



## Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter

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# 19

### Celebrating 19 Years in 2019

As 2019 gets under way, we at FELTG are celebrating our 19<sup>th</sup> year in existence. That's right, way back in 2001, the idea for this little training company was hatched on the back of a cocktail napkin. Nearly two decades later, we are gearing up for our best year yet – if the government ever fully reopens, that is. That first year, the only training program we taught was a two-day version hitting the tops of MSPB, EEOC, and FLRA law. Today, we have weeklong programs on each of those topics multiple times a year, plus classes on investigations, legal writing, litigation, negotiation, supervisor skills, behavioral health issues, and more.

We know this year has gotten off to a bumpy start. EEOC and FLRA decisions are not being issued because of the shutdown, nor are MSPB initial decisions – not to mention the lack of a quorum at the Board. A number of you are furloughed, or are being required to work without pay. It can be hard to stay positive in such challenging times. Here's to hoping it all turns around soon and we can fully celebrate 2019 together.

Take care,  
Deb

### UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

#### ***Advanced Employee Relations***

Barbara Haga  
February 12 – February 14, 2019  
San Diego, CA

#### ***Developing and Defending Discipline***

Deborah Hopkins  
Dwight Lewis  
February 26 – February 28, 2019  
Oklahoma City, OK

#### ***MSPB Law Week***

Deborah Hopkins  
William Wiley  
March 11 – March 15, 2019  
Washington, DC

#### ***Absence, Leave Abuse, & Medical Issues Week***

Deborah Hopkins  
Barbara Haga  
Katherine Atkinson  
Meghan Droste  
March 25 – March 29, 2019  
Washington, DC

#### ***EEOC Law Week***

Ernest Hadley  
Katherine Atkinson  
Meghan Droste  
April 1 – April 5, 2019  
Washington, DC

## ***The State of the Civil Service:***

***January 2019***

**By Deborah Hopkins**



We're just over three weeks into the new year and it's safe to say, the state of the civil service hasn't seen darker days in quite some time – if ever. There has been a lot happening (and a lot NOT happening, unfortunately), and with the ever-shortened news cycles, there's a chance that blink-and-you-might-miss-it information may have passed you by.

Let's take a look at where we are, and where we might be going, as it relates to our loyal FELTG readers.

### **The Longest Shutdown Ever**

Supposedly only 25 percent of the federal government is shut down, but it sure feels like a lot more, doesn't it? If you're furloughed and about to miss your second paycheck, or if you've been working for a month without getting paid, you feel the pain more each day. Contractors are getting crushed from the lack of business, as are restaurants and other business owners who rely on federal employees to keep afloat. And those of you whose agencies have been operational have also had to deal with some headaches, including rumors of travel restrictions that end up being just rumors, cancelled conferences and events, and plummeting morale among federal employees.

#### **Advanced Employee Relations**

Attention Employee Relations Specialists: It's great to know the basics, but the basics don't always help when you're facing those really challenging situations. Take your ER skills to the next level with Barbara Haga during FELTG's [Advanced Employee Relations](#) in San Diego, February 12-14, 2019. Great training. Great instructor. Great location.

It's ugly and I hope it ends soon. I know more than a few federal employees who are done waiting on this to be resolved and have decided to seek employment in the private sector. That's a shame because these are wonderful, brilliant, amazing people whose departures will be a huge loss to the government.

### **Congress**

Despite the lack of meaningful movement on the aforementioned shutdown, the House recently passed a bill (originally introduced in 2017) that addresses discrimination and sexual harassment in federal agencies. [The Federal Antidiscrimination Act](#) amends the NO FEAR Act and clarifies that the role of agency EEO offices shall operate independently of HR and OGC. OK that's fine, no big deal, right?

Just wait. Further on down, you'll see that the law would require the EEOC to inform the U.S. Office of Special Counsel (OSC) of all findings of discrimination or retaliation in its appeals. OSC will then review the case for the purposes of seeking disciplinary action against the employee who engaged in discrimination or reprisal. From my read, it looks like agencies will not be allowed to discipline that employee once OSC gets involved, effectively leaving the decision on how to discipline up to OSC and not the agency.

This bill moves on to the Senate next, so we'll see what those 100 folks on the hill have to say about it all.

### **MSPB**

January 7 marked two full years since MSPB had a quorum. That's two years of Petitions for Review stacking up, day after day, added to the pile that can't be issued as Opinions & Orders because the sole member, Acting Chairman Mark Robbins, needs at least one other member to make a quorum and issue decisions. Our estimates are somewhere between 1,600 and 1,700 PFRs waiting to be addressed.

You might remember, late last November the Senate Committee had a scheduled vote on the nominees the President had put forward. Senator Rand Paul refused to cast the vote that would have advanced them out of the committee and to the full Senate for a vote.

Well, if the news couldn't be any stranger, last week the President re-nominated the very same three people to be Board members: Dennis Dean Kirk, Andrew Maunz, and Julia Akins Clark. At FELTG, we were scratching our heads and wondering what the heck was going on because Senator Paul is still on the committee. While the committee is made up of 8 Republicans and 7 Democrats, a "no" vote by Senator Paul would result in a 7-7 tie and the nominees would not be advanced. If he decides to abstain, then the Republicans would have a one-vote advantage and the nominees would be advanced to the full Senate for a vote, where the Republicans have a 53-47 advantage. Or, maybe a Democrat or two on the committee plans to vote "yea" as was almost always the case in these types of bi-partisan boards and commissions until very recently.

Who knows? We can't predict the future but we WILL keep you posted.

### **EEOC**

Amid all the shutdown talk, did you happen to see that EEOC no longer has a quorum of Commissioners? That's right, out of a five-member commission only two remain because Commissioner Chai Feldblum was not re-confirmed. (*Look elsewhere in this newsletter for details about that.*) Last week the President re-nominated one person, Janet Dhillon, to serve as Commissioner but as of this writing, no confirmation hearing was scheduled.

The good(ish) news for you is that the lack of quorum at EEOC doesn't have much impact at all on federal employees. The Office of Federal Operations, which is responsible for issuing decisions on EEOC Appeals, is still functional and Administrative Judges are still

issuing decisions. Well, except not really ... they're all furloughed for now. So, if the government re-opens, EEOC will be mostly business as usual, besides, of course, the calendar nightmare of a month's worth of missed hearings, pre-hearing conferences, etc.

### **FLRA**

Chairman Colleen Duffy Kiko, who heads up the Federal Labor Relations Authority, recently decertified the employee union at FLRA. She reasoned that by having a union at FLRA, the agency was actually violating the labor relations statute it was created to enforce; because employees at FLRA work with federal labor relations law they should be excluded from being in a union, per the language of the statute. How about that? Our friends over at FedSmith have [written about this](#) in detail, if you're interested in the nitty gritty.

### **OPM**

The federal government's central HR office, while itself partially impacted by the furlough, has offered some guidance on this (ridiculous) shutdown, including topics such as what happens to leave accrual for furloughed employees (spoiler alert: it stops) and how healthcare and retirement benefits are impacted.

Late in December, you may have seen that OPM posted template letters for federal employees impacted by the shutdown – letters that requested landlords allow tenants to barter services such as painting and landscaping in exchange for reduced rent. As you can imagine, it did not go over well, and OPM quickly withdrew the letters, stating that they were posted by mistake.

### **OSC**

The U.S. Office of Special Counsel (not to be confused with Special Counsel Robert Mueller's team) is closed during the shutdown. Its website has still been accepting online complaints but a disclaimer states that the complaints likely won't be reviewed until after OSC reopens. So,

whistleblowers can file but they won't see an investigation until this all ends.

**Unions**

The federal unions, including NTEU, NATCA, and AFGE, are keeping busy with a lot to challenge, most specifically the fact that nearly half a million federal employees have been required to work without pay for almost a month. I saw an argument in a district court filing that said the requirement to work without pay was akin to involuntary servitude, which is a violation of the Thirteenth Amendment's prohibition against slavery. NTEU is also challenging the recalls to work that were more recently issued to more than 40,000 IRS employees who were not considered essential in December but are being required to work without pay now.

So, there you have it. People usually start a new year with excitement and hope, but this one is sure giving us all some challenges.

At FELTG, we are doing our best to stay positive and stay available to answer your questions, provide you with content, and even do some training while we wait for the world to right itself again.

Take care, my friends.  
[Hopkins@FELTG.com](mailto:Hopkins@FELTG.com)

**Out of Control**  
**By Barbara Haga**



After my last column regarding off-duty misconduct that resulted in removal, I thought it might be worthwhile to look at other cases with related types of situations where, on first glance, it might appear that there were not sufficient grounds to support an adverse action. There are two that I want to address this month. Both are about employees who were removed basically because management lost trust in their

ability to control themselves if confronted with stressful situations. Both employees were removed for conduct unbecoming.

**Unfaithful Husband and Service Revolver**

In *Mahan v. Treasury*, AT-0752-99-0749-I-1 (2001), a GS-13 IRS Criminal Investigator was removed as a result of an incident where she discharged her service revolver in her home. The situation arose when Mahan returned home from a trip and found a "sexually explicit" love letter written to her husband (Horne) by another woman. She took her government-issued .38 Smith and Wesson from the nightstand as Horne was returning to the house. She hid the gun in the waistband of her pants. At that point, she confronted Horne in the kitchen about the letter. During the ensuing argument, she fired the revolver in the kitchen. Horne agreed to leave (the house was hers prior to their marriage) and walked from the kitchen into the garage. She fired another shot into the floor at the bottom of the steps leading to the garage. After that she locked the door and called 911.

The police responded, and based on their questioning, they determined that she should be arrested on a charge of assault. The police notified IRS management of the arrest.

The IRS removed Mahan on two charges:

- 1) Conduct unbecoming an agency employee when she fired two rounds in the general direction of her husband using a government-issued weapon.
- 2) Failure to properly account for government property (which apparently had something to do with not properly accounting for the service revolver on multiple custody receipts).

Join FELTG President Deborah Hopkins and former EEOC Chief AJ Dwight Lewis for [Developing and Defending Discipline: Holding Federal Employees Accountable](#) February 26-28, 2019 in Oklahoma City.

The AJ sustained both charges, but mitigated the penalty to a demotion to the highest non-supervisory, non-law-enforcement position she was qualified for. The Board, however, reinstated the removal.

### **A Spanking Incident**

This case is *Doe v. Navy*, AT-0752-15-0206-I-1 (2016). Doe was a security specialist at the Naval Air Station in Milton, Fla. He was removed because his 4-year-old son had “extreme” bruising due to an alleged spanking by his father. A household nanny reported the incident to local police and the Florida Department of Children and Families (DCF). Doe was arrested for aggravated child abuse. DCF conducted a medical exam which documented extreme bruising to the child’s back, buttocks, hamstring and calves.

Doe admitted that he hit the child with a belt during the relevant period because the child had been violent with a teacher. Doe also told the child not to say anything about his injuries, and that instruction to the child was documented in the police report. There were three charges in the notice:

- 1) Conduct unbecoming (related to the spanking incident),
- 2) Lack of candor (regarding termination with a private company which he omitted from his resume and OF-306), and
- 3) Failure to follow leave-requesting procedures.

The AJ upheld the first two offenses, but not the third related to the leave procedures.

Even though not all of the charges were sustained, the AJ upheld the removal and the Board affirmed.

### **Common Themes/Lessons Learned**

In both cases, the employees were in responsible positions where they needed to be able to respond appropriately in emergencies. Mahan, as a criminal investigator, was in a position that required knowledge of criminal investigative techniques, rules of criminal procedures, laws, and precedential court decisions concerning the admissibility of evidence,

constitutional rights, search and seizure, and related issues in the conduct of investigations. Investigating crimes could be dangerous work, since she was issued a service weapon to use in the course of fulfilling those duties. According to the deciding official’s testimony, Doe’s job required him to ensure that the installation maintained adequate physical security and that Doe would be expected to obtain a weapon from the agency’s armory and repel any attack on the installation. This level of responsibility was important in the discussion of nexus.

In both cases, the deciding official’s testimony about loss of confidence was key. In *Mahan*, the DO testified that “the appellant displayed extremely poor judgment in discharging her revolver without provocation or justification.” In the *Doe* decision the AJ found that nexus was established because the Doe’s actions caused management to lose faith in his ability to provide a measured response to stressful situations as he completed his central duties of ensuring security. The DO testified that “...the appellant’s misconduct with his son caused him to question the appellant’s ‘composure’ and his ability to control his emotions in connection with his responsibility for protecting people.”

The events that led to the removals involved off-duty criminal actions, arrests, and questions from the appellants about whether the off-duty misconduct met the states’ definitions of the crimes. Mahan raised a self-defense claim in her initial appeal; however, the AJ found that she fired her weapon in anger and to scare her husband into leaving, not that she was in fear that he might do her bodily harm.

In her PFR, Mahan argued that the IRS should have been required to apply the criminal law of the State of Tennessee to her claim of self-defense. The MSPB stated that she was charged with conduct unbecoming and thus the law of Tennessee was immaterial to that charge.



Doe argued in his PFR that the Navy should have been required to prove the elements of Florida's aggravated child abuse statute to sustain the conduct unbecoming charge. Doe was arrested, but not criminally prosecuted for his actions. Doe characterized that as the prosecutor not wanting to pursue the case because of scant evidence, but in his testimony, Doe had said that he agreed to a pre-trial intervention program to resolve the situation because the state was not willing to drop the case otherwise. The Board ruled that he was charged with conduct unbecoming a security specialist, not with the commission of aggravated child abuse or any other criminal offense, and so the charge stood. Both agencies successfully managed to stay out of that quagmire by properly charging the underlying actions and not the arrests/criminal charges, and by making sure that the DOs stuck to the underlying actions and did not raise the arrests/criminal charges in their testimony.

Unlike last month's case, these are full Board decisions, although Doe is characterized as non-precedential, or in other words it doesn't tell us anything new. What is important for practitioners is that the removal charges in both cases were found within the bounds of reasonableness. Mahan had 18 years of service and no prior discipline, yet the Board restored the removal action. Member Slavet's concurring opinion in that decision highlighted several considerations about the events related to the shooting, such as it was an emotionally charged domestic incident, no members of the general public were endangered, Mahan alerted the authorities herself, etc. However, despite all of that, Member Slavet stated, "...although I believe the penalty imposed by the agency was harsh, it did not amount of an abuse of the agency's discretion." [Haga@FELTG.com](mailto:Haga@FELTG.com)

Have a question? Need help with a "hypothetical" situation? Try our new feature [Ask FELTG](#). Leave your question and we'll answer it in a future News Flash or FELTG Newsletter.

## ***Irony and the EEOC: You Have to Read It to Believe It***

**By Deborah Hopkins**

The Equal Employment Opportunity Commission is now without a quorum. That's right. As if no quorum at MSPB for more than two years wasn't enough, and a multi-week government shutdown didn't do it for you, EEOC is now helmed by only two out of a possible five Commissioners. Who's left over there? Victoria Lipnic, a Republican, is the acting chair. Charlotte Burrows, a Democrat, is the only other remaining Commissioner.

*But Deb, I thought the President reappointed Commissioner Chai Feldblum a year ago, to serve a third term?*

Yes, In fact, he did. However, a few days ago, Commissioner Feldblum's tenure at the EEOC ended. The reason? Senator Mike Lee (R-UT), has stated that he does not agree with Commissioner Feldblum's positions on marriage and LGBTQ rights.

Nominations to EEOC are generally passed as a group by unanimous bipartisan consent, but Senator Lee made clear he would not vote yes to the confirmation.

The only other way Commissioner Feldblum could have been confirmed, then, would have been for Senate Majority leader Mitch McConnell (R-KY), to call for a full Senate vote – something he refused to do. The result? The nomination died.

Let me be clear: Senator Lee did not ever directly mention Commissioner Feldblum's sexual orientation in his comments but rather focused his criticism on her views about same-sex marriage. But it is widely known that Commissioner Feldblum was the first open lesbian on the Commission, and spent a large part of her tenure advocating for workplace protections for LGBTQ individuals inside and outside the federal government.

While she served under the Obama administration, Commissioner Feldblum was

involved in two groundbreaking cases: *Macy v. Attorney General*, EEOC Appeal No. 0120120821 (2012), which stated that a federal employee's transgender status is protected under Title VII's prohibition against sex discrimination; and *Baldwin v. FAA*, EEOC Appeal No. 0120133080 (2015), which stated that a federal employee's sexual orientation is protected under Title VII. A number of federal district and appeals courts have ruled in the same manner for employees of private companies, though there is currently a circuit split on the issue.

Ironic, isn't it, that more 2 million federal employees and countless private employees now have protections under the law for LGBTQ status – due in large part to Commissioner Feldblum's tireless work – and now she has been essentially fired for the very same status she fought so hard to protect. And as a political appointee, she has no rights to appeal.

Commissioner Feldblum was also an advocate for disability rights, and co-chaired a bipartisan task force on sexual harassment at the EEOC. She also spoke at numerous EXCEL conferences and even worked with FELTG on a webinar discussing transgender discrimination and harassment. I can say without a doubt in my mind, that her voice on the Commission will be greatly missed.

So what now? Not only is Commissioner Feldblum out of a job (though not for long, I'd guess), EEOC now lacks a quorum. While AJ decisions are still being issued and federal sector EEO appeals are still able to be processed (after the shutdown, that is), some of the Commission's work will be halted until there are at least three Commissioners seated. The EEOC may not be able to bring certain cases that would be costly, would have a broad reach or affect large numbers of people, or would consider a new question of the law or its interpretation. Other work may be delegated to the regional offices.

Though the impact of a lack of quorum is less significant on the day-to-day operations of

federal workers, it's still a source of frustration and not the way the agency was ever intended to operate.

What is happening in the world of federal employment law – and will the madness ever end? [Hopkins@FELTG.com](mailto:Hopkins@FELTG.com)

### ***(The EEO) Process Is My Valentine*** By Meghan Droste



Happy new year, FELTG readers! If any of you are looking for new things to pick up in the new year, I strongly recommend podcasts. If you already listen to some, pick out a new show. I am lucky enough to be able to walk to work, and I listen to a variety of podcasts during my commute. By the time I arrive at the office, I feel very accomplished, I've gotten exercise, and I've learned something from one of my (somewhat nerdy) podcasts. The title of this article comes from one of the more recent additions to my rotation, a podcast hosted by three women from the national security field who unpack national security and defense issues with a side of pop culture. They regularly say that process is their valentine — meaning that following the established process is an important part of the development and implementation of any new policy or strategy. If we ignore the process, bad things can happen.

The Commission's decision in *Annalee D. v. General Services Administration*, EEOC App. No. 0120170991 (Oct. 10, 2018) is a good reminder of why the EEO process should be every agency's valentine. As anyone who has read a decision in which the EEOC granted sanctions against an agency can tell you, one of the most important factors in the Commission's view is the effect of the sanctionable conduct on the integrity of the EEO process. Part of the integrity of the process is that the investigation of a formal complaint must be impartial and should not be an adversarial process. As a result, there must be a firewall between the

EEO process and any subsequent defense of the agency if the complaint moves into litigation. Unfortunately, the agency in the *Annalee D.* case did not respect that part of the process.

As the Commission describes in its decision, an attorney from the agency's Office of General Counsel was present during the EEO investigator's interview of the complainant's supervisor. This attorney stated during the interview that she/he represented the supervisor (rather than the agency). The Commission also noted that attorneys for the agency "clearly assisted [a]gency witnesses with their affidavit responses during the investigation before they submitted responses to the investigator." The Commission found the agency's overall intrusion into the EEO process, which was apparently standard practice, was "extraordinarily bold and egregious."

The Commission ordered the agency to provide at least four hours of training to EEO personnel and the Office of General Counsel to remind them how to properly process complaints and the proper role of the agency's attorneys. In its decision, the Commission noted that the intrusion did not impact the outcome of the matter so it is reasonable to assume that the sanctions could have been more severe if it had. As an early valentine to your agency, you should consider reminding everyone about the importance of the integrity EEO process so you do not find yourself receiving sanctions instead of chocolates or flowers next month. [Droste@FELTG.com](mailto:Droste@FELTG.com)

***Tips From the Other Side: January 2019***  
**By Meghan Droste**

The first Tips from the Other Side for 2019 comes to you from one of my cases. One of my colleagues and I filed a formal complaint on behalf of a client last spring. We didn't hear a peep in response and after 180 days passed, we filed a request for hearing along with a motion for sanctions. In the motion,

we requested the Commission enter default judgment in favor of our client because the agency clearly failed to meet its deadline for investigating her complaint and issuing a report of investigation. After we filed the request for hearing and motion, the agency finally acknowledged receipt of the formal complaint and indicated that it would begin processing it.

I have seen this happen several times before — after a complainant requests a hearing, the agency, I assume in an attempt to mitigate its earlier inaction, jumps to investigate the claims. Unfortunately for the agency, it no longer has jurisdiction over the complaint once the complainant has

### 2019 SUPERVISOR SERIES

Register now for one, two, three or all of the webinars in our 2019 series – [Supervising Federal Employees: Managing Accountability and Defending Your Actions.](#)

1. **March 5:** Accountability for Performance and Conduct: The Foundation
2. **March 19:** Disciplining Federal Employees for Misconduct, Part I
3. **April 2:** Disciplining Federal Employees for Misconduct, Part II
4. **April 14:** Writing Effective Performance Plans
5. **April 30:** Preparing an Unacceptable Performance Case
6. **May 14:** Dealing with Poor Performing Employees
7. **May 28:** Mentoring a Multigenerational Workplace
8. **June 11:** Tackling Leave Issues I
9. **June 25:** Tackling Leave Issues II
10. **July 9:** Disability Accommodation in 60 Minutes
11. **July 23:** Intentional EEO Discrimination
12. **August 6:** Combating Hostile Work Environment Claims
13. **August 20:** EEO Reprisal: Handle It, Don't Fear It



requested a hearing. See *Jones-Sims v. U.S. Postal Serv.*, EEOC App. No. 01A50251 (March 15, 2006) (“Once a hearing request was made, the AJ had sole jurisdiction over the matter.”).

A complainant has no obligation to participate in the investigation at this point. See *Koch v. Sec. & Exchange Comm’n*, EEOC App. No. 01962676 (March 6, 1997) (“An agency may not require a complainant to continue to participate in the agency’s internal investigation of an EEO complaint after the expiration of 180 days from the filing of a complaint.”). If the complainant does not provide information the investigation may be of little value, as the other witnesses may not have much to respond to other than the basic outline of the claims in the formal complaint.

I understand the impulse to try to fix the situation by putting together something, but agencies should also keep in mind that once they have missed that 180-day deadline, they may face default judgment regardless of whether they have produced an ROI. If you find yourself in this situation, you should keep in mind that you should not dismiss the complaint if the complainant refuses to participate and you should start thinking about what your response will be if asked why the Commission should not issue sanctions for the untimely investigation. [Droste@FELTG.com](mailto:Droste@FELTG.com)

***Robbins in Two Roles is Fascinating, but Is It a Potential Conflict?***  
**By William Wiley**



While everybody was focused on the shutdown and the holidays, there was a fascinating, and frankly head-scratching, development involving MSPB Acting Chairman Mark Robbins. On December 21, 2018, OPM’s Acting Director Margaret Weichert announced that Mark Robbins will serve as

the new General Counsel for OPM. This in itself was not a shock. Robbins previously served as OPM General Counsel from 2001-2006, and it was expected that he’d return there once his MSPB tenure ended in March. However, Weichert’s announcement coincided with President Trump’s memorandum directing Robbins to serve concurrently as OPM General Counsel and Acting Chairman of the MSPB.

I cannot understand the rationale. Maybe there’s some need within OPM for there to be a Presidentially appointed General Counsel and Robbins was moved in earlier than he would be otherwise. I see no benefit to doing this from what I know historically. Is there a conflict created by holding these two positions?

As we all know, the MSPB has been without a quorum for over two years. With Robbins as the only current member, the Board has been unable to issue any decisions. However, recent news articles have reported that Robbins has been voting on cases. That is, he’s expressing his opinion as to whether the judge’s decision should be affirmed or modified. As a practical matter, that means that on top of each file for each appeal now pending at MSPB, there is at least a signature from Robbins agreeing with the judge or a legal note arguing why the judge’s decision should be modified. He has expressed his opinion as to the proper outcome. If another member were appointed while Robbins was still in office, the new member could vote in agreement with Robbins after considering Robbins’s action on the case, or express disagreement.

It now appears that there will not be a new member to concur or dissent from Robbins’s opinions before his term expires. Therefore, his work has no legal value. However, I seem to remember Robbins expressing in an interview that he hoped his opinions would be of value to the new members when they arrive. If that is correct, then it WOULD be a conflict if he continues to express an opinion in pending appeals. Here’s why:

1. When MSPB issues a decision, the appellant who doesn't agree with it can appeal to federal court.
2. However, if the agency doesn't agree with the decision, it cannot go directly to court. Instead, it has to go through the GC's office at OPM. Only if that office concludes that MSPB's decision has significant government-wide impact can the matter then be referred to the Department of Justice, who files a petition challenging the Board's decision in federal court.
3. If Robbins were to a) express an opinion on cases now pending at MSPB, and b) the new members were to be swayed by that opinion after he's gone, then c) it could be argued that he would be in a position at OPM to decide whether the case could be appealed to federal court.

Here's a hypothetical: An agency fires an employee for off-duty sexual misconduct. It's a close call, but the judge concludes that there is a nexus between the off-duty conduct and the government job, maybe because the misconduct occurred in government-supplied housing. The judge upholds the agency's removal. Robbins reviews the employee's PFR that challenges the judge's nexus finding, and concludes the judge was wrong. Robbins drafts a legal note arguing compellingly that this particular type of off-duty conduct does not support a nexus finding. He argues that the Board should set aside the removal.

New Board members read Robbins's argument, are swayed by his opinion, and issue a decision finding no nexus. The agency wants to appeal the issue to federal court. They now have to go through OPM's GC for approval. Robbins would be in a position to block the agency's appeal if he were to conclude that the matter does not have government-wide significance.

Of course, this will not be a concern if Robbins recuses from making these sorts of decisions on behalf of OPM. Or, if the new

members decline to consider any of Robbins' leftover legal notes.

And, my comment here should in no way be taken as the casting of an aspersion toward Chairman Robbins. It is not his character that is an issue, but rather the potential appearance of a conflict created by the duality of the appointment. Sometimes, even good people can be put in bad situations. [Wiley@FELTG.com](mailto:Wiley@FELTG.com)

### ***The Oscars are Here, So Let's Talk About Douglas Factor 10*** **By Dan Gephart**



It's Academy Award season. The glitz, the glamour. The flubs, the snubs. The perpetual parade of praise and the incessant asking of the one question that truly grates on me: Who are you wearing? And then it's all followed the day after the show by column after column criticizing the show's host. That last part may change this year only because, as of now, there is no host.

Kevin Hart was supposed to host. The Philadelphia-born comedian came under scrutiny when homophobic jokes made several years ago resurfaced. So he backed out of the hosting gig. Hart isn't the only public figure to suddenly face fire for old tweets, comments, or jokes. The Atlanta Braves' 25-year-old pitcher Sean Newcomb was basking in the glory of a near no-hitter last season when someone started sharing the racist, homophobic, and sexist comments he tweeted as a teenager. Kyler Murray spent the hours after winning this year's Heisman Trophy, apologizing for anti-gay slurs he tweeted at friends when he was 15. There are many more public figures who have had to walk back prior tweets, statements, or jokes in recent months.

Hart, Newcomb, and Murray showed the expected disgust of their previous selves,

saying they've "grown" and "changed" and that the old comments "didn't reflect the kind of person" they are now.

This got me to thinking: How do we know that they've changed, and they are not just saying it because they've been exposed? And I wondered how this would be handled if we were talking about workplace misconduct. This, of course, got me to thinking about the Douglas Factors, specifically the tenth one -- potential for rehabilitation.

Isn't rehabilitation potential what Hart, Newcomb, and Murray are laying claim to? *Look, we know we've said horrible things in the past, but we're different now, and it won't happen again.* Immediate apologies and sincere remorse are two of the strongest mitigating factors for rehabilitation potential.

In *Wentz v. USPS*, 91 MSPR 176, the MSPB named "taking prompt responsibility for the actions" and "giving assurances that the misconduct would not occur in the future" as two indicators of positive rehabilitation. The others include:

- Having a discipline-free service of more than 10 years
- Having a good work ethic
- Immediately reporting the misconduct
  - For example, reporting an accident caused by negligence
- Seeking medical assistance for medical-related misconduct

On the other hand, the MSPB has found several times that an employee's defensiveness when confronted with a charge of misconduct reflects a poor rehabilitation potential. But even defensiveness can be overcome when the employee acknowledges wrongdoing, expresses remorse and assures that the conduct won't be repeated. *Von Muller v. DoE*, 2006 MSPB; *Chavez v. SBA*, 2014 MSPB 37.

If only all acts of misconduct were so clear-cut. Determining a person's authenticity,

especially when it comes to remorse, is usually not that easy. It can and has been faked.

Really listen closely to the sincerity of an apology. Does the employee take blame for every piece of his or her act? Is there some shifting of blame, or any hedging taking place?

An Academy Awards gig, product endorsements, or NFL draft status might not be on the line when you're making discipline decisions. But an employee's job is. And so is the efficiency of the workplace. Only by thoroughly analyzing all of the Douglas Factors, including the potential for rehabilitation, can you make the right decision.

And if you get it wrong, guess what? There's a good chance you'll be doing it all again in the near future. [Gephart@FELTG.com](mailto:Gephart@FELTG.com)

#### Upcoming FELTG Webinars

##### **Tsk-Tsk Tech: Computer-related Misconduct in the Federal Workplace**

Barbara Haga  
February 26, 2019

##### **Writing Effective Summary Judgments for the EEO**

Meghan Droste  
March 7, 2019

##### **Think Before You Meet: Identifying Weingarten and Formal Discussions with Union Employees**

Joe Schimansky  
March 25, 2019

##### **The Reassignment Riddle: How, When and Why to Use This Management Tool**

Ann Boehm  
April 11, 2019

***The Graying of the Federal Workforce***  
**By Jennifer Johnson and George Woods**

Like many things in life over which we have little control, aging is an inevitable consequence of living. By the year 2030, one in five Americans will be older than age 65, according to the U.S. Census Bureau. Along with the graying of America, we have an aging workforce because people are working longer than ever before. Reasons for this are quite simple: People are working longer because they have to, because they want to, and because they can. Unlike any other time in America's history, there are multiple generations working side by side in a single work environment. Just what does this mean for federal agencies?

FELTG will be exploring this subject in a March 26 webinar [Aging and Cognition: The Graying of the Civil Service](#), in which we'll discuss the neurobiology of aging by looking at the structural, chemical and functional changes that take place in the brain as we grow older. We will look at the characteristics of aging and cognitive function, and identify both risk factors and protective factors that influence cognitive aging. We will also look at how those biological changes translate to everyday life, especially in the workplace.

Attention is the human ability to focus on information. There are multiple types of attention. Like attention, memory is similarly nuanced. Memory has been understood historically by dividing into two types — "short-term" and "long-term." However, memory is much more complicated and includes categories such as working memory, semantic long-term memory, procedural memory, and episodic memory. Each type of memory plays an important part in everyday life and relates directly to workplace issues.

Age still holds a tremendous stigma in the workplace. Stereotypes about aging and age-related decline in the workplace are more prevalent and acceptable than similar stereotypes about race and gender.

Understanding whether a person who is experiencing age-related decline in work performance is both sensitive and uncomfortable. Often, that individual is not aware of the deficits, or may be unwilling or afraid to disclose impairment to a supervisor or colleague. Managers may not understand the difference between pathological aging and nonpathological aging, and falsely attribute certain behaviors to age rather than other factors. The legal costs for such mistakes can be very high. We should be able to recognize barriers to confronting the issue of aging in the workplace and look for solutions to maximize the skills and talents of older workers.

While we cannot stop the relentless march of time, we can and we should embrace the benefits that come with an aging workforce. By better understanding how aging affects how we live and work, we can better suit federal workers to the tasks of a job, capitalize on years of experience and expertise, and learn to create a thriving and diverse workforce that may have five generations working together in a single agency.

*Jennifer Johnson is an attorney and George Woods, MD, is a geriatric neuropsychiatrist.*

**Absence, Leave Abuse, Medical Issues**

Federal employees enjoy a wide variety of leave-related benefits. However, many of us would never use the words "enjoy" and "leave" so closely together.

Whether you're an HR professional, employee relations practitioner, EEO specialist or agency counsel, you have undoubtedly faced a leave-related challenge. FELTG's [Absence, Leave Abuse & Medical Issues Week](#) will give you the critical foundation you need to address the most complex areas of federal employment law.

The five-day program will be held in Washington, DC, March 25-29, 2019. [Register now.](#)