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

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For many years, FELTG would file FOIA requests with MSPB to get material to use in our training. Nothing brings home a point like seeing the original proposal letter that caused the agency to lose the removal appeal due to poor charge drafting. MSPB provided us those materials for several years. Then, MSPB started denying our requests, citing the privacy interest of the appellants. Interesting in that MSPB hearings, where these documents might be discussed, are public, and the documents are otherwise government documents. So, we moved on. Next, we FOIAed for the list of parentheticals and case citations that MSPB attorneys use when drafting decisions. Hit a couple of key strokes and the following will pop up in your word processing document: "Once the agency proves these elements, its action is not subject to further review by the Board. See 5 U.S.C. § 4303(a); *Lisiecki v. Merit Systems Protection Board,* 769 F.2d 1558, 1567 (Fed Cir. 1985) (if the agency meets its burden, the Board has no authority to mitigate a penalty effected under chapter 43)." We had obtained this list in the past and distributed it on CD to practitioners in our classes at no charge, knowing it would help them write better legal documents. Well, this year that FOIA request was denied: deliberative process exemption. But my favorite was the FOIA denial we got a couple of weeks ago. We asked for the MSPB phone book, the listing of government phone numbers in the Board's government offices. Denied: unwarranted invasion of privacy. Who knew that an empty conference room with a phone had a privacy expectation? Look MSPB: You're a government agency, one who rightly or wrongly has been accused of doing a poor job, so poor that Congress has taken steps to reduce your authority and perhaps may be thinking about shutting you down altogether. Maybe you should spend some time helping those of us who are trying to help the civil service stay viable, and help you do a better job. Because denying us access to government documents is not helping the cause one bit. Honestly, if Skynet doesn't take over soon, I don't know what I'll do.

Bill

COMING UP IN WASHINGTON, DC

MSPB Law Week
September 10-14

EEOC Law Week
September 17-21

Absence, Leave Abuse & Medical Issues Week
September 24-28

JOIN FELTG IN NORFOLK

Advanced Employee Relations
September 11-13

WEBINARS ON THE DOCKET

Creating Effective Performance Plans: Setting Measurable Expectations
September 6

What's Harm Got to Do With It, Got to Do With It? – Or, Determining Compensatory Damages
By Meghan Droste

I apologize (or you're welcome) for putting that 80s classic in your heads. It may have been the recent debate in my office about the relative merits of other great 80s artists that made me think of it, but that Tina Turner hit is also somewhat related to the idea of compensatory damages. It's all about emotions, and broken hearts and how to heal them. Tina Turner's suggestion seems to be to try to avoid falling in love so that you don't get your heart broken.

Of course, in EEO cases, the harm has already happened. Until someone invents a time machine, we can't avoid it. What we can do is compensate complainants for the harm. Pecuniary damages are usually straightforward — simply reimburse the complainant for her out-of-pocket expenses — but non-pecuniary damages can be more complicated. How can we really put a price on emotional distress?

Sometimes both the pecuniary and non-pecuniary damages are complicated by preexisting conditions and other factors. The Commission's decision in *Stephanie A. v. Department of Defense*, EEOC App. No. 0120161052 (June 5, 2018) lays out some of the important factors to consider. In the underlying complaint, the Commission found the Agency subjected the Complainant to sexual harassment and retaliation. Following the Commission's first decision, the Agency issued a Final Agency Decision on damages. The Agency found the harassment "severely affected" the Complainant and exacerbated several health issues for an extended period of time (10 years passed between the initial harassment and the appeal). The Agency determined that the appropriate award was $60,000 in non-pecuniary damages and $3,113.64 in pecuniary damages, along with the restoration of 91 hours of leave. The Complainant appealed the FAD on the grounds that the pecuniary and non-pecuniary awards were insufficient.

In its decision, the Commission noted that "[t]here is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm." Although the Commission declined to increase the award to $300,000 as the Complainant requested, it did consider her testimony that she "suffered nightmares, developed stomach ulcers, anxiety, irritable bowel syndrome, and acid reflux." The record also contained statements from family members who described the significant impact of the harassment on the Complainant's physical and mental health. The Commission found the harm was severe and long-lasting, and awarded the Complainant $100,000 in non-pecuniary damages.

The Commission also increased the award of pecuniary damages. The Commission found that the Agency improperly reduced the out-of-pocket expenses by dismissing most of the $50,000 in prescription medications as being connected to chronic conditions that the Complainant suffered from before the harassment. The Agency further reduced the award by considering what the Complainant's insurance covered for appointments and testing. The Commission found these reductions to be improper. Although the Agency was correct that the Complainant's conditions began before the harassment, the Agency failed to consider the evidence in the record that the harassment significantly exacerbated these conditions. The Agency could not avoid compensating the Complainant for the notable increase in prescription medicat ions and appointments just because its actions were not the initial cause of the conditions. The Agency also could not

reduce its liability based on insurance payments. As the Commission reiterated, under the collateral source rule, an agency may not reduce pecuniary damages awards based on the portion of the full costs an insurance carrier covers. It must instead pay the full cost of the healthcare. As a result, the Commission increased the pecuniary damages award to $107,381, over $100,000 more than the Agency's original award.

In a perfect world, we will prevent harassment from occurring and address it immediately, if and when it does occur. In our imperfect world, in which harassment still goes on and complainants are still harmed, be sure to do the math correctly when considering an award of damages. After all, the answer to "What's the harm got to do with it?" can be a lot. Droste@FELTG.com

Here Comes OPM with Guidance Relative to the New Executive Orders
By William Wiley

So many practitioners have wondered just what the President's Executive Orders issued May 25 actually mean. We've received hundreds of questions here at FELTG, and we're just a little training company who contracts occasionally with federal agencies. I can't imagine what level of questioning there has been within the Executive Branch where answers actually carry official weight.

We were all excited to see that OPM, as the leader in human resources management in the federal government, recently (July 5) issued several pages of guidance as to how to implement the EOs. That is, until we read the guidance and then came away with that same empty feeling that comes from eating kale for dinner. Remember that lady years ago in the commercial who wondered, "Where's the beef!?!" Yeah, I know exactly what she feels like.

First, the general shortcomings in OPM's "Memorandum for Heads of Executive Departments and Agencies." Lots of highfalutin words that repeat and paraphrase the EOs, but add little substance that actually helps those of us out here on the front lines trying to make government work. For example, the guidance spends a lot of time talking about the new requirements for reports and team participation. Yes, that's important stuff. But if I'm a GS-12 Labor Relations Specialist servicing an HHS Indian Health Service clinic in South Dakota, and tomorrow I have to meet with the ticked-off union President to tell her what we're going to do with the mandates in the EOs, I get little help from the guidance. In fact, on a couple of tough issues, the guidance says that if I have any questions, I should refer them to a local labor relations advisor. Heck, I AM the local labor relations advisor. I'm the one who needs more guidance.

Secondly, and I know this is picky, but the guidance is written by someone who has spent waaaay too much time writing government bureaucratese. Too many vague words written with an undeserved

COMING TO OKINAWA

MSPB Law Week
August 27-31

MSPB Law Week covers the basics of disciplinary charges and penalties, plus understanding the law and strategy in handling performance cases. There will be special emphasis on leave abuse and medical issues. Join Bill and Deb to learn the law, strategies, and techniques that will benefit your agency for years to come.

degree of officialness, with no practical guidance about how to go forward. For example, I ran into an abominable sentence with 65 words in it. Come to our legal writing seminars here at FELTG and learn how to write shorter sentences that are easier to understand. I hate officious government bureaucratese. And, so do you.

Third, the guidance from OPM is just flat out wrong in a couple of areas. For example:

- The guidance says that agencies are required to use FMCS and FSIP when trying to implement the changes required by the EOs. Well, I can't find that requirement in law. If an agency wants to make a change, and after good faith bargaining it reaches an impasse with the union, the agency is free to notify the union that it will implement its last final offer by some date in the future without invoking either FMCS or FSIP. When that is done, it is then up to the union to either make new proposals to break the impasse or to invoke FMCS and FSIP. There is no statutory obligation for the agency to invoke the impasse procedures.
- Separately, when discussing the EO that makes it clear that progressive discipline is not a prerequisite to firing a bad federal employee, it adds the additional language that "consideration of progressive discipline is not … permitted when administering disciplinary action." None of the EOs say that, and if they did, it would be inconsistent with 36 years of law implementing the *Douglas* factors in penalty assessment. *Of course*, we have to consider whether the employee has been previously disciplined. The EOs simply say that we are not bound to something less than removal if the employee has not been disciplined before.

Finally, and this is the big one if you're working in a unionized organization, OPM's guidance – without citing to any authority for the proposition – concludes that the EOs carry the weight of a government-wide regulation EVEN THOUGH there is good authority that says that an EO carries the weight of law. Here's the 30-year old authority for the position that these EOs carry the weight of non-negotiable laws:

> "As to whether Executive Order 12564 [an EO dealing with drug testing] constitutes law or Government-wide regulation within the meaning of section 7117(a)(1) of the Statute, we find that it has the force and effect of law. Courts consistently have held that executive orders issued pursuant to statutory authority are to be accorded the force and effect given to a law enacted by Congress. Executive Order 12564 was issued pursuant to the President's statutory authority to regulate the civil service." *NTEU & Army*, 30 FLRA 1046 (1988). [The President's statutory authority to regulate the civil service comes from 5 USC 301 and 302, for those of you new to the business.]

So, what difference does it make if the EOs carry the weight of law or instead the weight

Disciplining Leakers and Whistleblowers: What's Legal and What's a Bad Idea
September 20

In this webinar, Bill Wiley will cover:

- The categories of protected disclosures
- How to handle disclosures that turn out to be false
- The appropriate avenues of protected disclosure
- What constitutes whistleblower reprisal and how to avoid it
- How to know when you can discipline a leaker
- Evidence needed to discipline a whistleblower for misconduct unrelated to whistleblowing.

of government-wide regulation? Well, it's a HUGE difference:

- If the EOs are effectively law, they are controlling NOW without bargaining with the union. We just tell the union that there's been a change in the law and wait for the union to propose impact and implementation proposals.
- If the EOs are effectively government-wide regulations, then we CANNOT implement them immediately. Instead we have to wait until to either a) the existing CBA expires, or b) the existing CBA provides for a reopener when EOs are issued or at the midterm. Once the contract expires or is reopened, we can unilaterally implement the government-wide rules at that time, but not before.

Under 5 USC section 7117, government-wide rules and regulations bar the negotiation of union proposals that conflict with them. The only limitation on the superiority of government-wide rules or regulations is found at 5 USC 7116(a)(7). That section makes it an unfair labor practice for an agency "to enforce any rule or regulation … which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed." Therefore, a government-wide rule is not controlling if there is a conflicting provision of a CBA that was in effect before the date the rule was issued.

I'm trying not to be too aggressive with these things, but here's my reasoning regarding effective dates of the mandates in the EOs should anyone ask:

1. OPM and other agencies trying to interpret the EOs argue for maintaining the status quo until an opener occurs in the contract because the EOs are mere government-wide regulations. In addition, some rely on this language for support: "Nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order."
2. Two sentences later, the EO says:
   (c) Nothing in this order shall be construed to impair or otherwise affect the authority granted by law to an executive department or agency, or the head thereof.
   (d) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
3. 5 USC 7103(a)(14)(c) says that management does not need to bargain "to the extent such matters are specifically provided for by Federal statute."

By case law, FLRA has equated an Executive Order with a law (e.g., a statute) when it comes to negotiability (*NTEU & Army*, above). It is ridiculous to the point of absurdity to think that a CBA could contain a provision that is inconsistent with law. For example, if Congress were to pass a law tomorrow that prohibited flexiplace, every flexiplace arrangement in the government including those contained within a CBA, would become invalid immediately. It is inconceivable that the authority in a union contract could be superior to the authority of a federal law. The two sentences quoted above give management the authority to conform to the law and say that the EO is to be implemented consistent with the law. The law says that executive orders are non-negotiable because they carry the weight of law. Now. They are not negotiable. I've heard that some agency guidance argues that the new mandates contained within the EOs cannot be implemented now because of this language:

> Sec. 9. General Provisions. (a) Nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order.

Regarding the no-abrogation language, the general rule is that management's decision

not to be bound by a CBA provision in conflict with law does not constitute a repudiation of the parties' agreement. See *Office of the Adjutant Gen., Missouri NG and ACT Show-Me Air #93 and Army #94 Chapters*, 58 FLRA 418 (2003). If an EO has the effect of law for bargaining purposes, we have a law. If there's a controlling law, there's no repudiation. If there's no repudiation, there's no abrogation.

Look. Here at FELTG, we're not saying that this is the right answer. What we ARE saying is that this appears to us to be a legally defensible approach, that the mandatory portions of the EOs are effective immediately, just like the provisions of a new federal statute would be effective immediately, regardless of contrary language in a CBA.

I don't know President Trump personally. I don't work for him, and all I know is what I read in the papers. Perhaps I'm mistaken, but he seems to be the kind of person who wants things done when he says he wants them done. On May 25, he laid out some significant restrictions that he believed should be applied to labor relations in the federal government. If I worked for him, I would be doing everything I could to implement those mandates as fast as I could, using every legal approach I could implement with a straight face until someone official told me I was wrong. Of course, that's just me, and I admit that I am a wimp and that I scare easily. Those who are willing to tell him "no" clearly have greater fortitude than do I. Wiley@FELTG.com

COMING TO ATLANTA

Developing & Defending Discipline: An Accountability Seminar
September 26-28

Attention supervisors and advisors: join FELTG at the Marines' Memorial Club in San Francisco for a three-day seminar on all you need to know to help your agency take defensible performance- and misconduct-based actions.

This program is one of our most popular and is a must-attend if you have a challenge with even one federal employee in the federal workplace. From performance and conduct to leave abuse to whistleblower reprisal to defending against frivolous EEO complaints, we've got you covered.

Registration is still open but space is limited. Bill and Deb will see you there!

How Specific Does a Legitimate, Nondiscriminatory Reason Need to Be?
By Deborah Hopkins

One of the things we teach in just about all of our FELTG classes is the importance of documentation. Management in the federal government is a defensive business. Because employees can challenge almost anything a supervisor does in the workplace in some forum or other (think administrative grievance, union grievance, EEO complaint, MSPB appeal, Office of Special Counsel, Department of Labor), it is exceedingly important for supervisors to document why they are taking whatever action they're taking – or not taking.

That's easy to do in cases of performance or discipline and has become second nature to our FELTG-Certified Practitioners. But when you're at hearing in 2023, will you really remember why you denied someone's annual leave request last week? Probably not, unless you documented it when it happened, and have those notes to refer to down the road. That's why we also strongly advise supervisors to make notes about more than just discipline or performance,

because there are certain times when a faded memory fails to meet a legal threshold.

Let's look at some cases of Intentional EEO Discrimination involving circumstantial evidence. While the events don't occur in a ping-pong format, the general analysis is this:

1. Complainant alleges he is treated unfairly in some way because of, or motivated by, his protected EEO category.
   – Examples: nonselection; denial of training; reassignment; low performance rating.
2. Agency articulates a legitimate, nondiscriminatory reason about the allegation.
   – *Supervisors: insert your documentation here.*
3. Complainant demonstrates pretext. That means the complainant has to show:
   – The agency is lying, or
   – The agency is telling the truth but its action was motivated by discrimination.

Problems arise for agencies when the legitimate, nondiscriminatory reason is not specific. If times, dates, and details aren't there, that vague response is generally not enough to overcome pretext.

Let's say the complainant alleges she wasn't promoted because of her religion. The selecting official, when questioned about why the selectee was chosen and the complainant was not, says, "I don't remember specifically because it was a while ago, but I am sure I chose the selectee because she was the best qualified. Her interview was really good, and plus the complainant came somewhere pretty low on the score sheet."

Sounds pretty common, but that selecting official's statement alone is not specific enough to overcome that presumption of discrimination, so the complainant is probably going to win this case. Does this mean she was definitely discriminated against because of her religion? Nope, there may not even be any actual merit to the claim – but there will probably be a discrimination finding anyway.

As our good friend and FELTG instructor Ernie Hadley writes in his EEO Guide, the legitimate, nondiscriminatory reason offered by the agency "must do more than merely distinguish the particular facts of a situation." In order to be considered sufficient, it must "articulate some meaningful distinction" which is related to a legitimate aim of the agency.

Below are a few cases to give you a better idea of what this looks like in the real world.

An applicant applied for a job at USPS and, though she was qualified, her application was not forwarded to the selecting official. She challenged this as discriminatory based on her gender. There were no notes, scores, or specific explanations of the scoring process in the agency record. A selection panel member was questioned about why the complainant was not considered, and his assertion that he "could only assume" she did not show she had the skills needed to work at a higher level was inadequate to overcome the allegation of discrimination. *Hatcher-Capers v. USPS*, EEOC No. 07A60008 (2006). Does this mean she was most definitely discriminated against because of her gender? No. Maybe she was; maybe she wasn't. But the vague response from the selecting official was not enough not overcome her allegation, so she won her complaint.

In a very recent case, an IT Specialist alleged he was not selected for a supervisory position because of his sex and his age (69). The selecting official had since left the agency, but in an unsworn statement, said that he had chosen the 37-year-old female selectee based on merit. In considering the evidence, the EEOC said the agency record was "bereft" as to how the five candidates were chosen for interviews, nor about the real reasons why the selectee ultimately was chosen. Therefore, the agency did not

provide a legitimate, nondiscriminatory reason for its actions. *William G v. DLA*, EEOC No. 0120160837 (February 14, 2018).

Now that you've seen what's not enough of a legitimate, nondiscriminatory reason, let's look at a case that shows what is enough.

A USPS employee was terminated after he got into a physical altercation with a supervisor. He alleged that he was removed because of his sex and because he had bipolar disorder. The agency provided a [specific] legitimate, nondiscriminatory reason for its removal action: The physical altercation with the supervisor violated its documented standards of conduct. *Hlinka v. USPS*, EEOC No. 0120064401 (2008). Easy peasy. That's how you do it.

So you see, in most cases you'll be just fine, as long as you have your documentation handy. If you don't have a notebook now, go buy one and start tracking why you do what you do. As we say at FELTG, we hope you never need those notes, but you'll be awfully glad you have them if you do. Hopkins@FELTG.com.

Why Do We Hide This Stuff?
By William Wiley

Here's the beginning of a story that recently ran on the first page of the Style section of the *Washington Post*:

> The *Washington Post* has dismissed a reporter for inadequately attributing material and closely parroting sentences from other publications in articles based on outside news sources. The reporter, [Jane Doe], 26, was let go last week before completing the newsroom's mandatory nine-month probationary period for new employees. The Post's editors found that she used without proper attribution reporting by at least a dozen other news organizations in articles she wrote since being hired in October.

The article goes on from here, describing the misconduct in detail as well as giving a bit of history about the (now former) employee's resume.

Are you blown away by this? Isn't it illegal or something to disclose the details of an individual's termination? In fact, we've even Jane Doe-ed her real name here in our newsletter. We sure don't want to reveal names in the federal government.

Well, maybe we should. Most members of the public, as well as a lot of federal employees themselves, believe that a federal employee cannot be fired. Both Congress and the White House keep trying to make it easier to hold employees accountable for their performance and conduct by loosening the rules. We are on the verge of losing our civil service protections altogether if a couple of outlier Congressional bills become law, bills that would make the federal civil service "employment at will."

In reality, hundreds of individuals are fired from federal agencies every month. Some are in unions while others do not have the extra protections that unions bargain for their members. Some are probationers, and some are tenured career employees. At least that's what OPM statistics tell us, statistics that are consistent with MSPB's annual report of appeals. But how would anyone know that if they were not an insider in the system, familiar with OPM and MSPB reports, or a reader of our beloved FELTG Newsletter?

You're probably thinking that there must be a federal law that prohibits the disclosure of such information. Why would we make such a big deal out of it if there weren't? Well, I've been looking for 40 years for a law or regulation that would prohibit the disclosure of the identity of and circumstances surrounding terminated civil servants, and I can't find one. In fact, of the few cases that touch on the subject, the federal courts have come down on the side of mandating the

disclosure of such information when it is requested under the Freedom of Information Act, at least for the more senior employees of an agency. When we're talking about government employees, the balance between the individual's rights to privacy, and the rights of the public to know about misconduct and unacceptable performance, the public's need for information usually gets the judicial nod.

The Privacy Act often is referenced as the authority for not releasing information about employee malfeasance. However, that law allows for the release of information for a "routine use." If OPM government-wide or an agency in its own Federal Register announcement would state that the release of discipline and conduct information by name was a routine use for collecting the record, that would seem to satisfy the legal requirements for privacy.

The salary and cash awards of federal employees are already a matter of public record, available on the web. There's a relatively mundane need for the public to know that information. We can certainly make a good argument that knowing who has engaged in misconduct harming the government so much that they had to be fired serves a greater public good. Bar association discipline records are available for public review by the name of the offending attorney. Keeping the names of misbehaving federal employees secret enables that person to move on to other positions in which he can repeat his harmful ways. If a federal employee was fired for violent behavior, wouldn't it serve a public good to make the public aware of who that person is? How about being fired for sexual harassment?

President Trump, through his recent Executive Order, has mandated the centralized collection of a lot of information about civil servants who are disciplined. For the sake of the public as well as for the sake of the federal employees who do good work and who obey the rules, perhaps it's time that government agencies publicized their discipline and removal actions. If you're a Big Coward, remove the names, but at least start to get the word out to the broad media that bad employees are fired from their government positions every day for good reasons. Maybe that will reduce the pressure that's starting to build to do away with the idea of a protected civil service altogether. Wiley@FELTG.com

Tips from the Other Side, Part VII
By Meghan Droste

At the time that I am writing this, I am in the midst of preparing to travel to Japan to teach a course on investigations. In between my packing lists and researching things to do and places to eat, I am also thinking a lot about investigations: What are the best ways to prepare for an investigation? What are effective interview techniques? All kinds of details that I am looking forward to sharing with my class. As a complainant's attorney, I spend some time thinking about investigations as well, particularly what information should have been included and what information is missing. Unfortunately, it is not unusual to find that key information is missing from a Report of Investigation.

I wrote about investigations recently in the context of witness interviews. In *Mari R. v. U.S. Postal Service*, EEOC App. No. 0120160377 (March 29, 2018), the Commission remanded the complaint back to the Agency for a supplemental investigation to include interviews of several witnesses. While a supplemental investigation may be helpful, it generally is not the outcome I seek when I find the Agency has not done a thorough investigation. Like the Complainant in *Ross H. v. U.S. Postal Service*, EEOC App. No. 072018001 (May 17, 2018), I often ask for more severe sanctions, including default judgment.

The complaint in *Ross H.* involved three non-selections. The Agency's Report of Investigation was unfortunately missing several key pieces of information. It failed to

include "application materials and qualifications of the candidates selected for two positions at issue, failed to identify the candidate selected for a third position, and failed to include interview notes for all three positions." The Complainant moved for sanctions and asked the administrative judge to award default judgment in his favor. In response, the Agency argued that the ROI did have relevant information including affidavits and vacancy announcements, the Complainant did not suffer any prejudice, and the parties could cure the deficiencies in discovery. In support of its argument, the Agency asserted that its failure to identify one of the selectees was not an issue because the Complainant knew who the selectee was. Unsurprisingly, the administrative judge did not find this persuasive and granted default judgment in favor of the Complainant. The Commission upheld the sanction, finding the Agency's failure to complete a sufficient investigation was "egregious." It concluded that default judgment was appropriate "in the interest of protecting the integrity of the EEO process."

Agency EEO offices should always review an ROI for sufficiency before sending it out. The necessary documents and testimony will vary from case to case, so be sure to determine what is appropriate for each ROI. And of course, in a non-selection case, be sure to include the names and qualifications of the selectees.

If you have specific questions or topics you would like to see addressed in a future Tips from the Other Side column, email them to me: Droste@FELTG.com

That's My Story
By Dan Gephart

I'm married to a talented and successful children's book author. She tells stories for a living. I'm proud of the work she does because she tells the stories of people from whom we don't often hear. And her stories evoke empathy, which is sorely lacking in our world today.

But published authors aren't the only ones who tell stories. We all have stories. In these hyper-partisan times, opposing stories can quickly subsume a federal workplace in conflict.

The stories we carry don't come in chapters or wrapped in fancy book covers. And they don't end when you turn the last page. The stories are buried on top of each other deep within us and they shade the way we address everything and everyone. We think our stories are 100 percent truth.

But the real truth is that even the most accurate stories we tell have a decent percentage that belongs on the fiction shelves.

Whether you are a supervisor, an HR professional, or an EEO practitioner, you need to understand your own stories, as you navigate those of your employees. We may not agree with the stories we hear, but we need to listen. That's not to say that every story we hear needs to be validated and acted upon. But you don't get to truth by shouting over someone.

I find the work of agency investigators to be fascinating. They are looking for answers in some of the most emotionally draining and intellectually challenging situations, whether they are investigating simple misconduct or harassment.

In one of our recent on-site trainings, Meghan Droste presented agency officials a thorough dive into the administrative investigation process. Reviewing the materials recently, the section on interviewing stood out. It was great information for investigators, but something that can benefit everyone. Meghan laid out clearly the difference between interrogations and interviews.

- While interrogations aim for a confession, interviews seek to gather information.
- An interrogation is structured. Interviews are free-flowing.
- And here's the big one: Interrogations are more speaking than listening. Meghan put the ratio at 95 talking to 5 percent listening. Interviews, on the other hand, are all about listening. The ratio is flipped the other way.

If we approach our discussions with our colleagues, peers, subordinates, and supervisors more as interviews, and less as interrogations, we might be able to better understand each other's stories.

Anyway, that's my story. And I'm sticking to it. Gephart@FELTG.com

Use these Clickbait-Type HR Terms for Loads of Fun at Cocktail Parties
By Deborah Hopkins

Sometimes, after a long day, I find myself in a labyrinth of articles intended to draw in the reader with catchy titles or claims – clickbait. Every now and then (though sadly not often) I find something amusing, interesting, or valuable. Of course, given my profession I'm drawn to HR-and-legal-type articles, but I'm not immune to other topics – especially on a transcontinental flight when the WiFi is actually working.

It's summertime and while there are plenty of important things happening every day, sometimes you just need a little mindless reading, so here for your reading pleasure is a list, in no particular order, of some trendy HR and legal terms that I've come across in recent months. You'll see a loose definition, and beneath it the word or term used in a sentence.

Mainstream – a verb people are using that basically means "to offer for consideration."
- "I'll mainstream this policy draft to the CHCO ASAP."

Socialize – another trendy word for passing around a document in the workplace, so that important people see it. Often used in conjunction with *mainstream*.
- "Let me socialize your resume around the front office to see if anyone wants to mainstream it."

Upskill – a term for teaching an employee new workplace skills.
- "Employees who participate in voluntary upskill seminars are more likely to be promoted."

Retention interview – an interview with a current employee, who has no plans to leave the agency, about why she still works there. (Umm, what?)
- "I'll meet you for lunch after I get out of my retention interview with the Director."

Deep dive background – a number of employers don't just call references. No, they comb through social media to learn all they can about a potential hire, before scheduling an interview. This is a deep dive.
- "Before we bring him in for an interview, we need to do a deep dive background on the candidate so there aren't any surprises."

Lifeline – a term that signifies the heart and soul of why your organization exists and who is most essential to its ability to achieve the agency mission.
- "The GS-12 analysts are our lifeline; without them we can't do anything."

Mobility pyramid – an organizational model that identifies who is least likely, up to who is most likely, to be willing to be reassigned in the event of a reorganization.
- "The 2018 mobility pyramid shows that 30% of our workforce is rooted to the headquarters region."

People and Culture – I saw this one in an Australian HR publication, and it is how a particular company refers to its HR department. In fact, HR departments all over the world are getting rid of the Human Resources moniker in favor of cutting-edge labels like People Operations, Employee Experience, or Partner Resources.

- "We have a job opening for Assistant Director of People and Culture."

Delayering – though this looks like a word for slowing something down, it actually means getting rid of hierarchy.

- "The agency head is considering delayering the federal contractor selection system."

Induction – a word for what we used to call onboarding or orientation.

- "The employee will arrive for induction Monday morning at 8:00."

360-degree feedback – a process of performance appraisal where employees are rated not only by supervisors, but by coworkers, direct reports, and customers too.

- "We're running a pilot on 360-degree feedback to see if it improves the employee's motivation to perform."

People analytics – turning people into statistics in an attempt to solve grand-scale problems.

- "As our organization grows, we need to run a predictive people analytics test to determine how many new hires to induct as part of the delayering process."

And finally …

Contribution – a term I recently saw an agency start using, to replace the word *performance*. Yes, that's right, instead of a Performance Plan, the employees are given Contribution Plans, and they are rated not on their Performance but on their Contribution to the agency.

- "Please meet me at 2:00 Tuesday for your mid-year Contribution assessment feedback meeting."

As the teenagers used to say in 2016, I can't even. My brain hurts. Whatever happened to words like *apply*, *interview*, and *job offer*? I guess that's for greater minds than mine to determine.

And with that, go forth and enhance your vocabulary. Hopkins@FELTG.com

Mark Your Calendars

Here are just some of the FELTG open enrollment programs taking place between now and the end of 2018.

Developing & Defending Discipline: Holding Federal Employees Accountable
Atlanta, GA
September 26-28

Developing & Defending Discipline: Holding Federal Employees Accountable
Honolulu, HI
October 2-4

FLRA Law Week
Washington, DC
October 15-19

MSPB & EEOC Hearing Practices Week
Washington, DC
October 29-November 2

Managing Federal Employee Accountability
New Orleans
December 3-7