



Federal Employment Law Training Group

Training By Professionals For Professionals

FELTG Newsletter

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Sad-to-Angry, Then Back Again

I think I might be suffering from a form of bi-polar disease. Some days, I'll review a document drafted by a client and think, "Wow, this is good stuff. They've been to our classes, learned how to draft discipline and performance documents, and are doing the right thing the right way." Other days, I am overwhelmed by the lack of competence exhibited by professionals in our field; e.g., the HR Director with many years of



experience who simply emailed the employee and told him he was fired; the attorney who drafted a six-page proposed removal of a probationer (!) based on an email the employee had written that disclosed violations of federal regulations (!!). When these cases are reversed on appeal by the Board, those agencies now will have reason to complain to an oversight committee on Capitol Hill that the mean old MSPB won't let them fire anybody. In knee-jerk response, some Congressman will propose abolishing our civil service protections so that it is easier to fire bad employees without the Board in the way. Folks, I probably publicly criticize MSPB decisions more than anybody out here. Yet, I am among the first to say that the main problem we are having with firing bad hombres is not the Board. No, the main problems are that a) many lower-level supervisors don't believe that they'll be supported by upper management if they try to fire someone, and b) too many agency employment law practitioners don't know a *Douglas* Factor from Douglas MacArthur. Please, come to the classes. Learn not to propose probationary



terminations. Develop radar to recognize a prohibited personnel practice. Exude due process. If we let those people on The Hill try to fix us, they will screw it up. Here at FELTG, we are ready to help you fix yourselves. If you need greater employee accountability in your organization, call us. We can show you how to make it start to happen today, before anybody else tries to do it for you.

Bill

JOIN FELTG IN SAN DIEGO

***Developing and Defending Discipline:
Holding Federal Employees Accountable***
February 28 - March 2

COMING TO WASHINGTON, DC

MSPB Law Week
March 13-17

Absence & Medical Issues Week
March 27-31

WEBINARS ON THE DOCKET

***Damages and Remedies in Federal
Sector EEO Complaints***
February 23

***Series: Supervising Federal Employees:
Important Tools for Managers and
Advisers***
Sessions begin March 7!

What About EEO Complaint-ing a Leave Restriction Letter?

By Deborah Hopkins



At FELTG we love to read your emails and are delighted to answer (almost) any question you have as a result of reading our articles. Here's one we got in response to the December 2016 FELTG Newsletter article, *EEO Complaint-ing a PIP? No Dice*.

Ms. Hopkins:

Thank you for an interesting article. You quote the Commission, "We intend to require dismissal of complaints that allege discrimination in any preliminary steps that do not, without further action, affect the person; for example, progress reviews or improvement periods that are not a part of any official file on the employee."

So by extension, can an agency dismiss a complaint alleging discrimination in a leave-restriction letter? How about all proposal notices informing the employee of impending discipline? These are "preliminary steps," for sure, and "without further action." The employee may well face discipline for violating the LR requirements or for the misconduct identified in the proposal notice, but per se, neither requires "further action."

Why did the Commission single out only PIP notices?

And our FELTG response:

Dear FELTG Reader:

Thanks for the email. Why did the Commission single out only PIP notices by name? Your guess is as good as ours, but here's what we do know:

Under 29 CFR § 1614.107(a)(5), an Agency may dismiss an EEO claim that alleges a proposal to take a personnel action or other preliminary step to taking a personnel action. The only exception is the situation in which a non-appealable matter is a proposed action, the agency proceeds with the action and that action becomes final, in which case the proposal is said to "merge" with the final action. *Wilson v. Dept. of Veterans Affairs*, EEOC Appeal No. 0120122103 (Sept. 10, 2012). Keep in mind, though, these preliminary steps can still go in to evidence in a hostile work environment claim, and/or a reprisal claim.

Regarding the LRL, from a read of the cases it seems that placing an employee on a LRL could be considered an adverse action (under EEOC's definition which is broader than MSPB's), if placement on the LRL was motivated by discrimination. So yes, the LRL could provide the grounds for an acceptable complaint. See *Brand v. Food Safety Inspection Service*, EEOC Appeal No. 0120113592 (June 5, 2013). Hope this helps. Hopkins@FELTG.com

When You Can Say "No!" to the President

By William Wiley



Recently, the *Washington Post* asked civil servant readers when they would be willing to refuse to comply with policy directives coming out of our new Administration. Hopefully, you FELTG-ers know that the answer to this question is more legal than philosophical.

The basic rule in government is that an employee must do what his supervisor tells him to do. As President Trump is the chief executive of the executive branch, if you are a federal government employee, he is in your supervisory chain of command. Therefore, if he directly or through one of his Trumpette underlings tells you to do something (5 USC 301), you are obligated to do it or open to being found to be insubordinate.

However, like many rules in life, there are exceptions. These excuses for not obeying a

supervisory order have developed over the years through MSPB case law:

1. **Unsafe.** A number of federal employees perform work every day that a lay person might find to be unsafe; e.g., defusing some of those spent munitions that can be found at various military bases around the country. However, a civil servant is not guilty of insubordination if she refuses to obey an order that would put her in an unreasonably unsafe situation, given the nature of her job.
2. **Illegal.** An employee does not have to obey an order that is illegal in itself. For example, if an employee is ordered to forego a Constitutional right (e.g., the Constitutional right to privacy surfaced in one or two cases), he can refuse it. Or, to undergo a psychiatric exam or to produce medical documentation that is not authorized by law.
3. **Requires an Illegal Response.** In this case, closely related to the former, even if the order itself is not illegal, a federal employee does not have to obey a policy directive that would require her to violate a law to comply with the order. For example, a law enforcement officer could refuse to obey an order that requires her to treat members of one race more harshly than members of another race.

Although these exceptions are relatively well-established in case law, here's the challenge:

If you are ordered to implement a supervisory order that you believe falls into one of these three categories and you choose to disobey that order, you are betting your job that you are correct.

Let's say, hypothetically speaking, of course, that you as a federal employee are directed to detain members of a certain group of individuals who are attempting to enter the United States. If you believe that order would require you to violate the Constitutional rights of those individuals, you cannot be required to obey that order as you would be violating a law if you were to do so. Unfortunately, the only way you can establish that you do not have to obey that order is to disobey it, get fired for insubordination, and then on appeal,

convince some judge that you were correct as to the un-Constitutional nature of the order. If you are found to be correct, you get back pay and your job back. If you are mistaken, if the order did not violate the Constitution, you stay fired.

This is a tremendously difficult situation. Few of us, this writer included, are qualified to finesse the fine points of Constitutional law out of a situation in real time with the boss yelling, "The President said do it; do it!" Few can stand the prospect of no income for several months while the subsequent removal case gets passed on judicially.

But there really is no alternative. If we were to grant federal employees the right to refuse to obey orders simply because they "believed" them to be illegal, then chaos would rein. Civil servants across America could find the most straightforward orders to be illegal, then keep their jobs even if eventually the orders were found to be perfectly legal.

"Bill, lunch is 30 minutes."

"Sorry, boss. That's unsafe as I need at least two hours to digest my meal. Plus, I think I read about some kind of law several years ago that says I get two paid hours for lunch because I am over 40 years old. Or, something like that."

Bottom Line: if you are a career civil servant (not a political appointee as was the recently-former Acting Attorney General) and you choose to refuse to obey a new policy directive, be aware of the potential risks and consequences. Being right in the eyes of your god doesn't necessarily put food on the table. Wiley@FELTG.com

JOIN US IN SAN DIEGO

***Developing & Defending Discipline:
Holding Federal Employees Accountable***
February 28 – March 2

Focusing on performance, conduct and defense against EEO complaints, this class also meets OPM's mandatory training requirements for federal supervisors found at 5 CFR 412.202(b).

Don't Be Suspicious: Remember the Reasonable Suspicion Standard
By Deryn Sumner



Federal employees have a very short statute of limitations to initiate EEO contact: the employee must make contact with an EEO counselor within 45 days from the date of the act thought to be discriminatory.

Luckily there are exceptions that prevent my job from being farmed out to robots. One of those exceptions occurs when the employee forms a “reasonable suspicion” of discrimination after the 45 day window has elapsed. Yes, the actual incident occurred past the 45 day timeframe, but the employee did not reasonably suspect that discrimination was afoot until afterwards. Sometimes, when reviewing whether to accept or dismiss complaints for investigation, EEO specialists may not properly consider whether there’s a basis to extend the deadline to make EEO contact.

The Commission recently addressed such an instance in *Leisa C. v. Department of Veterans Affairs*, EEOC No. 0120170391 (January 27, 2017). There, the complainant made EEO contact on May 2, 2016 alleging that her non-selection for a position as a Nurse Practitioner was motivated by her age and participation in prior EEO activity. The agency dismissed the formal complaint, noting that complainant learned of her non-selection on November 30, 2015 when she received an email informing her of the non-selection and thus her May 2, 2016 contact was untimely.

The complainant appealed and argued that although she knew of the non-selection back in November 2015, she only suspected discrimination when she learned the identity of the selectee in April 2016 after requesting, and not receiving an explanation for her non-selection several times. Further, the complainant argued that she only formed a reasonable suspicion of retaliation “after hearing an Agency representative’s remarks in the context of mediation on June 28, 2016.”

The Commission determined that dismissal of the formal complaint was inappropriate because the agency delayed in providing the complainant an explanation for 4.5 months and she did not reasonably suspect discrimination until after receiving the explanation.

A word of caution to the complainant: if the claim of retaliation is based on representations made during mediation, you’re most likely out of luck getting that admitted as evidence. But at least you can proceed with your case now.

And I will give credit where it is due. Assuming the dates in the decision are correct, the EEOC addressed and remanded this complaint for processing relatively quickly. The agency issued a final decision dismissing the complaint on September 22, 2016, and the Commission considered an appeal and issued a decision just about four months later, on January 27, 2017. Sumner@FELTG.com

Is Performance Recognition Necessary or Beneficial?

By Barbara Haga



I am going to jump out on a limb here and suggest that recognition tied to performance appraisals is at best benign and not achieving what it is intended to do, and possibly a detriment to performance management in Federal agencies. For this piece, I am talking about cash awards and Quality Step Increases (QSIs). I would ask each reader to reflect on these questions. Have you ever changed the amount of effort you put into your work or the techniques you used to complete your work based on the hope of getting some type of performance recognition? If you got an award, was there a spike in your performance because you were pleased to be recognized or grateful for the extra money? Did you do something extra beyond what you were normally going to do because you were

recognized? Did that spike in your performance last?

Intrinsic and Extrinsic Motivation

Taking a hugely oversimplified view of what motivates people, I would define intrinsic and extrinsic motivation for employees as follows. Intrinsic motivation is what comes from inside – how you feel about the work, how it aligns with your values, whether it achieves an end you believe is worthwhile, etc. Extrinsic motivation is external, in this case largely coming from your employer or possibly your peers. These things encourage you to achieve in order to be rewarded or to avoid a negative consequence. It could be a cash award, recognition in front of your peers, a promotion, etc.

I think many of us who work in the employee relations business do it because we believe that what we are doing is important and that the organization as a whole is better for it, if we do our jobs well. In my experience, I have found that most HR practitioners in this line of work are more motivated by the intrinsic rather than the extrinsic factors.

I have been asked many times about why NASA ranks so highly in surveys like the *Best Places to Work*. I believe it is because of intrinsic motivation. Employees in the science and engineering disciplines grew up wanting to do this kind of work, wanting to be part of NASA. In many areas, they are working on cutting edge science and making contributions that change the world. You can't buy that kind of motivation – it is intrinsic. It is also contagious. Even the folks in contracting and budget seem to align themselves very easily with that view. Other agencies want to copy what NASA does to raise their scores on those surveys. I don't think it is what NASA does but rather who NASA employs. I would suspect that if you looked at places like NIH, the CDC, and the EPA you would find a similar level of intrinsic motivation. I am not sure that an agency can accomplish with external motivators what the employee doesn't already bring with them.

Are Performance Awards Effective Extrinsic Motivators?

Here's a scary thought. Should an agency really want to buy a person's best performance? If you are a manager, is that the person you want? Or, do you want the person who sees the work as a challenge or that the goal is something valuable to the organization? Would you feel more comfortable with the one who takes the assignment because it is important and will ensure that management's interests are protected or an employee who says, "Yes, I'll volunteer to do that training session, or I'll take that grievance that covers fifty individual employees, or I'll put together the template for adverse action letters on that charge we've had issues defending – if you pay me a little extra"?

I am sad to say that I don't think performance awards are effective motivators. First of all, in some organizations the awards are virtually automatic and everyone rated Fully Successful or higher gets one. So, an employee comes to work and does what is expected and is rewarded. I have worked in some places where the question wasn't whether recognition would be granted, since essentially everyone got something, but rather when the payments were going to be processed. There really wasn't a question whether an employee would get one; people were already planning on the payments.

Because some unions have negotiated awards and/or award amounts, they have essentially become almost an entitlement. I remember reading at the time of the 2013 furloughs that the IRS wanted to eliminate award payments in order to reduce the number of furlough days, but the union wouldn't agree to eliminate them. NTEU Chapter 67 (<http://www.nteu67.org/>) has a post on their website dated 11/22/2016 that echoes that thinking which is apparently still alive and well. It says, "While you were working hard, NTEU was fighting hard to make sure you received your performance award. In this tough budget environment, the IRS tried to cut the awards program, but we fought successfully to keep it." So, in the union's view it is a good answer that in order to deal with budget

constraints, it isn't an option to reduce or eliminate award payments?

Secondly, we have that fundamental problem with what the employee must do to achieve one. Is there a clear explanation of what is expected at various levels of performance in order to be recognized? Or, are managers paraphrasing the famous definition of pornography and telling employees, "I can't define what it takes to be Outstanding or Superior, but I'll know it when I see it." How are award decisions made in such an organization? Is it favoritism as sometimes employees suggest, or is it the "halo" effect – those who have been viewed as achieving significant results in the past are always viewed that way?

Now, back to the questions I posed at the beginning. How many of you were inspired to reach new levels of performance by a performance award you've received? Is your organization more affective in meeting agency goals because you have an effective performance recognition program? What I have observed in many organizations is that it may be a nice "thank you" but it is not an effective extrinsic motivator.

More on this topic next time. Haga@FELTG.com

[Editor's Note: As the FELTG staff psychologist, I applauded Barbara's common sense conclusions and add that they are routinely backed up by the scientists who study motivation. If you read the literature on awards as motivators, you find three bottom lines:

- **Annual awards programs such as those found routinely in the federal government have never (as in "not ever") been proven to motivate increased performance.**
- **In contrast, there is decent evidence that piecemeal awards (sometimes referred to as "performance contingency reward systems" by those trying to sound impressive) do indeed act to motive increased production. For example, workers who dig ditches who are paid by the foot as compared to being paid by the hour dig longer trenches.**

- **However, piecemeal awards DO NOT seem to motivate increased quality or creativity. Also, individuals who have been given piecemeal awards for some period of time, and then who are denied future piecemeal awards, reduce their production levels below those employees who never received piecemeal awards.**

Whether we like it or not, awarding federal employees to improve the quality of their work is not supported by science. And, it's expensive.]

FELTG is Coming to Denver

Managing Federal Employee Accountability
May 8-12

It was hit last year in New Orleans, Honolulu, and San Francisco. So now we're bringing this exciting program to the Mile-High City!

Covering a range of topics, this week for supervisors and advisers will give participants the tools they need to handle employees with performance and conduct issues, leave abuse, frivolous EEO complaints, communication issues, and union considerations.

Registration is open now. Won't you join us?

So, the Union Wants a Bunch of Information?
By William Wiley



Questions, we get questions. Not a lot of questions are about union rights and corresponding management obligations, and this one is a good one:

From an inquiring mind among the FELTG newsletter readership:

Dear FELTG brilliant people. Here's an LR Hypothetical for you:

The union makes an information request for certain emails from a recent former employee. The union says that it needs the emails because it needs to find out whether to file a grievance about the former employee putting a current bargaining unit employee in a reprisal environment. The emails allegedly contain derogatory opinions expressed by the former employee, about the current employee, to the current employee's clients. Management says it was aware of the emails, and that it would release the emails if it still had them. However, the only component of the agency with access to the emails is the Information Technology staff, and the attorneys advising IT act like the emails are super-secret. Before IT will give management access to the emails so that management can respond to the union, the IT staff and its advisors want the union to demonstrate a "particularized need" for the information. How would you rule about the establishment of a particularized need?

Thanks, FELTG!

And now our FELTG fantastic response:

Dear Desperate Reader:

Thanks for your hypothetical question. As usual, we start with the law:

5 USC Section 7114:

(b) The duty of an agency and a union to negotiate in good faith under subsection (a) of this section shall include the obligation --

...

(4) in the case of an agency, to furnish to the union involved, or its authorized representative, upon request and, to the extent not prohibited by law, data --

A. Which is normally maintained by the agency

in the regular course of business. It is management's burden to establish that the material is not normally maintained or that its production would be unreasonably burdensome.

If you don't have access to the emails, the information is not "normally maintained." Therefore, you don't have to provide it. See *Navy and AFGE*, 26 FLRA 324 (1987) (If the data or information does not exist, it need not be produced, but management should inform the union of that fact).

However, if the data exists anywhere within the agency (e.g., the bowels of IT), then you must cough it up if there is a particularized need. A union demonstrates a particularized need, in general, if it tells the agency:

- Why it wants the information, and
- What it intends to do with the information.

And the information is "within the scope of collective bargaining":

- Contract administration
- Grievance and ULP processing
- Employee representation

FAA, 55 FLRA 254 (1999)

The union must justify a request as to:

- Geography
- Time frame (e.g., "for the past 4 years")

U.S. Customs, New Orleans, 53 FLRA 789 (1997)

In your case, the union has said that it wants the emails to consider whether to file a grievance relative to a particular employee whose rights might have been violated in a particular way. Can't get much more particular than that.

If you don't produce the emails, I'd say you have yourself a nice little ULP. But what do we know? If you deny the union's request and they file a ULP, by the time it works its way through the system, Congress may have outlawed unions in federal agencies anyway.

Hope this helps. Take care-
Wiley@FELTG.com

Commissioner Lipnic Named Acting Chair of EEOC

By Deryn Sumner

As FELTG has kept you all apprised, the MSPB currently lacks a quorum, which means that it can't actually issue any decisions on pending petitions for review. Luckily the halls of the EEOC are not so empty. The President appointed EEOC Commissioner Victoria A. Lipnic to serve as the Acting Chair of the EEOC on January 25, 2017. Chair Lipnic has been a Commissioner with the EEOC since 2010 and is serving her second term which ends on July 1, 2020.

Prior to joining the Commission, Chair Lipnic worked as the U.S. Assistant Secretary of Labor for Employment Standards, as well as a committee staffer for the U.S. House of Representative's Committee on Education and the Workforce. She previously worked for the Washington, D.C. law office of Seyfarth Shaw LLP, as well as in-house counsel working on U.S. Postal Service cases.

The other currently-appointed Commissioners include Chai Feldblum, who has served as a Commissioner since 2010, Jenny Yang, who served as the Chair of the EEOC from September 1, 2014 through January 22, 2017, and Charlotte Burrows, who has been a Commissioner since December 3, 2014. There is one vacancy on the Commission, and no one is currently serving as the General Counsel.

Presidents appoint the commissioners, who must be confirmed by the Senate to serve. No more than three commissioners can be members of the

same political party. Chair Lipnic, unsurprisingly, served as a Republican Commissioner prior to her appointment as the Chair.

Notably, Chair Lipnic served as co-chair of the *Select Task Force on the Study of Harassment in the Workforce*, which I talked about a few months ago, along with Commissioner Feldblum. According to a few pieces I read about her appointment, for which I won't provide links, lest I be caught unaware perpetuating "fake news," Chair Lipnic is expected to focus on age discrimination claims, equal pay act claims, and ways by which employers can create more jobs.
Sumner@FELTG.com



An Ugly Trend in Charge-Framing

By William Wiley

In science, we say that if it only happened once, it could be an accident; if it has happened twice, perhaps it's a coincidence; but if it has happened three times, we're onto a trend. I'm afraid we've come to a point in MSPB mitigation law that in our training programs here at FELTG, we are going to declare a sad trend. Here's the background.

There have been three major guiding principles in the world of charge-framing that we've taught for years, and they have been successful in many removals involving misconduct:

1. **Affirm all charges, get penalty deference**
- When all of the agency's charges are sustained, but some of the underlying specifications are not sustained, the agency's penalty determination is entitled to deference. *Payne v. USPS*, 72 MSPR 646 (1996). Agencies love penalty deference. That means that a Board member can look at an agency's removal penalty, conclude that if she were the deciding official, she would not have fired the guy, but still uphold the removal as within the bounds of reasonableness, thereby deferring to the

agency's decision. Without penalty deference, a Board member is more empowered and likely to select her own "reasonable" penalty.

2. **Affirm a single specification, affirm the charge** – Where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Army*, 918 F.2d 170 (Fed. Cir. 1990), *Hicks v. Treasury*, 62 MSPR 71 (1994).
3. **Determine a penalty even if all charges are not affirmed** - When the Board sustains fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty not be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246 (Fed. Cir. 1999).

Applying these three principles to the drafting of discipline documents, FELTG (along with others with expertise in this field) has been recommending that agencies:

- Draft as few charges as possible, thereby reducing the chance that one of them will be not affirmed, thereby losing penalty deference.
- List a bunch of specifications because you only need one to support the charge. If some are not affirmed on appeal, well, so what.
- Have the decision letter say something like, "Although I have affirmed all three charges, any one of the charges, standing alone, would warrant your removal." That *Lachance-v-Devall*-principle covers you on appeal if a charge or two is not affirmed.

In general, we continue to believe that this approach significantly reduces the agency's chances of having its removal mitigated to a suspension. Unfortunately, we now must acknowledge that the bottom line is sometimes different from where these principles would otherwise take us. For example, in a decision last year in which the agency brought three charges,

lost 10 of the 20 specifications, but managed to have at least one specification affirmed for each charge, the Board still mitigated the removal and put the employee back to work. *Brown v. DHS*, SF-0752-14-0816-I-1 (2016)(NP). In a case this year, the agency proved two of three charges with four of eight specifications being affirmed. With a charge lost, we can expect mitigation. However, to his credit, the deciding official said he would have removed the employee even without the failed charge. We should see some *Lachance-v-Devall* deference because all the charges that matter were affirmed on appeal. Well, that didn't happen. In spite of the deciding official's statement, the Board mitigated the removal and returned the employee to duty. *Leonard v. DVA*, CH-0752-14-0301-I-3 (2017)(NP).

So where does this leave us? I'm afraid it leaves us with the conclusion that the Board members sometimes are going to decide the proper penalty, regardless of precedence dating back to *Douglas* that says it is the agency's officials who should be selecting the penalty, not the lawyers at MSPB.

Having worked inside the Board for nearly a decade, I fully understand the temptation to step in and decide that a removal is too severe. It's a lot easier to have sympathy when you are removed from the front lines where these decisions are being made. It's hard to sit in your big Presidentially-Appointed Senate-Confirmed office and concede that you're really not in the best position to determine a penalty. But that's what *Douglas* says you'll do.

As a real-life example of how misplaced it is for the Board to determine a penalty, look to *Brown*. There, the agency removed the employee from her supervisory position. In mitigation, the Board said she should have been demoted to a lower-graded position instead WITHOUT ANY EVIDENCE WHATSOEVER AS TO WHETHER THE AGENCY HAD NEED FOR A LOWER-GRADED POSITION.

Here's an option the Board should try in cases like these, where a number of specifications and/or charges start to fall out on appeal. Once the judge reaches a conclusion that removal might not be

warranted after considering all the evidence, the judge could remand the case to the agency with an order that says something like this:

The agency has brought three charges in this case. Each charge is supported by three specifications. It is my determination that Charge One fails in its entirety, Specification C of Charge Two fails, and Specification B of Charge Three fails. Based on the remaining affirmed charges and specifications, the agency has seven days from today to reconsider its penalty determination and submit argument in support of its new determination. Once the agency has reached a new penalty determination, the appellant will have seven days to respond. As the record is closed, I will take no further evidence.

There's a new administration in town. How about we try out something new before we lose our civil service to history? Wiley@FELTG.com

FELTG is coming to Philadelphia

Join Barbara Haga for
Advanced Employee Relations
 May 9-11, 2017

This three-day open enrollment seminar will cover the relevant things HR practitioners need to with a day on each:

- Leave abuse
- Performance accountability
- Discipline

Plus, hands-on workshops will allow you to leave with the tools you'll need to succeed.

Check out our website www.feltg.com for all the details, and register before space runs out!

EEOC Publishes Quality Practices to Improve Federal Sector Complaints Processing
 By Deryn Sumner



For years, those of us here at FELTG have not been shy about identifying the ways in which the EEOC can improve its federal sector case processing.

Cases can languish for years before getting assigned to administrative judges. And even after one gets assigned, it can take a few more years to get a ruling on a pending motion for summary judgment, scheduled for a hearing, or receive a decision issued after a hearing. Sometimes, administrative judges issue decisions relying on incorrect application of the law, or award remedies not allowed by the law, such as punitive damages or compensatory damages in age discrimination cases. Appeals to the EEOC's Office of Federal Operations can sit for years and inquiries about when a party can expect to receive a decision all receive the same boilerplate letter in response that essentially says, "we have a lot of appeals to deal with and your case is one of them, but we can provide no timeframe by which you can expect to receive a decision." I am not exaggerating when I share that a case I worked on as a law clerk while in law school is still pending a decision on an appeal of remedies before the Office of Federal Operations. Further, I am personally aware of decisions issued by the Office of Federal Operations that contained clear misstatements of the factual record.

So given all that, it was heartening to see the EEOC acknowledge that federal sector case processing can improve. On January 17, 2017, the EEOC announced the publication of *Federal Sector Quality Practices*. In the Commission's own words, the purpose is "to address the quality of the agency's hearings and appeals in federal employee employment discrimination complaints." Given this, I was pretty excited to read the plan. I allowed myself to dream that this publication would talk about increased refresher training for administrative judges to keep them up-to-date in developments in the law. Perhaps the EEOC would be rolling out an

e-file system like the one the MSPB has used for years? Maybe the Office of Federal Operations would, as Ernie Hadley has preached for years, start issuing summary decisions on clear-cut cases to speed up the process? But much like a Falcons fan on the night of the Super Bowl, my dreams were dashed.

The EEOC's *Federal Sector Quality Practices for Effective Hearings, Appeals and Oversight* does lay out quality practices for the hearing stage, appeals, and oversight of federal agencies in EEO programs, but there's nothing groundbreaking in the actual practices laid out. You can find the Quality Practices here: <https://www.eeoc.gov/federal/quality-practices.cfm>

- Administrative judges should oversee discovery and grant summary judgment when appropriate.
- Administrative judges should also schedule hearings, make "accurate" rulings on evidentiary issues during the hearing, and issue a decision afterwards.
- Appeals should be acknowledged, Commission staff should follow up on obtaining the record if the agency doesn't provide it, and decisions on appeal should be accurate and supported by the record.

Sigh. Yes, these are all good things, but this doesn't represent much of anything in terms of new developments. The most notable thing I found in my review was the codification of the requirement to hold initial status conferences that many administrative judges have been holding for years under the EEOC's Pilot Program. I do appreciate the efforts by the EEOC to focus on improvements in federal sector case processing; I just wish it went a little farther to set goalposts for change. Sumner@FELTG.com