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

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Ah, September. Finally, we're turning the corner away from the heat of the summer. When that first slight chill hits in the fall, I am each year reminded of how that feeling - that smell - used to signal the beginning of another year in college. Perhaps, this new semester I'll actually buy all the books for my classes, begin to study earlier than the night before the exam, even raise my C-plus average to something closer to a B-minus. Yes, September has always been a chance to reflect on past shameful shortcomings and to commit to doing what I should have been doing all along. I wonder if others feel the same way? Does the administration regret waiting 15 months to nominate new Board members at MSPB, where the number of pending cases is now around 1,750? Does the Senate sniff the fall air and commit to voting on the new nominees who zipped through their confirmation hearing many weeks ago and have been stalled ever since? Will OPM finally comply with the law (the freaking federal LAW!) that requires it to issue life-saving Notice Leave regulations by LAST SEPTEMBER? Although I was a mediocre college student, I remained hopeful at the beginning of each school year that I would get better, that I would stop frittering away Daddy's money, and put my efforts into doing what I should have been doing all along. Perhaps, as well, some of our leaders in government will notice what month it is on the calendar, feel a little shame like I used to, and start to do a better job. A 2.5 grade-point average might have been good enough to get me through LSU, but that is not really a good enough score for managing our civil service. By the way, 2.5 was not only my grade-point, but for most of my undergraduate days it was also my blood alcohol level. Yes, the best four years of my life I spent as a sophomore at LSU. I hope that our civil service leadership is at least having as much fun as I did, because it's just about as effective.

UPCOMING WEBINARS

Managing the Suicidal Employee in the Federal Workplace
Shane Palmieri
October 4

Think Before You Ask: Medical Exams & Inquiries and Medical Documentation Requests in the Federal Government
Meghan Droste
October 25

Significant Federal Sector Updates: Recent Cases and Developments from the EEOC, FLRA and MSPB
William Wiley
Deborah Hopkins
November 8

Sex Discrimination in the Federal Government: Gender Identity, LGBTQI Status, and Sexual Orientation Cases
Meghan Droste
November 15

The Leave Mistakes that Supervisors Make
By Deborah Hopkins

Oh, leave. It's a topic that intersects with everything we do here at FELTG: conduct, performance, EEO, union issues, supervisor skills, and on and on. If you get it right, it's easy; getting it wrong can cause big problems, legal and otherwise. So what I've done for you today is compile some of the more common leave "mistakes" that supervisors and advisors make when dealing with employee leave issues.

But, first things first. Let's set out a few ground rules. Employee leave entitlements depend on the category of leave involved and can be inconsistent and confusing. Only certain types of leave are an entitlement; others are discretionary. Federal employees have significant rights, but in the discretionary areas (usually annual leave and leave without pay) the supervisor's judgment about the need for work may be a determining factor on whether the supervisor approves the leave request.

Speaking of leave requests, employees DO NOT place themselves on leave. There is a three-step procedure that MUST be followed according to the law, yet many supervisors don't enforce it. Ready for it?

1. Employee requests leave
2. Supervisor considers request
3. Supervisor grants or denies request

And that's it. So, onto the mistakes.

Mistake: Not checking local policy when considering leave requests. While certain areas of leave are discretionary under federal law, agency leave policies may provide more specificity. For example, there is not entitlement to annual leave (even though it is accrued) or LWOP (except for a few circumstances), but your agency's policy or collective bargaining agreement (CBA) might dictate how those requests should be handled. Always check local policy if you're not sure. Your L/ER folks or OGC should know those details by heart.

Mistake: Denying leave that's an entitlement. Some categories of leave are an entitlement IF the employee meets the requirements. This means you have to say yes to a leave request even if it inconveniences the agency to do so. For example, let's say an employee requests sick leave because his grandmother died, and he has to attend the funeral. That's an entitlement. The employee gets the sick leave for the reasonable time they need to attend the funeral. Another example: An employee requests 12 weeks (480 hours) of FMLA to have cancer treatment. Even if it's the end of the fiscal year, your office is crazy busy, and you don't allow people to take vacations during that quarter, you have to approve the FMLA because it's an entitlement.

Mistake: Not allowing the employee to choose his pay status during FMLA. A lot of supervisors miss this one, but the employee who is on FMLA gets to decide if the time off will be recorded as sick leave, annual leave, or LWOP. That means an employee can use LWOP during FMLA and keep all his annual leave and sick leave and save it for a rainy day. And there's not a darn thing you can do about it.

Mistake: Putting an employee on LWOP without the employee's consent. If a supervisor unilaterally places an employee on LWOP, although the employee did not request it, the supervisor has improperly suspended the employee without adverse action procedures. On appeal, the employee would be entitled to back pay for that period of time he was carried on LWOP without his consent. *See Martin v. USPS*, 2016 MSPB 16. The authorization of LWOP is a matter of administrative discretion and employees may not demand that they be granted LWOP as a matter of right, *Desiderio v. Navy*, 4

MSPB 171, 4 MSPR 84 (1980), but the supervisor may not place the employee on LWOP status without the employee's consent.

Mistake: Letting employees abuse the Voluntary Leave Transfer Program (VLTP). Agency VLTPs are generally for short-term medical emergencies, to get an employee through a difficult time. If a supervisor allows VLTP for medical non-emergencies, it denies the benefit to employees who truly need the leave. Be aware, though, that normal maternity situations meet medical emergency criteria. Therefore, pregnant employees will qualify for VLTP even if there is not a medical emergency related to the pregnancy. Once an employee is approved for the VLTP, though, donated leave use is not an entitlement even if it is for medical reasons; it is still subject to the same approval/disapproval procedures as is annual leave. *See Jones v. DoT*, 295 F.3d 1298 (Fed. Cir., 2002).

I have more, but that should do it for today. Go forth and be wise in granting or denying leave requests – and remember, supervisors, in most cases, it's up to you. Hopkins@FELTG.com

Why Not an Administrative Jury? (Part 1)
By William Wiley

In our FELTG seminars, we sometimes have to explain the difference between the two burdens of proof relevant in our business of civil service law: *substantial* and *preponderant* evidence. To fire someone from a government position for misconduct, we have to support the action by a preponderance of the evidence.

To fire that same person for poor performance, we need support the action by only a substantial evidence, a lower burden of proof.

Our lucky friends at the VA have the blessing of needing only substantial evidence.

Federal regulations define preponderant evidence to mean that there is enough proof to conclude it is more likely than not that the employee engaged in the charged misconduct and otherwise deserves to be fired. 5 CFR 1201.56(c) and 5 CFR 1201.4(q). For substantial evidence, an adjudicator has to conclude that a reasonable person *might* conclude that there's enough proof to warrant removal, not that a reasonable person necessarily *would* conclude that removal is warranted. 5 CFR 1201.56(c)(1) and 5 CFR 1201.4(p). In comparison, the burden of proof required to throw somebody in jail for a crime in our country most of us know is evidence *beyond a reasonable doubt*.

Yeah, these are nice lawyer terms. Lawyers love to dance around on the head of a legal pin arguing what these terms mean. But what do they mean in terms that a normal person would understand? Well, here at FELTG, we've come up what we think is a pretty darned good analogy that anyone can understand. Perhaps not as eloquent as the regulatory definitions, here's how we see the difference among the three.

Beyond a Reasonable Doubt: This one is easy. In most every state on our country and in the federal courts, to find someone guilty of a capital crime, 12 jurors need to agree that a crime has been committed. If 1 of the 12 disagrees, we do not have evidence beyond a reasonable doubt. Therefore, we can use 12 jurors as a benchmark for the other burdens of proof.

Preponderant Evidence: We're looking for a more likely than not standard using our jury as an avatar. Given that 6 of 12 jurors would be perfectly balanced, and we need a bit more than that, 7 of 12 would be a good number. So if we charged someone with misconduct, if 7 of 12 of his peers would conclude that he deserves to be fired, then

we'd have a preponderance of the evidence. **Substantial Evidence:** We know that his has to be less than preponderant evidence. We also know that the courts have defined substantial evidence as "a grain more than a scintilla." I have no idea what a scintilla looks like, and a grain is pretty darned tiny. Therefore, being generous, I would say that to have substantial evidence, we would need three maybe four jurors to conclude that a performance removal was warranted.

We're quite proud of this analogy as a teaching tool. No, there's never been a court or a board that has stated the burdens in a similar manner, but we hereby give notice that this language is hereby released from our copyrighted© protections thereby freeing any of you adjudicators out there to use it. With all due respect, it's a lot more relatable than a line like a "grain more than a scintilla" to most of us normal humans (yeah, I'm talking to you, Chief Justice Roberts).

With us in the middle of rethinking the civil service protections these days, it recently dawned on us that maybe this model would serve as an option to get us out of the quagmire of employee appeals, complaints, and grievances. Yes, we could change the law. But rather than waiting for that possibility to happen, what if we set up an alternative system that would tempt employees to forgo their appeal/grievance/complaint rights in exchange for an alternative resolution to their dispute?

And that's when we got the idea of an administrative jury.

"But, Bill, how would that work?"

Ah, dear reader, I guess you'll have to look for our next article giving the details. See, we don't want you to ever stop reading and attending FELTG. That's why we build in little cliff hangers like this one, to keep you interested. Wiley@FELTG.com

(Subscribe to our weekly email newsletter to see where Bill is going next with this idea.)

Michael Keaton, Burt Reynolds, and the FMLA
By Dan Gephart

Thanks to Facebook, I'm reminded of the birthday of that odd kid from sixth grade who had the massive nosebleed problems and carried a Land of the Lost lunchbox. However, Mark Zuckerberg's programmers failed to remind me of a more important birthday last month -- the FMLA's 25th. That's right, the Family and Medical Leave Act has been around for a quarter-century. President Clinton signed the bill into law in early 1993. Six months later – August 5, 1993 to be exact – the law went into effect.

The birthday snub aside, I have a lot of affection for the FMLA. Twenty-four years ago, I took advantage of the then-new law. It was three months after my second son was born, and my wife's maternity leave was ending. She needed to get back to work. We couldn't afford for either of us to lose our job. Unfortunately, our initial child-care plans fell through. Then our back-up plans fell through. And our back-up to the back-up plans.

After much deliberation, we decided I'd stay home for the next three months with our two sons – the oldest of whom had yet to reach age two. This could help buy time as we figured out another child care option with which we were comfortable. We'd be living on one salary, but only for a short time.

What a time it was! Those three months at home with our young sons are among the happiest of my life. I can't begin to describe the immense joy I feel when I think about those days.

Still, I missed work and was happy to go back three months later. What didn't bring me joy was some of my coworkers' reactions upon my return. While Michael Keaton is awesome, the Mr. Mom jokes … not so much. I also didn't appreciate the comments

referring to my three months as a vacation. And if you really wanted to get on my bad side, all you had to do was ask what it was like "baby-sitting" for three months. People, it's not baby-sitting if they are your own kids! Also, spending time with your kids or taking them out in public without your wife doesn't necessarily make you a great dad. It makes you a dad.

[Stage direction: Dan steps off his soapbox.]

The FMLA has made a difference in people's lives, whether it's meant being able to spend time with critically ill parents, bond with newly born or adopted children, recover from a serious health condition, or care for a spouse injured during military service.

Of course, there are people who try to take advantage of the law. I asked my FELTG colleague Barbara Haga – *the* FMLA expert – for her favorite stories of FMLA misuse. She reminded me about the letter carrier who invoked FMLA because of a back problem that caused numbness in his left arm and left leg. During his FMLA time off, he played eight games in an out-of-state national softball tournament. When confronted about how he could play softball but not deliver mail, he testified that softball wasn't really a physical sport. Oh, and he also used the time to travel to Alaska.

Barbara has a new FMLA case that she's discussing in her classes: "A GS-9 medical technologist with the VA took FMLA to bond with his infant child but was found to have been working at a private clinic for some of that time. Needless to say, he was removed, and the removal was affirmed by the AJ."

My personal favorite story of FMLA abuse involves the federal employee who took FMLA only to be discovered using his job-protected time off to act in a movie featuring the recently departed Bandit himself -- Burt Reynolds.

It's not just federal employees. The private sector stories are even more ludicrous. Employees have used FMLA to put on a new roof, do jail time, and finish Christmas shopping. In that last case, the employee's doctor cited the employee's need for "retail therapy."

The overall benefits of FMLA outweigh the challenges. But man, there are some serious challenges. Employees misuse FMLA in the most creative ways possible. You are the gatekeeper, and it's not an easy task.

As always, FELTG is here to help. Join us in early 2019 for the webinar series **Too Sick to Work: Absence Due to Illness**.

Also, you can register early for **Absence, Leave Abuse & Medical Issues Week**, which takes place on March 25-29, 2019 in Washington, DC. We have a star-studded cast of leave experts -- Deborah Hopkins, Katherine Atkinson, Meghan Droste, and the aforementioned Barbara Haga.
Gephart@FELTG.com

Open Enrollment Classes

Register now for these multi-day training events.

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December 3-7

https://feltg.com/open-enrollment/

Gender Disparities in Federal Sector Public Safety Occupations
By Meghan Droste

Summer is a slow time. I generally find that my office phone rings far less often during the summer and the pace of work is just a little different. It appears that the same may hold true for EEOC decisions. Checking for recent decisions to write this article, I found that either the EEOC did not issue any last month, or the folks at Lexis are a bit behind in posting them. Either way, my search for an update for you all led me away from OFO decisions and instead to the EEOC's June 2018 report *Recruitment & Hiring Gender Disparities in Public Safety Occupations*. While it might not seem like a page turner from the title (which, I would also add, should refer to sex rather than gender) the report genuinely is interesting.

The EEOC examined employment data for 10 public safety position categories at 14 agencies. The positions included correctional officers, park rangers, fire protection and prevention, and border patrol agents. The agencies included the Department of Agriculture, the Department of the Interior, the Department of Homeland Security, and the Environmental Protection Agency. The report examines both recent and historical hiring data for these positions at these agencies. The EEOC also conducted focus groups of representative female employees and individuals in the position to impact recruitment.

The Commission found a 1% decrease in the percentage of public safety positions held by women from 2012 to 2016, going from 14% to 13% across the relevant agencies. Customs and Border Patrol had the lowest number of female employees in the examined positions, with women comprising only 5% of border patrol agents, and no women serving in border protection interdiction positions. The Fish and Wildlife Service in contrast, received high praise from the EEOC. This agency, which I had the privilege of visiting last week, has implemented several outreach initiatives to recruit women. Sixty-six percent of their park rangers are women, a number that exceeds those for other agencies and the overall numbers in similar non-federal positions.

After reviewing the data, the EEOC presented several recommendations for improving recruitment of women for public safety positions. The suggested initiatives include expanding recruitment efforts to all-female colleges and universities, as well as increasing the visibility of female recruiters. The Commission also suggested developing outreach programs for elementary, middle and high school students to encourage a wide range of children to consider careers in public safety.

The summer sadly is over and the pace of work is starting to pick up in my office in a noticeable way. Even if you find yourself in the same position, I encourage you to take a few minutes to read the Commission's report. Droste@FELTG.com

Tips from the Other Side, Part 9
By Meghan Droste

No one — at least no one I know — likes to get in trouble. It's never fun to be caught in the act or to be called out for failing to meet expectations. When it looks like we have been caught, we tend to deflect: I didn't do it; and if I did, it wasn't really *that* bad; and no matter how bad it was, you can't punish me for it.

From what I remember, this rarely worked when I was a child, and it certainly does not work when arguing a case. Unfortunately, it seems that several agencies missed this memo when it comes to arguing that the EEOC does not have the authority to issue monetary sanctions.

In case after case, the Commission has shot down variations of the same argument when it comes to monetary sanctions. Several agencies have argued that the EEOC does not have the authority to order a federal agency to pay money to a complainant as a form of sanction in the administrative process.

These arguments generally center on the idea of sovereign immunity — the principle that a party may not sue the government without its consent. Agencies assert that the federal government has not waived sovereign immunity in a way that would permit it to use public money to pay a sanction in connection with an order from the EEOC.

The argument that sovereign immunity prevents the Commission — both administrative judges and the Office of Federal Operations — from ordering an agency to pay monetary sanctions goes back to at least 2005 with the case of *Matheny v. Department of Justice*, EEOC Req. No. 05A30373 (Apr. 21, 2005). In at least 11 other cases, agencies have asserted the same argument, including as recently as in the *Taylor Z. v. Department of the Army* decision from July EEOC Pet. No. 0420160037 (July 26, 2018). In every case, the Commission has rejected this argument outright and concluded that it has the authority to issue these sanctions.

This is a losing argument. Trust me. I cannot envision any circumstance in which the Commission is going to suddenly reverse its position on this issue. Please save yourself, and everyone else, the trouble and do not try this argument. You're not going to win and you will only succeed in wasting the time and resources of your agency, the complainant and the Commission.

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 Droste@FELTG.com.

Another Case Involving the Role of Agency Defense Counsel During the EEO Investigation
By Deborah Hopkins

For eons (OK, maybe not eons but it sure feels like it), the EEOC has issued decisions that discuss the importance of conducting impartial investigations. In these decisions, the Commission also shares its view of the role of agency defense counsel during EEO pre-complaint and investigation stages. The Commission has repeatedly held that agency defense counsel should *not* be involved in assisting supervisors during the pendency of these processes. Yet, the sanctions EEOC issues when agency OGC offices do become involved are so weak that, as Ernie Hadley wrote in this newsletter back in 2014, "it should give pause as to how serious the Commission really is about the issue."

Just a few weeks ago, the Commission tackled the topic yet again in *Josefina L. v. SSA*, EEOC Appeal No. 0120161760 (July 10, 2018). In this case, the complainant filed a complaint against her supervisor for harassment and discrimination based on sex and disability, alleging a number of discriminatory events that occurred over a 13-month period. You can read the case yourself if you want to get an idea of her claims, but I'll give you the punchline: Josefina didn't like it when her supervisor told her what to do, and she let him know that by using sarcasm and/or by not performing the job duties he told her to. The decision is mostly unremarkable, as the Commission found no discrimination based on the merits.

However, the Commission took time to address how an attorney in the agency's OGC worked closely with the accused supervisor (in the decision, he is referred to as S1) in developing his affidavit for the EEO investigator:

> In the email, Counsel told S1 it was great to have spoken with him that

> morning and requested that S1 provide a copy of his affidavit for review. In an email dated January 5, 2016, Counsel informed S1 that he was "the attorney assigned to assist" him with his affidavit for his EEO complaint, and he was working on revisions and should have them for S1 within the next few days. Counsel further directed S1 "not to discuss OGC's involvement in this case with the Investigator in any capacity," and to inform Counsel immediately if the investigator contacted him for other information. Additionally, in an email dated January 7, 2016 to S1, Counsel asked S1 to review OGC's proposed changes and comments about his draft affidavit statements. Counsel also directed S1 "not to cc [Counsel] on the correspondence to the investigator, or otherwise share [Counsel's] involvement in this matter," and to ensure that all his comments were deleted from the final version of his affidavit responses.

It's clear from the facts above that the attorney absolutely did not want his assistance to S1 to be known. Not good.

The Commission has previously held that an agency representative "should not have a role in shaping the testimony of the witnesses or the evidence gathered by the EEO Investigator." *See Tammy S. v. Dep't of Defense,* EEOC Appeal No. 0120084008 (June 6, 2014), *recon. denied*, EEOC Request No. 0520140438 (June 4, 2015). So it is not surprising that in *Josefina L.,* the Commission found "…that Agency counsel impermissibly interfered with the investigation… We determine that OGC's actions undermined the integrity of the EEO process by eroding the necessary separation of the investigative process from the Agency's defensive functions." The Commission also noted that this agency was recently sanctioned for similar conduct. *See Hortencia R. v. SSA*, EEOC Appeal No. 0120150228 (May 3, 2017). Strike two.

The Commission, finding improper interference, imposed sanctions on SSA in *Josefina L.*: EEO managers and OGC personnel were ordered to undergo training on the proper role of OGC in the EEO process. The Commission determined that "OGC's actions did not impact the investigation or the ultimate determination of Complainant's case to such an extent that a more severe sanction is warranted."

If you're thinking, "That's it?" you had a similar response as mine when I read this case. If EEOC considers this such a huge injustice, why are the sanctions so weak?

If agencies were to take the *Josefina L.* decision as an EEO policy, the accused supervisor would be hung out to dry with no help, unless he hired his own attorney to assist during the investigation stage. (A quick look at the Laffey Matrix tells you that's out of the question for most supervisors.) If agencies were to take the *Josefina L.* decision merely as a continued expression of the Commission's wish list or preference, they might not change anything in the way they provide assistance during the investigation.

As far as we are aware, there is no law or regulation that specifically prohibits all agency counsel from providing advice to supervisors during EEO proceedings. But Management Directive 110, Chapter 1, Section IV, says:

> Because the agency carries this responsibility of impartially processing discrimination complaints, conflicts of interest can arise when agency representatives in offices, programs, or divisions within the agency with a legal defensive role play a part in the impartial processing. This does not mean that any involvement in the EEO process by the Office of General Counsel or Office of Human Capital automatically creates a potential conflict, but instead **refers to impermissible involvement in the**

> **EEO process by those employees or units of employees designated to represent the agency in adversarial proceedings**. *See* *Complainant v. Dep't. of Defense*, EEOC Appeal No. 0120084008 (June 6, 2014) (finding that an agency representative should not interfere with the development of the EEO investigative record by "us[ing] the power of its office to intimidate a complainant or her witnesses"); *see also* *Rucker v. Dep't. of the Treasury*, EEOC Appeal No. 0120082225 (Feb. 4, 2011) (stating an agency "should be careful to avoid even the appearance that it is interfering with the EEO process.") [bold added]

I'm all for an impartial EEO investigation. After all, the law requires it, and it's only fair. When agency defense counsel is clearly looking to impact the investigation, we have a big problem and a violation of the law. But is impartiality automatically thrown out the window when an agency attorney assists an accused RMO through the process? Not automatically, but it should cause you to pause. Look at the bold text in MD-110. My read says that an attorney who will be defending the agency should not be involved, but it doesn't say another attorney cannot be involved. A federal supervisor is presumed to be acting on behalf of the agency, so why shouldn't *someone* in the agency (perhaps a different attorney, or an L/ER specialist not involved in agency defense) help the supervisor prepare to explain her actions to an investigator?

Is there a happy medium? What if agencies:

1. Build a wall around an attorney in OGC who can work with the supervisor during the investigation, and then do nothing else on the case (therefore, not become the agency's "representative"); or
2. Use an L/ER specialist to work with the supervisor in the investigation stage, so as not to mingle the defense role with the ongoing investigation; or
3. Hire outside counsel to work with the supervisor during the investigation stage, to assist in the development of the affidavit, and any other related matters.

Would those options make agencies more comfortable while simultaneously making EEOC happy? Your ideas and thoughts are welcome. Hopkins@FELTG.com

Summary Performance Ratings and PIP Initiation
By William Wiley

Here at FELTG, we invite seminar participants to address follow-up questions to us in case we were unclear in class, or simply if the old memory isn't working too well on a particular day. The following is a question we received recently from an attendee in our famous and fabulous *MSPB Law Week* seminar. Check out our website for the next offering of that program in your neighborhood: www.FELTG.com.

The question:

> Greetings! Hope all is well.
>
> I have a hypothetical question related to the training we recently had regarding firing employees who cannot perform acceptably in their positions.
>
> During your training, you walked us through the benefit of not marking an employee as 'Unacceptable' and simply proceeding with the PIP. Can you please explain that rationale again?
>
> Thank you.

Our tried and true FELTG-answer:

> No probelmo. Here's the logic tree:

1. If you PIP an employee, he cannot challenge your judgment that his performance is unacceptable. That determination and the PIP itself are outside the grievance and EEO complaint process (with the limited exception of reprisal and hostile environment complaints). He can challenge the result of the PIP if there is a failure to perform, but he cannot challenge the initiation of the evaluation period itself.

2. If the employee fails the PIP, you fire him. He can then appeal to an MSPB judge who will most likely affirm the removal. The MSPB appeal takes three to four months for the judge to adjudicate the removal appeal, then we're essentially done. There is a possible higher-level review by the Board and even by the courts, but the judge's decision is usually upheld all the way through the appellate process.

3. HOWEVER, if you give the employee an Unacceptable performance rating at the same time you PIP him, he can separately challenge that rating. He can file an EEO complaint, have your judgment that the performance was unacceptable investigated, get a Report of Investigation, file a formal complaint with EEOC, and eventually get a hearing before an EEOC judge and a decision as to whether the Unacceptable rating was justified. That process these days takes about four years.

If you give a rating commensurate with initiating the PIP, the eventual removal arguably could be set aside years later by some crazy EEOC judge ruling that the performance prior to the PIP was not unacceptable after all.

Trust me. You do not want this ugly mess on your hands. Just don't rate him. Initiate the PIP and it's a much more secure action. As we always teach, do no more than required by law when you are dealing with a problem employee. The more you do, the more you will have to be prepared to defend. And the more you have to defend, the greater is the chance that somebody somewhere in the review process will find fault with something you did.

If your CBA or agency's stupid policy requires that a summary rating of record be given at the same time you initiate a performance evaluation period, then you are stuck. However, that's hardly ever the case. Just initiate the PIP, wait 30 days, then propose to fire the employee if he does not perform to standard in all the elements of his performance.

This is sooooo easy if you know what you're doing. Wiley@FELTG.com

Our Most Popular Topic This Year
By William Wiley

When you're in a classroom as much as we are here at FELTG, you start to notice topics that come up from participants when they form a pattern or are repeated. The most asked-for repeated topic we've had so far this year is for a format for a Reprimand in Lieu of a Suspension.

If you've attended our classes, you know that here at FELTG, we're down on suspensions as a form of discipline. They hurt the agency sometimes more than they hurt the employee. On suspension days, the agency has to forgo the services of the suspended employee. Coworkers sometimes have to pick up the slack, not something that makes for a happy workplace. We even had a supervisor in a class earlier this year who said he had to spend nearly a thousand dollars in overtime to cover for a suspended employee. Why do these things if there's an alternative just as good without all the downside?

And that's where a Reprimand in Lieu of a Suspension comes into consideration. Experienced Employee Relations Specialists know how powerful progressive discipline can be when trying to defend firing an employee. As President Trump reinforced in his May 25 Executive order, progressive discipline is not mandatory, but as seasoned employment lawyers have learned, the Board gives a lot of weight to progressive discipline when evaluating the Douglas Factors relevant to a case.

Every GS-1 Employee Relations Specialist knows there are three steps to traditional progressive discipline:

1st offense – Reprimand
2nd offense – Suspension
3rd offense – Removal

The variation that we here at FELTG think is a great idea is to replace the suspension second-step with a Reprimand in Lieu of a Suspension. Here's how that would work:

1. First offense – Reprimand, as usual
2. Second offense –
   a. Propose a classic suspension.
   b. Then, after the employee has responded to the proposed suspension notice, the Deciding Official offers the employee a Reprimand in Lieu of a Suspension using the format below.
   c. If the employee accepts, you have avoided the workplace harm caused by a suspension, with the bonus that you will not have to deal with a grievance or EEO complaint.
3. Third offense – Remove as usual based on the two prior acts of discipline.

MSPB has recognized this alternative as equivalent to a suspension for many years now as long as the employee agrees to it (we've not seen the Board treat a unilaterally-imposed alternative in the same manner). if you're not using them, you're missing out on an employee-friendly management-supporting approach to discipline that can really make your life better.

We're just busting with cutting-edge ideas like this. Come to our seminars and learn even more.

(See template for Reprimand in Lieu of a Suspension Agreement on the next page).

MANAGING FEDERAL EMPLOYEE ACCOUNTABILITY
December 3-7, 2018
New Orleans

Attention all federal supervisors (and those who advise them). This is a program you can't afford to miss. Bill Wiley and Deborah Hopkins will cover a wide range of topics, including:

- Holding Employees Accountable for Performance and Conduct
- Supervising in a Unionized Environment
- Handing Employee Leave Issues
- The Manager's Role in EEO
- Essential Management and Communication Skills

As a bonus, supervisors who complete this training meet OPM's mandatory training requirements for new supervisors found at 5 CFR 412.202(b).

Registered participants will receive a copy of the textbook *UnCivil Servant*, the fourth edition, by Wiley and Hopkins.

For more information or to register, visit www.feltg.com.

Reprimand in Lieu of Suspension Agreement Format

[Letterhead]

From: [Deciding Official's name, title, and organizational location]
To: [Employee's name, title, series, and grade]
Subj: Decision Regarding Proposed [Suspension of X Days]
Date: [Month, day, and year]

On [date of proposal notice], your supervisor proposed to me that you be suspended based on certain charged misconduct. [If the employee responded to the proposal, note that here; e.g., "You responded both orally and/or in writing to the proposal."] I have considered the proposal and all information relevant to the charged misconduct, and it is my determination that discipline is warranted. However, because your suspension from the workplace would cause a hardship for the agency, I hereby offer you a Reprimand in Lieu of Suspension under the following conditions:

1. You commit to abstaining from any future acts of misconduct.
2. You acknowledge that this Reprimand in Lieu of Suspension is a step in progressive discipline and may be used as an aggravating factor in deciding the proper penalty should you engage in further misconduct.
3. You adopt this reprimand as a voluntary act on your part which you will not grieve nor otherwise challenge in any forum.

If you accept this offer of a Reprimand in Lieu of Suspension, please sign and return this memo to your supervisor by close of business tomorrow. If you choose not to accept this offer, I will issue my decision regarding the proposed suspension as soon as practicable.

_____
[Deciding Official's signature]

By my signature below, I, accept a Reprimand in Lieu of Suspension under the above conditions.

_____ _____
[Employee's name] Date