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

FELTG Newsletter Vol. XI, Issue 5 May 15, 2019

Petrified Wood, Antidotes to Chemical Weapons, and Other Cool Federal Things

One of the best parts about my job, besides all the wonderful people I get to meet, is all the cool places I get to go. A couple of weeks ago, I found myself in Petrified Forest National Park, training a group of supervisors on FELTG's signature class *UnCivil Servant: Holding Federal Employees Accountable for Performance and Conduct*. After class one day, I put my interagency pass to good use and toured the park. It was my first time there and I have to say – what an amazing place! If you haven't been, you must go. The photo to the left is a snapshot I took of petrified wood that is over 200 million years old, from trees that were likely standing when dinosaurs roamed the land that is now northeastern Arizona (which, coincidentally, used to be at the latitude of modern-day Costa Rica).

It's always fun to get a tour of the federal agencies where I train. Whether it's the National Weather Center in Norman, OK; a high-tech lab in Atlanta, GA where scientists are working to cure diseases; a hydroelectric generator in Grand Coulee, WA; a military hospital in North Carolina; or anywhere else in this great country, it's such a privilege to see what federal employees work on every day. Thanks for letting FELTG be a part of it. Now it's time for the May 2019 newsletter. We hope you enjoy.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

MSPB Law Week
June 3 – June 7
Dallas, TX

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

The Civil Civil Servant: Protections, Performance and Conduct
July 10
Washington, DC

Emerging Issues Week: The Federal Workplace's Most Challenging Situations
July 15-19
Washington, DC

Managing Federal Employee Accountability
July 22-26
Portland, OR

Workplace Investigations Week
August 5-9
Denver, CO

Employee Relations Spotlight: Managing Attendance and Conduct
August 21-22
Boulder City, NV

MSPB Law Week
September 9-13
Washington, DC

They Don't Call Me 'Backwards Bill' for Nothing
By William Wiley

Civil service law is a narrow field, we have to admit. A person could be the best litigator or Constitutional lawyer in history, and still trip over some of the intricacies of the law that those of us in the FELTG Nation are supposed to know.

Recently, I was reminded about one of the potential areas of misunderstanding in our field. I had helped a supervisor draft a performance standard for a critical element to place a poorly performing employee into a performance Demonstration Period (aka PIP), and it read something like this:

> *Two or more incidents of unacceptable performance during the demonstration period will constitute a Level 1, Unacceptable rating.*

This is an example of a classically easy to prove performance standard. We make sure that the employee knows what constitutes a mistake under the problematic critical element, count mistakes as they are made during the Demonstration Period, and then *voilà*! He either passes or fails based on the number of maximum mistakes we tell him we will allow. MSPB has accepted this approach as valid for decades.

After the employee failed to perform acceptably during the Demonstration Period by making too many mistakes, as is the practice at the supervisor's agency, she ran the proposed removal memo through legal for review. Here is the advice she got from the general counsel's office:

> ***Legal Comment****: The critical element will not be upheld by MSPB because it sets forth a backwards performance standard in that it tells the employee what not to do, rather than informs the employee of what must be done to achieve the minimum level of performance to avoid removal. Standards that only describe what an employee should not do, MSPB and the courts have found to be invalid "backwards" standards.*

Wow. That advice is just breathtakingly wrong.

As we have taught at FELTG for many years, we have to worry about a standard being impermissibly backwards if and only if we are dealing with a MINIMALLY ACCEPTABLE, Level 2 standard that doesn't leave any room under it for Level 1 Unacceptable performance. Take a look at the Minimally Successful standard in one of the lead backwards-standard cases (*Jackson-Francis v. OGE,* 103 MSPR 183 (2006)):

- **Critical Element:** Develops courses for agency officials and employees
  - Minimally Successful:
    - Does not identify training needs of the targeted audiences.
    - Fails to use principles of course design to develop performance-based training.
    - Fails to develop training designed to enable agency officials to determine whether rule violations occurred and employees to determine if they violated any of the rule prohibitions.

If *Jackson-Francis* utterly fails to complete the tasks identified in this critical element, using this standard, the agency would have to rate her as Minimally Successful and cannot fire her EVEN THOUGH SHE FAILED TO DO ANYTHING! Obviously, the agency intended for this to be the Unacceptable level of performance.

However, by mislabeling it as the Minimally Successful level, the agency has misled the employee and cost itself a bunch of back pay and attorney fees.

I will concede that the Board chose an awkward phrase when labeling this type of problematic (and illegal) performance standard as "backwards." It would have been clearer if it had simply said that a standard at the Minimal level is improper if it defines performance at the Unacceptable level. However, it did not choose the simpler route, so we are stuck with having to understand this term in a more conceptual way.

Folks, we have to know this stuff. It's OK to not know it if it's not your job, but it's not OK to be the supposed go-to person for legal advice and not know the case law. This little episode is a great example of being almost too smart.

The attorney-adviser knew a bit about Board law: that backwards standards are illegal and they have something to do with telling an employee what not to do. However, he was missing a vital piece of deduction.

It makes sense that a standard that describes only failure at the Minimally Successful level cannot be used to fire someone, but it does not make sense that a standard that describes failure at the Unacceptable level could not be used. Legal advice that does not make sense practically is almost always bad legal advice.

Read the cases. Ask questions of practitioners who know what they are doing. Come to the FELTG MSPB Law training (held next in Dallas June 3-7).

If we don't do a good job, not only do we let down the line managers who need us, but we also let down the citizens who rely on government for services. And last time I looked, that's just about everybody. Wiley@FELTG.com

Upcoming FELTG Webinars

Within Grade Increases: From Eligibility to Denial to Appeals
Barbara Haga
May 30, 2019

Understanding and Working with Your Agency's OIG
Jim Protin
June 6

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

Significant Cases and Developments at the FLRA
Joe Schimansky
July 18, 2019

Employee Sexual Misconduct: Discipline Early to Make Your Agency a Safer Place
Deborah Hopkins
June 27, 2019

Words Matter: Drafting Defensible Charges in Misconduct Cases
Deborah Hopkins
July 11, 2019

Sex Discrimination, Gender Identity, and LGBTQ Protections in the Federal Workplace
Meghan Droste
September 5, 2019

Why the Douglas Factors Are Your Friend
Ann Boehm
September 12, 2019

Suicidal Employees in the Federal Workplace: Your Actions Can Save a Life
Shana Palmieri
September 26, 2019

Dealing with Unacceptable Performance: Fast and Effective Accountability Tools for Agencies
Deborah Hopkins
October 3, 2019

Discipline Alternatives: Thinking Outside the Adverse Action
Ann Boehm
October 24, 2019

The $505 Alternative to Filing a PFR to the [Nonexistent] MSPB
By Deborah Hopkins

Everyone who reads this newsletter knows by now that we don't have a fully functioning Merit Systems Protection Board (MSPB or Board). Each of the three positions at the top of the agency, reserved for political appointees, has been vacant for more than two months, but there have been no decisions issued at all for over 28 months because, from early January 2017 through the end of February 2019, there was only one Board member – and one member is not a quorum. No quorum = no MSPB decisions.

Three nominees have been named; two have already cleared committee, and the final nominee needs to be voted on in committee. Then, if he passes muster, all three nominees will be brought to the Senate floor for a confirmation vote.

As it stands today, the administrative judges (AJs) are still issuing initial decisions (IDs) based on agency actions. If either party does not like the outcome of an ID, the typical process is for that party to file a Petition for Review (PFR) with the three Board Members – a process that usually renders a decision within about six months or so. But because at the Board level the MSPB is defunct, any PFR that is filed goes into a pile on top of more than 2,100 other PFRs, and there it sits for who-knows-how-long. Talk about discouraging.

There is a lesser-known alternative to filing a PFR that it appears more appellants are taking: filing PFRs directly with the Federal Circuit. After 35 days, if no PFR is filed with the Board, the administrative judge's ID becomes the final Board decision, after which parties have the right to file a PFR directly with the Federal Circuit. 28 USC § 1295(a)(9); 5 USC 7703(b)(1)(A; 5 CFR § 1201.113.

Typically, appellants file PFRs to the MSPB because it's free, and filing in the Federal Circuit is not. Also, the PFRs from the Board can then be appealed to the Federal Circuit – so appellants who go the route of taking the PFR directly to the Federal Circuit are losing an entire step of review.

I can't say I blame them, though; I wouldn't want to wait 3+ years to get a decision on a PFR. Either way they go, MSPB or Federal Circuit, appellants who file PFRs don't have very much success in getting agency discipline overturned or mitigated. The Federal Circuit's scope of review in an appeal from the Board is limited by statute; it must affirm the Board's decision unless the court finds the decision to be:

> "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 USC § 7703(c); *see Kahn v. Dep't of Justice*, 618 F.3d 1306, 1312 (Fed. Cir. 2010).
>
> Under the substantial evidence standard, this court reverses the Board's decision only "if it is not supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1298 (Fed. Cir. 2002) (quoting *Brewer v. U.S. Postal Serv.*, 647 F.2d 1093, 1096 (Ct. Cl. 1981)).

Hairston v. VA, No. 2018-2053 (Fed. Cir. Mar. 8, 2019).

Here are some additional facts you may not know about the Federal Circuit:

- Last year, the Federal Circuit upheld agency decisions 92% of the time.

- It costs about $505 to file a PFR from an agency action in the Federal Circuit.
- If an agency wants to take a case to the Federal Circuit, it can't file unilaterally; OPM has to give approval and then the Department of Justice gets involved with the litigation.
- The largest percentage of cases the court takes deals with patents.
- The Federal Circuit may have a total of **12** active circuit judges sitting at any given time, and they are required to reside within 50 miles of the District of Columbia. 28 USC § 44. Judges on "senior status" are not subject to this residency restriction.
- The Federal Circuit website lists 18 judges; only five are female.
- In 2018, three of the judges sat by designation with other district or circuit courts, which is allowable under 28 USC § 291.
- Oral argument sessions are open to the public. If you'd like to attend, oral arguments are normally held the first full week of each month. You can find the oral argument calendar for the year on the court's website: http://cafc.uscourts.gov/argument/upcoming-oral-arguments.
- Total argument time (including rebuttal time) is limited to 15 minutes per side for panel hearings and 30 minutes per side for *en banc* hearings.
- An attorney who wishes to be admitted to practice before the Federal Circuit must fill out an application and pay a $231 nonrefundable fee.

Expect to see more Federal Circuit action in the coming months, as appellants are starting to realize that they'll have a resolution much sooner if they skip the PFR to the Board. In fact, recent statistics on the MSPB's website show that only half the usual number of PFRs are being filed at the MSPB.

It doesn't have to be this way – so I beg you, if you know someone on the Senate Homeland Security and Government Affairs Committee, please ask them to vote quickly so we can get our MSPB back. Pretty please. Hopkins@FELTG.com

Reasonable Accommodation in the Federal Workplace

Reasonable Accommodation is one of the most complicated areas of federal employment law. Learn what you need to know in FELTG's five-part webinar series on **reasonable accommodation:**

1. **Reasonable Accommodation: The Law, the Challenges & Solutions** (July 18)
2. **Reasonable Accommodation: A Focus on Qualified Individuals, Essential Functions, Undue Hardship** (July 25)
3. **Telework as Reasonable Accommodation: When to Say "Yes" and When to Say "No"** (August 1)
4. **Hear it from a Judge: The Reasonable Accommodation Mistakes Agencies Make** (August 8)
5. **Understanding Religious Accommodations: How They're Different from Disability Accommodation** (August 15)

Whether you are an attorney, EEO professional, HR specialist, or a supervisor, join us for this informative series led by expert instructors.

The Good News: I'm an Optimist, Even When It Comes to Dismantling OPM
By Ann Boehm

I'm an optimist. I just am. Perhaps that's why I write a monthly column called "The Good News." Being optimistic does not always make me right about things, but somehow, I feel better trying to see the bright side.

What does this mean in the federal employment law world right now? It means I'm going to try to see the positive aspects of the President's desire to abolish the Office of Personnel Management.

I spent 26 years working for the Federal government. I do remember a time, early in my career, when I would call OPM experts for advice and guidance. I remember being very impressed with their knowledge and the legitimate wisdom they imparted. I will also tell you that in the latter of those 26 years, I was not finding the same to be true with OPM.

Don't get me wrong. OPM still does many things right, but it is failing greatly in the area of hiring federal employees. When I teach Federal managers how to handle problem employees, we always discuss that helping an employee improve can be vastly easier than trying to hire a new employee in the current morass of a system.

I personally dealt with OPM on a hiring matter right before I left the government. I was having difficulty filling an Employee Relations Specialist position. I went to OPM's website to see if there was anything there that could help me. I was drawn to OPM's hiring reform concept. I thought this was an initiative that would help creative managers bring in good people for jobs without being stuck in bureaucracy. I thought I could be that manager OPM would work with to show others how to hire more effectively. Boy was I wrong.

I wrote an email to the address on OPM's website. Instead of getting some legitimate guidance from OPM, the OPM contact forwarded my email to the Human Resources Director for the Agency and indicated that I needed help. What OPM did not only failed to help me, but also embarrassed me with my Agency, just for trying to think outside the box.

How does this story apply to my optimism and the President's intention to do away with OPM? OPM is not helping Federal agencies the way it could and should. Reform attempts continue to fail. Is possible that dismantling the agency will eliminate the inadequacies? I'm going to be hopeful.

If there is no OPM, will agencies finally have more autonomy in hiring Federal employees? Can KSAs become a thing of the past? Can restrictive job series requirements disappear? In other words, can the Federal government move into the 21st century?

According to the President's plan, existing OPM employees and offices will be moved to the General Services Administration or the Office of Management and Budget (background investigations are already on their way to the Department of Defense). I want to believe that if fresh eyes from other parts of government oversee OPM, the destructive personnel folklore and unreasonably bureaucratic aspects of OPM's mission will be questioned and hopefully changed. It's certainly possible that nothing will really change. And things could certainly get worse (the devil you know …). But the optimist in me believes that maybe, just maybe, if leadership from outside of OPM examines its practices, new ideas may actually move forward.

I told you. I'm an optimist. Here's hoping!!
Boehm@FELTG.com

Amazon Versus the Sabbath: Religious Accommodations in the Workplace
By Meghan Droste

When I think of a post office, there is one thing that definitely does not come to mind: a social gathering spot (unless you count standing in a long line because you waited far too long to mail a holiday package).

It turns out, however, that post offices use to be just that. Up until a combination of religious groups and the labor movement pushed to end Sunday mail delivery in the early 20th century, the post office was a Sunday gathering spot in many communities, acting as a substitute for the taverns that were closed. That all ended in 1921 when Congress declared that post offices would no longer be open for mail delivery on Sundays.

Other than helping out those of you who participate in trivia nights, why am I sharing this with you? Well, as you may have noticed, the U.S. Postal Service is back in the business of delivering packages on Sundays. USPS has a contract with Amazon to deliver our books, clothes, and whatever else we might order from the online retail giant seven days a week. This, of course, means someone has to work on Sundays to deliver all of things we order. That brings us to the Commission's recent decision in *Stanton S. v. U.S. Postal Serv.*, EEOC App. No. 0120172696 (Feb. 5, 2019), involving a request not to work on Sundays as an accommodation.

The complainant in *Stanton S.* worked as a PSE Sales and Services/Distribution Associate (PSE). The Agency required all PSEs to receive training and to make themselves available for Amazon-related deliveries. The complainant submitted a written request for an exemption from working on Sundays as a religious accommodation. He explained that his religious beliefs prevented him from working on his sabbath. The complainant's supervisor informed him that the scheduling portion would not be an issue because another employee volunteered to work on Sundays. However, the complainant was required to receive the training on processing Amazon deliveries so that he could serve as a backup. The Agency then scheduled the complainant for training on a Sunday. The complainant did not attend the training. The Agency responded by scheduling the complainant for training on the following two Sundays. The complainant did not report on those days. The Agency then removed the complainant from his position, based on his failure to report on the three Sundays as well as on two days on which he used approved sick leave.

The complainant filed an EEO complaint regarding his removal and requested a Final Agency Decision. In the FAD, the Agency concluded that it accommodated the complainant because it did not schedule him to work on Sundays, and that the scheduled trainings were required because the complainant had to serve as a backup.

The Commission reversed the Agency's decision and concluded that the Agency failed to accommodate the complainant. Requiring the complainant to be available as a backup on Sundays failed to accommodate his sincerely held religious beliefs. The Agency also failed to provide any indication that not scheduling the complainant as a backup was an undue hardship because there was no indication that other employees were not available. The Commission ordered the Agency to reinstate the complainant with back pay, along with other remedies including training.

The next time you receive a package delivery on a Sunday, think about how much fun we miss out on by not getting to hang out at the post office and play cards like people did in 19th Century.
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Failure to Meet a Medical-related Condition of Employment
By Barbara Haga

This month, we look at cases where the condition needed to be met involves some sort of physical capability. Because the employees in these cases had previously performed at a fully successful or better level or the medical showed that they could perform at a fully successful level in the future, one might think there could be an issue in holding the employee to the medical standard. However, the MSPB and EEOC ruled otherwise in these situations.

Medically unfit for flying

Boulineau was a 51-year old GS-12 Army Helicopter Flight Instructor. His position had established medical standards. He was required to undergo annual flight examinations. During an examination conducted in 1989, it was discovered that he had an elevated coronary risk index. He underwent additional testing, including a treadmill test and a fluoroscopy. The latter test revealed a mild calcification of his coronary area. To confirm the existence of coronary artery disease, which was disqualifying for the appellant's position, the Army asked that he undergo cardiac catheterization. Boulineau refused to do so and was removed consistent with the relevant Army Regulation (AR) 40-501.

Boulineau argued that the testing and evaluation program violated not only the Army regulation, but his civil rights. The Board found that AR 40-501 provided that a person is medically unfit for flying if he has suspected or proven to have coronary artery disease, and that a coronary risk index is presumptive evidence of such disease until further evaluation is done as needed. The Board also found that although Boulineau had performed his duties in an exemplary manner in the past, the Army reasonably suspected that he had coronary artery disease and that he was, therefore, medically unfit for flying. The Board did not concur that Boulineau's civil rights had been violated and noted that medical examinations of the type in question were authorized by OPM. *Boulineau v. Army*, 57 MSPR 244 (1993).

Boulineau alleged age discrimination and that issue was ruled on by the EEOC in 1994. Per the EEOC's analysis, the reason for his removal was that he refused the heart catheterization procedure -- not his age. Therefore, they did not find discrimination. *Boulineau v. Dept of the Army*, 1994 EEOPUB LEXIS 565.

Failure to meet new hearing qualification

McAlexander was originally hired as a Police Officer in January 2002 by the Defense Protective Service (DPS). In response to the terrorist attack against the Pentagon on 9/11, DoD established the Pentagon Force Protection Agency. The new agency absorbed the Pentagon's police force, formerly known as DPS, and its role of providing basic law enforcement and security for Pentagon and DoD interests in the National Capitol Region.

McAlexander had had no issues with qualifications prior to implementation of the new requirements. However, when he was tested subsequent to issuance of the new standards, he was found not qualified to hold the Police Office position. According to the agency's audiologist, McAlexander was "at risk for failure to recognize, discriminate, localize, and react appropriately to a variety of auditory stimuli." The audiologist also found that the appellant would have "significant difficulty recognizing and discriminating speech as well as other auditory signals, particularly in the presence of background noise," and stated further that he would be at a "greater than normal risk of being injured or of injuring others because of background noises he had

missed or misunderstood in critical situations." The audiologist stated that there were no hearing aids that could satisfactorily correct his hearing deficit.

DoD proposed removal, but offered another position. McAlexander was ultimately reassigned to a non-law enforcement position as a GS-07 Office Support Assistant, with retained pay, and the removal notice was rescinded. The case was taken to arbitration where the agency's action was upheld. The arbitrator found that the agency acted lawfully when it declined to waive its hearing requirement for McAlexander. The MSPB appeal was a request of a review of the arbitrator's award and a claim that the reassignment was involuntary. The MSPB found that the agency's auditory acuity qualification standard was job-related and consistent with business necessity and that McAlexander would pose a direct threat because of his lack of hearing acuity. The Board also ruled that acceptance of the offered reassignment was not involuntary. *McAlexander v. DoD,* 2007 MSPB 103.

See also *Holub v. Navy,* PH-0752-03-0395-I-1, which has the same result for another Police Officer who failed to meet revised hearing acuity requirements.

Failure to meet requirements for sea duty because of prescribed medication

Justice was a Utilityman in the civilian mariner pool with the Navy's Military Sealift Command. This position required going to sea. Justice had previously experienced psychiatric and alcohol-related problems while on board a vessel. As a result, he was repatriated back to the U.S. for treatment. He was diagnosed with Bipolar Affective Disorder. This condition was treatable with medication. Justice provided information from two treating physicians stating that he was being successfully treated with Depakote, a psychotropic drug. It was also noted that he would have to take this drug indefinitely, but he could resume his regular duties as long as he continued to take Depakote.

The agency medical officer found Justice disqualified for sea duty. He was removed, and he appealed that removal to the Board. The agency medical officer testified that she considered Bipolar Affective Disorder a disqualifying condition in itself under the agency regulations, and that the continued use of Depakote was a separate disqualifying factor under the agency regulations. The agency medical officer stated "Depakote is a medication that requires some routine monitoring of blood levels to determine whether it's a therapeutic level" and also noted that individuals taking psychotropic drugs are disqualified from sea duty because of the uncertainty such drugs present in terms of their effect on individuals who take them or who fail to take them, and because they could have some "rather significant side effects pertaining to alertness and judgment." The medical officer also testified that the type of ships that Justice would be assigned to did not have the medical facilities to test the amounts of the drug in his system as would be required. She also noted that in a situation where the individual stopped complying with the medication, incidents requiring repatriation could occur again which could interrupt the mission of the ship, which could interrupt the mission of a battle group. The Board sustained the removal, although they overturned the construction suspension for the period prior to his removal. *Justice v. Navy,* 89 MSPR 379 (2001).

Next month we'll look at cases involving security clearances and sensitivity determinations. Haga@FELTG.com.

Learn from THE Expert

Barbara Haga's next ***Advanced Employee Relations*** class will be held September 10-12, 2019 in Norfolk, VA. Registration is open now.

Tips from the Other Side, May 2019
By Meghan Droste

I think it is fair to say that in a lot of ways, discovery is the heavy lifting portion of litigation. It is time-consuming and usually involves a lot of different moving pieces. It may also include some literal heavy lifting as you sort through, organize, and produce a significant number of documents. This installment of our discussion of discovery tips covers what to do (or not do) when responding to requests for production.

The first, and perhaps most important, tip is to actually produce documents and to do so on time. I know that seems pretty obvious, but, unfortunately, I have had to remind agencies of this very basic point more times than I can count. All parties have an obligation to timely respond to discovery. The failure to do so, including the failure to produce responsive documents by the deadline, can result in a waiver of any objections to the requests. *See Cardenas v. Dorel Juvenile Grp., Inc.*, 230 F.R.D. 611, 619 (D. Kan. 2005). If you are unable to produce the documents by the deadline to respond to discovery, you must identify a specific date by which you will produce them. (You should also check in with the other side and request their consent to informally extend the deadline or to file a motion to extend it if needed.) Simply telling the complainant that you will produce the documents when possible is not enough, and may be considered a failure to respond. *See Jayne H. Lee, Inc. v. Flagstaff Indus. Corp.*, 173 F.R.D. 651, 656 (D. Md. 1997) ("[A] response to a request for production of documents which merely promises to produce the requested documents at some unidentified time in the future, without offering a specific time, place and manner, is not a complete answer as required by Rule 34(b) [of the Federal Rules of Civil Procedure] and, therefore, pursuant to Rule 37(a)(3) is treated as a failure to answer or respond.").

Producing the documents also means actually producing them. In the federal sector, it is generally insufficient to offer to let the other side come to your location to inspect the documents. *See* EEOC Handbook for Administrative Judges, Ch. 4, § II(B) ("As a practical matter, parties typically provide copies of the requested documents in lieu of inspection."). (Yes, I have had an agency try to do this. No, it did not go well for them on the motion to compel.)

The second tip is to ensure that you have an adequate privilege log if you withhold any documents, or portions of documents, pursuant to any privilege. If you redact or withhold anything, you have the burden of proving that doing so is appropriate and necessary. *See Apple Inc. v. Samsung Elecs. Co.*, 306 F.R.D. 234, 237 (N.D. Cal. 2015) ("The party asserting the privilege bears the burden of establishing all necessary elements."). Your privilege log should state the privilege you are asserting, identify each document or portion of a document that you are withholding, identify the individuals who created or sent and received the document if it is an email, and provide a description of the information you are withholding. Failing to produce a privilege log, or producing an insufficient one may result in the judge finding that the agency waived all asserted privileges. *See McNabb v. City of Overland Park*, No. 12-CV-2331, 2014 WL 1152958, at *6 (D. Kan. Mar. 21, 2014). Finally, if you are redacting, avoid the mistakes Paul Manafort's attorneys made, and make sure the text is actually redacted. Droste@FELTG.com

Emerging Issues Week in DC

Navigating the modern federal workplace requires both legal knowledge and the practical skills to handle the most intense and challenging situations. Join us July 15-19, 2019. **Register now.**

God Bless America and Charges that Avoid Intent
By Dan Gephart

The Phillies were hitting the stuffing out of the ball, the Sixers were engaged in a physical playoff series with the Brooklyn Nets, and the Eagles were preparing for the NFL Draft. So when I turned on a Philadelphia sports radio station last month, I was shocked to hear fans talking about, um … Kate Smith.

The Songbird of the South was once a good luck charm for the Philadelphia Flyers hockey team. When Kate Smith sang "God Bless America" before games, the Flyers more likely than not won, especially during their back-to-back Stanley Cup seasons in the mid-1970s. Her final public performance was actually before a Flyers game -- Game 2 of the 1985 Stanley Cup finals to be exact. Smith was so beloved that the Flyers organization built a statue of her outside their arena.

Kate Smith's iconic mid-song figure was a fixture in South Philly for years, until the Flyers suddenly covered the statue last month. Days later, it was gone. The organization had "discovered" the racist lyrics to other tunes in the singer's canon, songs like "Pickaninny Heaven" and the 1931 hit "That's Why the Darkies Were Born." (It was actually the New York Yankees who first cut their connection to the deceased singer a day before the Flyers, announcing they would no longer play Smith's version of "God Bless America" during the seventh inning stretch.)

Irate sports fans were shocked, and they called into sports radio stations en masse to share their displeasure with the Flyers' decision. There were several arguments against removal of the Smith statue, but the one that took sway over most Smith supporters was that "Why the Darkies Were Born" wasn't racist, but satirical. In other words, they argued, we didn't understand Smith's *intent* when she sang that song; she was making fun of racism.

Personally, I applauded the difficult decisions made by the Yankees and the Flyers. That said, there was something about the sports radio argument that struck a nerve. A decade-plus of hearing experts like William Wiley, Deborah Hopkins, and Barbara Haga teach disciplinary charges will make you wince when you hear an argument about *intent.*

If you've attended any FELTG training, whether as a federal HR professional, attorney, or supervisor, you know that it's awfully hard to prove intent. Your decision to remove, suspend, or demote an employee could be the right one. However, using an intent-driven charge will unravel your case faster than Anthony Scaramucci's tenure as White House Director of Communications.

The MSPB, in *Boo v. Department of Homeland Security*, made it clear: Whether intent has been proven must be resolved by considering the totality of the circumstances, including the appellant's plausible explanation, if there is one. Basically, if the employee has a decent excuse, your charge is sunk.

Here are a few charges to avoid with case examples:

Falsification: The MSPB found that the Richard Leatherbury, an assistant operations manager, improperly submitted a claim for past overtime based entirely on an estimate, and that improperly indicated that the claim was based on a precise calculation of actual time worked. The board upheld the agency's removal.

However, the Federal Circuit found that the employee's good faith explanation in filing the travel expenses was disregarded. A

reasonable good faith belief in the truth of a statement precludes a finding that the employee acted with deceptive intent. *Leatherbury v. Army*, 524 F.3d 1293 (Fed. Cir. 2008).

Insubordination: The agency claimed that registered nurse Irene Yetman's failure to complete her work was evidence of insubordination. The administrative judge rejected these charges. Yetman's intent was not to disobey orders. The orders were so onerous, she didn't have time to complete them all. *Yetman v. Department of the Army*, 88 FMSR 5138 (MSPB 1988).

Theft: Cathryn Nazelrod, a correctional institute employee, admitted that she took $10 from an inmate's envelope to buy herself lunch. Nazelrod put the $10 back into the inmate's envelope the very next day. When the agency found out, it demoted Nazelrod on the charge of theft. Noting that the one of the elements of criminal theft was an intent to permanently deprive the owner of possession or use of the property, the MSPB concluded that the agency failed to prove the requisite intent because she returned the money. On appeal, the Federal Circuit agreed. *King v. Nazelrod*, 43 F.3d 663, 665-67 (Fed. Cir. 1994).

Taking a page out of the best-selling *Eat This, Not That* book, I share with you *Charge This, Not That.*

- Charge Lack of Candor, not Falsification
- Charge Failure to Follow Orders, not Insubordination
- Charge Unauthorized Removal, not Theft

While I understand the Flyers' decision to remove a statue of an artist whose successful career included racist songs, and I have made that case in the court of public opinion, I would not want to argue it before the MSPB. 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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