge. The Board has the authority to decide a VEOA claim on the merits, without a hearing, when there is no genuine dispute of material fact and one party must prevail as a matter of law. *Davis v. DoD,* 105 MSPR 604 (2007).

The summary judgment motion is a standard tool in the world of EEOC law. As most MSPB appeals provide for an automatic right to a hearing if the appellant requests one, we don't often associate that standard tool with MSPB. However, as no agency representative in government actually wants to go to a hearing if she doesn't have to, keep in mind this exception to MSPB's pro-hearing rule. If confronted with a strictly VEOA claim in an appeal to the Board, review those factual claims closely and then file for summary judgment if none are in dispute.
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Sanctions: When Can They be Requested and What's the Standard for Granting Them
By Deryn Sumner

Ahh, sanctions. One of my favorite topics, and something I thought could be useful to explore over the next several months of newsletter articles. (As a side note, I received a suggestion that this series be titled, "Everything But the Kitchen Sanc-tion." And yes, I can hear you groaning from here). Complainants can request sanctions for the agency's actions during the investigative stage, such as failing to conduct an investigation, failing to timely complete an investigation during the regulatory timeframe, failing to conduct an appropriate investigation, or failing to require employees to cooperate during the investigation. Complainants can also request sanctions if the agency failed to properly preserve relevant documents, such as notes taken by a selection panel during interviews, or if the agency engages in other misconduct during discovery, such as destroying documents or improperly coaching witnesses. And don't worry agencies, you can move for sanctions too, including if the complainant fails to cooperate in litigation or respond to the administrative judge's orders.

By regulation at 29 CFR 1614.109(f)(3), sanctions can range from drawing an adverse inference against the non-moving party, excluding evidence that would be helpful to the non-moving party from the record, making determinations of fact in favor if the moving party, issuing a decision fully or partially in favor of the moving party, or the fun catch-all of "other actions as appropriate." These sanctions can include awarding attorneys' fees to a complainant, or dismissing a complainant's hearing request and remanding the complaint to the agency for issuance of a Final Agency Decision. And no agencies, no matter how many times you fruitlessly argue that the Commission cannot order a federal agency to pay attorney's fees as monetary sanctions because of the Anti-Deficiency Act, the Commission has roundly rejected this argument. As the Commission stated in *Complainant v. Dep't of Army*, EEOC No. 0720130011 (August 7, 2015):

> The Commission previously has addressed, and rejected, the Agency's arguments regarding sovereign immunity and the Anti-Deficiency Act. In *Mirabal v. Department of the Army*, EEOC Appeal No. 0720120007 (November 9, 2012), *request to reconsider denied,* EEOC Request No. 0520130236 (March 27, 2014), we found that the AJ

properly ordered the Agency to pay attorney's fees incurred because of delays in the hearing on the complainant's claim of national-origin discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Citing *Matheny v. DoJ*, EEOC No. 05A30373 (2005) and other Commission precedent, we concluded that the Commission has authority to issue monetary sanctions and that the AJ's actions were consistent with Commission regulations, EEO MD-110, and Commission precedent. *See also Complainant v. Dep't of the Army*, EEOC Appeal No. 0720130033 (Apr. 24, 2014)(rejecting Agency's arguments, in a Title VII case, that it did not have authority to pay attorney's fees sanction because of sovereign immunity and a potential violation of the Anti-Deficiency Act), *req. for reconsideration denied,* EEOC Request No. 0520140359 (Mar. 20, 2015).

Something I'm going to stress throughout this series is the idea that if the party you represent has engaged in sanctionable conduct, you may want to recommend to your client that you argue that although sanctions may be appropriate, a lesser sanction than the one proposed would serve to address the misconduct. Sanctions should, after all, be narrowly tailored to appropriately address the conduct at hand. *See Abulsaad v. Dep't of the Navy*, EEOC App. No. 0120102379 (March 26, 2012).

Next month, we'll discuss how to respond to motions for sanctions where the agency has not timely completed the Report of Investigation (spoiler alert: blaming it on the contractor your agency uses to conduct EEO investigations isn't going to fly). Sumner@FELTG.com

This Isn't the Way Civil Service Justice Should Work
By William Wiley

The drums continue to beat to abolish the civil servant protections we have all come to love and respect. Certainly here at FELTG, we have pushed back hard, arguing that the oversight programs and redress procedures really aren't that bad, that employees can indeed be held accountable if agencies just understand how easy this can all be done, and that all things considered, ours is a working civil service, redress procedures and all.

And then I run into a case like this one. If Congress really intended for things to be like this, then maybe the time has indeed come to dump the civil service protections completely, because a government cannot work efficiently when stuck with these processes:

1. The agency involved here has a two-step unacceptable performance procedure. Whereas most agencies require failure of a one-step Performance Improvement Plan prior to removal, this agency (unfortunately) requires that an employee initially fail a Performance Assistance Plan (PAP) and then subsequently fail a Performance Enhancement Plan (PEP) before being removed.
2. The employee's supervisor felt that the employee was a poor performer. He kept hand-written notes documenting instances of poor performance. Once he had collected enough documented poor performance, he transcribed the notes into typed form, initiated a PAP, then a PEP, and then fired the employee once she failed everything.

3. The fired employee took the case to arbitration, claiming race/retaliation discrimination, among other things. The arbitrator found no discrimination, failure of the PEP, and upheld the removal.
4. MSPB upheld the arbitrator's award: no discrimination, removal affirmed.
5. The employee took the issue of the failed PAP (and a couple of other alleged management bad-acts) to EEOC. After a TEN DAY hearing, using two different administrative judges, EEOC found discrimination in the issuance of the PAP. In large part, the discriminatory finding was based on the fact that the supervisor did not keep his hand-written notes once he transcribed them.
    a. EEOC has jurisdiction of the PAP as a claim of retaliation. However, it does not have jurisdiction over the PEP as removal for failing a PEP is a matter within MSPB's jurisdiction. Therefore, the Commission could not order the agency to reinstate the PEP-failed employee.
    b. Of course, the employee would not have been put on the PEP but-for the agency's discriminatory placement of the employee on the preliminary PAP. But we can't get there from here in a legal sense.
    c. EEOC awarded the employee about $15,000 in pain-and-suffering-like compensatory damages, reducing it from a greater amount requested because the employee was "impeached."
    d. EEOC then awarded the employee's attorney about **$385,000** in fees and costs.

Be sure to get your head around this: the employee was justly fired for poor performance, but got $15,000 in damages; she was discriminated against because her supervisor threw away some notes; and the agency has to pay the employee's attorney 25 times what the employee recovered as a remedy. If this seems to you like a good way to run a civil service, please-please don't write to me to explain it. If there is rationality in this mess, it is above my pay grade to understand. *Kerrie F. v. SSA*, EEOC No. 0720140026 (October 29, 2015).

Being desperate to come up with ANYTHING from this almost-half-million dollar waste of government money, I am left with two points to highlight for you wonderful readers:

- Be careful of EEOC's regulation at 29 CFR 1602.14 if you are agency counsel. A good complainant's lawyer is going to beat you over your head and demand big-time evidence-suppressing sanctions if your poor unsuspecting supervisor fails to keep ANY written note relevant in ANY way to a POTENTIAL personnel action. This regulation goes far beyond the classic prohibition regarding the spoliation of evidence: the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a legal proceeding. Rather 1602.14 says in abbreviated, significant language: *Any personnel record made relevant to a termination, shall be preserved for a period of one year from the date of the making of the record.* In this case, the "personnel record" that was not preserved was the supervisor's personal note, not anything in an agency's official systems of records. And those notes were related to the initiation of the PAP, not directly to the eventual termination for failure of the subsequent PEP. How many supervisors know that if they throw away any scrap of paper relative to

employee accountability, EEOC will assume discrimination? I keep trying not to go there, but that's where I keep coming out.

- Think, for a moment, how ridiculous this regulation is. Today, a supervisor makes a note (sends an email … whatever) regarding an employee being tardy. He has no idea whether that "personnel record" will be "made relevant to a termination" that might occur in the upcoming year. He either has to store that record for a year on the chance that it might be used relative to a removal or run the risk that he will be sanctioned for not keeping the note. And notice what the sanction was in this case: refusal by EEOC to allow the agency to introduce any collateral evidence (transcript or testimonial) as to what those notes said or what the facts were on which those notes were based. Absolutely ridiculous.

Civil service litigation, when taken to the nth degree as it was here, can easily be an ugly, nonsensical, expensive mess. Set high the price you are willing to pay to avoid it.

It's going to take some very big and very creative ideas to fix this chaos. Sadly, none of the proposals being batted around in the press and on Capitol Hill would make a dent in a case like this. For a better civil service, we need to go farther beyond the box, to look for a really-huge solution; really far and really-really HUGE. Wiley@FELTG.com.

[Editor's Note: Here at FELTG, we don't teach just the law; we also teach things that can help a person get through the world of the civil service when the law is not involved. One of our featured instructors in that effort is Michael Vandergriff, a specialist in *Surfing the Swamp*© of the inter-personal aspects of conflict resolution. What follows is an article written by Michael that addresses some of life's missed opportunities.]

Charlie Manson? Oh, He's Average.
By Michael Vandergriff

I trained Charlie Manson's psychiatrist.

It was the California Medical Facility (CMF) in Vacaville, CA, the summer of 1980, and the topic was conflict management. Part of an external degree program in Criminal Justice, offered by California State University, I was the junior member of a three-instructor team, but the only staff member present for all sessions. Attendees were Correctional Officers (fighting the "guard" label), local California Highway Patrol (quite serious), and CMF psychiatric staff (crazy, but in a good way).

Before and after class, I'd approach Chris, Charlie's shrink, and pepper him with questions about Manson. Chris told stories, and I was riveted. I learned that Charlie's job was to sweep out the institution's chapel! Picturing Manson in church on the end of a broom gave me mental images of his spontaneous combustion.

For political junkies, Charlie had a role to play in the national elections of 1980. The class was aware that Manson had a ring to place on one of three pegs and that, in his mind, his selection would determine the next President of the United States: Carter, Reagan, or the independent, Anderson. Student interest rose to a fever pitch, but their disappointment was palpable when Chris reported that Charlie had postponed his decision until after the end of the class. My guess was that several students wanted to know who to vote for.

My curiosity was blunted when Chris put everything in perspective. He said, "I appreciate your interest, young man, but the CMF is the repository of the most unstable inmates in the California State Prison System and, in this environment, Charlie is average." Chris proceeded to share stories to convince me of his assertion.

My summer in Vacaville was a wonderful start for my nearly four-decade career spent training others. And the food at the now-closed Nut Tree, a famous landmark, was the perfect end for each teaching day.

I have only two missed opportunities since 1979. First, was the loss of my role as part of a teaching team for a class of inmates at Folsom Prison, to be held the year after CMF. The professor, Larry, about 5'7" and 150 pounds, had recruited two of us to assist. I was an ex-collegiate shot putter and my counterpart, Kerry, weighed 300 pounds and was a Kendo expert (Japanese stick fighting). It was clear we were involved for more than our instructional skills. I learned the nuances of prison subcultures, the harsh details of the California no-hostage policy, and the health benefits of a clip-on tie. All classes were cancelled, though, when an inmate stabbed a staffer with a very unhygienic, concealed blade.

The second lost opportunity was with an organization being "stood up" in Colorado Springs. I had delivered a conflict session at Ft. Carson, and my performance had caught the attention of someone in this fledgling organization. Our schedules did not match up and, by the time there was flexibility, their workload had exploded. The potential customer was the US Anti-Doping Agency (USADA); the organization that eventually brought down Lance Armstrong, the cycling champion.

USADA would have been a very special audience to me. In the early 1970's, I was, pound-for-pound, one of the best non-steroidal shot putters around. This isn't saying much, as I believe I was one of only a *few* non-steroidal shot putters around. It would have provided closure to speak to USADA, as a presenter who walked away from the dreams of his youth because he refused to "juice." The residual imprint for me has been to watch sporting events wondering which combatant has the best chemist.

I've most enjoyed working with Native American groups (Lummi Tribe, Bellingham WA; Chippewa in Belcourt ND; Navajo in Shiprock NM). It has also been very rewarding to work with NASA (Kennedy Space Center FL). In hindsight, both NASA engineers and Native Americans had calm temperaments and function somewhat as families.

Missing out on teaching felons and anti-doping wizards is a regret, but not spending time with the fun-loving psychiatrists would have been a huge loss. They provided an early lesson in life: humor can be the best protection around tough characters and dismal situations. Training on the topic of conflict for decades, I remain upbeat. I guess it could be said that Manson's psychiatrists helped me more than I helped them. [To contact Michael, email info@feltg.com]