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

FELTG Newsletter Vol. XI, Issue 2 February 13, 2019

We Might Get an MSPB Soon (!)

February 2019 marks the 25th month the MSPB has been without a quorum. That means, for the past 25 months, agencies and (sometimes former) employees have been filing Petitions for Review on administrative judges' initial decisions, and those PFRs have been stacking up higher every day. In fact, the other day then number of PFRs hit 2,000. Talk about paperwork.

However, there might be relief in sight. At 10 a.m. today the Senate Committee on Homeland Security and Governmental Affairs will vote on two nominees to the Board (the Senate was informed last night that the nominee for Vice Chairman, Andrew Maunz, had withdrawn his name), and if what we are hearing is true, the nominees are expected to be voted through to the full Senate for a confirmation vote. I'll be there, watching live, and if anything exciting or unexpected happens we'll be sure to let you know. Interestingly, the committee is also going to look at a proposed amendment to the law which would allow the Acting Chair's one-year holdover status to be extended to two years, thereby giving more time to schedule a full Senate vote and guaranteeing the MSPB would not be shut down on March 1 when the Acting Chair's term expires. These are crazy times, indeed, and we're waiting along with you to see what happens. In the meantime, there's some reading to do. We hope you enjoy.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

Developing and Defending Discipline
February 26 – February 28, 2019
Oklahoma City, OK

MSPB Law Week
March 11 – March 15, 2019
Washington, DC

Absence, Leave Abuse, & Medical Issues Week
March 25 – March 29, 2019
Washington, DC

EEOC Law Week
April 1 – April 5, 2019
Washington, DC

Advanced Employee Relations
April 30 – May 2, 2019
Washington, DC

Workplace Investigations Week
May 13 – May 17, 2019
Denver, CO

Developing & Defending Discipline
May 14 – May 16, 2019
Denver, CO

MSPB Law Week
June 3 – June 7, 2019
Dallas

Can You Fire a Federal Employee Who Accidentally Eats a Pot Brownie?
By Deborah Hopkins

We know intentional marijuana use, even for medicinal purposes, is a no-no for federal employees (see my recent article here). But what happens to a federal employee who is fired for marijuana use after failing a drug test, when he challenges the removal by stating the intake of marijuana was *accidental*?

The Federal Circuit recently looked at that very issue in *Hansen v. DHS*, No. 2017-2584 (Fed. Cir. Dec. 28, 2018). Hansen, an IT Specialist at the United States Customs and Border Protection, was subjected to a random drug test, and the results showed marijuana in his system. The agency proposed his removal for "positive test for illegal drug use— marijuana." Regarding nexus, a portion of the proposal read "[t]he use of an illegal drug, such as marijuana, stands in direct conflict with the principles of law enforcement, the mission of the Agency, and the public's trust."

In his response to the proposal, Hansen said he had inadvertently consumed drug-laced brownies at a barbeque he had attended, which was hosted by someone he did not know. Hansen revealed that he wasn't initially aware the brownies had marijuana in them, and though he felt no immediate effects from the brownies, later that evening he felt tired and suffered an upset stomach. He attributed the upset stomach to a bratwurst he had consumed at the party, and as a result he called in sick the day after the barbecue.

The Deciding Official gave Hansen's response "significant consideration" but ultimately determined it was not convincing. In her explanation, the DO said the employee did not present "any evidence from either the person who purportedly brought the brownies, or from the host" or even "a statement from anyone else who either knew that the brownies contained marijuana or who did not know, but felt the effect of the drug." The DO subsequently removed Hansen.

Hansen appealed his removal to the MSPB, where it was upheld. The Board said that inadvertent marijuana ingestion would be relevant to its decision, if shown, but it determined that Hansen, not the government, bore the "burden of showing such inadvertent ingestion" and he did not show any evidence to convince the Board. The decision from the Board also said Hansen relied on "thirdhand hearsay" to support his story about marijuana in the brownies, and had not supplied "statements from the hosts, other attendees who observed the presence of the brownies, or the individuals who brought the brownies," or even any evidence confirming that he ate brownies at all.

The Board further noted that though Mr. Hansen claimed fatigue and upset stomach after consuming the brownies, he attributed those ailments to marijuana consumption only *after* the deciding official expressed skepticism regarding his lack of symptoms.

Hansen also argued that the removal should be reversed because the agency could not show his "intent" to use marijuana, but the Federal Circuit correctly said the charge as written did not have an intent element. The agency was not required to show intent; it was only required to show by preponderant evidence that the employee tested positive for marijuana. This highlights a fundamental principle we cover in MSPB Law Week and Developing and Defending Discipline: Words matter when drafting a disciplinary charge. Had the agency charged "intentional use of marijuana," then Hansen might very well be back at work today.

Hansen also argued that the agency violated his Fourth Amendment right against unlawful search and seizure by conducting the drug

test because the government failed to show that he occupied a testing designated position, This argument failed because the agency's "Drug-Free Federal Workplace Program" handbook listed employees with "access to the Customs Law Enforcement Automated Systems" as testing designated, and IT Specialists fall under that designation. The Federal Circuit upheld the removal.

If you're interested, you can read the full decision here. In the meantime, stay away from the brownies. Hopkins@FELTG.com

Why Not Taking Performance Actions is a Big Deal
By Barbara Haga

I am shaking my head again. I was told by a supervisor in a recent class that one of his supervisors had called the servicing HR office in December about initiating an opportunity period for an employee whose appraisal cycle ends on March 31. He was told that he was too late and couldn't do one.

I really am at a loss. This is a responsible non-bargaining unit position, the employee was relatively new in that job, although he had been a Federal employee for a few years, and they had a lot of examples of how the employee was not performing at the level necessary.

There is nothing in their appraisal system that sets any limits on when an action could be initiated. It is a mystery to me what would have been necessary to satisfy this HR practitioner that they could and should proceed.

Back to Basics

5 CFR 432.104, entitled "Addressing unacceptable performance," states:

> At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position.

The first phrase is relevant to this discussion. The regulation says "at any time" during the cycle. It doesn't say "at least 90 or 120 days before the end of the cycle" or "by some arbitrary date set by the HR office prior to the end of the cycle" or "the employee has to be warned at the progress review." It just says the employee may be notified at any point during the cycle.

I read the regulation in 430 to say that a cycle may be extended if needed in order to prepare a rating (which could include completing a PIP in my book). 5 CFR 430.208(g) states, "When a rating of record cannot be prepared at the time specified, the appraisal period shall be extended. Once the conditions necessary to complete a rating of record have been met, a rating of record shall be prepared as soon as practicable." My take is that a PIP could be initiated on the last day of the cycle. To me that's better than giving the employee (and I chose that verb for a reason) a rating they didn't earn. It's a gift that can come back to bite later.

MSPB Law Week in DC and Dallas

Don't miss out on one of FELTG's signature programs.

Join Deb Hopkins and Bill Wiley for MSPB Law Week in Washington, DC on March 11-15, 2019. We will also be bringing MSPB Law Week to Dallas, Texas June 3-7, 2019. For information on all of FELTG's open enrollment programs, click here.

The View from Outside HR and Legal

When HR practitioners advise, sometimes that advice can come back to roost in the future. If you advise managers not to take action or that they can't take action, sometimes they learn to stop calling you. They may reach the conclusion that the HR or Legal staff is not able to support them (or fill in unwilling, untrained, unmotivated, etc.)

Recent history would seem to tell us that this is the perception across government. Witness the OMB Directive M-17-22 issued on 04-12-2017 entitled "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce." While many were very excited about the second part of the title, I think there wasn't much attention paid to the part about reform. One portion of the directive had to do with performance. Section III, Para D iii directed agencies to "Develop a plan to improve the agency's ability to maximize employee performance." Agency responses were due at OMB by June 30, 2017. You can check and see what your agency did with it. The list of required actions included:

- Review policy, procedures, and guidance on how to address poor performance and conduct.
- Remove any unnecessary barriers to addressing performance, eliminating steps not required by statute or regulation.
- Set a date by which all supervisors will be provided a copy of rules and guidance regarding PIPs, including timing of PIPs and use of Chapter 75 procedures.
- Ensure all managers and HR staff are appropriately trained on managing employee performance and conduct.
- Establish real-time manager support to assist them in taking needed actions.

If that isn't a clear signal that the Administration perceives that HR practitioners are not doing what needs to be done, we could turn to Executive Order 13839, which echoed some of the same themes. Even though the two other EOs issued last May were largely enjoined by the DC Circuit decision from last August, very little in 13839 was found invalid. What did that order direct agencies to do regarding performance actions? Here's part of the list:

- Minimize burden on supervisors.
- Eliminate pre-demonstration period requirements.
- Eliminate any requirement to use 432 procedures and use 752 when appropriate.

I read these two documents to say that HR practitioners need to do a better job helping managers hold their employees accountable – whether it is drafting notices in a timely manner, not agreeing to extra steps with unions, or using the right tool for the problem.

If that weren't enough, the hits just keep coming. On July 16, 2018 a coalition of the Senior Executives Association, Federal Managers Association, and other manager associations provided input to House Oversight and Government Reform Government Operations Subcommittee on what they thought needed to be done to fix the civil service system. They had numerous recommendations, including implementing pay banding and merit pay, and also to:

- Eliminate the statutory requirement that creates Performance Improvement Plans (PIPs), and the really scary one …
- Provide funding for an online playbook with information on how to handle adverse actions, performance problems, improving employee morale, and other areas supervisors may need guidance.

Why are these manager groups asking for funding for an online tool to help them deal with their employee relations issues? Could it be that they don't think they are getting

good service from the human beings who presently are supposed to be providing these things? Could it be that they are tired of being told you can't do this or that? Could it be that it takes too long to get the actions prepared?

The Current Case

So, what about the manager who wanted to take action but was told he couldn't? The HR office may have thought they dodged an action, but this case is not going away. As it happens, the manager who asked about initiating the improvement period departed. A new supervisor is now in place dealing with this employee. I am convinced that this supervisor will persist in getting this person to perform or will take action.

However, the new manager is starting out behind the eight ball. Because the HR office advised that an action could not be initiated in December, that departing supervisor had to complete a close out rating. And, because according to HR nothing could be done to take this person to task for the poor performance, that rating was a Fully Successful (their system doesn't have a Level 2). Their system makes that close out rating the rating of record when there are not 90 days remaining in the cycle. So, the EPF is going to include an unearned Fully Successful rating for this year. The new supervisor will have to confront the inevitable questions if there is an action down the road about why this person was rated FS by the prior supervisor and why this employee's performance is not good enough anymore.

The bad advice from last fall is going to add extra complication for the manager and HR to resolve this situation down the road if there is a 432 action. This is sad – and completely unnecessary. 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 FELTG News Flash or FELTG Newsletter.

Affirmative Defenses 3: Too Little, Too Late

By Meghan Droste

Although the movie theater closest to where I live features reserved seating, small theaters, and upscale snacks, I have to admit that I don't see movies in the theaters all that often. So many of the big movies that come out every year are just the second, third or even seventh in a franchise. Call me a snob, but I would appreciate some original ideas from time to time. I try to apply a similar standard for these articles, focusing on different topics, or at least a new spin on a topic, each time. As you can probably guess from the title of this month's EEOC case update, I'm breaking my own rule. A pair of decisions the Commission issued last fall involving the issue of affirmative defenses — a topic I covered in articles on the *Jenna P.* case last April and November – were just too interesting to overlook.

In *Sallie M. v. U.S. Postal Service*, the complainant alleged that her supervisor subjected her to sexual harassment on a daily basis. *See* EEOC App. No. 0120172430 (Oct. 16, 2018). The harassment ultimately culminated with unwanted touching while the complainant was out on her postal delivery route. When the complainant reported the harassment, another supervisor told her that the harasser could be dangerous but apparently did not do anything else. After the complainant's union steward got involved, the agency placed the harasser in non-duty status and initiated an investigation. When the harasser then threatened to rape and kill her, the complainant asked the agency to move her to a different location for her safety. She expressed her willingness to go to any location other than the post office near the harasser's home. The agency then transferred her to that location in direct conflict with her request.

Although the agency placed the harasser in a non-duty status, investigated the allegations, and ultimately proposed the removal of the harasser, the Commission held that the agency could not successfully assert any affirmative defenses for several reasons. First, the agency failed to take any action when the complainant initially reported the harassment and the management officials denied knowing about the report in their EEO affidavits. The Commission found these denials lacked credibility, in large part because the management officials' responses to the EEO investigator were short and contained no details. Second, although the agency concluded its investigation within weeks of the union steward's report of the harassment, the agency waited another two weeks to issue a report and then another month a half to propose the harasser's removal. Finally, the Commission found that the agency failed to take proper action to prevent further harassment when it moved the complainant to a location closer to the harasser who had threatened her with physical harm. As a result, the Commission found the agency liable for the sexual harassment as well as for retaliation.

The Commission issued its decision in *Isidro A. v. U.S. Postal Service* on the same day as the *Sallie M.* case. *See* EEOC App. No. 0120182263 (Oct. 16, 2018). In *Isidro A.*, a manager used the n-word and the phrase "you people" during a staff meeting while referring to a group of African-American employees. The complainant and a union steward reported the comments within days of the meeting, but the agency did not initiate its investigation for another three weeks. The investigator issued a report less than two weeks later, finding that the manager admitted to making the statements. The agency waited another three months before issuing a proposed letter of warning in lieu of a 14-day suspension. Ultimately, the agency concluded that although the complainant had been harassed by the manager's comments, it was not liable because it took prompt and effective corrective action. The Commission rejected the agency's findings regarding the affirmative defenses. It found that the agency waited too long to initiate the investigation and too long to take any action after the investigator issued a report. The Commission also held that the proposed letter of warning was "a woefully inadequate response" to the harassment. As a result, the Commission concluded that the agency was liable for the harassment.

The main takeaway from these cases is that any corrective action should be prompt — remember waiting for a week or two to start an investigation is not prompt — and effective in correcting what happened and preventing any further harassment. These are key points not just to avoid liability, but also to ensure a productive and safe work environment. Droste@FELTG.com

The Good News
By Ann Boehm

I know, I know. How can there possibly be any good news after the 35-day government shutdown? But please hear me out.

Those who were required to work are exhausted, exasperated, and bummed that they did not have an opportunity to clean out closets and basements. Those who did not work are frustrated and feeling undervalued. Let's not forget the overdue bills and debts incurred when hundreds of thousands weren't paid for 35 days. Everybody is angry – and that's understandable. You should be.

During the 2013 shutdown, I was "essential," or whatever the buzzword of the day is for "having to work during a shutdown." I wasn't sure I would be essential, so I started a basement paneling painting project, expecting to have lots of time to see that to completion. But I was essential, so my "furlough project" became my evenings and weekends project.

There's always some relief in being essential, because you know you will get paid. But then Congress also pays the non-essential employees for the time they did not have to go to work. I will fully admit that I was bitter about having to work while others did not. And we all got paid the same. And my basement still had to be sanded, primed, and painted.

Why am I going over all of this?

To move forward as an effective body of federal government employees, everyone needs to acknowledge the frustrations felt by everyone else (except maybe Congress and the President, who haven't seemed particularly bothered by it) during and after this shutdown. Perhaps those who did get a substantial amount of paid time off can pick up some slack as they return and help those who had to work without pay. Maybe agencies can come up with creative ways of rewarding those who had to work. Maybe agencies can also figure out ways to show those who were non-essential that they are highly valued. Most importantly, everyone needs to be mindful of everyone else's needs. Federal employees need to work together to get this government back in shape.

Okay, Ann, you may be saying. Still waiting for the good news. Well here goes.

The American public is starting to realize that government employees are skilled, hard-working, and dedicated, and that they're critical to the nation's effectiveness. That is really good news.

As you know from our newsletters, federal employees have been a target for Congress and the President, and even the public. But you know the old adage: You don't know what you've got until it's gone. Now Congress is actually contemplating a 2.6 percent pay raise for 2019! Let's hope the good will and positive feelings toward Federal employees continue. We need that for federal workers and for the good of the country.

What else?

We at FELTG are here to help. Our instructors are available to assist the overworked among you. Along with the training we provide, we can serve as advisors, consultants, and even litigating attorneys. Need help reviewing discipline proposal and decision letters? We can do that. Need help reviewing investigative reports? We can do that too. Heck, we can even provide oversight and other assistance on performance-based actions and personnel litigation. Human resources professionals, counsel, and managers out there: If you need assistance to get moving again, we can help.

Also, join me for a 60-minute webinar Boosting Employee Morale: 10 Dos and Don'ts for Federal Managers. I'll share specific actions you can take to lead employees through these difficult times.

Any more good news? Yes. This article will be a regular feature of our newsletter. We want you to feel good about yourself and your jobs. We are going to make an effort to highlight what is going well in government—"The Good News." Feel free to share any stories with us by emailing me at Boehm@FELTG.com.

We know we often focus on the crazy judges, problem employees, missing MSBP members, and Congressional attacks, among other things, but we know there is good out there. You need to know those things. But with this column, you can stay tuned for more good news! Boehm@FELTG.com

Join Meghan Droste for the 90-minute webinar Writing Effective Summary Judgement Motions for the EEOC on March 7, 2019.

Tips from the Other Side: February 2019
By Meghan Droste

The EEO process, which should be your valentine, does not end when an agency issues a Report of Investigation. It often continues in front of an EEOC administrative judge, which means both sides spend a fair amount of time requesting, producing, and reviewing information in discovery. For the next few Tips from the Other Side, I am going to share some tips that should make the discovery process more efficient and less painful for you.

The first discovery tip is to avoid boilerplate objections. It is not enough to simply say that a request is vague, or overly broad, or unduly burdensome. If any of these things are true about a request from the other side, be sure to explain exactly what the issue is — what part of the request is vague, in what way (scope, time period, etc.) is the request overly broad, or why would responding to the request actually be burdensome? You should also keep in mind that a boilerplate objection that the requests are not likely to lead to the discovery of admissible evidence is not going to get you very far. *See Petty v. Dep't of Defense*, EEOC App. No. 01A24206 (July 11, 2003) (finding that objections about the likelihood of leading to admissible evidence are largely unhelpful and improper because "questions of evidentiary admissibility are rarely implicated in federal sector hearings").

Boilerplate objections are objectionable (yes, pun intended) for two main reasons. The first is that they are a waste of time. They do not assist the parties in resolving any discovery disputes and instead lead to unnecessary correspondence and motions that could be avoided with more meaningful objections. The second reason is that they may very well backfire against the party raising them. Some courts have held that not only will they overrule boilerplate objections, but they will also find that the party making them has waived all objections and therefore must respond fully to the original request. *See, e.g.*, *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 247 (M.D.N.C. 2010) ("By failing to present valid objections to these discovery requests, Plaintiff 'waived any legitimate objections [they] may have had.'"); *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL, 2005 U.S. Dist. LEXIS 16946, at *31 (D. Kan. Aug. 12, 2005) ("Defendant . . . fails to explain how the request is overly broad and any alleged overbreadth is not apparent on the face of the request. The court, then, must overrule the objection."). In order to preserve your right to object, as well as your time and resources, you should be as specific as possible in your objections. Leave the boilerplate language for the printing presses where the term may have originated. Droste@FELTG.com

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.

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

Performance Requirements and PIPs, Post-Shutdown
By Deborah Hopkins

The longest shutdown in history is over, but there is a threat of yet another shutdown coming up in just a couple of days. At FELTG, we've gotten a LOT of questions about the shutdown, including a number on shutdown-related employee performance issues. So I think it makes sense to address some of the questions, and answers that have arisen over the last 7 weeks or so.

Do you need to alter performance requirements after a shutdown?

Yes, No, Maybe.

Yes. Of course, you can't hold accountable any work that was not done during the shutdown; you essentially have to ignore the work that was not done and be reasonable in rating the employee's performance after she gets back to work. For example, let's say to be fully successful, one of the critical elements of the employee's performance plan requires the employee to return all customer voicemails within 24 hours. Well, if the voicemails had been piling up for 35 days while the government was shut down, it's completely unreasonable to require the employee to return every single call within 24 hours.

No. If the employee's performance plan is broken down into daily requirements that haven't been impacted by the shutdown, and the employee has not come back to a huge backlog, there may not be any need to alter the performance requirements. If an employee on the custodial staff is required to clean 10 offices each day, and those 10 offices have been empty for the last 35 days, you wouldn't need to alter the performance requirement.

Maybe. Let's use the example of custodial staff again, and those same 10 offices the employee is required to clean every day. If those offices had been used by essential personnel during the shutdown and after 35 days of not being cleaned they are atrocious and take 10 times as long to clean to the appropriate standard, then you may have to temporarily modify the performance requirements until things are back to normal.

The best idea is to communicate with your employees and set reasonable expectations for performance during this "dig out" period. When the backlog is cleared, let the employee know it's back to business as usual. Oh, and follow up the discussion with an email as documentation of what you discussed.

What do you do if an employee's Performance Improvement Plan was scheduled to start during the shutdown?

Oh, what a fun one. Remember, to put an employee on a PIP, you only need to be able to articulate a reason for doing so – that the employee fell below acceptable on at least one critical element of his performance plan. Therefore, you can put an employee on a PIP post-shutdown based on their performance leading up to December 21. If you had planned to launch a PIP January 2, but couldn't because the employee was furloughed, then you can start it any time you want, as long as you can articulate the reason for the deficient performance.

The only time you might want to re-think it is if your poor performing employee came back post-shutdown and has been a rock star for the last couple of weeks, outperforming everybody.

What do you do if an employee's Performance Improvement Plan was scheduled to end during the shutdown?

Unless there was only a day or two remaining in the PIP, you must extend the PIP by however many days were left in the PIP when the shutdown occurred, and you must ignore the period the government was shut down in the overall assessment of performance productivity. You will also need

to look closely at the PIP requirements and make adjustments as necessary, to reflect the legal requirement that you allow the employee an opportunity to demonstrate acceptable performance.

For example, let's say the employee had 15 days left on the PIP when the agency shut down. Now, you're picking up with the remaining 15 days on the 30-day PIP and perhaps setting new deadlines and goals for the weekly assignments you've laid out. (If you haven't done this, come to MSPB Law Week to learn why it's so important). You can't change or alter a performance standard, but you can clarify it. If the draft grant proposal was supposed to be completed by day 25 of the PIP, you'll let the employee know he has 10 days to finish that proposal. Be specific, be clear, to let the employee know what exactly is expected.

If the PIP was all but over, and was supposed to end December 24 (Merry Christmas!), you probably have enough evidence to show whether or not the employee was successful. The shortest PIP on record, that the MSPB held was a reasonable amount of time to demonstrate performance, was 17 days. See *Bare v. DHHS*, 30 MSPR 684 (1986).

Can you cancel an employee's already approved leave once the shutdown ends due to performance workloads that now exist because of the shutdown?

Absolutely – you can always cancel previously-approved leave if you have a legitimate, business-based reason for doing so – as OPM puts it, for "project related deadlines or the workload of the agency." And a 35-day backlog with all the related issues is most certainly related to the agency's mission. So if you have to do it, go ahead and do it.

At FELTG we are keeping our fingers crossed that there is NOT another shutdown this weekend. But we'll be here, either way. Hopkins@FELTG.com

Collect Call for Misuse of Technology: Do You Accept the Charges?
By Dan Gephart

In these highly partisan times, I think there is one thing we can all agree on, whether your politics lean left or point right, and that unifier is this: Geico makes the best commercials. Right?

(Disclaimer: I'm not a Geico customer. However, there may be a picture of me with a large gecko taken in a previous life).

One of my favorite Geico commercials is "Collect Call." That's the one where a brand new parent, hoping to save a few coins as new parents are wont to do, makes a collect call from the hospital to a relative. He tells the operator: "Collect call. First name: Bob. Last name: Wehadababyitsaboy." The relatives immediately reject the collect call. They don't need to pay the phone company to know that Bob's wife had the baby and it's a boy.

Let's call this action, a variation of which many of us of a certain age used to communicate to our parents in our teen-aged days, what it really is: Misuse of technology.

It's almost as if some humans are always going to find a way to use the technology in a way for which it wasn't created, whether it's telephones or computers or tiny telephones that mostly serve as computers.

We all know tech misuse is a big problem in the federal workplace. And much like our collect caller, some federal employees have gotten pretty creative in their misuse of technology. Despite what the shock headlines tell you, it's not all about porn.

Register for Barbara Haga's upcoming webinar Tsk Tsk Tech: Computer-related Misconduct in the Federal Workplace on February 26 and you'll hear the following

non-pornographic examples, and many more.

There's the VA housekeeper's aide, who used his government computer to send promotional emails about the handbags and DVDs he was selling. His removal charges included inappropriate use of an agency computer. But removal was the least of his problems. He was criminally charged for trafficking in counterfeit goods. You didn't really think that Gucci had three c's, did you?

Then there was the EPA attorney-advisor who was removed for using his government computer to do his outside legal and real estate work. His excuse that he was mostly replying to emails? That didn't really stick.

My favorites usually involve social media, and few beat the nurse who posted the following comments on her Facebook page:

- *Just realized I never see my head nurse and Satan in the same place. Hmmmmm?????*
- *Off to work like a dog, for pennies, in unsafe conditions, being exposed to diseases and body fluids … no, not a third world country … I'M A VA NURSE.*

The nurse, who also referred to her coworkers as d---heads, liars, and b------ in Facebook posts, was suspended for 14 days, although an arbitrator later mitigated it to 5 days. **[Hopkins note: we only used the dashes so your firewall wouldn't filter our newsletter as junk mail. If you need to know what grown-up words the employee used, email us. ☺]**

The range of misuse is wide, and how you choose to handle it will depend on the type of misuse. Was the employee's misconduct criminal? Did it violate the Hatch Act? Did it disrupt the workplace? Did it interfere with agency work? Did it involve harassment? What agency policies were violated?

The key to finding the right discipline is to not be overwhelmed, and to approach your actions in a strategic, knowledgeable, and efficient way – the FELTG-Way© as we like to say here. And I can't think of a better start than Barbara's webinar later this month.

Upcoming FELTG Webinars

Tsk-Tsk Tech: Computer-related Misconduct in the Federal Workplace
Barbara Haga
February 26, 2019

Boosting Employee Morale: 10 Dos and Don'ts For Federal Managers
Ann Boehm
February 28, 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 21, 2019

Aging and Cognition: The Graying of the Civil Service
Jennifer Johnson
George Woods
March 26, 2019

The Reassignment Riddle: How, When and Why to Use This Management Tool
Ann Boehm
April 11, 2019

What to Do and What Not to Do in the EEO Process
Dwight Lewis
May 16, 2019

*Miss a recent webinar? Recordings are available for purchase on the **FELTG website.***