Federal Employment Law Training Group

Training By Professionals For Professionals

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Introduction

Back in the day, right after the Civil Service Reform Act was passed in 1978, we had non-attorney Presiding Officials rather than Harvard-JD-ed Administrative Judges. Hearings were held in spare conference rooms rather than federal court houses. And decisions issued by the Board were based on common sense and an efficient civil service rather than the code-pleading intricacies of some legalistic paradigm.

Sadly, our world today in federal employment law is filled with those nasty legalistic paradigms, never intended by Our Founders, but the reality in which we here at FELTG try to help you navigate. As evidence of how far we've moved away from the beginning, be sure to check out the extra-explanation of the aptly-named case, *Boo v. DHS* discussed below, referencing an *FELTG News Flash* from last week. If ever there was a case that should scare the pants off of you ("Boo!") relative to the legalistic direction we are going, this just might be it for 2014. Welcome to the FELTG Newsletter.

Enjoy your reading,

Bill

William B. Wiley,
FELTG President

UPCOMING WASHINGTON, DC SEMINARS

MSPB Law Week
March 2-6

Workplace Investigations Week
April 6-10

Leave & Attendance Management and Performance Management
May 5-8

FLRA Law Week
June 1-5

AND, IN SAN FRANCISCO

EEOC Law Week
June 22-26

WEBINARS ON THE DOCKET

Correcting and Preventing Sexual Harassment in the Federal Workplace
February 26

Merit Systems and Prohibited Personnel Practices: The Foundation of the Civil Service System
March 19

Significant Federal Sector Developments: The Latest and Greatest
April 16

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The EEOC Wants You! To Provide Input about Federal Sector Complaints Processing

By Deryn Sumner

Most law students don't go into law school with dreams of working in administrative law. Constitutional law? Criminal defense? International human rights? Sure. But I'd wager many law students don't know much about administrative law when they start law school. I sure didn't, but a stint on the Administrative Law Review, along with classes and working at a law firm focused on representing employees and employers before administrative bodies, has educated me on how important it is to the legal process in the United States. So notices of proposed rulemaking, especially issued by the Agency I appear before the most, are notable occurrences. And this one certainly is notable.

On February 6, 2015, the *Federal Register* published an Advance Notice of Proposed Rulemaking regarding the federal sector EEO complaint process by the EEOC. Practitioners at every stage of the process should consider submitting comments as the EEOC is seeking input on all aspects of federal sector complaints, and I do mean all aspects. Note: the below ramblings reflect my views and not the views of my employer (not that I think he'd disagree with much of what I have to say).

The Commission is looking for thoughts on whether agencies should continue to investigate formal complaints in-house, or whether investigators should be selected from a pool so that agencies are not conducting their own investigations. The Commission even wants input on whether the EEOC should conduct the investigations, as they do with private sector charges. In my view, moving the investigative function over to the EEOC would require a substantial increase in the budget and resources the EEOC currently has in order to effectively process complaints. Colleagues who file private sector charges often lament how long it takes to get the attention of an EEOC investigator, and note the quality of the investigators widely differs. I would be very hesitant to recommend the EEOC assume that responsibility and I think this would signal a move backwards since the *Cox* (*Cox v. SSA*, EEOC No. 0720050055, (2009)) and *Royal* (*Royal v. DVA*, EEOC No. 0720070045 (2009)) cases which emphasized the need for agencies to timely investigate claims and empowered administrative judges to issue sanctions when agencies don't.

The Commission is also seeking input as to whether the statute of limitations should be changed (the current 45-day window is substantially shorter than the 180 to even 300 days allowed for private sector employees), as well as whether the 14-day timeframe an employee has to file a formal complaint should be altered. It's certainly an interesting idea, and one I admit I have never thought much about. The disparity between the statute of limitations between private and federal sector employees is wide and definitely worthy of discussion.

The Commission further wants comments as to whether there should even be an investigative stage, or if cases should proceed directly to a hearing. My view on this is a resounding vote in favor of keeping investigations. Yes, additional information is almost always needed for a complete record; however, the ROI provides a key starting point in assessing a case, for advocates on both sides, and allows the parties to narrow what they need to obtain in discovery. The EEOC's Pilot Program, as we discussed last month, is requiring practitioners to demonstrate the need for discovery, and giving them narrowed timeframes to conduct it. It's hard to see how the discovery process can be streamlined and the timeframes reduced without the information provided in an ROI.

The Commission seeks input regarding what standard of review it should apply when there is a hearing decision or an appeal from a final agency decision. Right now, decisions issued by administrative judges are based on a substantial evidence standard of review. On its face, that makes sense and I don't think it should be changed. If a hearing is held, an administrative judge has had an opportunity to make credibility determinations and enter into conclusions of fact and law. The administrative judge also is supposed to function as a neutral fact finder, which is much easier when you're not employed by the same agency accused of discrimination. Appeals from decisions issued by an agency are currently based on a de novo standard of review. I would be hard-pressed to agree that this standard should be changed, because the agency has not had the benefit of hearing live testimony in rendering its determinations and the skill-sets of those issuing FADs can vary widely.

Hearings are also up for comment, including whether the hearing stage should even exist, if it should take place after an investigation has been conducted or in lieu of one, if it should be considered a continuation of the investigative process or "adversarial in nature, such as

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those conducted by the MSPB," and if it should still be discretionary, and who makes that decision. Whew. Again, it's hard to imagine going into a hearing without an investigation. The employee has the burden of proof to establish both a prima facie claim and pretext. If the Agency doesn't have to submit evidence to support a legitimate, non-discriminatory reason for its actions until a hearing, proving pretext would be more difficult than it already is. Plus, I would imagine that hearings would be substantially longer as the parties present and respond to information they are hearing for the first time. However, I do think the administrative judge (and not the employee or the agency) should have discretion regarding whether a hearing is necessary. There are cases without merit, sure, and providing a mechanism for their dismissal without a hearing saves resources for both sides.

Comments are accepted until April 7, 2015 and you can read more and find out how to submit comments here: https://federalregister.gov/a/2015-02330.

Program Spotlight:
Workplace Investigations Week
April 6-10, 2015
Washington, DC

From employee misconduct to EEO investigations, it's important to know - and to carry out - the proper steps when conducting every type of employment investigation in the federal workplace. We've got you covered with William Wiley, Michelle McGrath and Ernest Hadley. In addition to providing you with practical investigative skills, we'll also give you detailed information on writing effective reports.

Registration is open now. Check out www.feltg.com for details.

Is it Okay to Break Up through a Text Message?

By Deborah Hopkins

I was out with some friends a few nights ago, and we got into a discussion (okay, maybe a debate) about the best way to tell someone you've been dating, that you're not interested in another date. This came up because I was telling them about a first date I had recently been on. It was fine but there was really no chemistry and after I got home I decided that I wasn't interested in a second date. However, in the twelve hours following the date, the guy called me about six times and texted me at least a dozen times. It wasn't even that great of a date. I was annoyed.

So, the conversation centered around the issue of whether I should even bother telling this guy I'm not interested, or whether I should just ignore his (multiple) attempts to connect and let him figure it out on his own. There was much banter among the group members as we discussed the merits of "breaking up" by text, email, phone call or in person. After one date, maybe no follow-up is necessary. Three dates, a text or email is probably okay. Five dates deserves at least a phone call. Anything beyond that, and a face-to-face conversation is the respectful way to go. So even though there was some disagreement on the numbers I've given you above, we all arrived at one conclusion: the longer the relationship continues with someone, the more personal the "breakup" conversation needs to be.

How in the world am I going to connect this to what we do for a living in the federal employment law realm? It's pretty easy, actually. Remember my January newsletter article *The MSPB Hearing (Not) Heard 'Round the World*? (If not, read it here.) Well, in that article I discussed the hearing for an IRA Appeal that was made by a 25-year MSPB employee who had a stellar performance record, an employee who had never received any discipline during his tenure. I won't repeat all the specifics here, but let me tell you the kicker: this employee's supervisor proposed a 21-day suspension for something the employee did at work. And how did the employee receive notice of this proposed discipline?

Through an email.

That's right, someone with a terrific employee record receives notice of proposed serious discipline though the impersonal medium of email, even though everyone in his office works within earshot of everyone else - including his supervisor. I think most people would agree with me that this was a poor management decision. Something that serious - a suspension of that length is appealable to the MSPB, which is another article in itself - proposed to an employee of this caliber should have been handled much differently.

We are fortunate to have multiple communication devices at our disposal. When I was in the Dominican Republic over New Years, my cell phone didn't really work and the Wi-Fi was inconsistent. It was wonderful, but it was also strange to revert back to a time, not even

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too many years ago, when we didn't have the luxury of those devices. They're convenient, but they've made us lazy and dependent and I think they've clouded our judgment on the best method to send messages to people.

So, when it comes to the workplace, here's my list of communication encounters and the types of scenarios that each format is best suited to:

Text:
That completely depends on your supervisor. Some prefer texts to phone calls; some don't know how to text. (I'm not talking about you, Bill Wiley. I promise.) **[Editor's Note: Yes. Yes, you are.]** Maybe your supervisor is okay with your texting to ask for sick leave, but maybe she prefers an email or phone call. Be sure you know what's expected when using text as a communication option. **[Editor's Note: All negotiable and a working condition change you cannot implement without notifying and bargaining with the union.]**

Email:
This has become a workplace communication staple and is a wonderful tool for tracking important conversations, deadlines, rules, reminders, group collaboration, policy dissemination, and much more. Email is perfect for detailing non-sensitive items that don't have urgent deadlines. But because there is no inflection in email, and because words can get misunderstood easily, if something is potentially a difficult matter to discuss, it's best to go on to the next couple of methods. Plus, if you've been the person to accidentally click Reply All when you've sent a comment that was meant for one person only, you know that terrible feeling you get in the pit of your stomach. Oops.

Also, avoid the reputation of being the Email Bearer of Bad News. At one company where I formerly worked, the only time the president ever sent out an email was to tell the remaining employees about layoffs, the sale of a division, or some other terrible news. And the email subject line always said, simply, Update. When that email dropped in we all knew it wasn't going to be good. Trust me; you don't want to be the Guy or Gal with that reputation!

Phone:
Use the phone to communicate things that are confidential, time-critical, urgent, or require explanation and two-way communication. While it's best to discuss the most sensitive matters in person, sometimes they must need to be handled over the phone because the people having the conversation are in different physical locations.

In Person:
For good and bad news, this is the optimal way to go. I'm a communication person and I prefer face to face in everything, from holding a training session to catching up with an old friend. In person communication is critical for performance evaluations (unless, again, the different locations thing gets in the way), formal meetings, depositions, proposing discipline, and anything else that involves communicating sensitive information.

Boo Re-do

By William Wiley

Those of you who read our FELTG missives as soon as they hit your inbox should remember that last week, we sent out a flash article regarding the Board's decision in *Boo v. DHS*, 2014 MSPB 86. In that decision, the Board changed the rules after the game was played by adding a new third element to the definition of the charge of Misrepresentation. Post-*Boo*, to be sustained on a charge of Misrepresentation (Lying or Falsification), in addition to proving that the employee provided incorrect information with the intent to deceive, the agency will have to prove a new third element, that the employee intended to benefit personally from the provision of the incorrect information.

Sometimes after we publish an article, a reader will contact us admitting to confusion as to what we were trying to say. When that happens, we patiently explain to the reader what he didn't get, with the hope we can advance his education a bit so that he is a better employment law practitioner, even with his limited talent and abilities. But when the Great Renn Fowler contacts us with a misunderstanding of the point behind the *Boo* piece, we know that we owe everybody a measure of clarification. Here's the deal:

- In *Boo*, DHS brought two independent charges: Misrepresentation and a second lesser charge.
- When the Board concluded that the agency had to prove three elements to establishing charge of Misrepresentation, and that the agency had proven only two, the Misrepresentation charge failed completely, leaving only the second lesser charge.
- Based on the remaining lesser charge, without any consideration being given to the dismissed

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> Misrepresentation charge, the Board concluded that removal was too severe and thereby unreasonable, and mitigated the removal to a suspension.

What you should NOT do is read the article from last week and conclude that once the Board found a failure to prove one element of the Misrepresentation charge, it somehow used the remaining two elements to sustain a lesser-included charge within Misrepresentation (e.g., Lack of Candor). One of the golden rules in our business is if a single element in a charge fails, the entire charge fails. In the *Boo* case, that would mean that had there not been a second unrelated charge, once the Misrepresentation charge lost an element, the entire action would have failed, and there would be no mitigation.

This business was never intended to be this complicated. When it takes two old employment lawyers with 75 years of experience between them to make sense of a relatively straightforward series of events of misconduct, something is wrong with our system. It couldn't possibly be that the problem is one of our old brains.

Could it?

Webinar Spotlight:
Preventing and Correcting Sexual Harassment in the Federal Workplace
February 26, 2015
1:00 - 2:30 p.m. eastern

Join attorneys at law and FELTG instructors extraordinaire Gary Gilbert and Katie Dave for this special event.

Mr. Gilbert, who spent years as the Chief Administrative Judge for EEOC's Baltimore office, will join forces with Ms Dave, an experienced practitioner and litigator, to explain the foundation of the law related to sexual harassment and will define what constitutes a hostile work environment. They'll also cover:

- Liability in harassment cases
- Same-sex harassment and gender stereotyping
- Sexual orientation discrimination
- Transgender status as protected category

Plus, our instructors will answer your questions in real time. At only $250 per site, ather everyone together for this not-to-be-missed training event!

Hearing Practices: Discovering How to Conduct Good Discovery

By Deryn Sumner

As promised, after last month's discussion of what you should do when you first receive a new EEO case, this month we're going to delve into the next step in our hearing practices discussion: *conducting discovery*. Assuming you have the complete case file, you don't yet have an Acknowledgment and Order, and you have some free time (those are a lot of assumptions, I know), take a stab at developing a discovery plan early on as you are reviewing the case file. What's a discovery plan? Nothing too complex, don't worry. You should think about the accepted issues and what theories are being asserted. Is the complainant putting forth a theory of harassment, that he or she was treated less favorably than others in the workplace (disparate treatment), or the rare disparate impact claim? If retaliation is a basis, what's the protected activity being relied upon and when did it occur?

Next, take a look at what you already have in the Report of Investigation (ROI) and what you'll need to ask for to fill in the gaps. If you intend to file a motion for summary judgment, start thinking about what you'll be arguing in the motion and what you don't yet have on file to make your case. If you ask the complainant to provide all evidence of discriminatory animus and he or she can't provide any, that admission can make a great exhibit to such a motion. When you receive one, read the Acknowledgment and Order carefully.

Some administrative judges only allow you to serve one set of written discovery. Some judges limit the amount of interrogatories but not document requests. And as I mentioned last month, the EEOC's Pilot Program requires you to demonstrate discovery is even necessary, so be prepared if you have such a case.

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Depositions can be expensive and not in every agency's budget, but you should still take them if possible. Why are depositions so important? Well, they are the opportunity to ask all of those follow-up questions that EEO affidavits often leaving you begging to ask. They also lock a witness into testimony, can be used to gather evidence of inconsistencies in testimony to use for impeachment, to gauge credibility, and preserve the testimony of a witness who may be leaving federal government service. They can be crucial to assessing a witness's credibility prior to a hearing. If travel costs are an issue, explore whether you can use a Video TeleConference (VTC) connection. Also, think about who else you may need to depose besides the complainant. If this has the potential to be a high-value damages case, you may want to depose the medical care provider or damages witnesses identified by the complainant. Remember, depositions don't have to take all day and with a targeted and organized outline, in most instances you can keep them to just a few hours and still get the information you need.

After you initiate discovery and receive the responses, take the time to review them for sufficiency. Did the other side actually respond to the request in full? If not, you need to make a good faith effort to meet and compel prior to bugging the judge about it. Some judges require this good faith effort to be certified in an affidavit from you; some judges require both parties to get on the telephone to try and work things out before considering a motion. Know your judge and read the orders carefully. And if you need to file a motion to compel, make it easy on the administrative judge. Include the initial discovery request, the response to the request, and a brief argument explaining why the response is not sufficient within the motion. Be prepared to explain why the information you are requesting is actually relevant to the case, and not just something you want the other side to have to give you.

And finally, to echo a point I made last month, unless you know for sure that the hearing is bifurcated *and* that discovery on damages is bifurcated as well, conduct discovery about them. Be prepared to ask for the identification of damages witnesses and request documents such as relevant medical records and reports, proof of pecuniary damages, and evidence of efforts to look for other jobs if back pay is at issue. Next month we'll talk about responding to discovery.

Wiley Defends the Board; Hath Hell Frozen Over?

By William Wiley

In the past few weeks, the Board has issued several decisions that have gotten the attention of not only the media, but also our leaders on Capitol Hill. For those of us who watch the Board, this is a fascinating time because very few MSPB decisions ever see the light of day beyond those of us who practice federal employment law:

1. The Board set aside the suspensions of two attorneys accused of improper conduct relative to the prosecution of Sen. Ted Stevens. *Goeke and Bottini v. Department of Justice*, 2015 MSPB 1 (January 2, 2015).
2. The Board set aside the removals of two senior managers accused of improper conduct relative to the development and presentation of an "extravagant" agency conference. *Prouty & Weller v. General Services Administration*, 2014 MSPB 90 (December 24, 2014).
3. Although affirming the removal on other grounds, the Board's administrative judge declined to sustain charges relative to the inadequate provision of healthcare to our veterans. *Helman v. Department of Veterans Affairs*, DE-0707-15-0091-J-1 (December 22, 2014).

Oh, the gnashing of teeth and public outcry these decisions have caused. Doesn't the Board have any common sense? Isn't it obvious to everyone ("everyone" referencing certain elected officials in Congress) that all these charges should've been sustained; that all this discipline should've been upheld? Perhaps one or more of those MSPB members should be oughta-boarded, as in, "They oughta find themselves another job."

Clearly, all three of these situations involve issues of significant concern to the citizenry of our great country. It would be easy to fall into the trap of joining the criticism being expressed, and demanding that the Board members and staff be replaced by individuals with the good sense to uphold public opinion. Certainly in the pages of this newsletter over the past several years, those of us who write for FELTG have not been hesitant to criticize the Board when we felt criticism was warranted.

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Well, not this time. FELTG is proud to stand by the Board in its hour of need and defend its decisions in all three cases based on the following:

1. In *Goeke and Bottini*, the agency set a policy for taking disciplinary actions, then violated its own policy. Couple that with proof that had the agency abided by its policy, the two appellants would not have been disciplined, and you have a harmful error that requires setting aside the penalty, and has since 1979.
2. In *Prouty & Weller*, the agency did not submit proof of most of its charges due to the mistaken belief that it could remove someone without evidence of misconduct if the evidence was related to an on-going criminal investigation. Rule One: You gots to have evidence to fire someone.
3. In *Helman*, the agency charged the appellant with conduct which no rule prohibited, with conduct that preceded her employment with the agency, and with the conduct of her subordinates for which she could not be held accountable. Element One of every case of discipline: there has to be a rule foreclosing the misconduct, or you don't have misconduct, by definition.

Yes, the Board makes serious mistakes at times. On occasion it misunderstands an annuity appeal, on other occasions it unnecessarily criticizes an agency's outside counsel, and it fails to understand the detrimental effect its decisions relative to disparate penalty and the authority to reassign have on government. But in these three decisions, regardless of what some of the talking heads are saying on television and in the media, track squarely with what the Board has held relative to these issues for many years. We may disagree with some of the factual conclusions; we may conclude that there should be a wholly different approach to adjudicating the appeals of serious disciplinary actions taken by agencies against career civil servants. However, to our read here at FELTG, in each of these three cases the Board has done what we expect of an adjudicatory body. It has assessed the claims as put forth by the parties, it has evaluated evidence, and it has applied long-standing precedent. It may not have reached the conclusion that outsiders are making about the outcome of these cases, but it has reached the conclusions that it was established to reach.

As a wise man once said, "You can't blame a compass for pointing north." In the case of MSPB, you can't blame it for applying principles that have been in place for over three decades.

What Have We Heard From OFO Six Years After The Effective Date Of The ADAAA Amendments? Not Much.

By Deryn Sumner

The Americans with Disabilities Act Amendments Act (ADAAA) became effective January 1, 2009. The Commission issued revised regulations to implement these changes into the regulations at 29 CFR 1630 in 2011. By now we should have a wealth of case law from EEOC's Office of Federal Operations (OFO) addressing claims that arose after the ADAAA became effective, right? Well, as I write this more than six years later, OFO is still disposing of cases with fact patterns that take place prior to the effective date of the Amendments Act. Yes, the ADAAA Amendments are now old enough to attend kindergarten and we're still seeing cases under the old analysis, with its tedious consideration of whether an employee can show she or he is actually considered an individual with a disability. Which, as those practitioners who have been doing this for a while know, required considerable evidence and analysis. An individual with diabetes was not covered unless he or she could show substantial limitation in the major life activity of eating, for example. I remember many years ago having to scrutinize blood sugar readings from a client's medical chart in order to make such an argument. This is not to say the Commission hasn't considered formal complaints with incidents occurring after January 1, 2009; it has. However, those cases have not revealed much about the substantial changes the ADAAA put into place. Case law from district courts has been looking at the post-ADAAA framework for several years now, and we're seeing many cases decided on other aspects, with some parties even stipulating that the plaintiff is considered an individual with a disability without argument.

But most of the cases where the Commission substantively addresses whether an individual has a disability (and doesn't just assume so for the sake of argument, which usually means that it isn't going to find in the employee's favor) are still performing the old analysis. Consider *Complainant v. DHS*, EEOC Appeal No. 0120110576 (August 20, 2014), a case where the Commission looked at whether the complainant was an individual with a disability such that he could even establish a *prima facie* claim of discrimination. Noting several times that the pre-ADAAA framework applied, the Commission stated the employee had nerve damage in his neck that prevented him from continuously lifting

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more than five pounds and intermittently lifting more than 26 pounds, as well as limitations in continuously pushing more than 20 pounds or intermittently pushing more than 40 pounds. Because of the old framework at play, the Commission had to look at these lifting restrictions as two distinct limitations – intermittent restrictions and continuous lifting restrictions. Reviewing prior cases on lifting restrictions, the Commission found that these restrictions did not substantially limit him in a major life activity. As an urban dweller without a car, it's hard to imagine someone who can't carry his own groceries home as someone not substantially limited in a major life activity. But relying on cases from 2001 through 2005 which detailed the specifics as to how many pounds the employees were restricted in lifting on a continuous and intermittent basis, the Commission had to conclude that these limitations did not render the complainant substantially limited in a major life activity. If this case had taken place after January 1, 2009, the outcome would have almost surely have been different.

The regulations now in place emphasize that exacting analysis should be a thing of the past. The primary purpose of the ADA is to make it easier for people with disabilities who need protection to have coverage. 29 CFR 1630.1(c)(4). Major life activities include what we do (lifting, bending, working) as well as our bodily functions, including musculoskeletal functions. 29 CFR 1630.2(i). Substantially limits is no longer to be a "demanding standard." 29 CFR 1630.2(j)(1)(i). For Mr. Complainant, evidence that he couldn't lift more than 5 pounds or push more than 20, even if that impairment did not prevent or significantly or severely restrict him in a major life activity, 29 CFR 1630.2(j)(1)(ii), would likely have been enough to establish coverage as an individual with a disability. The purpose of the ADAAA was to significantly reduce the energy spent on determining whether an employee had a disability, in order to shift focus onto whether the employee could perform the position and if the employer met its obligations to the employee.

What does this mean for your practice? Of course, still conduct a basic analysis. Some impairments do not rise to the level of substantially limiting a major life activity. There will always be medical conditions that fit the definition of transitory and minor. But, it makes more sense to focus your energy on other parts of the inquiry. Was the employee qualified to perform the position with or without a reasonable accommodation? Did the agency meet its obligations in accommodating the employee? Did the agency treat the employee differently because of his or her disability? That should be the focus of your time, either as an employee or employer advocate. And someday we'll have the Commission case law to back it up.

[Editor's Note: The ADAAA purpose changes that Deryn has so well described speak to our focus once the employee provides adequate documentation of a medical condition. We are to spend less energy arguing whether a particular medical condition meets the definition of "disabled" and instead move on to whether the medical condition can be accommodated. However, that does NOT change the requirement for acceptable documentation for a medical condition. Under the ADAAA, an agency does not have to accept lesser evidence of the existence of a medical condition. It is still entitled to demand adequate objective medical evidence beyond the conclusory findings of a health care provider, just as it was entitled before the passage of the ADAAA.]

Bad Cop, Bad Cop; Whatcha Gonna Do

By William Wiley

Every now and then we get a non-precedential case that two or three little jewels of precedent tucked into it. Well, that's what we get in *Gunville v. DoI*, MSPB No. DE-0752-13-0220-I-1 (December 5, 2014).

The appellant, a cop, was removed based on a charge that off-duty he assaulted his wife. The first jewel in this decision is how the Board found a nexus between the off-duty misconduct and the efficiency of the service. As every employment law practitioner knows, you can't discipline a federal employee for something he does away from his job unless the off-duty misconduct is somehow related to his position. In finding a nexus in this case, the Board simply noted that the off-duty activity caused the deciding official to lose trust and confidence in the employee. Well, that's a darned low bar when you consider some of the cases over the years in which the Board has found no nexus for some pretty bad misconduct. If I were an agency practitioner dealing with an off-duty misconduct case, I sure would press the proposing and deciding official for whether they had lost "trust and confidence" in the employee because of what he did away from the job. Of course, if there are other nexus elements, I'd include them, as well. But losing trust and confidence just has to be close to a universal feeling when an employee does something bad, at work or away from it.

The next jewel in the analysis of this decision is the Board's handling of the critical hearsay evidence on which the agency relied to remove the employee. It's

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sometimes hard to get non-employees to testify at Board hearings, even with the judge's subpoena power. This case involved a battered wife. Getting her to appear, take the oath, and have her husband stare at her for an hour or two is asking a lot. So instead of calling the poor woman to testify, the agency used the statement she had given to the police relative to what her husband (the appellant) had done to her. It's summarized in the Board's decision. If you can read it without feeling for her, you are a stronger person than am I.

The wife's statement is classic hearsay; an out of court statement entered into the record for the purpose of establishing the truthfulness of the facts in the statement. Can an agency use hearsay, and only hearsay, to fire an employee? Yes it can, according to MSPB. In concluding that the wife's statement was preponderant evidence to establish the charge, the Board relied on the following factors:

1. The availability of the witness to testify in person (in this case, there was no hearing and thereby no testimony),
2. Whether the statement was sworn,
3. Whether the person giving the statement is disinterested,
4. Whether the statement is of the type routinely made,
5. Whether all statements made by the witness are consistent,
6. Whether there is corroboration in the record, and
7. The credibility of the witness giving the statement.

A good agency practitioner will make sure that each of these elements is addressed in argument and evidence submission whenever a hearsay statement is important in a case.

The final jewel in this decision addresses part of an issue, but unfortunately leaves another part unanswered. This appellant declined to defend himself in the proposed removal, believing that if he were to respond to the proposal, his testimony might undermine his ability to defend himself in a pending criminal action. In other words, he "took the 5th" after his removal was proposed. The deciding official relied on the employee's decision not to defend himself when evaluating the evidence and sustaining the removal. On appeal to the Board, the appellant argued that he was deprived of the Constitutional right to defend himself because the agency implemented the removal while criminal charges were pending.

The agency-good-news part of this final jewel is that the Board did not find anything fundamentally improper about an agency initiating a proposed removal while criminal charges are pending (a topic we have written about recently in the *FELTG Newsletter*). Therefore, if you are agency counsel, you should not feel legally restrained in proposing a removal even if there are pending criminal charges.

The agency-bad-news part of this decision is that MSPB dodged the bullet and did not address whether an agency can properly go through with the proposed removal IF the employee asserts his 5th Amendment right to remain silent. That's because in this case, the Board noted that the criminal charges against appellant were resolved two weeks before the end of the response period, thereby avoiding the Constitutional issue for the last two weeks of the response period when the criminal issue was moot. Prior case law suggests that the agency is free to go forward with the removal, whereas the Board on appeal would be constrained to honor an appellant's right to remain silent and dismiss the case without prejudice. It just would have been nice if this particular Board had specifically reinforced the agency right to remove even in the face of a claim of a 5th Amendment right to remain silent.

And as a bit of polish on this last jewel, the Board noted that although neither it nor the agency may draw an adverse inference from an employee's assertion of the 5th Amendment right to silent, the deciding official can rely on this silence in evaluating the evidence. A fine line, but one if properly characterized will be of benefit to an agency with a non-responding employee.

Program Spotlight:
Leave & Attendance Management and Performance Management
May 5-8, 2015
Washington, DC

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