Federal Employment Law Training Group
Teaching the Law of the Federal Workplace

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Here at FELTG, given the nature of our work, we get a lot of feedback and we generally appreciate it, whether it's good or bad. Last week, I heard from a class participant who suggested that I had "San Francisco values." Being a citizen of that great city (I will trade my property tax bill for yours sight-unseen), I thought that might be a compliment. Then, I decided to look it up. I see that the term is "often used pejoratively and as an ad hominem phrase to refer to cultural, social and moral attributes associated with the city of San Francisco's liberal politics and pluralist culture."

After then looking up "pejoratively" and "ad hominem," I see that the guy actually was not giving me a compliment after all. Ha ha ha! After looking up "pluralistic," I see that he thinks we San Franciscans believe in the coexistence of different values. Well, we do. With 8,000,000,000 people on Earth, some of us are going to have different values. And if we're not going to kill each other, we probably are better off by choosing to coexist. So I have decided to wear the label as a badge of honor, thereby reducing the sting of the intended critical feedback. There are a lot of deficiencies in my character, but being accepting of others is not one of them. Yep, I am from San Francisco!

(What happens when people find out I live on "Russian" Hill?)

Bill Wiley,
FELTG President

COMING UP IN WASHINGTON, DC

Workplace Investigations Week
October 23-27

Settlement Week: Resolving Disputes without Litigation
October 30 – November 3

FLRA Law Week
November 13-17

Advanced Employee Relations
December 5-7

WEBINARS ON THE DOCKET

Unacceptable Performance Removals: Accountability is Easy if You Know What to Do
September 21

Not Your Average Leave Category: Special Leave Scenarios You Need to Understand
October 12

50 Shades of Reprisal: The Differences among Whistleblower, EEO, Union & Veteran Reprisal
October 26

Welcome to the Show
By William Wiley

A few weeks ago, I was holding forth in a seminar of supervisors about one of the big secrets in our business. Learn the minimum and focus on that when confronted with a problem employee. With this philosophy of accountability, you'll get the job done more quickly, with fewer grievances and complaints, and have less chance to mess things up. In application of that philosophy, the smart supervisor will avoid using legally useless tools like cautions, warnings, and admonishments. Instead, if you have a problem employee, and you're ready to do anything, cut to the chase and issue a Reprimand to try to correct the misbehavior.

If you want to go from DC to Baltimore, you get on I-95 and drive north. You can also go from DC to Baltimore by leaving DC, driving to West Virginia, up through Pittsburgh, to Buffalo, back to Philadelphia, and then to Baltimore from the north. But why would you waste all that time, risk a lot more accidents, and spend a lot more money when you can just get on I-95 North? The same with accountability. When you're ready to do something, move straight to a Reprimand, then a Suspension, and finally a Removal (Baltimore). Life's too short to dilly-dally.

After explaining the principle of "avoiding the yellow donut" and going straight to the tools that work, I got a little push back from one of the class attendees. A lady in the front row – obviously smart and wanting to do a good job as a supervisor – asked why I would suggest avoiding letters of warning, caution, and admonishment. "Isn't it our job to work with employees? To try to get them to be successful? Isn't it a supervisor's responsibility to take time develop his employees rather than just go straight toward removal if he isn't working out?"

When she said that, I was reminded of little league baseball. If your son or daughter has participated in little league sports recently, you're familiar with how they work. Everybody gets to play. Everybody gets a turn at bat. At the end of the season, everybody gets a certificate of accomplishment. The coach's job is to help each player to rise to the level of his or her potential. Winning is not as important as playing.

Compare that to the big leagues, "The Show" as they sometimes call it in baseball. Players compete for the privilege of playing. Coaches coach, but they also are strong evaluators. If a player turns out not to be very good after being given a period of time to demonstrate performance, he's cut from the team and another individual is given a chance to bat.

With all respect, the class participant who wanted to emphasize developmental efforts rather than accountability tools is taking the little league approach to federal supervision. Taking lots of time to work with individuals, holding their hand as they try to do their job, avoiding the tools of accountability … that's all good when the goal of the endeavor is to develop individual kids to play the game as best they can. But that's not the goal of a federal agency. Ours is not a place where people get hired so they can have a job (can play a position).

Ours is a workplace where people get hired and continue to be paid because they successfully contribute to the productivity of the government. At least it's supposed to be run that way. Sure, you may want to coach employees so that they can do the best they can do. But if their best is not good enough, whether you coach them or not, remember that your primary responsibility as a federal manager is to run your part of the agency efficiently. If Congress had wanted it to be

otherwise, there would be laws that say, "Removal is to be avoided," or "Individuals should be retained as employees if they are working really hard and to the best of their ability."

I checked. There are no laws that say that. In fact, the law that says what you are to do as a federal supervisor has been in place for 40 years. You are to 1) give the employee expectations ("Get a hit!"), 2) give the employee a chance to meet those expectations ("Wiley, you're batting fourth."), then 3) fire the employee if he strikes out. 5 USC 4302.(b)(1) and (6).

Welcome to the big leagues, my friend. Yours is not a little league government agency. You're in the pros now. Cuts are allowed here, even mandatory if you know the law. Everyone doesn't get to be a federal civil servant. Only the best of the best are supposed to be playing in this game. As Slider said to Maverick and Goose in *Top Gun*, "Remember, boys, no points for second place." Wiley@FELTG.com

Accommodating Sleepiness into the Future, But Not the Past
By Deryn Sumner

It was a hollow victory for the complainant in a recent case where the EEOC's Office of Federal Operations found the Department of Transportation failed to accommodate him, but also found his termination during his probationary period was justified. In issuing the decision, the EEOC overturned an administrative judge's conclusion that no discrimination occurred in *Lloyd E. v. Department of Transportation*, EEOC Appeal No. 0120150325 (August 17, 2017). The EEOC reviews the decisions of its administrative judges using a substantial evidence standard of review, as compared to the *de novo* review given to Final Agency Decisions, which essentially means that decisions from administrative judges are given more deference. However, here the EEOC found appropriate to modify the final order in part, based on a detailed examination of the timeline in the case, as I discuss in more detail below. **[Editor's Note: In comparison, MSPB board members grant zero deference to the decisions of their judges, except for credibility determinations based on physical observation.]**

The complainant worked as an Airway Transportation Systems Specialist and alleged the Department of Transportation failed to accommodate his depression and sleep apnea when it denied him a reasonable accommodation and terminated him during his probationary period. The complainant's work hours were 7:00 a.m. to 5:30 p.m. Monday through Thursday. He had some issues arriving to work in the morning, once because he showed up at the wrong facility thinking he was supposed to attend a class there, once for oversleeping after getting into an argument with his roommate, and once when he overslept because he had run out of medication. The complainant had recently relocated and was having issues getting his medication refilled at his new VA Medical Center. After the complainant failed to show up to work on time the third time, his supervisor contacted HR to ask about disciplining him, and specifically asked about terminating him because he was still a probationary employee. The supervisor also sent out an email to the complainant and other employees reminding them that the morning shift started at 7:00 a.m. and employees needed to notify him if they were going to be late.

Now here's where the timing becomes important. The day after the supervisor sent the email reminding everyone to be on time, which was November 16, 2011, the complainant was 45 minutes late to work. In a conversation about the complainant's tardiness, the complainant reported that he was late because he had problems sleeping and asked if he could switch to working eight-hour days with a start time of 8:00 a.m. The supervisor told the complainant that he could work eight-hour days, but would still need to start work at 7:00 a.m. The supervisor charged the complainant AWOL for being late to work that day.

The next day, November 17, 2011, the complainant spoke to the supervisor again and told him that he was a disabled veteran, what his medical conditions were, and said that he had been late to work because he was not able to get a prescribed medication that helped him sleep. The complainant then asked again for later start time, this time to be switched to the 1:00 p.m. - 11:00 p.m. shift, which the supervisor denied, saying that instead, the complainant could arrive at 8:00 am and use an hour of leave each day. Given the complainant's limited leave balance, he did not agree to this proposed solution.

The complainant reported to work on time from November 17 through December 20, although the record later revealed that a handful of times he came to work in the middle of the night and slept at his desk to avoid being late. More than a month later, on December 19, 2011, the supervisor asked the complainant if he had been seeking a reasonable accommodation back in November, and asked for medical documentation, as well as whether the complainant could safely perform his job duties, given his need for medication. The complainant provided a doctor's note the next day, December 20, 2011, but told his supervisor that he didn't need accommodations because he had now been taking his medication and was showing up to work on time.

After the complainant requested leave at 8:30 a.m. the following day after not showing up to work, the supervisor terminated him on December 28, 2011 for "continued problems with tardiness."

The complainant filed an EEO complaint and eventually the case wound its way to an administrative judge. After holding a video teleconferencing (VTC) hearing, the administrative judge concluded that the agency did offer reasonable accommodation by allowing the complainant to use leave every day and show up by 8:00 a.m. The administrative judge further found that the agency did not discriminate against the complainant when it terminated him because he did not identify employees outside of his protected class who were treated better, and that he didn't tell the agency until November 17, 2011 that his tardiness was due to his medical condition.

On appeal, the Commission disagreed with the administrative judge that allowing the complainant to use leave to arrive to work late each day is providing accommodation, noting its prior precedent in *Denese G. v. Department of Treasury*, EEOC Appeal No. 0120141118 (December 29, 2016) that, "forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation." The Commission further found that allowing the complainant to report to work at 8:00 a.m. did not pose an undue hardship, and that the agency should have accommodated the complainant by granting his request for a modified schedule. However, the Commission defined the timeframe of the failure to accommodate as only from November 17, 2011 until December 20, 2011 (hence why the dates of the fact pattern are so important).

The Commission did agree that the termination was not discriminatory because the complainant was tardy on five occasions, four of which occurred before he requested reasonable accommodation. As we've previously discussed, an employer does not have to accommodate an employee by forgiving misconduct. As I mentioned at the start, a hollow victory for the complainant. What remedies would be appropriate for just a little over a month of not being accommodated? The Commission remanded the case to the agency for an investigation to determine just that. Sumner@FELTG.com

COMING TO ATLANTA

Developing & Defending Discipline: An Accountability Seminar
September 27-29

Attention supervisors and advisors: join FELTG in Atlanta for a three-day seminar on taking defensible performance-and misconduct-based actions.

This class sold out in 2016, so register before it's too late!

We'll see you there!

Do Supervisors Have Any Appeal Rights?
By Deborah Hopkins

A couple of weeks ago, I was teaching a class to supervisors on holding employees accountable for performance and conduct. The day after the training ended, I received the following email from an attendee.

> Thanks for the excellent presentation on holding employees accountable. My concern is with the new changes that might be coming from Congress -- it seems that there will be little to NO protection for Supervisors, regardless of tenure with the government.
>
> What recourse does a supervisor have IF given a letter of Reprimand, and where can I find information as to the rights of a Supervisor within the Federal government, when I have no union for protection?

And here's the quite-brief response to that question.

Dear FELTG attendee,

Thanks for the email. Though you're not in a union, you do have a couple of options if you'd like to challenge the reprimand:

1. You can file an internal administrative grievance with the agency. This is different from a union grievance in that the internal grievance generally goes to a higher-level official in the agency, instead of to an arbitrator, and of course you don't have a union to represent you. I haven't read your internal grievance policy so I don't know the specific person you file with, but I imagine HR will be helpful in providing you with that info.

2. You could contact an EEO counselor if you think the reprimand was motivated by your EEO category (age, sex, religion, etc.).

3. You could contact the US Office of Special Counsel if you meet the definition of a whistleblower.

4. If you are a veteran and feel you have been mistreated because of your military service, the Department of Labor (or OSC sometimes) can help you out.

And that's about it. Please let me know if you have any questions at all. Take care. Hopkins@FELTG.com

R U a Smart Employee Relations Specialist? Take the Test and Find Out.
By William Wiley

If you have been to any of our FELTG accountability seminars, you know that we are big fans of performance-based removals. When it comes to firing bad employees, if the choice is between initiating the misconduct (5 CFR 752) approach or the performance (5 CFR 432) approach, with one exception, we recommend that the supervisor always choose the performance procedures.

Let's start with the exception. If an employee engages in a single act of misconduct that's so bad that it warrants removal, then fire the employee for misconduct. If an employee hits a coworker between the eyes with a two-by-four, it makes no sense to issue a PIP and give him a chance not to hit anyone else for the next 30 days. A singular act of first-offense serious misconduct warrants immediate use of the 752 procedures.

In comparison, lesser acts of bad behavior should always be screened to see if they can be dealt with by use of the 432 procedures instead. If the employee's bad acts can fairly be considered as evidence of Unacceptable Performance on any critical element, the supervisor has a choice between 752 and 432. Here's how the two options play out:

The Players

Pam is a wise, experienced employee relations specialist. She has seen most of it in her career, and reads MSPB decisions that address everything else. She's comfortable using the 432 procedures, and almost always recommends them as a good option to supervisors who are dealing with a problem employee. Pam is decidedly attractive in a classy sort of way, exceedingly charming, and has a solid, calm personality.

Pat, on the other hand, has a couple of years in the business, but hasn't found a need to do much case law research. She used the 752 procedures a couple of times and thinks that they are the only way to go. Someone once told her that the 432 procedures were "hard," and she never bothered to learn much about them. Pat is known to skip bathing several times a week, spits when she talks, and is afraid of squirrels.

The Scenario

Sally Supervisor needs help. She has a problem employee, Ed, who is causing problems, not producing, and not obeying rules. As luck would have it, the employee's latest screw-up is not bad enough to fire him, but probably justifies an Unacceptable rating on one of his critical elements.

Incident 1

- Pat, being an old 752-aficionado, recommends a Reprimand. Discipline early, discipline often is his motto. Sally issues Ed a Reprimand, and Ed promptly files an EEO complaint claiming race, sex, and age discrimination as well as an administrative grievance claiming a violation of agency discipline procedures.

- Pam, appreciating the advantages of a performance removal, recommends a PIP. "PIP 'em early, PIP 'em often" are her by-words. Sally issues Ed a PIP initiation memo. Ed soon learns that the initiation of a PIP cannot be the basis of a race/sex/age/etc. discrimination complaint and is excluded from the agency's administrative grievance procedure, as well.

Incident 2

A couple of weeks later, Sally reports that Ed has engaged in a second incident of bad behavior.

- Pat is all excited. She lives for progressive discipline. She recommends a three-day suspension. Sally dutifully proposes the suspension, Ed responds 24 hours later, and Margaret Manager imposes the suspension, to be served immediately. Ed then files a new EEO complaint as well as a second grievance.

- Pam is all excited, as well. The PIP specified that Ed could make no mistakes during the 30-day PIP. Because of this incident, the PIP can be terminated and Ed's removal can be proposed now. Already, the 432 procedures have given the supervisor the option of removing Ed today rather than waiting for a third incident that will be necessary for a 752 removal.

Incident 3

Just a couple of days after he returns from his suspension, poor Ed commits a third act of misconduct/performance.

- Pat's ploy to go with the 752-approach has finally paid off. Of course, had there not been a third offense, Ed would have dodged the bullet and remained an employee indefinitely. But the three-strike rule is activated and Sally proposes Ed's removal. Margaret decides it, and Ed files his MSPB appeal.

- Pam already had a removal case at Incident 2. However, now that she has another incident, she has twice as many as are needed to declare old Ed to be Unacceptable. Sally proposes removal, Margaret affirms the proposal, and Ed files an MSPB appeal.

The MSPB Appeal

- Pat's got some work to do. First, she has to prove that Incident 3 occurred. If she cannot, Ed gets his job back. Also, Margaret has to testify (with supporting evidence) that removal is the penalty warranted under a *Douglas* Factor analysis. If she fails here, MSPB can reduce the removal to a suspension. Pat's burden of proof as to the charge and the penalty assessment is at the preponderant level; 51% of the evidence must support the agency's conclusions.

- Pam, on the other hand, is carrying a smaller brief case. She only has to prove that EITHER Incident 2 OR Incident 3 occurred to have the removal sustained. She does not have to present ANY *Douglas* Factor penalty analysis because the Board cannot mitigate a performance removal. And her burden as to either incident occurring is only at the substantial level, maybe 40% of the evidence has to support the agency's conclusion.

Conclusion

Folks, if you are working with an employee relations specialist who reflexively recommends that a misconduct removal is always to be preferred to a performance removal, you are working with an idiot. I'm sorry if that last line is offensive to some of you idiots out there, but this is not an opinion issue. This is a fact-based conclusion. I am exhausted by practitioners in this business who make recommendations that are not supported by the case law. If you can read the above and still remain committed to a belief that the misconduct procedures are routinely better than the performance procedures, there is

something wrong with your ability to analyze facts and draw conclusions. Leave us. Go work in classification where you can't hurt anybody. Wiley@FELTG.com

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Settlement Week: Resolving Disputes without Litigation
October 30 – November 3

Settlement makes up a major part of federal employment law practice. Most disputes in our field settle – whether they initiate as grievances, EEO complaints or MSPB appeals – before they ever get to hearing.

Join FELTG for this special program to learn the skills you need to save your agency time and money, and successfully resolve federal employment disputes without litigation.

Registration is open now!

Avoidable Conflicts in EEO Complaint Processing
By Deryn Sumner

Conflict is a fact of life (of course, we seem to be experiencing a bit more than usual since January 2017). And one type of conflict that sometimes can't be avoided is a conflict of interest in processing EEO complaints. These conflicts come in a few forms and the EEOC's Management Directive 110, Chapter 1 (as last revised in August 2015), does an excellent job in explaining an agency's obligations with regards to them.

The first conflict arises between an agency's role in processing EEO complaints and preventing unlawful employment discrimination and the "fiduciary obligation to defend the agency against legal challenges." The EEOC cautions agencies that agency representatives should not be involved in the processing of complaints, or do anything to prevent impartial processing. Agencies also must ensure that EEO complaints programs are kept separate from personnel functions to avoid impermissible interference.

Now that type of conflict affects every EEO complaint. But there are some specific to particular employees who engage in the EEO complaints process. MD-110 addresses those as well and explains how agencies should handle situations where the alleged responsible management official is the head of the agency, which may lead to a real or perceived conflict of interest, or where the alleged responsible management official is the EEO Director or supervises the EEO office.

EEOC's MD-110 also speaks to the need for a clear separation of the complaints program from the agency's role in defending against EEO complaints, noting, "Only through the vigilant separation of the investigative and defensive functions can this inherent tension be managed." EEOC instructs agencies to institute a firewall between the EEO function and the defensive function, that agency representatives may not conduct legal sufficiency reviews, and that agencies should not rotate agency representatives between working with the EEO office and defending against claims filed by employees.

The integrity of the EEO complaints process is of upmost importance, and addressing conflicts of interest helps preserve this integrity. Even if the conflict of interest may not be explicit, if there is even an appearance of conflict, as explained by the EEOC in MD-110, agencies are likely best served by either entering into a

formal agreement to have the case processed by another agency or utilizing a private contractor to process and investigate the complaint. Sumner@FELTG.com

Negligence and Federal Employees
By Barbara Haga

Sometimes a particular charge is used in a case that really piques my interest. Negligence is one of those charges, and this month I am writing about two cases where this charge was used.

Culpable negligence in performance of official duties is a failure to exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation and with equal experience would not omit. In reviewing the penalty, it may be determined that a more severe penalty is appropriate if an act of carelessness or negligence results, or could result, in serious injury.

The Drug Box Case

This 2016 initial decision involved a removed employee named Shannon Publicover, who was a Firefighter/Paramedic GS-081-9 at the Marine Corps Base in Quantico, Virginia. All emergency vehicles at Quantico were outfitted with a drug box that was kept in a temperature controlled part of the vehicle and narcotics that were kept in another location in the vehicle. The events that led to the removal are outlined below.

Publicover reported for her 24-hour shift at 7:00 a.m. as scheduled. She was assigned to a vehicle that day that responded to six calls beginning with a first call at 7:07 a.m. It was not until her last call of the day at 6:47 p.m. that she needed to use drugs from the box, which is when she realized that the box on her vehicle could not be used because its seal had been broken. She reported this to her supervisor at 7:00 p.m.

Publicover explained to the Assistant Chief that she had been too busy during the day to check the drug box, and thus had not discovered it until the end of the shift. The patient was not harmed because Publicover was able to retrieve a sealed, usable drug box from the fire engine that had accompanied her on the sixth call, and thus had been able to continue treating her patient without undue delay.

The Assistant Chief testified that it was standard practice of Emergency Medical Service providers everywhere to check one's equipment when coming on duty. When reporting to work, paramedics were required to insure their gear was ready and to perform vehicle checks. The check of the equipment took between 45 minutes and an hour to complete.

Publicover agreed that this was standard practice unless "something impaired that action." She explained that the first call came in 7:07, so she had to discontinue the checks to respond.

The Assistant Chief agreed that, under the circumstances, she had to go on the call without completing the check and that six calls in a day was a busy day. However, he also believed that there was ample time in between calls to complete the check. The Assistant Chief reviewed the records of calls and found that her vehicle was not on a call for a total of 5.5 hours. The ambulance driver on Publicover's crew that day gave a statement that since their first call came in seven minutes after the shift began, he had to truncate his own equipment check that morning, but he had completed his check later that morning while waiting at the hospital.

Publicover also argued that she was not completely responsible because the drug box had been unsealed and not replaced by the paramedic on the shift before hers. The Assistant Chief testified that the employee on the prior shift had been "dealt with," although his testimony did not specify what the penalty was. There was testimony that other individuals who had engaged in similar misconduct had also been disciplined.

The Assistant Chief viewed the failure to check the box before 12 hours into her shift as a serious lapse that could have meant the different between life and death for any of the patients she was called to treat. That she was able to secure a drug box from another vehicle when she needed medication for the sixth patient was a case of good luck.

Her past record did not help Publicover because it showed that she had five prior short suspensions (none more than three workdays) in her eleven years of employment on charges of failure to follow proper procedures, inappropriate conduct, and negligent performance of duties.

The Administrative Judge (AJ) accepted management's view of the seriousness of the situation, writing:

> The appellant's failure to complete her equipment check before 12 hours into her shift was a serious lapse that could have meant the difference between life and death for any of the patients she was called to treat. That she did not need the medications in the unusable drug box for five of the six patients she treated on the day in question was just a lucky occurrence. That she was able to secure a drug box from another vehicle when she needed medication for the sixth patient was, again, good luck. I note that even though the delay was slight, there was nevertheless a delay in the care she provided to that sixth patient, since medications were not available on her own vehicle but had to be purloined from another. That kind of delay could have caused death in other circumstances.

The Deciding Official testified that he did not believe the appellant took ownership of her actions because she blamed the incident on the paramedic on the shift before her and never apologized or admitted that her behavior was negligent. This led to his conclusion that there was little potential for her rehabilitation, and he had no confidence in her ability to perform her duties. The AJ also agreed that the past disciplinary record warranted the next step in progressive discipline and upheld the removal. *Publicover v. Navy*, DC-0752-15-0003-I-1 (2016) (ID).

The Dirty Instruments Case

The issues of remorse and potential for rehabilitation were dealt with squarely by the MSPB in 1994 in the case of Mack Williams. Williams was a Medical Supply Technician at the VA, GS-05, who was removed for careless and negligent workmanship on three occasions. Williams was responsible for placing barrier filters in the lids of containers in which surgical instruments were sterilized, but on three occasions in a very short period of time, he did not correctly perform that function. The AJ found that the instruments from the containers with improperly installed filters could not be used because they were considered contaminated, and that the errors could have caused surgical patients to become infected, if the errors had not been detected by medical personnel. In one instance, an improperly-sterilized container of surgical instruments was sent into a sterile field in an operating room prior to surgery; when the problem was noticed, the sterile field had to be reestablished, meaning that approximately $1,000 worth of medical supplies that were exposed to the surgical instruments had to be

discarded unused, and surgery was delayed by 20 minutes.

The AJ found the errors to be serious breaches, but he found that Williams had shown remorse, that he had good potential for rehabilitation, that he had 22 years of satisfactory federal service, and that his disciplinary record consisted of only a 15-day suspension (the charge was unauthorized removal of government property and took place in 1992). In light of these considerations, the judge concluded that the maximum reasonable penalty under the circumstances was a 120-day suspension.

The Board took a very different view of Williams' potential for rehabilitation and remorse, writing:

> In any event, although an employee's expression of remorse bears on the determination of an appropriate penalty for deliberate misconduct, whether the employee showed remorse is of little relevance where, as here, an adverse action is based on negligence. That the appellant is quite sorry that surgical instruments were contaminated does little to lessen the possibility of a recurrence of his negligence.
>
> Moreover, we agree with the agency's contention that there is no evidence to support a finding that the appellant has good potential for rehabilitation. The appellant was counselled about the importance of ensuring the proper placement of barrier filters on sterilization containers after the first incident, and yet, twice within the next 7 weeks, he failed to ensure proper placement of filters.

The Board reinstated the removal. *Williams v. VA*, 94 FMSR 5623 (1994), *affirmed without opinion* (Fed. Cir. October 18, 1995). Haga@FELTG.com

Solo Scriptura
By William Wiley

A couple of things happened last month that caused me to do some personal psychoanalysis. In the first incident, I had just completed a training class for agency lawyers. As is my usual introduction to the seminar, I had said that I have 40 years of experience doing civil service law, much of it at the highest levels of government. I've personally been involved in nearly 10,000 adverse actions, either on the taking end or the adjudicating end. No brag – just fact: I have more experience in firing bad government employees than just about anyone you're ever going to meet.

As the seminar broke up, one of the participants approached me to discuss a particular point. Although in the session I had said that the best approach was X (the issue doesn't really matter), in her opinion the better approach was Y, the exact opposite. She had previously identified herself as being new to civil service law, having worked in her position less than 18 months.

In the other incident last month, I had provided advice to a client regarding a particular matter, and told him the correct answer was "red" (again, the issue is unimportant). When he consulted with a senior attorney within his agency, that attorney responded with a detailed brief that referenced several MSPB decisions for the proposition that the correct answer was red, but in his opinion, without reference to any authority, he concluded that the better answer was "blue."

In both incidents, I was taken aback. In fact, I found myself feeling anger. How could these people disagree with me? Don't they know who I am?? On recognizing those feelings, I became embarrassed at myself. How arrogant I must be to expect everyone to agree with what I say. What a jerk. Thank goodness, I

didn't say anything. They are entitled to their opinions, just like I'm entitled to mine.

But the more I thought about it, using my highly advanced self-analysis tools developed through a year and a half of graduate school in psychology, I came to the conclusion that my anger was not based on arrogance. Rather, it was based on the objective fact that these two agency lawyers, well-paid and held out to be civil service law experts, were ignoring the case law and substituting their own opinions as to what the correct answer should be. That X is the better approach than Y is not my opinion, it is the conclusion that anyone would reach who has read the case law extensively. That red is better than blue was borne out by the second attorney's own research, which he promptly rejected because he believed personally that the correct answer should be blue.

And therewith is one of the problems in our profession. We are paid to give our opinions as to the proper courses our clients should consider. We are smart (more or less), and it is a real ego stroke to have another smart person ask for our opinion on something. But we breach the responsibility of our profession, whether we be lawyers or Human Resources specialists, when we give our personal opinions rather than legal opinions based on written decisions of the boards, commissions, authorities, and courts. It's the individuals who inhabit those lofty institutions who are empowered to have opinions, not we lowly agency advisors.

If we say that the answer is X or red, we should be able to point to authority for that conclusion. Here at FELTG, we pride ourselves on being able to do that for everything we teach. Whether we rely on case law or science for a particular proposition, you can be sure it's not just us spouting off what we think the answer should be. If anyone else tells you the answer is Y or blue, tell them to put up or shut up. Unless that advisor is a judge or a Presidential appointee empowered to oversee some aspect of the civil service, without a citation to a piece of paper somewhere for authority, his best guess is no better than chance. And perhaps, even worse.

This issue is the same as the issue that caused Martin Luther to break with the Christian church of that time. Up until the day in 1517 he nailed his theses to that door, the church upper hierarchy decided what Christianity should be. They read the book (in Latin, thereby limiting interpretation to the priestly Latin-speakers), told the believers what the book actually meant to say, and sometimes shaded their interpretation in exchange for a small contribution to the church building fund. Well, Martin Luther said that's wrong. He believed that there was no need to place interpreters between the written word and the worshiper. Let the congregation read the pages for themselves, in English and German and other languages relevant to the people. His reform efforts got him uninvited to the church's Christmas party, but his point was right-on.

Martin Luther's call to arms was "solo scriptura!" The Bible didn't need interpretation, it spoke for itself. In our world of civil service law, we might say something like "solo authority!" Our advice to our clients should come from published controlling authority, not from some internal opinion of how the world should be. Amen. Wiley@FELTG.com

Life Goes Better with a Plan
By Deryn Sumner

Sometimes at work, we can feel like we're simply jumping from one urgent matter to the other, without stopping to look at what's coming ahead and plan for the next steps. I'm certainly guilty of that myself. As a litigator, work is often times about meeting deadlines, and if a case doesn't have a deadline attached to it yet, such as when a case is waiting for

assignment to an administrative judge, it's easy to cast it aside in favor of more pressing matters. But, if you do have a reprieve to focus on a case file before a deadline is looming, I encourage you to do so. I know that's not always possible. Hey, you may not even receive a case assignment until the initial status conference is coming up (or has already been held, with or without you).

But when time and circumstances allow, I recommend taking the following steps to familiarize yourself with the Report of Investigation and plan out your case strategy ahead of time.

So what should you do with that time? Well, first, sit down (or stand up I guess, if you have one of those standing desks) and review the Report of Investigation (ROI) itself. Check your agency's internal system to see if there are other complaints pending from the same complainant. What's the procedural status of these other cases? Are the cases appropriate for consolidation under 29 CFR 1614.606?

When reviewing a Report of Investigation, I often take notes highlighting three things as I go along. First, what can I glean about events keyed to dates and key undisputed facts from the record? That's going to be the start of a timeline and a statement of facts for the case. Make sure you include the citation to the ROI as you are drafting the timeline. And avoid citing to the EEO Counselor's Report or Investigator's Summary. You want to be making references to a statement in an affidavit or the source document (like a Letter of Reprimand itself).

The second thing I look for is documents that are not already included that I want to ask for in discovery or from the Agency's witnesses, if I'm representing the Agency. Is there sufficient evidence about damages? Almost always the answer is going to be no. Are there references to emails or meeting notes in affidavits that aren't included? Write the ideas down as you review the ROI, and you're already on your way to having a draft of discovery requests set to go when you do get assigned to an administrative judge and given a deadline to initiate discovery.

The third thing I look for are the "cast of characters" involved in the case. Sure, you know who provided an affidavit, but review the ROI with an eye towards identifying who else was involved or played a role so you know who you need to speak with. Make a list, gather their contact information, figure out who may have left, and even start witness interviews if you have the time.

After you've reviewed the ROI, next think about what you would need to either file a successful motion for summary judgment or present the case at hearing. If you are missing key pieces of information, that's more fodder for your list of discovery requests. If there are red flags – for example, you can't quite figure out what the Agency's legitimate, non-discriminatory reason actually is – examine that. Is there information that needs to be gathered and added to the record? Or do you need to be valuing the case and locating a settlement authority?

I have been saved many times by having a timeline already drafted when I need to draft a motion for summary judgment or proffer a stipulation of undisputed facts in preparation for filing a prehearing submission. Going into a case with knowledge of the current record and an eye towards what's missing will repay itself many times over, if you can make the time to do it. Sumner@FELTG.com

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