Federal Employment Law Training Group
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Driving in the Dark

I am not proud of what I am about to tell you, and please don't tell my grandkids that I did it, but when I was a teenager, sometimes at night I would drive down country roads with my headlights turned off. I grew up in a small rural town with nothing much to do for excitement but drive Dad's car. Our road trips were sort of a cross between American Graffiti and Carpool Karaoke. The thrill of driving down a two-lane road at night, and then switching off the headlights, was about as much of an adrenaline rush as we could imagine back in the day. Of course, we did it for only short periods of time - maybe 30 seconds at the most - and always on a full moon night. Heck, it'd be really dangerous to do it without moonlight (pause for the ironic nature of this last statement). As we move into the first months of a new administration, many of you readers see a dark road ahead, much as did Sarah Connor in the second *Terminator*. What's going to happen? Where will the danger be? How will we get through this? Here at FELTG, we hope that you will see us as the moonlight in your dark travels. We don't know any more than you do what 2017 in the federal civil service will bring. But whatever it is, we're here to shine light on your path, and to offer some degree of rationality in what some might characterize as a dangerous thing to do.

Bill

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April 10-14

WEBINARS ON THE DOCKET

The Hostile Work Environment: It's More than Just Sexual Harassment
February 2

Damages and Remedies in Federal Sector EEO Complaints
February 23

If It's Good Enough for College Football Players …
By William Wiley

If you watched many of the hundreds of college football bowl games recently, you might have noticed something I've not seen before. Apparently, there were at least a couple of senior superstars who chose not to play in their team's bowl game to protect themselves from potential injury that would have reduced their respective values in the upcoming drafts for the pro teams. In other words, they sacrificed the benefit they would have provided to their team in the bowl for their own personal reasons.

There was banter among the talking head commentators as to whether such a self-centered non-team selfish decision was "good" or "bad," whatever those relative terms mean in the world of college sports. "What about team spirit?" some said. "If it hadn't been for his teammates and coaches, they guy might not even be going in the pro draft. He owes them." Others took a different path. "He's got to look out for himself. There are millions of dollars at stake, perhaps even an entire pro career. He'd be crazy to put that at risk for the sake of a team he's about to leave."

My vote count certainly isn't scientific, perhaps clouded by a bit of guacamole and light beer, but I think that I counted more commentators opting for the "take care of yourself" approach over the "take care of the team that brought you here" option. It seems those former pro players who announce the college games learned the hard way that taking care of Number One should be a player's Number One priority. The Spock/Kirk-view that "the needs of the many outweigh the needs of the one" is mainly for science fiction.

Apparently, the now-former Chairman of MSPB shares the opinion of the majority of the sports commentators. As you long-time readers of this here newsletter know, our profession has been concerned about the impending end of the Board Chairman's appointment. MSPB is a three-membered board. Currently, it has a position that has been vacant for well over a year, leaving just two members. The good news is that even with only two members, MSPB has been able to issue final opinions and orders because it has a quorum. However, with only one member, the Board's judges can continue to do their work, but MSPB cannot issue final orders without a quorum of Board members.

And as of January 7, we no longer have a quorum at MSPB. Effective that week, Chairman Grundmann cast her last vote as a Board member, then quit. Her term was set to expire on March 1, and most Board watchers expected her to serve to that date, as had her predecessors. However, Ms Grundmann decided to depart before the end of her term, leaving the Board unable to issue any final orders until President Trump's replacement nominee is confirmed by the Senate.

Though unlikely given the notorious confirmation process, it is conceivable that President Trump could have a replacement Chairman ready to take over soon after March 1. If that were to occur and had Ms Grundmann served out her term, the no-quorum period of no-votes at MSPB might have been short if at all existent. Given the former-Chairman's early departure, now the civil service is guaranteed a period of several weeks of an inoperative MSPB no matter how quickly the President and Senate work to appoint new members. In 2015, the Board issued about 60 final decisions per week. If it were at the same pace for this year, that would equate to about 300-350 final orders that could have been issued that will not be issued.

I leave it up to you, our wonderful readers, to decide if that's "good" or "bad." Here at FELTG, we certainly do not claim to know nearly as much about teamwork as do those guys who announced the bowl games, and we take no position on the former Chairman's personal decision. If there is a fault here, it is that Congress did not foresee that Board members will be making personal career decisions, and that there should be a statutory

mechanism in place to prevent the lights being turned off at MSPB (or FLRA or EEOC or NLRB) headquarters when something like this occurs. Officially, we wish Ms Grundmann the best in the future, wherever that might take her. People are entitled to make personal career decisions and to determine the value of teamwork.

At the same time, we feel sadness for those appellants and agencies represented in those 300 or so appeals who will have to wait extra weeks or months for a final decision in their cases. Football teams have backup players to replace those who choose not to play. As Congress assesses the future of oversight agencies like the Board, hopefully it will give consideration to developing a system to prevent this sort of delay from occurring again. Our country is too important to allow civil service accountability to be delayed when an appointee's personal career decisions diminish the ability of the team to continue to function.
Wiley@FELTG.com

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EEOC Seeks Public Input on Revising Enforcement Guidance on Harassment Complaints

By Deryn Sumner

Following up on the report issued in 2016 by the EEOC's *Select Task Force on the Study of Harassment in the Workplace*, on January 10, 2017, the EEOC announced that it was seeking feedback on a proposed *Enforcement Guidance on Unlawful Harassment*. The Commission last issued guidance on harassment claims in June 1999, with its issuance on *Vicarious Employer Liability for Unlawful Harassment by Supervisors*. Although the Supreme Court's decision in *Vance v. Ball State*, 133 S.Ct. 2434 (2013) narrowed the definition of who is a supervisor for purposes of establishing liability, the Commission's 1999 Guidance was only updated with a small text box at the top noting what the Supreme Court held in its decision. This is the same tactic the Commission has taken with its guidance on disability discrimination, which was issued years prior to the passage of the ADA Amendments Act of 2008.

The EEOC seeks public comment on the proposed enforcement guidance, which is intended to replace all the current enforcement guidance on harassment issued by the Commission. The proposed guidance refers to the EEOC's Select Task Force in the introduction section and sets out the applicable and most recent case law regarding harassment in the workplace. The proposed guidance clearly states the EEOC's position that claims of gender identity discrimination, including discrimination based on transgender status, as well as claims of sexual orientation discrimination state claims of sex discrimination.

The proposed guidance sets forth examples of how claims of actionable harassment must be linked to an employee's membership in a protected class. For example, derogatory comments about an employee's national origin could help make an actionable claim of harassment. A workplace

altercation because an employee's girlfriend broke up with him to date someone else in the workplace is not. As the proposed guidance states, "Although an employee's protected status need not be the only basis for the harassment, the EEO statutes do not prohibit harassment unless it is based, at least in part, on a protected characteristic."

The proposed guidance also includes a section on liability standards, guidance that is needed after the Supreme Court's decision in *Vance.* It also includes four sub-sections under the heading of "Promising Practices," to discuss how to avoid complaints of harassment in the first place. These include "Leadership and Accountability," "Comprehensive and Effective Harassment Policy," "Effective and Accessible Harassment Complaint System," and "Effective Harassment Training." These compliment the recommendations of the EEOC's Select Task Force in the report issued last year, and it is heartening to see the Commission continue to work to update its Guidance.

If you'd like to submit your own comments, you have until February 9, 2017 to do so here: https://www.regulations.gov/docket?D=EEOC-2016-0009. **[Editor's note: if this topic interests you, join FELTG for a very timely webinar on hostile work environment harassment on Thursday, February 2.]**
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Another Reason to Do Away with Letters of Counseling
By Deborah Hopkins

Within the first few minutes of our FELTG onsite class *UnCivil Servant: Holding Employees Accountable for Performance and Conduct*, Bill and I ask a question of the attendees:

Which of the following are "disciplinary" actions?

A. Letter of Caution
B. Letter of Warning
C. Admonishment
D. Letter of Counseling
E. Letter of Expectation
F. Reprimand
G. Suspension
H. Demotion
I. Removal
J. Reassignment
K. Placement on a PIP
L. Denial of a WIGI

The answers we get often make us cringe. We'll give you ten points if you can pick them out without error. Go ahead, take a look…we'll wait…and the answer is…there are only FOUR disciplinary actions on that list: Reprimand, Suspension, Demotion and Removal. That's it. Everything else on the list is NOT a disciplinary action, which means it holds ZERO significance in progressive discipline.

Items A, B, C, D and E have no legal value and often create problems for the agency that might not exist were they not implemented. Consider the recent EEOC case *Meaghan F. v. SSA*, EEOC Appeal No. 0120152932 (November 2, 2016). Here's what happened: SSA employee Meaghan F. suffered from migraine headaches and had exhausted all of her annual leave and sick leave and had used more than 240 hours of Leave without Pay (LWOP). She provided a doctor's note that said she might be absent "from time to time" in the future if her migraines worsened.

Not very specific medical documentation, is it? The supervisor didn't think so either, so he held a counseling session about her attendance and told her the medical information she provided was insufficient. We don't have a problem yet; a good supervisor should talk to an employee about her attendance if it's becoming a problem. But the supervisor took it a step further and issued a Letter of Counseling about the problem, which he placed in her personnel file. So, what did the employee do? She filed an EEO complaint and said the letter was discriminatory because she had a disability (migraine headaches) that caused her leave issues.

You'll be happy to know that the agency prevailed on this, as the EEOC held that a letter of counseling is not discipline and that the supervisor had a legitimate, nondiscriminatory reason for asking for more specific medical information. But, that didn't stop the agency from having to go through the lengthy EEO process, which now takes a good two to three years on average.

Though it's speculation on my part, I can't help but wonder, had the supervisor not issued the letter of counseling and put it in the OPF, whether the employee would have filed a discrimination complaint. I guess we'll never know, but this case underscores what we've been telling supervisors for years: sometimes the less you do, the better off you'll be. Hopkins@FELTG.com

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The Good News About the MSPB Chairman Quitting
By William Wiley

Having worked inside of MSPB for nearly a decade, I know how this stuff works. As a Member's departure gets closer, tough issues with significant impact that have been hanging around undecided get decided. It's now or never when an adjudicator is about to turn out the lights, much like happens at the US Supreme Court in early summer as the Court's term for the year draws to an end.

As you may have read about in other parts of this newsletter, MSPB's Chairman resigned on January 7, leaving the Board without a quorum and unable to operate until the Senate confirms replacements. That means that if there were any contentious issues that had been sitting around, the members had to get them out before that date, or perhaps lose the opportunity to have their voices heard at all.

With that as background, here are decisions that came out the first week of January that, by my guess, were causing some heartburn within MSPB. A couple reverse major precedence in some aspect of federal employment law. Although their impacts are limited to relatively small groups of cases, the effects are significant in those situations, and undo years of precedence contra:

> *Firing Long-term Temporary Employees:* For many years, individuals employed in a series of temporary appointments accrued MSPB appeal rights even with a few days' break in service between appointments. That theory was known as a "Continuous Employment Contract." *See Roden v. TVA*, 25 MSPR 363 (1984). Well, that's no longer the rule. From now on, to be entitled to appeal a removal from a temporary appointment, the employee must have more than a year of continuous uninterrupted employment. *Winn v. USPS,* 2017 MSPB 1.
>
> *Settlement Enforcement:* For many years, MSPB would enforce settlement agreements only in cases in which it found

that it had jurisdiction over the underlying action on appeal. That principle has now been reversed. The Board will enforce settlement agreements entered into even if it has not established that it has jurisdiction over the underlying matter. *Delorme v. DoI*, 2017 MSPB 2.

Appellant's Right to a Hearing: The Federal Circuit has long held that an appellant is entitled to a hearing, and that the Board may not issue a summary judgment decision without a hearing, even if there are no material issues of fact in dispute. *Crispin v. Commerce*, 732 F.2d 919 (Fed. Cir. 1984). While the Board's precedent in this area has not always been consistent or clear, the clarified rule now is that an appellant is not entitled to a hearing when his discrimination claims are deficient as a matter of law. *Sabio v. DVA*, 2017 MSPB 4.

Sometimes it takes a while for things to happen. I remember a country and western song from my college days that said something like, "All the girls get prettier as closing-time comes around." Well, the first week of this month was closing-time at the Board. Pretty or not, these are three important decisions that every practitioner needs to know. Wiley@FELTG.com

EEOC Issues Its List of Notable Cases for Fiscal Year 2016
By Deryn Sumner

A few weeks ago, someone stopped by my office and asked me to list what I considered the most important cases issued by the EEOC's Office of Federal Operations in 2016. And I'm pretty sure I looked up from the pile of work I was trying to complete before the holidays with a dazed expression on my face, until the person walked away not expecting an answer. When I came back to the question a few days later, I still couldn't come up with much a response. Past years have seen groundbreaking decisions that expand the coverage of Title VII and grant standing to more employees, like *Mia Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (holding that claims of transgender discrimination state claims of sex discrimination) or *David Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015) (determining that sexual orientation claims should be processed as sex discrimination claims).

But looking back on 2016, I could not easily identify such notable cases. Luckily, the EEOC did the work for me and a few days ago issued Fiscal Year 2017, Volume 1 of its *Digest of Equal Employment Opportunity Law*. You can find the full digest here: https://www.eeoc.gov/federal/digest/vol_1_fy2017.cfm. Since the cases were pulled from the Commission's fiscal year, which runs from October 1, 2015 through September 30, 2016, it does include some 2015 cases. But for our purposes (and since I did see fit in FELTG's December 2015 newsletter to expound upon my list of notable OFO cases from 2015), I'll focus on the 2016 cases the EEOC included. We'll call it the notable cases of the notable cases of 2016.

First up, in *Candice B. v. Department of Homeland Security*, EEOC Appeal No. 0120160714 (June 1, 2016), the EEOC certified a class action defined as "all women who were required to take PCE-1, PCE-2, and the FCS and failed to pass the push-up qualification standard at any stage." We discussed this case in more detail in the July issue of the newsletter.

In cases involving high awards of non-pecuniary compensatory damages, the Commission affirmed an award of $192,500 to the complainant in *Ervin B. v. USPS*, EEOC Appeal No. 0720150029 (March 15, 2016). There, the Commission found the award appropriate based on "the shock, embarrassment, and great upset in being placed in off-duty status, destroying his unblemished record of not getting in trouble with criminal law and what this did to his identity, the humiliation, despondency, extreme anxiety and ruminations resulting from the criminal action and being booked, having an invasive strip search, and being put in a holding cell; the damage to his reputation among neighbors, co-workers and customers on his route because of the criminal action, the worry, hysterical crying spells, and fear

of being convicted and having his life destroyed as he knew it, the financial struggles from being put in off-duty status for an extended period, his loss of a sense of having a new start when shortly after returning to work he received a retaliatory seven day suspension, the loss of self-worth and self-esteem and going from jovial to withdrawn, the sleeplessness, nightmares, depression, damage to his marriage and PTSD stemming from the Agency's actions, the lessening in control of his glucose levels partly as a result of the discrimination, not being able to work for extended periods, and the emotional damage which continues to this day." This case is a prime example of how even awards at the higher end of the range fail to adequately compensate an employee for what they have experienced.

In *Glynda S. v. Department of Justice*, EEOC Appeal No. 0120133361 (February 23, 2016), the EEOC issued default judgment in the complainant's failure because the agency waited over a year to file a Final Agency Decision which the Commission found created an "extreme delay [which] stranded Complainant in a procedural 'no-man's land' wherein she had no recourse within the administrative EEO process until the Agency issued its final decision." The Commission has not consistently held agencies accountable for delays in timely completion of investigations, or issuing final agency decisions and final actions, but found it appropriate to grant default judgment in this case because, in part, the Commission had previously warned the Department of Justice that delays in issuing final decisions were concerning. *See Sylvester v. Department of Justice*, EEOC Appeal No. 0120101890 (November 18, 2010).

And finally, in *Ivan V. v. Department of Veterans Affairs*, EEOC Appeal No. 0120141416 (June 9, 2016), the Commission found that a supervisor engaged in *per se* retaliation when he asked the complainant if he planned to "play the Latino card" while investigating a complaint from another employee. The Commission found that these comments could have a chilling effect on the EEO process and constituted a per se violation of the anti-retaliation provisions of Title VII.

Watch this space to see what 2017 brings us from the Office of Federal Operations.
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Civil Service Reform and Performance Recognition
By Barbara Haga

I am following up with another article regarding another recommendation included in the report *Governing for Results: A Transition and Management Agenda to Lead Policy Change in a New Administration*, issued on October 17. The report is available here: https://gallery.mailchimp.com/b7de61719141ea27646be0c7d/files/Transitions2016Report.pdf. This time I want to talk about performance recognition for Federal employees.

Taking Authority Away from Agencies

The report notes that previous performance systems have not lived up to their potential, and the private sector seems to be moving away from traditional performance reviews. The Transition Group acknowledges that there was no clear consensus in the group about what a new system should look like. However, on page 25 of the report they list some options in a section entitled "Expand Employee Rewards and Pay-for-Performance Systems":

> ***Non-Financial Reward Systems****: As an alternative to or companion to performance evaluation systems for all employees, create a robust employee recognition and reward initiative.*
>
> ***Financial Reward Systems****: If financial rewards are used, the Administration may want to take decisions for those rewards outside of the agency and provide for a third-party validation entity. To buffer criticism that bonuses are being given out at taxpayer expense, consider partnering with*

> *foundations in each mission area of government who could pledge funds to reward federal employees.*

The first recommendation skips over the fact there is a merit principle that requires agencies to reward performance. 5 USC 2301(b)(3) states: "Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, *and appropriate incentives and recognition should be provided for excellence in performance* (emphasis added)." 5 USC 4302(b)(4) requires agency appraisal systems to provide for "… recognizing and rewarding employees whose performance so warrants." If any of the performance recommendations included in the report are going to be implemented, then not only is 5 USC Chapter 43 going to need to be overhauled, but the merit principle is going to need to be changed, too.

The Transitions in Governance group is recommending non-financial rewards as an alternative or a companion to performance recognition. I am not sure what they have in mind. It could be anything from the array of offerings under 5 CFR 451 from time off awards to career recognition awards to employee of the quarter programs. It could be something entirely new. Agencies actually have very broad latitude to create incentive award programs under the law and regulations as they exist today. I agree with the transitions group that an incentive award program can be an effective management tool. I think our best bet with getting a "bang for the buck" with recognition is to do it when something exceptional happens with an incentive award.

The group's recommendation about taking award decision-making authority away from agencies is difficult to understand. If we can't have confidence in the decisions that managers make about that 1% or 1.5% of the personnel budget that most agencies are allowed to allocate for awards, how is it reasonable to count on them to manage huge programs, prepare regulations and defend agency policies to constituents? If they can't be trusted to effectively deal with decisions on rewards for good employees, how could we expect them to make tough decisions about discipline and firing and answering grievances and EEO complaints?

I think this recommendation buys into a perception that Federal managers don't do a very good job of managing. Surely there are examples of where there have been failures, but in a lot of cases, I think the awards system drives the bad decisions. I don't think that giving the authority to someone else is the answer. Third-party validation to me would turn performance awards into a bureaucratic nightmare. The award recommendations would be handed over to a group far away from where the accomplishments took place to people who would be outside of normal agency control. Handing off important management decisions to folks outside of the chain of command is a scary proposition. Folks who have a vested interest and have knowledge about the details of the work should be judging who warrants recognition. We have seen problems with this handing off of authority before. Anyone out there remember Merit Pay pools from the '80s? One could also ask the DoD employees who were under NSPS how well received the pay pool system was where managers many layers of supervision away from the recommending manager were deciding on whether the ratings and thus the pay rewards were warranted.

Get the Money from Somewhere Else

The second half of the recommendation says agencies should get some foundation to give money to use to reward Federal employees to combat the perception that taxpayers are footing the bill for the awards. Taxpayers fund the salaries, and awards are just a small portion of that amount. I frankly don't think the average taxpayer cares until awards are handed out to those who don't seem to deserve them – such as VA folks who are not taking care of patients as they should, or IT professionals whose programs don't meet the requirements they were designed to address, or managers who don't manage. I don't think it is an issue of using the taxpayer dollars, but making sure they are used where warranted.

The report takes a different tack. To me, this is one of the stranger recommendations in this report.

Maybe NASA could find a group to give them award money – and maybe other agencies like NIH or CDC could do so. But, I would think that a foundation would want to give their money in furtherance of some end that they want to foster. For example, an aerospace group might give money to "reward" the entities within NASA that do aeronautical research but not to other parts of NASA engaged in climate research or space flight. But, seriously, what about other agencies that don't have that "draw'? What foundation is going to sign up to give money for awards to the TSA, IRS, or SSA? If a foundation is giving money, isn't it reasonable to think that they are expecting something for it – some program achievements related to their areas of interest, some report back on what was achieved, some answers about who received award money?

A Better Idea?

I have an alternate solution. I think the appraisal system would work much better if we got rid of performance recognition completely. In next month's column, I'll explain why.
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Deck Chairs on the Titanic
By William Wiley

Here we go again. Congress is convinced that it is impossible to fire bad federal employees. In response to that belief, we've seen a bevy of bills, proposals, and actual legislation attempting to remedy this situation. Here are a few:

- Reduce the notice period in a removal from 30 days to 10 days.
- Reduce the number of days to file an appeal from 30 days to 7 days.
- Make Reprimands a permanent part of an employee's file rather than only temporary.
- Extend the probationary period to five years.
- Limit a removal appeal to a final decision by an MSPB career administrative judge rather than a decision by the politically appointed Board members.
- Annotate a former employee's file to reflect that after he left government, an investigation revealed that he did bad things while a federal employee.
- Allow Congress to effectively fire individual civil servants without due process.

Talk about rearranging the deck chairs. Woof.

Look. None of this is going to make much of a dent in the challenges we have in fairly holding employees accountable in the civil service. You can reduce the notice period to a minute and a half, make the probationary period 20 years, and include embarrassing photos of the employee at the office New Year's party in his OPF forever, and you still are going to have agencies that do not fire enough nonproductive employees.

You would think that before changing the system to correct problems, one might actually look to see what is causing the problems. If those who proposed the above had done that, they would have found out that the difficulty with accountability in the civil service is not going to be fixed by these nipping-at-the-edges changes to what we do. Instead of this "Ready! Fire! Aim!" approach to civil service reform, Congress and the White House should identify what it is that's causing these systemic problems.

Fortunately, that study has already been done for them. The good folks at MSPB's Office of Policy and Evaluation recently released the results of a survey that found that the two major reasons that more bad employees are not fired are:

1. Lack of support from upper management, and
2. Lack of knowledge on the part of human resources staff.

Here at FELTG, based on our many years of experience, we would add as third to that list:

3. Lack of knowledge on the part of agency legal counsel.

When we conduct accountability training for management officials, when they bemoan the fact that it's hard to remove bad employees, they don't say anything like, "Gee, if I could just have kept his Reprimand in his file permanently, I'd have been able to fire him." No, they say, "I won't get any support if I do this. If I fire the guy, there's no guarantee that I'll be able to replace him. Besides, HR and legal won't let me do it."

So, Congress/White House, if you want to improve accountability in the civil service (aka "drain it"), take action based on the known causes of the current problems, not what you might speculate about in the dark of the night from the corner of your lonely cluttered room. We've said it before in this newspaper, and we say it again, just in case you haven't been reading us for very long. Set the accountability tone from the top. President Trump, here's your Executive Order:

> *To all front-line supervisors, managers, executives, human resources specialists, and legal advisors:*
>
> *From today forward, the Executive Branch will be built on employee accountability. If there are employees in government who are non-performers or who do not obey workplace rules, they should be disciplined and removed from service, promptly and fairly, if they do not improve their behavior. If a supervisor removes an employee for misconduct or performance, that supervisor will be able to replace that employee. All agency discipline and performance advisors will be trained, certified, and continually evaluated by the professionals at FELTG to ensure the adequacy of the service they provide and the possession of the knowledge necessary to hold civil servants accountable.*

Separately, we once again put forth our FELTG belief that as long as there is a confrontational redress process available to employees, nothing is really going to change fundamentally until the concept of entitlement to a civil service position is re-evaluated. Last month, we put forward a proposal that we do away with the adversarial taking of an employee's job via termination and replace it with a concept similar to that known as *eminent domain*, the right of a government or its agent to expropriate property for public use, with the payment of compensation. In our proposal, when a career employee reaches a point at which he is no longer performing acceptably, instead of firing him and dealing with the resulting appeals, complaints, and grievances, the agency could effectively buy back the job from the employee. The job would be valued based on grade level, years of service, and performance ratings; the agency would pay the employee that amount; and the entire process could not be challenged as it would be non-adversarial.

Some readers who commented on our suggestion thought it to be un-American, devoid of due process, and something Congress would never approve. Well, "Ha!" on you. Have you read the "Holman Rule" that the House of Representatives recently adopted? It makes our FELTG recommendation look downright wimpy in comparison. Wiley@FELTG.com

Practice Tip: Say What You Mean in Drafting Terms of Settlement Agreements
By Deryn Sumner

In issuing one of its last decisions of 2016, the EEOC's Office of Federal Operations left us with a nice reminder of the importance of being as specific as possible when drafting terms of settlement agreements. Although everyone in the room might think they have the same understanding of what each side is promising to do, different interpretations can arise after the fact. At the core, settlement agreements are contracts and are interpreted as such. The complainant agrees to withdraw his or her EEO complaint with prejudice. In some instances, he or she even agrees to do more than that, such as resign from the agency as of a specific date. The agency may agree to a whole host of things (particularly if it is getting the employee to resign as part of the deal) including making monetary payment to the complainant, paying the complainant's attorneys' fees and costs,

restoring leave, changing personnel files and performance evaluations, providing letters of reference, rescinding suspensions or other disciplinary actions, and even sometimes agreeing to reassign the complainant to a different position away from a specific supervisor.

That's what the parties agreed to in the case of *Ouida L. v. Department of Interior*, EEOC Appeal No. 0120162588 (December 30, 2016). Or at least that's what the complainant thought she was receiving in exchange for agreeing to settle the case. The language of the settlement agreement included the following language: "Reassign Complainant under the direct supervision of [the Senior Advisor for Hydropower ("S2")] instead of [the PRO Manager ("S1")] effective immediately."

The decision notes that many of the issues which caused the complainant to file an EEO complaint stemmed from her interactions with her first-line supervisor "S1" and that during the processing of the EEO complaint, the complainant had been placed in a separate chain of command from S1. After execution of the agreement, the Agency did as agreed and moved the complainant formally to reporting to the S2. Who, of course, ends up retiring a year later only to be replaced by, you guessed it, S1 who assumes S2's position. The complainant contacts the Agency alleging a breach and the Agency finds that considering the plain language of the agreement, no breach occurred. Which leads us to the appeal of that finding and the EEOC's decision.

The complainant argued that the intent of the agreement was to place the complainant outside of the chain of command of S1. The Agency argued that it did as it contracted to do when it reassigned the complainant to the direct supervision of S2, and that the language of the settlement agreement did not say that the complainant would not be in S1's chain of command.

The Commission, after discussing the Plain Meaning Rule, agreed with the Agency. It found that removal from S1's chain of command was not one of the terms of the agreement and that there was no evidence that the settlement agreement was otherwise void, voidable, or that the complainant was misled into signing the agreement, particularly as she was represented by counsel. The Commission cautioned, as we caution you, readers of the FELTG newsletter now, "if Complainant wanted such constraints imposed on the Agency employee, she should have included such a provision as part of the settlement agreement." (internal citations omitted). Think about the result you want and draft the right language to achieve that result, lest you be stuck litigating enforcement matters forever and ever. **[Editor's Note: Amen.]** Sumner@FELTG.com

COMING TO SAN DIEGO
Developing & Defending Discipline: Holding Federal Employees Accountable
February 28 – March 2

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Tuesday - Accountability for Conduct and Performance, Part I: Accountability and supervisory authority; discipline and misconduct; penalty defense and due process; discipline procedures and appeals; psychology of performance appraisal; performance-based removal procedures.

Wednesday - Accountability for Conduct and Performance, Part II: Completing a performance action; team workshop; mentoring programs; handling the absent employee; union considerations; understanding personal liability.

Thursday - Defending Against Discrimination Complaints: The Supervisor's Role: The role of EEO in the federal government; defining protected categories: race, color, national origin, religion, sex, age, disability, genetic information and reprisal; theories of discrimination; agency defenses; what to do if you're a Responding Management Official in a complaint; being an EEO witness.

Bonus: This class meets OPM's mandatory training requirements for federal supervisors found at 5 CFR 412.202(b).