Federal Employment Law Training Group
Training By Professionals For Professionals

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My friend, Masahiro, is Japanese. From when we first met 25 years ago, we have exchanged letters periodically, discussing growing families, jobs, and crazy political leaders. His English is very good, which is fortunate because my Japanese is non-existent. Even so, sometimes he says something in a way I would not have, and which captures a thought that I understand perfectly that crosses both of our cultures. For example, over the years, Masahiro and I have each lamented at the lack of focus in our respective sons. My Joe took 18 years to get his college degree. Masahiro's son is just beginning college with a similar non-focused approach to life. When describing that attitude, Masahiro said, "He has a good positive spirit, but often runs idly." That's a concept many parents understand, yet described in a refreshing different manner.

And perhaps that's exactly what we need for the future of the civil service: a refreshing approach that captures our need for a protected public service, but using different concepts. Perhaps we need someone with a different point of view to look at the foundations of the oversight of federal career employment, and by using words we might not have originally, develop a different approach to what we do. We've floated an idea here at FELTG that would place a fair price on a government job and allow an agency to buy it back from the incumbent in a no-fault, non-adversarial manner. If you have similar outside-the-box ideas, why not use your official agency stationery and recommend them to OMB? As Barbara Haga explained in her excellent article a couple of weeks ago, you have until June 30 to suggest changes to our civil service. Get creative. Use a systemic approach.

Don't just nip along the edges. If you speak a foreign language, see if that experience helps you think differently. Just don't write your submission in Japanese.

Bill

COMING UP IN WASHINGTON, DC

Legal Writing Week
June 5-9

Employee Relations Week
July 10-14

JOIN FELTG IN DALLAS

Managing Leave, Attendance & Performance Issues
June 21-22

WEBINARS ON THE DOCKET

Depositions and Hearings: What to Know if You're a Witness in a Complaint or Appeal
May 25

Understanding the Family & Medical Leave Act
June 1

Telework and Leave as Reasonable Accommodation
June 22

How to Handle a Dangerous Employee
By William Wiley

Last week, senior team members of our training group presented a webinar on the psychological aspects of employees with mental conditions and related supervisory obligations to accommodate a disability. It was one of the most widely received programs we've presented this year, so you can expect to see it again soon in some form, in case you missed it. When an employee with a mental condition poses a threat in the workplace, the information we provide in seminars like this can save your life.

One concern in situations like these from the employment law aspect is this:

> *What should a supervisor do when confronted with an employee who appears to be a danger to himself?*

A classic example is the employee who says to his supervisor, "I'm so upset about how things are going around here that I'm thinking about committing suicide." According to *USA Today*, there is a suicide every 13 minutes in the United States. Applying general suicide statistics to the federal workforce without tweaking for the specific demographic, we can expect about 850 federal employees to commit suicide this year. So when an employee says to her supervisor, "I'm thinking about killing myself," there's a real possibility she will.

Deb Hopkins and Shana Palmieri did a terrific job last week of explaining the supervisor's options, given the psychological and reasonable accommodations aspects of a situation like this. We have an obligation to help the employee get help, while simultaneously recognizing the employee's rights to reasonable accommodation and medical records privacy. But what do you do as a practical matter for the rest of the work day? Do you say something like, "Geez, Joe, I'm sorry you're feeling that way. Maybe your mood will get better if you get back to your desk and work on the XYZ report that I need by the end of the day?"

I'm guessing not.

So, what do you do? Well, of the options available to you, the easiest one is to tell the employee to take the rest of the day off, to get some help and to perhaps relieve any immediate stressors. You can invite the employee to request sick or annual leave, or you can place the employee on administrative leave (if you've been to FELTG's *Absence and Medical Issues Week* seminar, you know that you cannot place the employee on sick or annual leave without his permission). But what if the employee refuses to leave? Sadly, a number of people with mental issues do not realize that they have a psychological problem.

If you are familiar with our training programs here at FELTG, then you probably are aware that we claim to always know where the bottom line is legally when it comes to workplace dilemmas. For many years, the legal bottom-line in cases like this was not good. But now, thanks to the recent passage of the *Administrative Leave Act of 2016,* the answer is much better. Here's what you do:

1. If you can conclude that it is more likely than not that the employee is a danger to herself or to others in the workplace, you can immediately tell the employee that she is to leave the workplace and not return until she can produce medical evidence that she can perform her job safely.
    a. Tell her that you will carry her in a regular pay status for 30 days to give her a chance to produce the evidence.
    b. Also tell her that if she does not produce the evidence in 30 days,

you will place her in a non-pay status until she does.

2. For all you legal technicians out there, here's what you're doing as far as the law goes:
    a. Proposing the employee's Indefinite Suspension, *see Gonzalez v. DHS*, 2010 MSPB 132.
    b. Placing the employee on Notice Leave, so that she gets paid during the notice period.
    c. Giving the employee 30 days to respond to the proposal notice, 5 CFR 752.404(b)(1).
    d. Implementing the Indefinite Suspension so that the individual is continued as an employee, but without pay until she produces medical evidence she can perform safely.

Once you initiate this approach, here are the possible outcomes and your response to each:

1. *The employee produces medical evidence he can do his job safely*: You restore him to his position. It may have cost you up to 22 days of salary, but you may have saved a life. If you don't think this a fair trade off, we don't like you. Stop reading our newsletter.
2. *The employee produces medical evidence that he cannot do his job safely*: You remove him for Medical Inability to Perform based on that evidence.
3. *The employee never responds*: Six weeks after the proposed suspension, send the employee a *Cook* letter, explaining that if he does not produce evidence that he can do his job, you will propose his removal. Give him two more weeks. If nothing, then propose his removal based on Excessive Absence. If you don't know the details of what all of this *Cook*-ing is about, you need to come to our next Absence and Medical Issues Week seminar, September 25-29, in Washington, DC.

We joke around a lot here at FELTG, as sometimes that's the only way to get through the day. However, with this one we are deadly serious. When you have a dangerous employee in the workplace – dangerous to himself or to others – you need to be prepared to move quickly and with efficiency to do something about it. You owe it to the employee, to the coworkers and to yourself to know what to do. Wiley@FELTG.com

JOIN FELTG IN NORFOLK
Advanced Employee Relations
September 12-14

Focusing on employee leave, performance, and conduct, this seminar is a must-attend for federal ER professionals. Registration is open now.

Non-Pecuniary Compensatory Damages Awards in 2016: A Brief Overview of Trends
By Deryn Sumner

Just as I did in the June 2016 edition of the newsletter, here are some facts and figures from 2016 decisions from the EEOC's Office of Federal Operations awarding non-pecuniary compensatory damages. I'll repeat my caveat from last year: this is based on my review of all of the decisions issued by OFO in 2016, which I rely on Westlaw and Lexis to accurately upload and provide to me in my search results. Although I briefly review every decision issued each year to identify the notable ones, it's entirely possible and quite likely that I missed a few.

And with that caveat established, on to the trends from 2016. By my count, the EEOC

issued 34 decisions addressing appeals of non-pecuniary compensatory damages last year, a few less than the 40 decisions issued in 2015. Of those decisions, 10, or 29.4% of the overall number, dealt with awards between $0 and $5,000. Two decisions involved awards between $5,001 and $10,000. The highest percentage of decisions, 13, or 38.2% of the 34 decisions, concerned awards between $10,001 and $50,000. For those of us who aren't math wizards (raises hand), that means that about 73.5% of decisions issued by the Office of Federal Operations in 2016 concerned awards of less than $50,000. To round out our survey, 5 cases concerned awards between $50,001 and $100,000, and four cases involved awards over $100,000.

Of these 34 decisions, 18 of them increased the award, 15 affirmed the current award, and one (which I talk about below) decreased the award of non-pecuniary compensatory damages. Nineteen of these decisions were appeals from Final Agency Decisions, and 15 of them were from final actions implementing or rejecting decisions from administrative judges.

Now, is this to say that complainants very rarely recover significant awards of non-pecuniary compensatory damages? Of course not. When there's liability, smart agencies settle early or choose not to appeal decisions issued by administrative judges. But it is fair to say that even those complainants who establish liability are not guaranteed a significant payday unless they can provide evidence to show substantial emotional and/or physical harm that can be linked to the agency's discriminatory actions.

And even if you establish substantial evidence of harm and grab that golden ring of an award of the statutory maximum of $300,000, it can still be grabbed away from you, as the complainant in *Alene S. v. USPS*, EEOC Appeal No. 0720150033 (April 6, 2016) learned. There, the administrative judge had awarded that $300,000 maximum after the complainant established discrimination when the agency failed to take the complainant's medical limitations seriously and failed to accommodate her, made comments about her disability, and retaliated against her. The administrative judge found that the complainant was an example of the "eggshell plaintiff" and as the agency's actions rendered her unlikely to ever work again, found $300,000 to be appropriate. The Commission agreed that substantial compensation was appropriate based on the evidence she presented herself, as well as from her psychiatrist, her psychologist, and her sister. But the Commission agreed with the agency that the award should be reduced because the complainant had pre-existing medical conditions, and the administrative judge did not factor those in. The Commission reduced the award to $200,000, still a large award, but not the most that could have been awarded. Rest assured, I'm already hard at work reading the over one thousand decisions issued by OFO in 2017 and will bring the notable ones to the FELTG audience's attention.

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What Do You Do with the Guy Caught Masturbating on Government Time?

By Deborah Hopkins

Last week, Bill and I were in Denver providing training to a bunch of supervisors from agencies across the country. One of the things we regularly discuss during training classes is why so many agencies don't take disciplinary action against people who deserve to be disciplined. A warning: the situation I'm about to describe is crass, so read at your own risk.

Let me give you an example of one such conversation; I'll call it a hypothetical even

though it's not. Agency employee (let's call him Jimmy) is retirement-eligible but hasn't yet retired. A couple of times a day, Jimmy walks in to a closet, strips down completely naked, and masturbates during his normal work hours.

The closet is one that other agency employees commonly access for supplies. There have been several instances of employees going to the closet for paper, staples, etc., and opening the door to find Jimmy in the middle of his routine.

And the agency has done NOTHING to discipline Jimmy.

Jimmy is spending quantifiable government time, paid by the taxpayers (that's you, and that's me), to masturbate – and the agency doesn't take action because the supervisors "hope" he will just decide to retire. Now, I don't know Jimmy personally but I think it's a pretty good bet that he's not motivated to retire because he is getting paid to pleasure himself on the clock.

If you've been in this business longer than five minutes, then it is not a surprise to you that many agencies have dealt with employees masturbating on government time. Here's the deal: masturbation at work, on government time, is a removable offense. If you want to read a case involving shock and awe related to this type of inappropriate sexual conduct in the workplace, check out *Jardim v. Army*, CH-0752-08-0147-I-2 (July 22, 2008). In *Jardim*, the appellant's removal for "immoral, indecent, or disgraceful conduct" was affirmed after evidence showed he masturbated at work and in the process exposed himself to a coworker and got semen on her jacket.

In another case, an employee's removal was sustained after he was seen by others masturbating in a government vehicle; at a different time he masturbated in front of a female coworker. The charge there? "Ejaculating or releasing bodily fluids in a government office, while on duty." Ever have to charge someone with that? It works. *Lee v. OPM*, CH-844E-06-0525-I-1 (September 18, 2006).

Need more? I've got them. How about *Venneri v. Navy*, PH-0752-05-0389-I-1 (October 19, 2005), where the appellant exposed himself to a female coworker and started masturbating in front of her? Fired and removal upheld. What about the supervisor who ejaculated onto his employee's desk after work hours and the next morning told her he had "left a present" on her desk? Charge him with "conduct unbecoming a supervisor" = see ya later, Supervisor Wagner. *Wagner v. DOJ*, DE-0752-03-0466-I-2 (September 14, 2004).

Plenty more still, but I think you get the idea. Masturbating at works is serious misconduct, particularly when others are exposed to the conduct.

It's a problem too because, in addition to being a poor management decision, refusal to discipline this misconduct puts other employees at risk and creates the potential for an EEO claim of a hostile work environment. A hostile work environment is created when the victim is subjected to unwelcome conduct that is based on a protected category, and the conduct is so severe or pervasive that it affects the terms, conditions or privileges of employment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). An agency can absolve itself of liability only if it shows it took immediate corrective action and the complainant does not take advantage of any corrective measures. *See Quinn v. U.S. Postal Service*, EEOC Appeal No. 05900546 (1990).

In our non-hypothetical hypothetical above, we run into a liability problem because the agency is on notice of Jimmy's conduct and has not done a darn thing to put a stop to it. There's no question this is unwelcome conduct and there's no question that it's sexual, so the only thing we need to consider is whether the conduct is

so severe or pervasive that it affects the terms, conditions or privileges of employment. How many times does another employee have to go to the closet in search of paper clips and discover a stark-naked Jimmy masturbating, in order for it to affect the terms or conditions of her employment? If every time I need office supplies, I hesitate before opening the closet door because of what I'm afraid I might find inside, I'm thinking that it doesn't have to happen a whole lot of times to meet that legal standard of "severe or pervasive." I guarantee you that if I see that once, I'm never ever going back for more paper clips.

Just one isolated instance of unwelcome sexual conduct can be found to be severe enough to create a hostile work environment – *even if the agency does not discipline the conduct*. *See Weaver v. U.S. Postal Service*, EEOC Appeal No. 0120065324 (2008) (a male employee ground his pelvis into a female coworker's buttocks and EEOC found a hostile environment even though the agency did not discipline the male employee).

If you follow the news, you may have noticed last week that DOJ is in the process of making a $20 million settlement with a class of female corrections officers who were exposed to harassment based on sex for a number of years, and Bureau of Prisons officials did not do enough to correct and prevent the harassment from continuing. Among the conduct? You betcha, males masturbating in front of the women or in places they knew the women might be at any given time. *See also Lemons v. BOP*, EEOC Appeal No. Appeal No. 0120081287 (April 23, 2009); *Wilson v. BOP*, EEOC Appeal No. 01A23614 (February 3, 2004); *EEOC v. Indiana Bell*, No. 99-1155 (S.D. Ind. 2000).

There are times when agencies win the liability argument. In a recent case form the Federal Bureau of Prisons, a female corrections officer informed the agency of inappropriate sexual conduct by inmates (including inmates masturbating in her presence), on 17 occasions in a one-year period. The EEOC found that the inmates' conduct did rise to the level of sexual harassment, but that the agency was not liable because it took immediate corrective action in 16 of the cases to sanction the inmates' conduct and to protect the employee from further instances. *Larae S. v. BOP*, EEOC Appeal No. 0120143209 (March 9, 2017).

In another instance, employees at FAA would commonly take "dumpster breaks" at the agency facility; "dumpster breaks" were widely known among employees as code language for people masturbating behind the dumpster in back of the agency facility. *Shalon C. v. FAA*, EEOC Appeal No. 0120141603 (July 21, 2016). The agency won this one because employees never made management aware that the conduct was occurring and the "dumpster breaks" were routinely taken after the supervisors had left for the day – so the agency was not on notice and had no opportunity to investigate and correct it, until after the complaint was filed.

Let me be clear: even though the agencies were not liable because, as in *Larae S*., the BOP took immediate action, or like in *Shalon C.* the FAA was not aware of the conduct and could not have reasonably known it was occurring, this liability defense is NOT an excuse to allow this type of conduct at work. EEO cases are not the same as MSPB cases, and EEOC notes in most of the decisions that the conduct should be addressed in a separate forum. In Jimmy's case, the agency leadership knows about the conduct, and has chosen not to charge anything. I hope someone from that agency reads this article and realizes it's a situation that's too dangerous to leave alone with the hope that Jimmy decides to finally retire.

Bottom line: why would you ever refuse to discipline someone for such serious misconduct when the conduct might create a

hostile work environment for your other (good, hard-working) employees? I just don't get it.
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How to Handle Controverted Oral Response Statements
By William Wiley

Questions, we get questions. This one came to us after a recent webinar we presented involving due process rights:

> My question involves an issue that can arise after the reply and involves due process/*ex parte* communication issues.
>
> The FELTG newsletter had some excellent articles on this topic in 2014-2015. The scenario I find particularly troubling arose in 2013 in the *Kolenc* MSPB case. To simplify a bit, part of Kolenc's charged misconduct was failure to pay a parking/traffic ticket. In his reply, Kolenc asserted the ticket was cancelled. The Deciding Official (D.O.) then called the Police Department to verify Kolenc's bald assertion and learned the ticket had not been cancelled. The D.O. then indicated in his Final Decision that he determined the ticket had indeed not been cancelled and the lack of credibility Kolenc demonstrated in his bald assertion in his reply influenced his decision to proceed with removal.
>
> My question is in this scenario what option does a D.O. have when the employee makes a bald assertion like this (i.e. does not include proof other than his assertion) that the ticket was actually cancelled? I understand the riskless scenario is for the D.O. to inform Kolenc in a "Ward Letter" what he found and give him 10 days to respond.
>
> How much risk, however, would the D.O. and the Agency assume if they had not called the Police Department but declined to accept the employee's bald assertion by itself, concluding that Kolenc needed to do more to establish the cancellation than offer his bald assertion in a written reply?

Our FELTG response follows. This questioner already knew the less-dangerous answer, but like most of us, is trying to find a way to be more efficient:

Dear Participant-

Thanks for your question. It's conceivable that the police made a mistake when checking the employee's records. It's possible the employee has evidence that the ticket was cancelled. That's why due process requires that we notify employees of facts on which we are relying prior to making a decision on a proposed removal, to give them a chance to defend themselves. In my world, an extra five days of pay is well-worth removing this potential due process violation from the case when it goes up on appeal.

When informing the employee of the new information in situations like this, I like to say something like, "In your oral response to the proposed removal, you claimed that the traffic ticket issued to you had been cancelled. Further investigation revealed that the XYZ police department's records show that the ticket was not cancelled; see attached. You have seven days to respond to this evidence that the ticket was not cancelled and to the fact that you potentially made a significant error in your statement to me in your oral response." Now the employee is on notice that a) there is evidence that the ticket was not cancelled, and b) that the DO will consider the employee's lack of truthfulness when making his decision.

The alternative is for the DO to weigh the employee's unsupported statement that the ticket was cancelled against whatever evidence there is already in the record that it was not cancelled. Perhaps there is no evidence that the ticket was not cancelled. Whatever the evidentiary balance, the supervisor could have said – without contacting the police department to verify one way or the other – "In your oral response, you claim that the traffic ticket was cancelled. However, you presented no evidence supporting your statement. Therefore, I have not considered your unsupported self-serving claim further."

This latter approach saves you five days of pay. And it has to be based on the premise that the DO has no independent evidence of the non-cancellation of the ticket. However, it runs the risk of a judge disagreeing with the DO as to the evidentiary weight to be given to the employee's possibly-uncontroverted statement. Separately, there is a possibility that on review, some judge may conclude that the assertion of a claim such as this in a response to a proposed removal requires that the DO investigate the claim prior to making a decision, *see Whitmore v. DoL*, 680 F.3d 1353 (Fed. Cir. 2012).

Were I making the decision between these two approaches, I would pay the extra salary and notify the employee of the new information. To me, the extra pay is well worth avoiding the possibilities of reversal on appeal by a judge who disagrees with my decision not to investigate and notify, plus it gives me the bonus misconduct to base the removal on, that the employee lied in his oral response.

Due process violations are dangerous. I am scared to death of them. I take no chances if there is a way I can avoid them. A new notice and response time will cost the agency, but that cost is a price I feel is worth the expense. Hope this helps. Wiley@FELTG.com

COMING UP IN WASHINGTON, DC

Legal Writing Week
Washington, DC
June 5-9

FELTG's limited-enrollment writing-based program *Legal Writing Week* focuses on effective legal writing in federal sector employment law cases, including:

- Drafting proposed discipline
- *Douglas* Factor analysis
- Petitions for Review
- Final Agency Decisions
- Motions for Summary Judgment
- Editing your work

Analysis and evaluation of writing exercises allows you to receive immediate feedback from our instructors.

Grab your pen and notepad – or your laptop – and come prepared to write!

Registration is open now. We'll see you there!

Probationer no More?
By Deborah Hopkins and William Wiley

If you've read anything we've ever written in this Newsletter, then you probably know we get lots of questions from readers and we use this forum as a place to post our answers. Here's a relatively quick one that some of you might find helpful.

> Good Afternoon FELTG Team:
>
> I'm hoping you can answer a question that I'm getting conflicting answers on. A Pathway Employee (hired under

> Excepted Service) finishes two years and converts to a competitive position with no break in service, into the same position and grade. Would you consider this employee as having served a probationary period and therefore now has full appeal rights, or would you consider him a probationary employee with limited appeal rights after the conversion to competitive service?
>
> My case law research shows me that this employee is no longer probationary (limited appeal rights). What do you think?

And here's our response:

Thanks for the email, Loyal Reader.

Without doing any research (we'd have to charge you for that!), our understanding is that employees in these sorts of positions serve a "trial" period." Effectively the same thing as a "probationary period," but for some reason, it has a different name.

Secondly, and this is the point that confuses so many people, is that employees get MSPB/adverse-action appeal rights TWO different ways:

1. If they have completed a probationary period, OR
2. If they have current continuous employment of at least one year in the competitive service or two years in the excepted service. *Van Wersch v. HHS, 197* F.3d 1144 (Fed. Cir. 1999)

The employee in your situation satisfies the two years in the excepted service test. Therefore, it is immaterial whether he is placed into a "probationary period." That's why the better practice is NOT to play games with using a new probationary period. He got rights when he was converted.

Keep in mind that the "OR" above is a typo in the law and was always supposed to be an "AND." In fact, that's how OPM regs interpreted it until *Van Wersch* was issued. That's why so many people get confused on this point.

Hope this helps!

Hopkins@FELTG.com

The Odds are in Complainants' Favor When They Appeal Agency Awards of Compensatory Damages

By Deryn Sumner

As I noted in another article discussing trends in cases awarding non-pecuniary compensatory damages in 2016, 18 of the 34 cases issued by the Commission increased the amount awarded. Some of these increases were significant, and I will discuss a few here.

First, in *Marguerite W. v. Dept. of Labor*, EEOC Appeal No. 0120142727 (December 21, 2016), the agency issued a FAD awarding $4,500 in nonpecuniary compensatory damages in response to the Commission's Order in EEOC Appeal No. 0120110728 (January 9, 2013). The original case dealt with a complainant with a vision impairment who needed a flat screen monitor. She got one, but when her supervisor, the Area Director, found out she had one, he took it away and gave it to the Assistant Area Director.

Although the complainant also raised other allegations of harassment and violations of the confidentiality of her medical information, the Commission only found discrimination with regard to the monitor being taken away and appropriate alternative accommodations not being provided and ordered the agency to investigate her entitlement to compensatory damages and issue a FAD.

The agency did so, finding $4,500 to be appropriate, and the complainant appealed.

The Commission increased the award to $30,000 and found that the agency failed "to address a situation that was inherently degrading and humiliating" and found persuasive testimony from the complainant and her husband that she suffered emotional harm and physical pain from the actions, which left her without accommodation for three months. The Commission found it appropriate to increase the award by more than $25,000.

In what was I believe the largest increase in 2016, the Commission awarded an additional $105,000 to the complainant in *Vaughn C. v. Dept. of Air Force*, EEOC Appeal No. 0120151396 (April 15, 2016). The agency had awarded $20,000 in response to an order from the Commission requiring the agency to investigate and issue a FAD on remedies after finding the complainant was subjected to racially motivated harassment, including use of the n-word, which caused his constructive discharge from employment. The Commission said the following:

The Agency asserted that Complainant failed to provide adequate evidence of the harm. We disagree. In response to the Agency's request for documentation, Complainant provided a statement detailing the physical and emotional toll taken on him due to the ongoing harassment that resulted in his resignation from his position with the Agency. In that statement, Complainant indicated he experienced increasing anxiety, difficulty concentrating, a loss of appetite, high blood pressure and severe headaches. He also noted that his physical and emotional relationship with his wife was negatively affected. Complainant also submitted documentation from his mental health counselor that indicated that he lost his motivation to work; felt anxious; developed insomnia; experienced a change in appetite and drinking resulting in a 15-20 pound weight gain; had difficulties with fatigue and focus; and had feelings of hopelessness. She also indicated that he became paranoid that the coworker would physically harm his family, even going to the extent of developing a 'safety plan' in that eventuality. The record also included statements from coworkers in support of Complainant's claims.

Given all of that, the Commission found $20,000 was not enough to compensate the complainant and increased the award to $125,000. Sumner@FELTG.com

Call a Plumber!
By William Wiley

Here's how accountability works in the federal civil service. Bad employees get fired. They appeal to the US Merit Systems Protection Board. The Board assigns a judge to collect all the evidence, conduct a hearing, and rule on whether the employee stays fired or gets his job back. When that ruling is challenged, the Board members themselves review the judge's initial decision, thereby becoming the final arbiters of who gets fired from government for poor performance or misconduct, and who gets reinstated with back pay and attorney fees.

MSPB's headquarters workload has been relatively steady (save for the occasional Stupid Sequestration Furlough appeals). Every workday, the members receive five to six appeals challenging a judge's decision. To stay even with this intake, each member must review the record evidence, consider a judge's rationale, then vote to affirm or modify the initial decision in five to six cases each day. I worked at MSPB headquarters for nine years. Five to six decisions a day is a manageable workload for a Board member to accomplish.

There are three members' seats on the Board. Each is designed to be occupied by a political appointee, nominated by the President and confirmed by the Senate, for a non-renewable term of up to seven years. Final Board decisions are by majority vote. Even when

there is a vacancy at MSPB, the Board can still operate with two members. By accepted rule, two is a viable voting quorum of a three-member body such as is MSPB.

As of January 7, due to the then-Chairman's premature resignation and another member's term expiration, the Board has been reduced to a single member. Two seats remain vacant. MSPB cannot issue final decisions regarding the appeals of judges' decisions with only one Presidential appointee member. It cannot affirm the judge, set aside the judge, or dismiss the appeals without any action at all. Some might compare a one-membered Board to a black hole in space, an entity in which once matter crosses the event horizon, it disappears forever. Others might prefer the analogy of a roach motel, where the guests check in, but they never check out. As for me, I'm most comfortable thinking of a non-function Board as the clog in the plumbing, not letting anything go out while backing up a smelly mess into the living room of federal employment.

Every day that the Board sits impotent, another five or so former-employees are added to the heap, denied resolution of their appeals. Perhaps they should be reinstated with back pay. Perhaps their removals should be affirmed so that they can either get on with their lives, or pursue even more challenges in federal court. The individual appellant suffers as well as do his family members.

The former employing agencies also are disadvantaged each day the Board is powerless. Back pay with interest continues to accumulate. Some agencies will not replace a fired employee until the Board appeal is finally resolved. Positions sit vacant or are filled on only a temporary basis until at least two Board members agree on what constitutes a proper outcome.

Compared to health care, tax reform, and FBI directors, this is the tiniest of government problems. Fortunately, it requires the tiniest of actions to fix it. The White House needs only to submit to the Senate a name of someone willing and competent to serve as an MSPB Board member. Go look in the mirror. If you're a regular reader of the FELTG newsletter, you're probably more qualified on Day One than were at least a couple of individuals who actually served as Board members in the past. You don't need to be a lawyer. Heck, you don't even need a college degree. Take your common sense, combine it with federal workplace experience, and if the President picks you, you can have your picture hung on the wall in MSPB's front-office conference room right there along with the other 20 members who have served in history.

It breaks our little FELTG hearts that something so hurtful to the civil service could be fixed with something so easy to do. We understand that there are priorities in a new administration. We certainly defer to the greater minds at the higher pay grades when it comes to running the government. And at the same time, we hope that someone in a position to do something will see the service that will be done for America by clearing the pipes in the civil service accountability and oversight system, and cleaning up this mess before it gets so big that it cannot be easily undone.

To help us stay focused on this problem, every now and then in one of our periodic FELTG publications, we'll print an update to the backlog situation using the graphic below.

Backlog Cases Sitting at MSPB due to Lack of another Member as of Today
440

When you see it, think of two things:

1. This number would be zero if we had a quorum on the Board, and

2. The poor soul who finally gets appointed to one of those vacant seats is going to need a helluva big in-basket.

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EEOC Issues Quarterly Digest of Equal Employment Opportunity Law Decisions
By Deryn Sumner

The Commission issues several thousand decisions every year. Many of these decisions are summary affirmations of agency decisions finding no discrimination without much useful analysis to those of us who practice before the EEOC. Many others still are concerning procedural dismissals, either affirming the agency's decision to dismiss a formal complaint for reasons such as untimely filing, failure to state a claim, or mootness, or remanding the case for investigation because the dismissal was improper. So how do you as a busy practitioner stay up-to-date on the recent notable cases coming out of the Office of Federal Operations? Well of course you're already taking a great step by reading this newsletter and attending FELTG's courses, where we provide you with the latest and greatest decisions you need to know. And of course, if Bill will let me plug it, you can always get your agency to buy one of the fantastic publications from Dewey Publications such as the *Consolidated Federal Sector EEO Update 2004-2017* (co-authored by yours truly and Gary M. Gilbert), which will be released later this summer and which summarizes all of the notable decisions every year from 2003 to 2016 (even though I've worked on this publication for over a decade, no, I can't explain why the title doesn't match up with the years) by category.

Supposing you work for one of the federal agencies with its budget on the chopping block and are looking for a free way to learn about the notable decisions issued by the Commission, the EEOC has you covered. It just recently released its Quarterly Digest which provides decisions issued in the fourth quarter of 2016 and highlights those decisions addressing attorney fees, compensatory damages, findings on the merits, remedies, summary judgment, and all those other great topics you need to know in your practice.

As a bonus, this edition also includes an overview of the law on age discrimination cases (don't forget that administrative exhaustion requirements and the remedies available are different in these types of cases) as well as the recent decisions from the EEOC addressing claims of age discrimination.

You can locate the digest here: https://www.eeoc.gov/federal/digest/vol_2_fy17.cfm. Prior editions are available here: https://www.eeoc.gov/federal/digest/index.cfm
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