Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

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Do you want to know why we love this work here at FELTG? Well, consider the following. One of our favorite readers recently wrote about a problem employee he had to deal with several years ago: "The most interesting case I had was an employee who would go into trances during the workday, speak in tongues, then faint. When her supervisor told her she could not do that, she responded that it was God, not her, speaking."

Most folks who would read about this lady would immediately feel sympathy. Poor thing. She's having hallucinations and delusions. Perhaps she's in need of medical care for her apparent schizophrenia. Normal people would worry about her ability to take care of herself. Perhaps she needs to be hospitalized for a while. Well, you know what we civil service lawyers and employee relations specialists here at FELTG immediately think when we hear about this?

- We can't charge her with *Insubordination* because her actions are not a "willful" refusal to follow an order.
- If her condition is a disability or the result of a religious belief, we need to try to reasonably accommodate her by finding another position in which she can perform the essential functions while speaking in tongues and fainting.
- If her spells are a religious practice, will accommodating them be an undue hardship?
- Perhaps there's a critical element in her performance plan that says, "No more than one fainting incident in any 30-day period."

Some days I don't know if our business is calling or a sickness. Take advantage of us by attending our training while you can. You just never know when "they" may take away one or the other of our team and institutionalize us along with this poor lady.

Bill

COMING UP IN WASHINGTON, DC

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

FLRA Law Week
November 13-17

Advanced Employee Relations
December 5-7

JOIN FELTG IN LAS VEGAS

Developing and Defending Discipline
February 27 - March 1

WEBINARS ON THE DOCKET

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

Significant Federal Sector Updates: Recent Cases and Developments at EEOC, FLRA and MSPB
November 9

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Do I Have to Pay My Disabled Employee's Wife to Assist Him at Work?

By Deborah Hopkins

The answer to this article's title: maybe.

Earlier this year, EEOC amended the regulations on federal agency obligations to provide Personal Assistance Services (PAS) to employees who have targeted disabilities. (If you need a refresher on what a targeted disability is, check out [this recent FELTG article](#)). The amendments apply to Section 501 of the Rehabilitation Act of 1973, the law that prohibits the federal government from discriminating in employment on the basis of disability and requires it to engage in affirmative action for people with disabilities.

Some individuals with targeted disabilities cannot work unless PAS are provided to them in the workplace, so beginning January 3, 2018, federal agencies will be required by 29 CFR § 1614.203(d)(5) to provide PAS to individuals who need it. PAS are provided by humans, and help individuals who, because of their targeted disabilities, require assistance to perform basic activities of daily living, such as eating, walking, or getting out of a vehicle.

According to the regulations, PAS means "assistance with performing activities of daily living that an individual would typically perform if he or she did not have a disability, and that is not otherwise required as a reasonable accommodation, including, for example, assistance with removing and putting on clothing, eating, and using the restroom." Keep in mind these are examples and the regulations do not list every activity that might constitute a need for PAS. For example, someone providing PAS might push a wheelchair or assist someone with getting into or out of their desk chair at work.

PAS provide *functional* assistance, not *medical* assistance. PAS do not include performing medical procedures (such as injecting insulin) or medical monitoring (such as monitoring heart rate, body temperature or blood sugar).

Here are some examples of Personal Assistances Services federal employees might need:

- Pushing a wheelchair
- Getting out of their vehicle when they get to work
- Using the restroom
- Walking across uneven surfaces
- Assistance with prosthesis
- Eating or drinking during a break
- Reaching and retrieving items

As stated above, PAS allow individuals to perform activities of daily living that an individual would typically perform if he or she did not have a disability – **but they do NOT perform the essential functions of the job FOR the individual**. EEOC's website gives an example: "PAS do not help individuals with disabilities perform their specific job functions, such as reviewing documents or answering questions that come through a call-in center. PAS differ from services that help an individual to perform job-related tasks, such as sign language interpreters who enable individuals who are deaf to communicate with coworkers, and readers who enable individuals who are blind or have learning disabilities to read printed text. Those services are required as reasonable accommodations, if the individual needs them because of a disability and providing them does not impose undue hardship on the agency. An agency's obligation to provide reasonable accommodations is unaffected by the new regulations."

Agencies are required to provide PAS to an individual if:

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1. The individual is an employee of the agency;
2. The individual has a targeted disability;
3. The individual requires the services because of his or her targeted disability;
4. The individual will be able to perform the essential functions of the job, without posing a direct threat to safety, once PAS and any required reasonable accommodations have been provided; and
5. Providing PAS will not impose undue hardship on the agency.

In addition to being available regularly scheduled work hours, PAS must be supplied during overtime hours and work-sponsored events such as special talks and holiday parties, as these are "benefits and privileges of employment," PAS must also be provided to teleworkers who qualify.

PAS employees may be federal employees, independent contractors, or a combination of employees and contractors. While the agency has the final say on who provides PAS to the employee, the employee's choice should be given deference whenever possible. This means if the employee's spouse provides PAS when he is not in the workplace, and the employee needs assistance when in the workplace, the agency may employ his wife (as either an employee or contractor) as the PAS provider if the employee requests her. If the agency denies a request for a specific PAS, the agency must show providing it would be an undue hardship under the disability standard.

For more information see EEOC's *Questions and Answers: Federal Agencies' Obligation to Provide Personal Assistance Services (PAS) under Section 501 of the Rehabilitation Act* at https://www1.eeoc.gov//federal/directives/personal-assistance-services.cfm?renderforprint=1. Hopkins@FELTG.com

Commission Reiterates Burden of Proof for Employees to Establish Joint Employment Relationship
By Deryn Sumner

As we've discussed in this space before, federal government contractors can have standing to file formal complaints of discrimination against federal agencies, if they can demonstrate that they should be considered joint employees of both the contracting agency and the federal government. The Commission utilizes the *Ma* test, named after one of its decisions, *Ma v. Department of Health and Human Services*, EEOC Appeal No's. 01962389, 01962390 (May 29, 1998), which laid out a common law test with a number of factors to be examined with the goal of determining whether an employer-employee relationship existed between the employee and the government agency. Note that this test does not require an employee to demonstrate that the federal government agency controls all aspects of employment, nor does it require an employee to demonstrate that the federal government agency should be considered the sole employer of the employee. With regards to the individual factors, an employee does not have to demonstrate that the federal government exercises complete agency control in order to show joint employment. Rather, the test looks at whether the federal government agency exerted sufficient control over the employee's work such that the employee could raise claims of discrimination against the federal government agency, even though the employee is, on paper, not a federal government employee.

The *Ma* factors include reviewing the entity that provided the employee with day-to-day assignments, performance evaluations and feedback, tools, material and equipment needed to do the job, whether the agency's

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communication that it no longer wants the employee's services leads to the employee's termination by the contractor, whether the employee's position required substantive knowledge and expertise, whether the federal government approved leave requests and other schedule changes, and the entity that provided benefits to the employee.

In the years since the issuance of the decision in *Ma*, the Commission has addressed hundreds of appeals where an agency has dismissed claims brought by federal government contractors for lack of standing. In some of these decisions, the Commission did find that the relationship was too tenuous such as to permit standing. However, in my unscientific view, a majority of these decisions reinstated the complaints and remanded them for investigation.

In a recent decision, *Corrina M. v. Department of Defense*, EEOC Appeal No. 0120171798 (September 22, 2017), the Commission took the opportunity to note that agencies have not been properly applying the *Ma* test in making determinations on standing and too often rely on contracts between the federal government and the contractor as dispositive. The Commission noted that the test had been "announced many times and in several formats, including Compliance Manual chapters, formal enforcement guidance, and federal-sector rulings." The Commission also stated, "[i]n determining a worker's status, EEOC looks to what actually occurs in the workplace, even if it contradicts the language in the contract between the staffing firm and the agency." Later in the decision, the Commission used the word "holistic" to describe its approach to the analysis.

In the case at hand, the Commission found the agency improperly dismissed the complainant's complaint for lack of standing and found the agency sufficiently controlled the complainant's work such that she could proceed with her EEO complaint. The relevant factors in that case included that the complainant had worked for the agency for over eight years, worked in agency facilities using agency equipment, and the agency had constructive power to terminate the complainant. The Commission further determined that the agency had the opportunity to gather additional evidence to support its determination that the complainant should not be considered a joint employee, but failed to do so in its decision.

As agencies continue to rely upon contractors to support the various missions of the federal government, it must properly determine whether these contractors have EEO protections. Sumner@FELTG.com

COMING TO LAS VEGAS

Developing & Defending Discipline: An Accountability Seminar
February 27 - March 1

Attention supervisors and advisors: join FELTG at the Tropicana Hotel in Las Vegas for a three-day seminar on taking defensible performance-and misconduct-based actions.

This is a must-attend if you have a challenge with even one federal employee in the workplace.

We'll see you there!

Litigation Constipation
By William Wiley

In the world of civil service law, we live and die by the works of our alphabetical oversight agencies: MSPB, EEOC, FLRA, OPM, FSIP, and OSC. When they shut down, some part of the federal employment system shuts down, as

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well.

Coming out of the Obama administration into the Trump administration, we were starting to hurt. A number of vacancies and early resignations or firings had left the senior-most political positions in those agencies barren. People had left, but none were being nominated or appointed to replace them.

Recently, however, the White House seems to have recognized the important roles these agencies play in our government, and appointments began to flow: new commissioners at EEOC, two new nominees and a re-appointment at FLRA, a new director at OPM, seven new members of the Federal Service Impasses Panel, and a new Special Counsel over at OSC. Yes, White House personnel has been working overtime to get these civil service oversight agencies up and running and carrying their respective loads relative to federal employee rights and protections.

Except for one.

What in the world is going on with MSPB? The agency responsible for making sure that removals and other serious actions taken by agencies are implemented fairly has effectively been shut down since the first week in January when one of the two remaining members quit early. A single hold-over member of a three-member Board cannot issue decisions for the lack of a quorum. Therefore, for the past 35 weeks or so, approximately 750 challenges to decisions made by MSPB's cadre of Administrative Judges have been added to the Board's headquarters backlog with nothing coming out the other end. And every work day, another four or five appeals are added to the pile, appeals in which the future of some poor fired soul hangs in the balance, and agency back pay liability continues to stack up.

The word on the street is that the remaining member, Acting Chairman Mark Robbins (a Republican by persuasion), is hanging in there, doing a yeoman's job of voting on four or five cases every day as they are presented to him. Of course, no Board opinions can be issued with just one vote. That means that somewhere within MSPB's palatial office space there's a room filled with about 750 case files with decisions already drafted by the career staff, and Chairman Robbin's vote sheet attached to the top. I've been there. Some files are six inches think; some are six copy paper boxes in size. Some appeals are exceedingly easy to resolve, others are exceedingly hard. And they are just sitting there. Waiting.

So how will this tale of woe come to an end? Well, poopsie, I'm glad you asked. There are two likely optional outcomes:

1. The President nominates and the Senate confirms a single new Board member. Hopefully, it would be someone like our colleagues, Peter Broida, Barbara Haga or Rock Rockenbach. Someone who already knows Board law cold and could begin immediately voting on cases relying on a deep well of previously-accumulated civil service law knowledge. That new member could be locked in the storeroom with all those pending cases, and fed red meat and Mountain Dew until he or she had voted on them all. Along with the prior concurring vote of Chairman Robbins, those appeals that now have votes from two members can be issued post haste, resolving issues some of which have been pending for a couple of years.
2. Chairman Robbins cannot be replaced until his term expires at the end of February. The President could wait until that time to name two new Republican members (or three new members, if he has a Democrat he likes) thereby replacing Mr. Robbins and simultaneously voiding his 1000 votes that have accumulated over the

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previous 14 months. Then, we would lock the new members in that room full of pending cases, and hope to goodness that they are quick learners agreeable in their jurisprudence. If we end up with this option, we're going to need a LOT of Mountain Dew.

Were it not for the activity with the other appointments, it would be easy to conclude that the White House just hadn't begun to focus on staffing up the civil service oversight agencies. But they have indeed been focused in White House personnel, even needing to nominate a second OPM director when the first nominee withdrew. It's starting to appear as if there is a method to their madness, a rationale for letting all these cases accumulate when one name for one Board position sent to the Hill early last spring would have avoided this litigation constipation.

What could that rationale be? Are they intentionally positioning themselves to void Chairman Robbins' votes? Are they having trouble finding someone willing to be appointed to a job that has a ten-month backlog of work to be done? Do they mistakenly believe that by keeping the Board below quorum, the Administrative Judges cannot set aside agency removal actions?

Or, is there something bigger on the horizon? There would be no need to name members to a Board if the federal agency which housed that Board no longer existed. Recent changes to the law have made MSPB irrelevant to certain employees at DVA. More changes in the future could make it irrelevant to the entire civil service, reducing the due process required for removals from federal employment to decisions made within an agency. Next November will be the 40th anniversary of the law that created MSPB. Perhaps there will be no need for a 41st Board anniversary.

Well, here at FELTG, we don't know the answers. All we do know is that there is an insidious continuing harm being done to the civil service system every day that MSPB is not functioning. Here's hoping that if there is indeed a plan behind the madness, that the benefit of the delay in filling these positions is worth the cost of letting then sit vacant. Wiley@FELTG.COM

Negligence and Federal Employees II
By Barbara Haga

In the last column, I dealt with negligence in medical positions, where perhaps the life and death consequences are somewhat more apparent. In this column, I will review cases of negligence or careless workmanship in other kinds of positions, including looking at the issue of being "in charge" when things go wrong.

Failing to Complete a Required Records Check

The heading for this case seems innocuous enough, but the consequences of the failure were tragic. This case also makes another important point – that higher-level officials can be successfully disciplined for failures on the part of their subordinates. The case is *Velez v. Homeland Security*, 101 MSPR 650 (2006), *aff'd* Fed. Cir. 06-3305 (2007).

Velez was disciplined on a charge of negligently performing his duties as a Supervisory Border Patrol Agent, GS-12, in New Mexico. The following briefly summarizes the events that lead to the discipline.

A subordinate officer (Officer I) working for Velez arrested several illegal aliens and returned to the Border Patrol trailer for processing. One of those arrested was identified as using another name. One of the

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names he used was Silerio-Esparza. Another subordinate officer (Officer II) ran a criminal records check and found that there was an outstanding warrant in Oregon on Silerio-Esparza and there was also a notice to conduct a National Crime Information Center (NCIC) check using the FBI number it provided for the alien. Officer I followed up with Oregon and determined that they would not extradite Silerio-Esparza; however, the NCIC check was not completed. The supervisor ordered the voluntary release of Silerio-Esparza back to Mexico without having ensured that the additional required check was completed.

The decision notes that within a few months after Silerio-Esparza's voluntary return to Mexico, he reentered the United States and traveled to Oregon, where he raped two nuns and murdered one of them. The publicity which resulted reflected negatively on the agency and led to an 18-month investigation by the DOJ Inspector General. The OIG's investigation proved that none of the Agents who processed Silerio-Esparza conducted a FBI NCIC check as required while he was in their custody, and, if they had they would have found that he had a criminal history in the U.S. for thefts, narcotics offenses, robbery, and kidnapping. He also had two previous deportations from the U.S and a warrant for robbery in Los Angeles. Ostensibly with this information, Silerio-Esparza would not have been released.

The agency's charge against Velez was negligent performance of his duties in that, contrary to agency policy, he failed to ensure that the Border Patrol Agents who processed Silerio-Esparza had run a FBI NCIC criminal records check on him before Velez granted him a voluntary return to Mexico. Velez testified that Officer I told him that the records check had been run, but there were no records of radio calls or telephone calls to or from the trailer to request such a check. Velez acknowledged his awareness of the policy that a FBI NCIC criminal records check must be run whenever a "red-line hit" or "lookout" was obtained from the agency's criminal information system and of his duty to ensure that the NCIC records check has been run before making any decision on the disposition of an illegal alien.

The judge's initial decision did not sustain the removal but the Board reinstated it and the Federal Circuit affirmed. In this case, the supervisor did not have hands-on involvement in the initial situation, but was responsible for ensuring that subordinates acted within the policies established before he took the next step.

Excessive Radiation

This Navy case is an old case but establishes that not complying with safety requirements can still result in a stiff penalty, even if no serious injury actually occurred. The case, *Watkins v. Navy*, 29 MSPR 146 (1985), involved a charge of endangering the safety of personnel through carelessness and resulted in a removal by the Agency. The judge upheld the removal and the Board concurred, but the Federal Circuit reversed the Board's decision insofar as it upheld the penalty of removal and remanded the case for mitigation of the penalty (Fed. Cir. No. 84-1409 (1985)). Subsequently, the Board mitigated the penalty.

The facts in the case were that Watkins was charged with exposing himself and a co-worker to excessive radiation in the course of taking x-ray pictures of pipes and fittings on a Navy ship. While the potential seriousness of the accident was clear, the amount of radiation received was established not to be "medically significant." The Board found in reviewing the *Douglas factors* that the offense was inadvertent and technical and was committed without any intent, malicious or otherwise. It was Watkins' first offense on an otherwise spotless work and safety record. With regard to the effect of the offense on appellant's ability to perform, appellant had spent twenty-five years doing this type of work, including five years

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with the Navy, and the Board found it unlikely that one incident of carelessness would significantly impact his future performance.

Watkins' supervisor and assistant received only a reprimand and a five-day suspension, respectively, for their involvement in the incident. Watkins was "in charge" of the project at the time of the exposure, so the Board's decision found that a higher disciplinary penalty than the other two received was appropriate. However, the Board was not convinced by the agency's arguments that they had lost confidence in his ability to perform in the future. The Board wrote that the low penalties handed out to the other employees tended to weaken the Navy's argument. Based on this analysis, the Board found the maximum reasonable penalty to be a 60-day suspension.

Although the discipline was more minor in the *Watkins* case, once again supervisors shared in the responsibility for the failure of the subordinate. If you will permit me a Shakespearian reference, "Uneasy lies the head that wears the crown" (*Henry IV*, Part 2, Act 3, scene 1). Federal supervisors have a right to be uneasy, for they do carry a heavy burden when it comes to the work that their subordinates perform or fail to perform. Haga@FELTG.com **[Editor's Note: Compare Barbara's cases to those in which the agency could not discipline a supervisor for the failings of subordinates because the supervisor lacked actual knowledge of the misconduct, e.g., *Miller v. HHS*, 8 MSPR 249 (1981) and *Prouty & Weller v. GSA*, 2014 MSPB 90.]**

JOIN FELTG IN WASHINGTON, DC

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.

Space is still available!

Are You a Bureaucrat or are You the Next Steve Jobs?

By William Wiley

Here's a little quiz to demonstrate the difference between the private sector world and the world of bureaucratic government employment:

When confronted with the question, can you do X, you look for:

A. Some authority that says you can do X.
B. Some prohibition that says you cannot do X.

We get this sort of question here at FELTG once or twice a month. An inquisitive practitioner who has been through one of our training programs will say something like, "In the webinar yesterday, you said we should do blah-blah-blah. Do you have a case on point that says that blah-blah-blah is legal?"

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Many times, our response is, "No, there's no authority that says specifically that you can do blah-blah-blah. However, blah-blah-blah is a logical extension of the current case law, and there's nothing that says you cannot do blah-blah-blah."

Even though we don't always hear back, I bet this is what's going on in some minds when they read our response:

> *Oh, Mr. Bill. I'm so afraid. You haven't given me anything that says specifically I CAN do blah-blah-blah. What if I were to do it and it turns out I don't have the authority to do it? I'm so scared.*

Well, pucker up your frightened little lips and kiss my sweet advice. Textbooks that criticize government often point out that whereas in the private sector an individual gets rewarded for doing new and creative things (e.g., the iPhone), in a bureaucracy an individual gets rewarded for not making mistakes (where some government agencies might still be using rotary dial telephones if we let them). Rather than ask, "Where does it say I can do that?" the better question is, "Does it say anywhere that I cannot do that?"

Make this change to your approach in how to do your job, and your world will be more fun and creative, and just might be good for America. I can't imagine my end coming and being post-mortem happy that they wrote on my tombstone, "At least he didn't make many mistakes."

If you're not on the edge, you're taking up too much room. Rather than look for guidance, look for opportunity. Wiley@FELTG.com.

A Classic Reprisal Case
By Deborah Hopkins

EEO activity isn't fun for anyone involved – not for the complainant, not for the agency reps, and not for the supervisor named as a responding management official. But EEO laws exist to protect people from illegal reprisal for engaging in protected EEO activity, and a recent reprisal case from USGS shows us exactly what not to do.

The employee, a hydrologist for the U.S. Geological Survey, filed an EEO complaint based on age (51), sex (male), hostile work environment, and reprisal. The employee's claims were:

1. On September 12, 2013, he was notified by the selecting official that he was not selected for the GS-13 Supervisory Hydrologist position;
2. On September 11, 2013, the selecting official did not try to discern between the best qualified candidates, misrepresented the position and asked him if he preferred a GS-13 non-supervisory or a GS-13 supervisory position;
3. On September 10, 2013, his first level supervisor instructed him to pull his application prior to being interviewed for the Supervisor Hydrologist position in Rolla, Missouri;
4. On August 20, 2013, the selecting official told him that the supervisory position was the Selectee's position;
5. On August 20, 2013, his first level supervisor instructed him not to apply for the Supervisory Hydrologist position in Rolla, Missouri;
6. On an unspecified date in October 2010, he did not receive his promotion after being told that he had the director's approval for the promotion, pending a letter of reference;

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7. On an unspecified date in October 2007 and October 2008, he was not allowed to rewrite his performance standards as another technical specialist was allowed to do;
8. On October 24, 2013, after he contacted the EEO Counselor, his first level supervisor made remarks to him about his EEO activity; and
9. On May 9, 2014, Complainant received a Letter of Warning (LOW) from his immediate supervisor subjecting him to a hostile work environment.

As is common in EEO cases filed, the complainant's claims on age, race and harassment were found to have no merit, but the EEOC did find evidence of reprisal for prior EEO activity:

- The supervisor offered the employee an incentive to withdraw his complaint, and told him that if management changed and the employee had a good performance evaluation, he would talk with senior management about a new job for the complainant.
- The supervisor told the complainant he thought he had "pulled the trigger too soon" by contacting the EEO counselor.
- The supervisor also told the complainant that the EEO process is not "the most enjoyable path for anyone involved."

The EEOC found that the supervisor "engaged in conduct that was designed to intimidate and/or interfere with Complainant's EEO activity. We further find that [the Supervisor's] comments would be reasonably likely to deter an employee from exercising their rights under the EEO statutes, and that the actions and comments by [the Supervisor] were clearly in violation of the anti-retaliation provisions of our regulations."

As part of the order, EEOC required the USGS to provide "at least eight hours of in-person EEO training to [the Supervisor] regarding his responsibilities under Title VII, with special emphasis on the duty of managers to avoid retaliating against employees." *Octavio C. v. USGS*, EEOC Appeal No. 0120150460 (August 16, 2017).

We try to get the word out to your supervisors that while EEO is not fun for anyone involved, making these types of statements is going to be reprisal, every single time. If you need to know more on this topic, Bill and I are holding a webinar called 50 Shades of Reprisal: The Differences between Whistleblower, EEO, Union & Veteran Reprisal on October 26. Hopkins@FELTG.com.

A Five-Rating Performance Rating Plan is Asking for Trouble
By William Wiley

If your performance rating system has five levels, with a Marginal or Minimal (or Partially Achieved Expected results) rating level between Fully Successful and Unacceptable, you absolutely need to read this article.

Many years ago, MSPB started noticing an odd type of performance standard being used to fire poor performers. Some agencies were describing the worst sort of performance possible (e.g., "Never gets anything done on time") and labeling it Marginal performance. When I would see those standards, I would think to myself, "That's the job I want to have!" because I could never be fired for not doing anything. Marginally performing civil servants get to keep their jobs until retirement, although they would retire at Step One of their pay grade without receiving any within-grade step increases during their career. Still, not a bad retirement income.

For reasons I never quite understood, MSPB began referring to this kind of performance standard as a "backwards" standard. The Board reasoned that by stating the negative

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accomplishment as the Marginal level of performance, the agency was taking a "backwards" approach; that the Marginal level should state what the employee needs to do, not what he needs not to do. I always thought it made more sense to analyze these things as the agency writing an Unacceptable level description, but misnaming it the Marginal level. But who am I to tell the Board what to do?

This is an absolutely critical concept for the practitioner to grasp. Use a backwards performance standard to fire an employee and you will get your removal action overturned *muy quick-o*. Where a "less than fully successful" rating in a critical element allows a summary rating of "Marginal," an agency fatally errs by not advising an appellant of what is required to reach the marginal level and thereby avoid a performance-based action. *See Van Prichard v. DoD*, 117 MSPR 88 (2011), *aff'd* 484 F. App'x 489 (Fed. Cir. 2012). A performance standard written at the minimally-satisfactory level that describes unacceptable performance in terms of what an employee should not do, but fails to inform her of what is necessary to obtain acceptable performance, is an invalid "backwards" standard. *See, generally, Eibel v. Navy*, 857 F.2d 1439 (Fed. Cir. 1988).

A Marginal performance standard is an invalid backwards standard because, although it is written at the "minimally successful" level, it fails to inform the appellant of what is necessary to obtain an acceptable level of performance, and instead describes what he should not do. *Romero v. EEOC,* 55 MSPR 527, 534 n. 5 (1992), *aff'd,* 22 F.3d 1104 (Fed. Cir. 1994) (Table). Because the Marginal standard does not define the minimal performance necessary for the appellant to remain employed in his position, the agency fails to distinguish between Marginal and Unacceptable performance as a practical matter. *See Burroughs v. HHS,* 49 MSPR 644 (1991).

For example, in *Wilson v. HHS*, 770 F.2d 1048 (Fed. Cir. 1985), the Court found that the following Marginal standard was almost a parody of a proper standard:

> Coordinates controls, and directs activities of subordinate staff to insure adequate service to the public by appropriate management principles. Assignments and instructions to staff are hastily made and sometimes misunderstood. Direction of work activities is occasionally effective in achieving objectives.

Wilson, 770 F.2d at 1053.

Here's another one:

> *Marginally acceptable;* needs improvement; inconsistently meets Fully Successful performance requirements. The employee has difficulties in meeting expectations. Actions taken by the employee are sometimes inappropriate or marginally effective. Organizational goals and objectives are met only as a result of close supervision. This is the minimum level of acceptable performance for retention on the job. Improvement is necessary. Examples include:
>
> - Work assignments occasionally require major revisions or often require minor revisions;
> - Inconsistently applies technical knowledge to work assignments;
> - Employee shows a lack of adherence to required procedures, instructions, and/or formats on work assignments;
> - Employee is reluctant to adapt to changes in priorities, procedures or program direction which may contribute to the negative impact on program performance, productivity, morale, organizational effectiveness

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and/or customer satisfaction needs improvement.

Sommer v. HHS, MSPB No. SF-0432-16-0063-I-1 (February 22, 2016) (ID)

A number of agencies have modified their appraisal systems to do away with a Marginal rating, in part because of this problem. If you are in a policy position within your agency, you might well want to follow that example. Hey, who wants to go to The Hill and tell their oversight committee how proud the agency is that all of its employees are at least Marginal civil servants?

If you cannot change things from a policy position, be sure to watch out for backwards standards whenever you're putting together a performance case. A backwards standard is void *ab initio* and cannot be "fleshed out" or otherwise explained in the PIP initiation letter. If you find one, you need to start all over, fix it with a rewritten standard, then give the employee a warm-up period of a few weeks to get used to it before you initiate a PIP.

If you need more of this mundane-but-critical insight into performance accountability, consider signing up for the next FELTG *MSPB Law Week* open-enrollment seminar in Washington, DC March 12-16 or Denver, CO June 4-8 (assuming, of course, that we still have an MSPB by then). But don't do that if you work for Navy, because we'll be coming to you with a full week of *MSPB Law Week* in late January, in lovely Silverdale, Washington. What's that you say? Why don't we come to YOUR agency with all this good stuff? Well, we'd be just delighted and honored to do so. Give us a call to make your 2018 the best year ever for winning MSPB appeals and holding your employees accountable for performance and conduct: 844-at-FELTG.

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NEW WEBINAR SERIES

Handling Behavioral Health Issues in the Federal Workplace

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Supervisors, managers and advisors alike will benefit from learning the practical side to something we all deal with.

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Session 1: **Handling Behavioral Health: Legal Considerations and Clinical Overview** (February 8)

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Session 4: **Handling a Psychiatric Crisis in the Workplace** (March 22)

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