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

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As perhaps the oldest person you know, I feel obligated to warn you of what will happen to you as you mature, and your facilities that served you so well when you were younger start to go downhill. The other day I was at one of those do-it-yourself car washes. I had finished washing my car and was vacuuming the carpets when I was approached by a woman who appeared to be slightly distressed. I couldn't turn off the vacuum for fear of losing my quarters, but I heard her over the roar say, "Do you know where there's a whisk broom?" I did not. However, I thought I could be helpful and I responded, "No, but if you'll bring it over here, I'll blow it out for you." Her facial expression of distress turned to outright fear as she spun around and walked away as fast as I've seen anyone walk in a long time. My wife approached me as the woman hurried away past her and asked what I had said. When I told her that the lady asked me if there was a whisk broom, my Lovely Bride clarified things and said, "No, Honey. She asked if there was a rest room."

Consider yourself warned.

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

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

Managing the Suicidal Employee in the Federal Workplace
October 4

Three Recommendations to the New Board
By William Wiley

Many of you in FELTG Nation are about to see something that has not previously occurred since your birth, and which is unlikely to happen again in your lifetime. Within the next couple of weeks, we in the United States of America are about to witness a once-in-a-life-time event. It happened in 1979, and it is happening again in 2018: The US Merit Systems Protection Board will soon have three brand spanking new members all at once. The only time that occurred before is when the first individuals to become The Board assumed office on MSPB's zero birthday in January 1979, when it was created by the Civil Service Reform Act of 1978.

MSPB was not designed to have such a quantum shift in membership. The Creators carefully laid out the terms of the three members so that they each overlapped by a couple of years, theoretically assuring a gradual changeover in both case law and procedures. Sadly, that grand plan fell apart these past two years because of the Senate's refusal to confirm President Obama's nominee, and then the current White House's inaction in filling two vacancies for a year and a half, with the term of the third remaining holdover member expiring in the meantime. By June of this year, three new appointees had been nominated to the Senate, with confirmation and the swearing in of all three nominees imminent as of this writing.

Coincidentally, MSPB recently has endured some of the most severe criticism in its 40-year history. For example, its decisions limiting an agency's ability to reassign employees and to select differential penalties have universally been criticized by agency practitioners. Congress even passed legislation a few years ago to bypass the decision-making authority of the three members, preferring to rely on the judgment of a career staff attorney rather than President Obama's political appointees (that legislation has now been invalidated by the courts). With all the ongoing activity relative to civil service reorganization, there has even been talk of abolishing the Board altogether.

What a perfect time for some significant changes at MSPB. And who better to recommend those modifications than the world-famous brains here at FELTG. So, buckle up, new Board members. Here comes some of the best advice for change that you're ever going to get:

1. **Initial decisions should be more focused and structured.** As we've argued in this space before, Initial Decisions written by the Board's administrative judges are too long and cover too much irrelevant detail. In one decision we reported on recently, in the appeal of a misconduct removal, the judge did not reveal the charge until page seven. In another decision we addressed, the judge spent useless verbiage describing the color of the trellis on which the marijuana was being grown. Dear Board, the judge's decision need not be a novel. We don't need a back story with character development and subplots to figure out if you're saying whether the guy should stay fired. Generally, every judge's decision should start off the same way:

> *On June 15, 2018, the Government Services Administration removed William Wiley based on misconduct. The charges in the removal action were 1) Theft of Government Property, and 2) AWOL, 24 hours. In his appeal, Wiley*

> *claims that the removal action was motivated by whistleblower reprisal. I find that although Charge 1 was proven, Charge 2 was not. I also find that Wiley has not proven his claim of whistleblower reprisal. I SUSTAIN the removal.*

The New Board should declare that focused, succinct decisions are highly valued. Judges and their supervisors should receive feedback from a centralized authority within the Board (not from individual regional directors) as to how well their decisions conform to these principles and to an established Board-wide format for drafting decisions.

2. **The Board should stop drafting full-text decisions in every appeal, labeling some as non-precedential (NP).** This practice was adopted in 2010 in response to a few complaints that litigants (primarily the appellant's bar) wanted to know why their wonderful, insightful, compelling disagreements with the judge were not adopted by the Board members on petition for review. Well, there are some mysteries in life that simply need not be revealed (e.g., how my mother gave birth to me without having sex). The US Supreme Court doesn't issue a fulsome decision regarding every petition it receives, and America continues to be the greatest country in history. The Board issued full decisions in only about a third of its appeals until 2010, and the civil service remained strong.

   It's not that full decisions in every case are necessarily bad. It's just that a) they are not worth the legal effort of HQ staff to produce them, and b) they are confusing to practitioners who the Board instructs can use NPs for reference, but they aren't really controlling. With apologies to Bill Clinton, that's like saying that you can smoke marijuana all you want, but you just can't inhale it. Foolish.

   Perhaps NP decisions were worth a try. Here at FELTG, we're big believers in trying out different approaches. And, we're also big believers in cutting our losses. Well, we've tried out these NPs, and the result is that they are not worth the effort. Dear Board, please consider going back to short-forming most petitions challenging judges' decisions because most judges get things right, and most arguments contra are just spitting into the wind (with apologies to Jim Croce). Also, you don't pull the mask off an old Lone Ranger, and you don't mess around with Jim. We are a full-service advising organization.

3. **Make it a Board objective to help agencies be successful in removals 100% of the time.** No, no, no. That does not mean that you rubber stamp all disciplinary and performance removals that are appealed to you. By golly, there are civil service laws, and you are responsible for holding agencies accountable for adhering to them. The problem is that after 40 years of Civil Service Reform Act standards, you still set aside about one in five removals appealed to you. In other words, agencies screw up removal actions about 20% of the time when you review the merits of an action. This is just wrong. Agencies should get it right every time because agencies should not be firing anyone who does not deserve to be fired. There would be a full national emergency if 20% of the attempted landings of commercial aircraft resulted in failure. Why isn't the

Board at DEFCON 2 trying to make sure that all removals in government are handled properly?

> "But Bill. That's not our job. We get to stay above the fray, issuing stinging criticism and awarding copious back pay from Our Holy Mount, telling agencies after the fact when they blow it, but not doing much to help them know how not to blow it."

Oh, really? Have you considered your FREAKING NAME recently? You're supposed to be protecting the darned merit system, not just critiquing it when it breaks bad. Who better to honor our good civil servants by helping agencies remove bad employees only when it's warranted?

You are an Executive Branch entity, not a judicial court. You should be down here in the trenches with us trying to make civil service work, not hovering above us criticizing what we do. Join the fight. We can use all the help we can get.

How to get started on this? Easy. Turn your decisions into teachable moments. After you adjudicate the action in your decision, evaluate the agency's action. Sample last paragraphs:

> *Lessons Learned – In this case, the agency did a good job of focusing the employee's poor performance on a single critical element of the performance plan. Had it tried to incorporate several critical elements into the demonstration period, the employee would likely have become confused and unfocused. By selecting a single element, the employee had the best chance to demonstrate mastery of his assignments and the agency's resources were more focused*.

Or

> *Lessons Learned – For over 25 years, the Board has held that an agency errs when it creates two or more charges based on a single act of misconduct. Doing so here resulted in merger of the two charges in this case, thereby causing mitigation of the penalty to a suspension rather than a removal.*

Dear Board, please rethink your role in our civil service. Don't just tell us when we do things wrong. Tell us how to do things right. Make yourself useful. Nobody likes a critic because they take no responsibility for the work being done. Take responsibility. If we lose our precious civil service because of some of that legislation floating around Capitol Hill, you will have failed in your responsibility to protect the merit systems. If you look at the Board's official seal, you will see that your protection responsibility goes back to 1883. Don't let down our fore-parents. Wiley@FELTG.com

Don't miss the FELTG Webinar **Threats of Violence in the Workplace: Assessing Risk and Taking Action** with Shana Palmeri on Thursday, Aug. 30. For information on this event and a full schedule of FELTG webinars, visit https://feltg.com/webinar-training/.

Can Federal Employees Smoke Pot?
By Deborah Hopkins

I live in Washington, DC, and on any given day, I'll smell the unique scent of marijuana several times as I go about my daily activities. During a 6 a.m. run – yep, there's a strong hint of weed in the air as I run through my neighborhood in NW. I guess it goes well with coffee? Walking to the Metro behind someone who is openly smoking a joint? Happens all the time. A car drives by, windows open, and out wafts the pungent smell of cannabis? You'd better believe it. Recreational marijuana is legal in DC, so it's everywhere. Literally, everywhere.

- Fun Fact 1: It's illegal to sell in DC, but you can give it away for free. Or you can buy something – say, a pencil, for $20 – and with it comes a free joint. There are even smartphone apps for easy ordering. Gotta love those legal loopholes.
- Fun Fact 2: It's technically only legal to use in the privacy of your own home, and its use is prohibited in public places such as sidewalks, hospitals, buses, and on federal property. But that's not really enforced much.

So, anyone who lives in DC is allowed to use marijuana, right? Wrong.

It is illegal for federal employees to use marijuana in any form – smoke, edibles, tinctures, pens, etc. – if they are employed by a federal agency, even if they live in a place where marijuana is legal. So if a federal employee living in DC uses marijuana, it's very likely she will have to say goodbye to her federal job because she will be removed, most likely for misconduct or suitability reasons.

The same applies for federal employees in the nine states where recreational marijuana is currently legal: Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington. (About 20 additional states allow for its use with a medical license.)

There's proposed legislation in Congress that would change that. The bipartisan bill *Fairness in Federal Drug Testing Under State Laws Act* (H.R. 6589) was recently introduced by Charlie Crist (D-FL) and co-sponsored by Drew Ferguson (R-GA). Look at that, Democrats and Republicans on the same page about something! In its current form, the bill would bar the federal government from denying employment or making federal employees "subject to any other adverse personnel action" if they tested positive for marijuana while living in a state where its use is legal.

A few weeks ago, Senator Chuck Schumer (D-NY) introduced the *Marijuana Freedom and Opportunity Act* (S. 3174) which would take marijuana off the list of controlled substances at the federal level. That bill hasn't gone anywhere yet.

A few more statistics: According to one article I read, about 42 percent of government employees surveyed (includes state and local government) approve of legalizing recreational and medicinal marijuana and about 21 percent think only medicinal marijuana should be legalized. Roughly 11 percent oppose legalizing it in any form.

Now that we're on the same page regarding the legality of marijuana use by federal employees, I want to answer a few questions that routinely come up during training sessions.

Can a federal agency require a drug test from an employee suspected of being under the influence of marijuana?

There are two categories we need to look at here: drug testing positions and non-drug testing positions.

Drug Testing Positions:
An agency can order a drug test of an employee if the employee occupies a position that has been identified as part of the agency's drug testing program, and the agency has a reasonable belief the employee is under the influence. Mandatory drug testing is a search and seizure under the Fourth Amendment and must be reasonable to pass constitutional muster. *NTEU v. Von Raab*, 489 U.S. 656 (1989).

In addition, an employee is generally required to comply with an order to take a drug test first, and to challenge the order after the fact. *Watson v. DOT*, 91 FMSR 5447 (1991)

In order to sustain a charge of failure or refusal to comply with an order to undergo a drug test, the agency must prove:

1. The employee was given an order to undergo a test;
2. The order was lawful (i.e., within the agency's authority);
3. The employee failed or refused to comply; and
4. The failure or refusal was not justified.

Garrison v. DOJ, 95 FMSR 5215 (1995)

Non-Drug Testing Positions:
The agency's drug testing program has to be designed to balance the needs of the agency relative to the particular types of positions with an employee's rights to privacy. So if the employee is just a regular old employee occupying a regular old position, he cannot be ordered to undergo a drug test. A good agency strategy is that if it suspects drug intoxication in an employee who does not occupy a testing position, offer the drug test anyway. If the employee refuses, that refusal can be used when evaluating the other evidence (bloodshot eyes, smell of marijuana, etc.).

Can a federal employee use marijuana as a reasonable accommodation for a disability?

While medical marijuana has been shown to be effective for treatments from stomach ulcers to glaucoma to cancer, it is NOT a reasonable accommodation because its use violates federal law.

What happens if a federal employee doesn't use marijuana but lives in a home where non-federal employees smoke, grow or otherwise use marijuana?

Just ask the former USDA employee whose husband grew and sold marijuana on their property in California, a state where it was legal to do so. While there was no evidence the employee actually used marijuana herself, residing in a place where it was grown and sold was enough to cost her a GS-9 Forestry technician position. *Avila v. Agriculture*, MSPB No. SF-0752-17-0488-I-1 (February 26, 2018) (ID).

Is using marijuana while a federal employee a zero-tolerance, automatic removal?

No. In fact, zero-tolerance, automatic-removal policies are illegal in the government with a few exceptions. As the law stands, just about every executive agency (except the VA) must determine the appropriate penalty by considering the *Douglas* factors in a case where an employee is using marijuana. Sometimes, we see agencies incorporate last chance agreements with people who use illegal drugs, and those can be very effective. If successful, you retain an otherwise good employee. But if the employee violates the agreement, it's immediate removal.

Here's a case example: The USPS removed an employee who violated a last chance agreement that included a provision prohibiting her from working under the influence of drugs or alcohol while on duty. She was sent for a drug and alcohol test after her supervisor noticed she was having

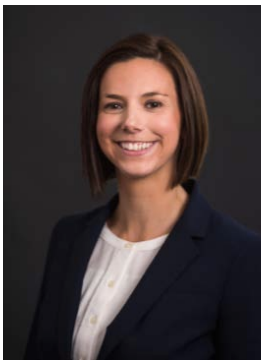
difficulty keeping her balance and her eyes were "red and glossy." She tested positive for alcohol and marijuana. As last chance agreements go, this meant immediate removal for the employee. *Complainant v. U.S. Postal Service,* EEOC No. 0120130190 (2014)

What if a supervisor believes a federal employee is under the influence of marijuana at work, but doesn't want to discipline the employee because the employee is much more pleasant to work with when he is high?

I have been asked this more than once, and I laugh out loud every time because I can see why this scenario might be tempting to ignore. That's between you and your agency, but I bet you know the correct answer: Your job is on the line if you let that one go.

We'll keep you posted on the proposed legislation if it goes anywhere, but in the meantime, Just Say No. Hopkins@FELTG.com

CBA, or not to CBA: What Controls in Settlement?
By Meghan Droste



Time for me to let you in on a little secret, readers — I have a bit of a formula for writing my monthly articles for you. I always start by looking at the most recent EEOC decisions; I pick one that looks interesting and I write an article on it. I like to think this is helpful for you because it keeps you up-to-date on what the EEOC has ruled on in the past few months (and bonus for me: It keeps me up-to-date for my own cases). The selection is a bit dependent on what I find interesting though, which has resulted in a few topics or themes coming up more than once. One of those topics is settlement agreements. It seems that fewer complaints actually go to a hearing these days, in part, because many of them settle. That makes settlement agreements — both drafting them correctly and then complying with them — very important for agencies and complainants.

The Commission recently reminded us of the importance of being careful when drafting agreements in its decision on a request for reconsideration in the case of *Celinda L. v. U.S. Postal Service*, EEOC Req. No. 0520180260 (June 7, 2018). In this case, the agency and the complainant reached a settlement that included the offer of adjusting the complainant's seniority date. The settlement agreement contained a disclaimer that if the provision violated the applicable collective bargaining agreement, the settlement agreement would be null and void. After the parties signed the agreement, the agency notified the complainant that it believed the settlement agreement violated the collective bargaining agreement, which prohibited the change to her seniority date. The agency offered to modify the seniority date provision of the settlement agreement or to reinstate the underlying EEO complaint. When the complainant did not respond, the agency modified the settlement agreement and notified the complainant of her appeal rights. The complainant filed an appeal and the EEOC issued a decision in her favor. It concluded that the agency "should have raised its concerns about the CBA prior to the execution of the settlement agreement. The EEOC reversed the agency's Final Agency Decision finding that it did not breach the agreement. The agency then requested reconsideration, which the Commission denied.

Unfortunately, at the time of writing this article the Commission's decision on the appeal is not available on Lexis or the EEOC's website, so I can't provide you with more details on its reasoning in this specific case. This is not, however, the first time the Commission has addressed this issue. In *Inglesias v. U.S. Postal Service*, EEOC Req. No. 0520110503, 0520110270 (Mar. 30,

2012), the Commission determined that the Agency could not establish that the settlement agreement in question violated the terms of the collective bargaining agreement. It found an affidavit from a labor relations manager concluding that there was a violation to be insufficient. The Commission also reminded the agency that labor relations should review settlement agreements *before* the parties sign them, to avoid these situations.

Settlement agreements are contracts. The parties are generally bound to them even if they come to regret them later. If there is even a remote chance that the terms of a settlement agreement might violate a collective bargaining agreement, please be sure to get your agency's labor relations team involved before anyone puts ink to paper and finalizes the agreement. If you don't, you may have to suffer the slings and arrows of an outrageous settlement agreement. Droste@FELTG.com

Playing the Shame Game
By Dan Gephart

Imagine spending a beautiful summer day at the ballpark. You have great seats along the first base side. Foul balls routinely make their way towards you – four to be exact. The first three balls you pick up and immediately hand over to youngsters in your section. The fourth foul ball you grab and, remembering it's your anniversary, hand to your wife who is sitting next to you. It's smiles all around.

It sounds like a perfect day. But it's not.

You see, a video of you snagging that fourth foul ball is being shared at alarming rates on Twitter. The video makes it look like you snubbed the cute little boy a row in front of you. You are trending and not in a good way. After all, what kind of monster doesn't give a foul ball to a kid?

If you're a baseball fan or a Twitter user, you are familiar with the video taken during a recent Chicago Cubs game. Heck, you may have retweeted the video along with the comments "jerk" or "a—hole," or maybe you are the Twitter user who called for the man to "be publicly shamed and booed for hours." I'm not even mentioning the tweets that called for a good old-fashioned physical beatdown.

If there's one thing we Americans are especially good at, it's shaming others. Facts? We don't need no stinking facts. Context? Ha! Let's shame!

I was thinking about the baseball fiasco as I read a story last week about two former EPA career employees. Michael Cox worked at the EPA for more than 25 years, most recently as a climate change adviser. Elizabeth Southerland had more than 30 years of EPA experience when she left.

Both resignations were political. The departing employees made it known that they were unhappy with the agency's direction under then-Administrator Scott Pruitt. Cox certainly left with a bang, writing a scathing five-page letter to Pruitt and sharing it with his EPA colleagues.

The best thing would've been to let this blow over.

An EPA spokesman took a different tact, telling reporters that Cox was expressing "faux outrage" and that the real reason for his resignation was so he could cash in on his "six-figure taxpayer-funded pension." (A year and a few FOIA requests later, we now know that Cox's pension, minus benefits and taxes, falls well below that "six-figure" threshold.)

The same communications team pitched a story to news outlets that Southerland left for similar reasons.

This was clearly an attempt to shame the former federal employees.

Does anybody remember former VA social worker Robin Paul? Barbara Haga wrote about her extensively in our July 2015 newsletter. Unlike our Cubs fan, Paul really did commit an awful act, or at the very least, she suffered a serious lapse in judgment. She sent an email to her staff that included images that mocked veterans by placing a toy elf in various positions. (You really have to see it to understand. But it was awful.) Paul was placed on administrative leave while the VA investigated. She agreed to a 90-day suspension of her clinical license.

Meanwhile, the Shame Patrol came out in full force, publicly arguing for Paul's termination. This was followed by death threats. After her children were harassed, the family was forced to seek police protection. Finally, Paul, who had an otherwise excellent work history, resigned before the VA even finished its investigation, pleading to be left alone.

She got what she deserved, you might say. Well, that's pretty harsh. Then again, the Shamers don't deal in nuance. Read through Jon Ronson's highly engaging 2015 book "So You've Been Publicly Shamed" and you'll understand why social media shaming has become the modern-day equivalent of a public flogging.

But as purveyors of discipline in your agency, you can't afford to listen to the Shamers. You need to gather the facts, weigh the evidence, and carefully determine the penalty. Unfortunately, you're going to have to work really hard to tune out these Shame Spreaders. If you've been on Twitter or Facebook lately or read any newspaper's comments section, you know that these Internet vigilantes aren't going anywhere anytime soon. Gephart@FELTG.com

Tips from the Other Side, Part 8
By Meghan Droste

A certain coffee and pastry chain that originated in the great Commonwealth of Massachusetts, from which I also hail, advertises that America runs on its products. While I imagine that a good chunk of the federal workforce is well caffeinated, I think it is safe to say that the federal government runs on forms. Lots and lots of forms—SF-50s, SF-86s, you name it and OPM probably has a form for it.

A potential client recently provided a copy of her pre-complaint intake form when she contacted my office seeking representation. I will keep the agency's name confidential to protect the guilty, but I was very concerned to see that the agency had not updated its forms in several years. How do I know this? The form states that sexual orientation is not covered by Title VII and therefore the agency will not process discrimination claims based only on sexual orientation under 29 C.F.R. § 1614.

The information contained on this form is incorrect. Don't believe me? Check out what the Commission had to say about this in 2016: "We find that the Commission has jurisdiction over Complainant's sexual orientation discrimination claims pursuant to our findings in *Baldwin v. Department of Transportation*, which held that a claim of sexual orientation discrimination is a claim of sex discrimination, and therefore covered under Title VII and properly processed under the 29 C.F.R. Part 1614 process for EEO complaints." *Ronny S. v. Dep't of Veterans Affairs*, EEOC App. No. 0120132198 (May 17, 2016).

It doesn't get much more to the point than that. I am willing to give the EEO office at this unnamed agency the benefit of the doubt and assume that the counselors and other staff know that sexual orientation is covered by Title VII. But having the incorrect information on the form could confuse other agency employees or, even worse, discourage them from filing complaints that they are entitled to file.

The tip for this month is very simple — update your forms! You and your agency should stay on top of developments in EEO

law and then update your forms, and all other materials, accordingly.

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: http://info@FELTG.com.

Is There Such Thing as a Triple-Negative?
By Deborah Hopkins

A few days ago I saw a news headline from a well-known legal resource that said, "Judge declines to dismiss suit against ban on transgender people in military" and I had to stop and re-read it a few times as I tried to figure out what it was saying. Is this a double-negative? A triple-negative? And I'm still not sure I understand what the story is about; I didn't click on the link because I couldn't get past the headline. Maybe I'm impatient, but I have to think a lot of other people are as well.

If you have to read a sentence more than once in order to understand it, then you have a poorly written sentence. With legal writing it can be tempting to use complex words and long sentences, but the Plain Language Movement is alive and well, and people from appellants to union reps to judges appreciate legal documents that make sense and are easy to read – the first time.

Below are a few of the helpful tips we teach in FELTG's legal writing classes.

Use F-IRAC
This method gets beaten into our brains in law school, after which we promptly forget we've ever learned it. But it's actually an incredible way to stay organized, to keep the reader moving along, and inevitably lead to the conclusion you're making.

Facts: What happened?
Issue: What is this about?
Rule: What is the guiding law on this topic?
Analysis: How does the law, when applied to the facts, support my position?
Conclusion: Answers the question posed in the issue.

Don't Bury the Lead
Legal writing is not creative writing and it can feel a little boring sometimes. But you don't want people to have to wait until the end of the document to know what the document is about. The biggest reason is that most people won't actually read the entire document. So do yourself (and your client) a favor and put the important stuff up front.

Don't Characterize the Facts
It can be tempting to add a little flair to the factual narrative but be careful to use only facts and not opinion. If opinion is interjected, it can damage your credibility and your entire case might suffer as a result.

Example of characterization from the agency side: Supervisor Cook asked the grievant to stop wasting time and to return to his assigned duties. In response and without provocation, the grievant spun away, ignoring the manager's lawful order, and essentially engaged in an illegal strike.

Example of characterization from the employee's side: The "temporary" supervisor ordered Mr. Jones to get back to work immediately with no excuses accepted. Trying to avoid an unnecessary confrontation, Mr. Jones stepped away to give the "temporary" supervisor time to cool down.

Rewritten without characterization: The acting supervisor told the employee to return to work. The employee turned and walked away.

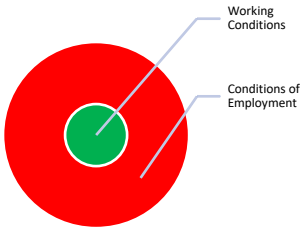
Choose Your Verbs Wisely
One little verb can change the whole meaning of a sentence, so be smart about your verb selection and don't use a thesaurus carelessly.

Take a look at these examples:

- The witness affirmed that she saw the supervisor touch the complainant's breast.
  - The word *affirmed* implies trust
- The witness stated that she saw the supervisor touch the complainant's breast.
  - The word *stated*, along with words such as *said* or *testified*, implies neutrality.
- The witness alleged that she saw the supervisor touch the complainant's breast.
  - The word *alleged* implies doubt.

There's plenty more we'll cover in future articles, but this should get you started. In the meantime, have fun being a little boring in your writing. :) Hopkins@FELTG.com

The "New" FLRA Is Making Big Changes
By William Wiley



New political appointees, new case decisions, new changes to the law. The answer to the questions below from an alert reader highlight one of the recent changes, in case you missed it:

> Good Morning FELTG,
>
> With the recent ruling by the FLRA clarifying the two concepts of **Conditions of Employment** vs. **Working Conditions** as distinct, would a low-level agency policy concerning **Conditions of Employment** still be negotiable or still excluded? Does the level of authority make a difference?

Sometimes good questions take two answers to cover everything. Here's our first:

> Dear Reader -
>
> As this is a very recent and significant change, it will be a couple of years before we understand all the implications. However, our best guess is that it is not the level of the change that is controlling, but the nature of the change itself. Remember, some unions have recognition at a relatively low level in an agency; perhaps just a few offices in a regional structure. If a low-level manager changes a personnel policy (e.g., the manner in which annual leave requests will be considered and the standards by which they will be approved), then in our opinion, that's a change in a **Condition of Employment** and thereby just as negotiable as it would be if the agency head made the same declaration.
>
> Hope this helps-

Given the complexity, it's not surprising that the answer above generated question Number Two, below:

> So, a policy, rule, etc. affecting a **Working Condition** is negotiable, just not vice versa? Thank you, sir, for your guidance.

And here's our answer Number Two:

> After *DHS & CBP and AFGE*, 70 FLRA 501 (2018) we have to be strictly careful about the phrase we use:
>
> 1. A new policy or practice that will change a **Condition of Employment** must be proposed to the union and bargained to conclusion by management. The agency may not implement the change until this is done.

2. These negotiable **Conditions of Employment**, by definition, affect **Working Conditions**.
3. However, once the new **Conditions of Employment** are bargained, the agency may further change the affected **Working Conditions** established by the **Conditions of Employment** WITHOUT new notice and bargaining.

The facts of the case were that the workplace **Conditions of Employment** had established that work was being done in two different related areas. Management changed the relative amount of work being done so that more work was done in one area and less in the other. The union claimed that this was a change that had to be bargained; i.e., a change to a **Condition of Employment.** FLRA disagreed, finding that although there was a change to the **Working Conditions**, there was no change to the **Conditions of Employment** affecting those **Working Conditions**. Therefore, no bargaining obligation.

This is a fine line issue our Dear Reader has raised. We will need dozens more FLRA decisions to see more clearly where that line is exactly. Our advice to all you fired-up agency labor relations specialists? Go change something in the workplace without noticing and negotiating and thereby tick off your union so that they file an unfair labor practice. We need the case law.
Wiley@FELTG.com

What to Do When a Disabled Employee Declines an RA Reassignment Offer
By William Wiley

Oh, the challenges of trying to accommodate a disability. Does the employee *really* meet the legal definition of disabled? If his job cannot be modified, is there a vacant position he is qualified to perform? What should management do if the employee refuses a reassignment to a vacant position if one is offered? Here at FELTG, we teach days and days of training each year on the answers to these questions. To give you a flavor of our approach, here's an answer to a question we got recently from a concerned reader:

> Hello FELTG!
>
> I am reaching out to you for some advice on a hypothetical case here at my agency.
>
> If a Bargaining Unit employee were to have a valid Reasonable Accommodation claim that no longer allows him to work in his assigned position, and if that employee refuses to take a new assignment at the agency that recognizes their Reasonable Accommodation limitations, what actions can the agency take against such an employee?
>
> Furthermore, if the employee hypothetically announces that he is pursuing a medical retirement, does the agency have to retain him in a paid status until the medical retirement process is completed? Would pending EEO complaints also have any impact on such a hypothetical situation?

All good meaty issues. Here's our response:

> Typical situation; easy answer. This very day propose his removal with the charge being Medical Inability to Perform. Attach to the proposal:
>
> 1. The medical documentation that shows he cannot perform an essential function of his job,
> 2. A statement from his supervisor that the function is indeed essential and that

accommodation in the position is not possible, and
3. Evidence from your disability coordinator that there are no vacancies in the agency for which he is qualified medically and professionally which he is willing to accept.

EEOC likes it when we get any declination of the other position(s) in writing, but I'm sure your coordinator knows that. Do not include a *Douglas* Factor analysis along with the proposal because those factors are not relevant if the employee simply cannot perform one or more essential functions.

Do not delay the removal because he has filed for disability retirement. Two reasons:

1. It may be denied, and then you are in a bad situation, and
2. By firing him for Medical Inability to Perform you essentially guarantee his application for disability retirement will be granted.

As for pending EEO complaints, they will form a basis for the employee to file a reprisal complaint when you fire him. However, you can't let that stop you from doing what you need to do. If he is not able to perform work for the agency, you should not keep paying him. He may file a reprisal complaint, but there will be no merit to it because you will have taken the proper steps to demonstrate that you had a legitimate, non-discriminatory reason for firing him.

Hope this helps. Best of luck.
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Mark Your Calendars

It's open enrollment season again. Join us for these training events.

Advanced Employee Relations
Norfolk, VA
September 11-13

EEOC Law Week
Washington, DC
September 17-21

Absence, Leave Abuse & Medical Issues Week
Washington, DC
September 25-29

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 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