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

FELTG Newsletter Vol. XI, Issue 3 March 13, 2019

Putting the 'Civil' in Civil Servant

If you follow the news, you probably agree there doesn't seem to be much civility in Washington, DC – or really the country – right now. Congress is engaged in an *uncivil* civil war, and the American people, especially federal employees, are stuck in the middle.

FELTG readers are probably familiar with our signature class *UnCivil Servant: Holding Federal Employees Accountable for Performance and Conduct*, created by the one and only Bill Wiley. It's a program that empowers federal supervisors to take the legal steps to get their employees to do their jobs, or else move on.

Well, FELTG now has a class that presents the opposite side of *UnCivil Servant*, and it's targeted specifically to federal employees: *The Civil Civil Servant: Protections, Performance, and Conduct*. It provides federal employees with an understanding of their rights and responsibilities under the law, and challenges them to be more engaged and effective employees. Engaged employees are less likely to cause their supervisors or HR offices the time- and energy-consuming drama that is not only costly, but serves as a roadblock to agency mission. Check out all the details here.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

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

EEOC Law Week
April 1 – April 5
Washington, DC

Advanced Employee Relations
April 30 – May 2
Washington, DC

Workplace Investigations Week
May 13 – May 17
Denver, CO

Developing & Defending Discipline: Holding Federal Employees Accountable
May 14 – May 16
Denver, CO

MSPB Law Week
June 3 – June 7
Dallas, TX

Developing & Defending Discipline: Holding Federal Employees
June 25 – June 27
Washington, DC

How I Became a Zen Master of Civil Service Law
By William Wiley

Way back in the early ’80s, when I was just a GS-12 ER puppy working for Navy, a brand new MSPB board member named Dennis Devaney spoke at a conference I had helped pull together. In his speech, he announced that the Board was about to issue a decision that would hold that if an employee was having performance problems, the relatively new *Civil Service Reform Act of 1978* required that they be dealt with through the relatively new Chapter 43-PIP procedures rather than through the old school adverse action procedures. This issue had been hanging out there since 1978, with OPM providing advice that it was mandatory that agencies use the Chapter 43 procedures and avoid the Chapter 75 adverse action procedures when confronted with bad performance.

Even at that limited-experience point in my career, I already knew that was going to be a bad decision. I recently had been advising a supervisor about a pediatric nurse who was engaging in such bad performance that she was perhaps on the road to killing patients. She failed to give medications if the patient didn’t want to take it. She did not keep an eye on IV needles, thereby ignoring any that had perforated the vein and were infusing fluid into the surrounding tissue. When I asked OPM for advice, the response was that I had to PIP her and could not fire her using adverse action procedures. When I asked how many dead babies I should consider to be an indicator of unacceptable performance, they told me to assign one of my spare nurses to follow her around all day to make sure that didn’t happen. Like I got a closet full of spare RNs. Geez Louise.

Member Devaney and I happened to run into each other the evening after his speech (in the hotel’s bar, of course; I LIKE BEER!). Failing to have the good graces vested in a frog, I confronted Member Devaney about the idiocy of his pending decision, the one that would require that poor performers be given 30 PIP days or so to commit even greater harm to the government. Mr. Devaney graciously ignored my youthful arrogance, thanked me for my opinion, and that was that.

Several weeks later, I got a letter from Mr. Devaney. This is before email, children, a time when adults communicated using paper, ink and stamps. In his note, Dennis described how the more he thought about our discussion, the more he appreciated the problem that would be caused by mandating Chapter 43-PIP procedures for all performance problems. When he returned to his office from the conference, he discussed the issue with the other two Board members, and they decided NOT to limit agencies to using just PIPs when dealing with a poor performer. The decision recognized that since the beginning of our civil service, agencies had been able to use adverse action procedures to fire poor performers, and nothing in the *Civil Service Reform Act* did away with that option. That principle is still good law. When confronted with a poor performer, supervisors are not limited to Chapter 43 procedures and are free to use discipline/adverse action procedures whenever they see fit. In fact, the Board’s case law is chock-full of removal actions taken under Chapter 75 that are based on bad performance.

Unfortunately, that word didn’t get around very well. For example, maybe a dozen years after that decision, I was dealing with an OSC investigator/attorney. The agency I was representing had reassigned a poor performer to another position in which it thought the employee might succeed. The attorney from OSC argued with me that such a reassignment was illegal, that the employee was *entitled* to be PIPed instead. Holy moly. Am I the only one who has read the Board’s decisions? And has a smidgen of common sense?

That brings us to today; 35 years deep into Board case law. So, what do I see coming out of EEOC and echoed by some others who opine in this field? This:

> "Work product errors and untimely completion of work assignments are not matters of misconduct; they are matters of performance." EEOC reasoned that "measures designed to address performance problems, such as appraisals, remedial training, non-disciplinary counseling, and Performance Improvement Plans (PIPs)" be used. *Marx H., Complainant, v. Richard V. Spencer, Secretary, Department of the Navy, Agency*, Equal Employment Opportunity Commission-OFO Appeal No. 0120162333, Agency No. 14-00259-03453 (June 19, 2018)

EEOC appears to be saying that using adverse action procedures for bad performance is somehow "improper." Well, that was an issue back in the early 80s. But it was resolved back then, and is just as wrong today as when OPM advised me to assign backup nurses to keep a PIPed coworker from harming babies and small children. When it comes to dealing with a poor performer, there are a number of tools available to the supervisor. With all due respect, EEOC should be making decisions based on the answers provided by case law, not what they think the answer should be. In any particular case, using a disciplinary or Chapter 75-type approach vs. using a "performance improvement" type of approach may be the more reasonable way to go, but both approaches remain available.

What does that have to do with my personal career? At the end of Mr. Devaney's note, he told me that if I ever wanted to move to DC, he could use someone with front-line practical experience as an advisor on his staff.

I was loading the U-Haul before the week was out, heading off to a career that gave me a chance to see civil service law from the inside out. And, what's the professional-development lesson in here for all you youngsters out there?

Drink beer. Wiley@FELTG.com

Cook-ing a Sick Employee
By Deborah Hopkins

A few days ago I got a nice note from a FELTG customer, who had a question about an employee with excessive absences. Allow me to paraphrase a snippet that you might find interesting.

> I recall learning in one of your courses that a supervisor who approves leave cannot then turn around and use the approved leave to support a disciplinary charge of excessive absence. Is this correct – and if so, are there any exceptions?

And here's the answer: While there's a fundamental principle that says an agency cannot discipline someone for being on approved leave, there are indeed exceptions. At FELTG, we like to highlight these kinds of exceptions, as they provide us with the coordinates of the outer boundaries of the law, for taking these kinds of actions.

The foundational case for excessive absence removals, one that every employment law practitioner should read, is *Cook v. Army*, 18 MSPR 610 (1984). This case sets out the elements required for an excessive absence removal, where an employee has been on approved leave for a period of time but the agency can no longer allow the absence to continue, and needs to remove the employee for not being able to work. Here they are:

1. The employee was absent for reasons beyond her control;
   - For example, she was too sick to come in to work.

2. The absences continued beyond a reasonable time;
   – For example, she was gone for 2 months out of 6 months after her FMLA ran out (see *Gartner v. Army*, 2007 MSPB 8; *Savage v. Army*, 2015 MSPB 51).
3. The supervisor warned the employee that she would be removed if she did not report to work;
   – Send the employee a letter that tells her this.
4. The agency showed that the position needed to be filled on a regular, full-time basis
   – Your *Douglas* analysis on the harm caused by the employee being gone is key here.

After you read *Cook*, take a look at *Curtis v. USPS*, 2009 MSPB 134, in which a *Cook* removal was upheld when, over a 21-month period, the employee was absent for 77 days (on approved LWOP) due to PTSD and depression. That works out to about one day per week. If this kind of intermittent attendance happens for a couple of weeks, you don't have a burden – but this went on for nearly two years and the agency was able to show a hardship in the absences.

You'll want to be careful here. You can rely on approved annual leave, sick leave, and LWOP but you cannot count FMLA excused absences (these are an entitlement) or AWOL (which is an act of misconduct) when determining what constitutes excessive absence. See *McCauley v. DoI*, 116 MSPR 484 (2011); *Savage, supra*.

If you can't meet even one of the *Cook* elements listed above, you can't *Cook* an employee. Let's look at a couple of cases that demonstrate this point.

First up is *Miles v. DVA*, CH-0752-14-0374-I-2 (May 17, 2016). Miles had been out on approved leave for quite some time (1,000 hours, if I remember correctly) and the agency needed him to come back to work, so they sent him a letter telling him so. The warning letter told the employee that if he did not return to work, he would be disciplined – but it did NOT state that absence on approved leave would warrant dismissal. There was the agency's first problem. Secondly, Miles' medical documentation said he could return to work in six months, which was a foreseeable end to the absence. The agency had already granted 1,000 hours of approved leave, and the workload was actually getting done in the office despite his absence. The result: MSPB decided the agency did not meet the *Cook* burden, and Miles got his job back.

Another case to check out where the agency lost an excessive absence removal, is *New v. DVA*, 99 MSPR 404 (2005). In this case the employee had 12% absences over a five-year period but the MSPB reversed his termination because the *Cook* criteria were not met – being absent 12% of the time is not excessive enough.

One other approach to consider with an employee who is too sick to work, rather than *Cook*-ing him, is doing a non-disciplinary Medical Inability to Perform removal. I know it's not easy on the conscience to fire someone who is in a bad medical place and is too sick to come to work; after all, you're not dealing with someone who is breaking the rules for fun. But the good news is, these removals almost always help the employee's case in an application for disability retirement. For information on this, and a whole lot more, join FELTG for Absence, Leave Abuse & Medical Issues Week, March 25-29 in Washington, DC.
Hopkins@FELTG.com

MSPB Law Week in Dallas

Don't miss out on one of FELTG's signature programs. Join Deb Hopkins and Bill Wiley for MSPB Law Week in Dallas, Texas June 3-7, 2019. For information on all of FELTG's open enrollment programs, click here.

I Wanna Be in the Room Where It Happens
By Meghan Droste

As someone who is, shall we say, mildly obsessed with the musical *Hamilton*, I have to admit that I'm amazed that it took me over a year of writing these articles to work in a reference. We had to wait for it (that's my favorite song so you'll have to forgive me) but now I can say that I'm not throwing away my shot (ok, I'll admit, that one was a reach) and I'm satisfied (that's the last one, I promise). Now that I have that out of my system, we can get down to the real purpose of this article. This month's Commission decision summary is all about who gets to be in the room where it happens—i.e. the hearing—and who needs to wait outside.

In *Katharine B. v. U.S. Postal Service*, EEOC App. No. 0120170444 (December 7, 2018), the administrative judge held a two-day hearing and then issued a decision finding no liability. During the hearing, the administrative judge allowed the complainant's first line supervisor, who was also named as the harasser in the complaint, to remain in the hearing room as the agency's representative (the person sitting in for the agency, not the person representing the agency by questioning witnesses or presenting arguments) during the testimony of other witnesses. The complainant objected to the supervisor's presence but the administrative judge overruled the objection. Rather than excluding the supervisor outright, the administrative judge asked each witness before the start of their testimony if they were comfortable with the supervisor being present. Four of the witnesses stated that they were not comfortable and the supervisor was excused during their testimony. The supervisor was present for the rest of the hearing.

The Commission reversed the finding of no liability and remanded the complaint for a new hearing based on the decision to allow the supervisor to be present during the testimony of other witnesses. Although, as the Commission noted, administrative judges have broad discretion in regulating what occurs during a hearing, that discretion is not without limits. The Commission found that the supervisor's presence had the potential to chill the testimony of the complainant or the other witnesses. As a result, allowing the supervisor to stay in the room "violate[d] the prohibition against interference with the with the EEO process." The Commission also noted that there is a conflict of interest when the agency's representative also serves as a witness in the complaint.

Hearings can be interesting; three of my colleagues just finished the first two weeks of a lengthy hearing and I wish I could have been there to just listen in. The desire to be in the room where it happens is understandable (just ask Aaron Burr), but we can't let that desire impact the outcome. Droste@FELTG.com.

Cases Based on Failure to Meet a Condition of Employment
By Barbara Haga

In training classes on developing performance plans, I am often asked about putting language into standards that state employees are required to complete training or obtain necessary certifications. My response is that typically those measures are not needed. We write standards from the standpoint that they have the necessary qualifications to perform the assigned work. Put another way, we write performance standards about how well the work is performed; failure to meet such a requirement is a conduct matter.

Back to Basics

Condition of employment cases under 752 are actually fairly simple. If it is a condition of

employment that an employee possess, obtain, and/or maintain a license, certification, or membership status, then failure to comply is often the basis for an adverse action. To win these cases, we need to show the following:

- The employee occupied a job requiring the certificate/license/status,
- The employee failed to obtain or lost the certificate/license/status, and
- If the agency controls granting this certificate/license/status, the agency decision was made in accordance with agency procedures.

The Board deals with the facets of such cases in *Gallegos v. Department of the Air Force*, 114 FMSR 185 (2014). The Board wrote that the charge of failure to meet a condition of employment contains two elements: (1) the requirement at issue is a condition of employment; and (2) the appellant failed to meet that condition. The key point follows: “Absent evidence of bad faith or patent unfairness, the Board defers to the agency's requirements that must be fulfilled for an individual to qualify for appointment to, or retention in, a particular position.”

Failure to Meet a Condition of Employment

Gallegos was a GS-1811-13 Criminal Investigator with the Air Force’s Office of Special Investigations (OSI). As a condition of employment in that position, she was required to sign a mobility agreement in which she acknowledged that any failure to accept a geographic reassignment could subject her to separation from federal service. The Board found that the Air Force policy had a legitimate management reason for directed reassignments based upon its need for “civilian mobility” as an essential component of its organizational effectiveness and for employee career progression. The agency policy established that high-level employees were expected to have a variety of work experiences at various locations throughout the Air Force. Thus, mobility agreements for all civilian Criminal Investigators were required.

The agency policy included a provision that it would honor employees' geographic preferences to the extent that the needs of the Air Force permitted, but did not commit itself to honor all such preferences under all circumstances.

Gallegos had initially been hired in Florida, and moved to Andrews Air Force Base in Maryland in 2008. She obtained a hardship reassignment back to Florida in 2009 where she remained until she was notified in May 2012 that she was required to accept assignment at Quantico, VA. She refused that move. She argued that the agency was required to show that her move to Quantico promoted the efficiency of the service. The Board disagreed, ruling that the removal was effected for not meeting a condition of employment (to rotate) and not whether that directed reassignment was based on legitimate management reasons.

Other Kinds of Cases

There is a great variety of certifications, licenses, memberships, qualifications, and clearances that Federal positions require. In each of the cases listed below, the MSPB upheld the removal. Here are some examples:

Failure to Maintain IT Credentials – Change in Requirements

Sasse was an Information Technology (IT) Specialist, GS-2210-09. He was appointed to that position in 2008. The position description required him to satisfactorily complete the appropriate training and obtain the required certification/recertification as outlined in Department of Defense policy, 8570.01-M ("Information Assurance Workforce Improvement Program"). CompTIA is the certifying body for work in this field.

Prior to his initial appointment, Sasse had passed an IT Security examination and as a

result was granted a "Good-for-Life" (GFL) certification by CompTIA. However, DoD changed the requirement in 2011. The GFL certifications went away and employees had two years (2011 and 2012) to enroll in a Continuing Education (CE) program. Once enrolled in the CE program, the certificate holder had three years to complete the CE requirements, which meant submitting proof of completing a minimum number of CE units annually to CompTIA. If the employee allowed the certification to expire, then he would have to pass the current version of the examination and comply with CE requirements.

Sasse allowed his certification to expire in 2014. He was not allowed to perform any duties requiring privileged access between September 2014 through 2016. He performed administrative tasks during this time frame. He also tried to pass the current security exam several times, but was not successful. He was given nine written notices in the fall of 2016 that he had to regain the CompTIA Security certification. His removal was proposed in January 2017.

Agency officials testified that privileged access enables users to make substantial changes to agency systems, potentially causing them great harm. There also was testimony that if the facility was found to have violated DoD Information Assurance requirements, the facility's access to the broader network could be disconnected. Sasse argued that, even without his certification, he still had "many other duties and responsibilities that he could complete without maintaining elevated privileges." The AJ deferred to the agency's explanation that the requirements that had to be fulfilled. *Sasse v. Army*, DA-0752-17-0327-I-1 (2017).

Failure to Maintain EMT Credentials – Agency Not Aware of Lapse

Full-performance level Firefighters in the Department of Defense are required to maintain several types of certifications including that of Emergency Medical Technician (EMT), a certification which must be renewed every other year. The certification was documented in the position description and was also included in the vacancy announcement when Saline was hired. Saline's EMT certification had expired four years before the agency knew. He never notified his employer that this had occurred. It was noted in the decision that because the certification had lapsed for so long, he would have to re-take the EMT course and re-take the examination to be recertified. When it was discovered that he didn't have current certification, he was questioned on May 24, 2014. He initially told his employer that he had an updated EMT card but that was not true.

Once the Army established that he was performing EMT duties without a current certificate, he was immediately removed from firefighting duties and his removal was proposed on June 25, 2014.

Saline's removal response was an extended apology for allowing this to occur, stating basically that he allowed it to lapse and that he had no excuse other than that he was not as diligent as he should have been. One of Saline's arguments in his appeal was the suggestion that management could have discovered the lapsed certification earlier and notified him of the need to take prompt corrective action.

The AJ wrote that regardless of whether management could have discovered the problem earlier, Saline knew he was not certified. Agency witnesses testified that it would be virtually impossible for a Firefighter to forget to re-certify, particularly given the frequency with which it was discussed at work in the Fire Department. *Saline v. Army*, DE-0752-14-0567-I-1 (2015).

In future columns, we will look at more condition of employment cases, including several with issues related to failures to meet qualifications based on medical conditions. Haga@FELTG.com.

The Good News: Ruby Slippers from President Trump
By Ann Boehm

I love *The Wizard of Oz* (spoiler alert – this article will be discussing key moments in this movie, so if you have not seen it, I suggest you do so before reading more). In my youth, it came on television once a year. There were no options to watch it like we have now – no DVDs, Hulu, Netflix, Amazon Prime. I waited for it and could not wait to watch it. When I was very young, I was afraid to watch it alone – the witch was very scary. I was so proud when I could finally watch it by myself.

I love when the movie goes from black and white to color. That's when Dorothy acquires the ruby slippers right off the feet of the deceased Wicked Witch of the East, and the ruby slippers become the key part of the movie. I was so excited when I saw the actual ruby slippers at the Smithsonian Institution's National Museum of American History in Washington, DC. Although they are just shoes with red sequins on them, they are somehow still magical.

So you know the deal. Dorothy, Toto, the Scarecrow, the Tin Man, and the Cowardly Lion follow the yellow brick road in order to get Dorothy to the Wizard of Oz and eventually back home to Kansas. Along the way, they keep getting harassed by the Wicked Witch of the West, who is pretty ticked off about Dorothy's house landing on her sister and Dorothy's acquisition of the ruby slippers. She asks the Scarecrow to "play" with fire, puts everyone to sleep with poisonous poppies, writes threats in the sky (on her broom, of course), and is always lurking. The witch even has terrifying flying monkeys. And she locks Dorothy in this awful tower with an hourglass to count down the time to Dorothy's eventual doom. Dorothy's friends rescue her and melt the witch, and then the Wizard of Oz is ready to take Dorothy to Kansas in a hot air balloon. Toto messes that up, and Dorothy is in a crisis. That's when Glinda the Good Witch drops this bombshell – "you've always had the power" to go home. It's all about the shoes!

Gee, Glinda. Seriously, you put us through these terrible trials and knew all along the shoes had the power.

Ann – why are you talking about the ruby slippers and this movie? Get to the point.

Okay. Executive Order 13839 issued by President Trump on May 25, 2018, is just like the ruby slippers.

Huh? Isn't it enjoined? What the heck do you mean?

Three Executive Orders were issued on May 25, and only some parts of the orders are enjoined. The employee discipline aspects of Executive Order 13839 are certainly not enjoined. The provisions in the Executive Order give you the power that has always been there and even reinstate some things that had been there and were taken away for a while by the Merit Systems Protection Board.

For those of you who feel like efforts to take care of problem employees have been met with opposition similar to the fire, poisonous poppies, flying monkeys, and hourglass tower, I am here to tell you that you've had the power all along – you are wearing the ruby slippers. You don't have to be scared of the wicked witch any longer.

Okay, Ann. Explain please.

Executive Order 13839 says that adverse actions should be *completed* during the 30-day statutory notice period. That means no long extensions. Proposal, reply, decision, suspended or maybe even gone – all done in 30 days. In fact, it further specifies that agencies should issue decisions on proposed removals "within 15 [business]

days of the end of the employee reply period following a notice of proposed removal." The statutory reply period is seven days – just seven! You should have been following this timeline all along, but you did not know you had the power. You needed the ruby slippers. The President (the head of the Executive Branch – your boss) is telling you to handle these cases quickly.

Then there's the matter of suspensions versus removal. Executive Order 13839 makes it clear that "[s]uspension should not be a substitute for removal in circumstances in which removal would be appropriate." Further, this Executive Order also says progressive discipline is not required if the misconduct warrants a strong penalty. This is where the Executive Order ruby slippers get things back to where they used to be.

So what does it mean? GET RID OF BAD EMPLOYEES! Use the ruby slippers!

And then there are the performance matters. How many of you thought Performance Improvement Plans (PIPs) had to be 60-90 days long? Nope. Thirty days is plenty. That's what the MSPB has said for almost 40 years, and it's what we here at FELTG teach. Executive Order 13839 says "no agency shall" give an employee "more than a 30-day period to demonstrate acceptable performance," unless a union contract requires longer. Thirty days for a PIP, folks. You always had this power. You just did not know it**. [Editor's note: at FELTG we have moved away from using the misleading acronym PIP and instead we use the more legally accurate term Demonstration Period, or DP. The law requires the employee be given an opportunity to show she can *demonstrate* acceptable performance, and not *improve* her performance.]**

Now join me and say, "I will take care of problem employees." Click your heels three times. You have the power, and you always did.

And that's the Good News this month. Please send me any good news you have to share: Boehm@FELTG.com.

Upcoming FELTG Webinars

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

Substance Abuse Disorders and the Federal Workplace
Shana Palmier
Mollie Slater
April 18, 2019

Successfully Managing Federal Employees With Mental Health Disabilities
Shana Palmieri
May 2, 2019

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

50 Shades of Reprisal: Whistleblower, EEO, Union & Veteran Reprisal
Deborah Hopkins
June 13, 2019

Webinar recordings are available for purchase on the FELTG website.

Tips from the Other Side: March 2019
By Meghan Droste

Our discussion of tips to make the discovery process more efficient continues this month with a topic that is near and dear to me—in other words, something that drives me crazy on a regular basis; something that counsel for agencies (and other employers, this is by no means unique to the federal sector) do all of the time and then seemed shocked when I push back; something that results in a lot of wasted time arguing when it could be straight forward if done properly. What could be so bad? What could drive me to distraction, or at least to writing a mini-rant to you? Overly broad medical releases and requests for medical information. I know, maybe not as scary as you were expecting based on my build up, but stick with me.

First, some basics on medical information in discovery in general. As those of you have attended Absence, Leave Abuse & Medical Issues Week know, there are very specific, and limited, circumstances in which an agency is entitled to an employee's medical information. Agencies are never, even in discovery, permitted to go on a fishing expedition or to dig around in an employee's medical records simply because the agency is curious about possible medical conditions or methods of treatment.

One of the permissible times is the enforcement of the Rehabilitation Act. That means that an agency may be entitled to information about conditions that substantially limit major life activities when a complainant alleges a failure to accommodate. However, if there is no dispute about whether the complainant is an individual with a disability—if the agency determined at the time that the complainant was entitled to an accommodation and/or if the condition and need for accommodations is obvious—there is no need to obtain this information in discovery. Please don't try. It's a waste of the agency's discovery requests and the complainant will likely push back on it. If you move to compel you will likely have a difficult time explaining why the agency needs medical documentation of a condition it is not contesting.

Now, on to the more common example of this problem: when a complainant in any type of case is seeking compensatory damages for the emotional distress the complainant suffered as a result of the agency's actions. Too often in these situations I see the agency send out a broad medical release asking the complainant to sign off on the agency obtaining information from all of the complainant's doctors about all of the complainant's conditions for which the complainant has ever sought treatment. That's right, a completely blanket release for all medical information ever. Do not do this. This can also take the form of an incredibly broad discovery requests asking for the names of all doctors from whom the complainant has ever sought care with a description of all conditions and all treatments with no limitation on time frame or connection to the alleged discrimination (I wish I was making this up but I really have seen it). Do not do this either. Neither approach is appropriate. Why not? Because an agency is not entitled to a complainant's entire medical history. The entire history simply isn't relevant. Your discovery requests should always be limited to the relevant time period—in this situation I would argue no more than a year or two before the events at issue—and to information that is relevant or will lead to the discovery of relevant information. The complainant's entire medical history is not relevant. Other conditions the complainant suffered from during the relevant time period that were not the result of the agency's actions and that impacted the complainant's damages are relevant. A good test for all discovery requests is to ask yourself why are you asking for the information. If you can't easily provide a one-sentence explanation for how it is directly related to the case—and simply saying that the complainant is seeking damages or requested an accommodation is not specific enough—the request is probably too broad. Droste@FELTG.com

Reasonable Accommodation in the Federal Workplace

Save the dates for our five-part webinar series on **reasonable accommodation:**

- **Reasonable Accommodation: The Law, the Challenges & Solutions** (July 18)

- **Reasonable Accommodation: A Focus on Qualified Individuals, Essential Functions, Undue Hardship** (July 25)

- **Telework as Reasonable Accommodation: When to Say "Yes" and When to Say "No"** (August 1)

- **Hear it from a Judge: The Reasonable Accommodation Mistakes Agencies Make** (August 8)

- **Understanding Religious Accommodations: How They're Different from Disability Accommodation** (August 15)

Work Now, Grieve Later, and Avoid Having to Testify Before Congress
By Dan Gephart

Two weeks ago, nearly 16 million people watched Michael Cohen tell the House Oversight Committee about the many illegal, unethical, disreputable, and downright nasty things that he did at his boss's direction.

Whether you believe the president's former attorney or not, I'm sure you think that you would, as Spike Lee says, do the right thing if your boss asked you to do something wrong. Heck, I know I would. And no psychology text book or Stanley Milgram experiment is going to change my mind.

This got me thinking about orders disobeyed and generally ignored in the federal workplace. Years of reading MSPB decisions involving charges of insubordination and failure to follow orders leaves me thinking the federal workplace's problem is different than the one faced by the former Trump Organization lawyer. There are some federal employees, it seems, just looking for a reason -- any reason -- to ignore their supervisors' orders.

That's why every federal employee needs to know what "work now, grieve later" means, especially that first tenet – work now. The employee must follow the supervisor's order. If not, that employee should be disciplined.

> "[A]n employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation." *Taylor v. HHS*, 40 MSPB 106 (1989), citing *Gragg v. US Air Force*, 13 MSPB 296 (1982).

Ah, the exception. An employee does not have to follow an order that would cause him "irreparable harm." That would mean orders that are:

- Illegal, whether the order itself is illegal, or obeying the order would be an illegal act.
- Unsafe.
- Immoral.
- An unwarranted psychiatric examination.

An order can also be rejected if it foregoes a Constitutional right.

But let's be honest here: When we're talking about orders that cause irreparable harm, we're talking a miniscule number of cases. The percentage of orders that would fit into the irreparable harm category are so far to the right of the decimal point, they make pi look like a number Count von Count would rattle off on Sesame Street. It's more likely that an employee would think the

supervisor's order was wasteful, or argue the order falls outside his position description. And in those cases, it's simple: Work now, grieve later.

Oh wait. We nearly forgot about the *Follow the Rules Act*, which Congress sneaked through and the president signed in June of 2017. Yes loyal readers, that's the bill that FELTG Professor Emeritus and Former President Bill Wiley wrote could create a "hellscape scenario" for the federal workplace if passed. Well, it did pass without much fanfare.

The *Follow the Rules Act* extends whistleblower protections to federal employees who refuse to obey a direct order that would violate a rule or regulation, whereas previous protections extended only to those refusing an order that would violate a law. Bill wrote about a confused employee who thinks she's being ordered to violate a rule or regulation:

> Well, what if it turns out she is wrong? What if her honest belief about what the order meant was simply mistaken? If she is fired for insubordination, if on appeal her argument that the order violated a rule is not affirmed, she has effectively bet her job that her interpretation was correct at the moment she chose to be insubordinate. Why in the world would we want to entice federal employees into this high-risk gamble with their livelihood when there are other ways to protect them from abuse?

It's a clear no-win situation. It's something you want to avoid, just like the anarchy that comes from a workforce that disregards supervisors' orders. That said, if you have a supervisor who has no fear of ordering an employee to something illegal, unsafe, or immoral, then you're going to be watching someone from your agency testify before Congress while millions watch. Gephart@FELTG.com

FELTG Case and Program Consultation Services

Sometimes, you need an outside perspective when handling a difficult federal workplace situation. Whether it's been a while since you've taken a misconduct action, you have a tricky performance case with a high-ranking employee, you need help negotiating your next union contract, or there's a challenging EEO complaint pending, it can be beneficial to get assistance from someone who's handled these types of legal challenges before.

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We're not just a training company. We have a team of specialists with decades of experience who can help you tackle even the most tricky federal workplace legal challenges. Take a look at some of the projects we've been working with agencies on recently:

- Drafting and reviewing documents and evidence for discipline and performance cases
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- Drafting performance plans and writing standards to comply with OMB Directive M-17-22
- Preparing negotiators for bargaining with unions
- Developing administrative investigation plans
- Defending against nonmeritorious harassment complaints
- Negotiating settlement agreements
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