



Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter

Vol. XI, Issue 6

June 12, 2019

Close Doesn't Count in the Lottery or in MSPB

MICHIGAN



LOTTERY

My grandfather has played the lottery for as long as I can remember. One year, my mom took me to a party store to get a lottery ticket for Grandpa for his birthday. Since I was only about 10, mom bought the ticket – but I picked the numbers. As most 10-year-olds would, I selected numbers that corresponded to the ages of the people in my family; conveniently the Michigan Lotto was a six-number game and there were six people in my family, so it was perfect. Almost perfect, anyway. Turns out the ticket was one number off of the grand prize. Grandpa was *this close* to winning a million bucks, but instead he won nothing.

Do you ever find yourself *this close* to something really great? Well, in the world of federal employment law we're sooooo close another milestone: we are (maybe) about to get an MSPB again. Later today, there is a committee vote on the third and final nominee. If it goes well, the full Senate will then be ready to vote on all three nominees, which means we could have a fully seated Board within weeks.

We're only a vote or two away; With that, let's take a look at FELTG's June 2019 newsletter with articles on topics including investigatory problems with the Special Counsel, a 75-cent insurance policy for federal supervisors, and more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

***Developing & Defending Discipline:
Holding Federal Employees Accountable***
June 25 – June 27
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

***Absence, Leave Abuse & Medical Issues
Week***
Washington, DC
September 23-27

Legal Writing Week
October 7-11
Washington, DC

Barr and Mueller Should Come to FELTG Training
By William Wiley



Yeah, they each messed up. And if they had participated in the FELTG *Conducting Workplace Investigations* program (next offered [August 5-9 in Denver](#)), they would have not. In case you've been

adrift at sea without social contact for the past several weeks, here's what happened.

As provided for in both law and regulation, Robert Mueller was appointed by the Attorney General (AG) of the United States as the Special Counsel (SC) assigned to conduct an investigation into questionable dealings between members of President Trump's campaign team and representatives of the Russian government. After two years of investigation, Mueller issued a 448-page report containing a bunch of fascinating facts, but no legal conclusion as to whether those facts amounted to criminal activity on the part of the President. When asked why he did not draw a legal conclusion relative to criminal activity, Mueller noted a Department of Justice policy that stated that a sitting President cannot be criminally indicted for federal crimes prevented him from doing so.

Subsequently, when Attorney General William Barr was asked whether Mueller should have drawn a legal conclusion, the AG offered that he should have. Barr said that even though there is a DoJ policy that a President cannot be indicted, the policy did not prevent the SC from drawing a legal conclusion as to Presidential criminality without issuing an indictment.

Each of these honorable gentlemen made a mistake, mistakes that are not made by participants in FELTG investigations courses. As we have taught for nearly 20 years, an investigation begins with a "customer," someone who needs the benefit

of an investigation. That customer appoints another individual to be the investigator, with certain powers, objectives, and limitations; i.e., defines the scope of the investigation. The goal of an investigation is for the investigator to provide the information needed by the customer to do whatever it is the customer wants done. In a workplace investigations situation, that's usually whether some poor federal employee should be fired. In the AG/SC situation just described, it's whether the President of the United States should be impeached, thrown in jail, or at a minimum, should be re-elected.

The law that governed the appointment of Mueller states specifically that the report of the investigation is to be provided to the AG. It could have said that the report was to go to Congress, or to the public. But it did not. The law made the "customer" of the report the Attorney General of the United States. Therefore, according to basic constructs of investigation, it is up to the AG to define the scope of the investigation, so that the SC investigator knows what to look for and what to produce as an outcome.

In our FELTG classes, we recommend that this critical scope definition be memorialized in an "appointment" memo. Preferably, that memo is provided by the customer to the investigator and lays out the expectations the customer has. For example, part of the appointment memo might say something like, "I am appointing you to investigate the theft of laptop numbered 123 from the director's office that occurred around June 3, 2019. Based on the information you collect, I will make a determination as to who most likely took the laptop and whether discipline is warranted." Sometimes a different result might be desired by the customer. If so, it should be stated clearly in the appointment memo: "If possible, you are to identify who you believe took the laptop without authorization, and the degree of proof you believe that you have regarding that determination." Perhaps the customer wants the investigator to go even further: "In

addition to identifying the probable perpetrator, you are to consider the facts that contribute to the relevant Douglas Factors and suggest a range of penalty.”

There’s no right or wrong when it comes to the scope of an investigation. It’s up to the customer to decide what the expectations are to be, to define the scope, and then to empower the investigator to collect all the evidence that’s required. In our investigations classes, we’ve found that some agency customers just want the investigator to collect facts without any consideration of the penalty factors, and other agency customers want the whole enchilada: facts, perpetrator, and penalty. That’s why it’s so critical that the scope be understood mutually from the very beginning. Otherwise, the investigator may not be satisfying the needs and expectations of the customer.

We teach the potential investigators who participate in our classes that they should protect themselves by clarifying the scope of the work with the customer. If the customer does not draft an appointment memo, we suggest that the investigator draft a memo to the customer before the investigation is initiated that describes what the investigator believes his responsibilities; e.g., “It is my understanding that I am to collect facts surrounding the disappearance of the laptop from the director’s office, but not recommend a penalty nor identify specifically who I would conclude took the property.” That allows the customer to clarify any misunderstandings from the beginning, in case the investigator misunderstands his role.

This simple, basic step would have saved both Barr and Mueller a lot of confusion. When the SC decided early on that DoJ policy prevented him from reaching a legal conclusion as to Presidential criminality, he should have notified his customer (the AG) of this limitation early on in the investigation. Since the DoJ policy is open to interpretation (as evidenced by two really

smart people disagreeing as to its meaning), and since there is no automatic right or wrong, a question presented by the SC to the AG for clarification two years ago when the investigation began would have saved a lot of disagreement and confusion at this stage now that the SC office has been dissolved. On the other hand, there’s not necessarily any fault to be assigned when it comes to being confused. When you order your eggs over easy for breakfast, and the waiter brings you (the customer) eggs that are scrambled, you simply say, “Excuse me, but I ordered eggs over easy.” It doesn’t matter if you misspoke or the waiter misheard. Your eggs were not served the way you want them, and any waiter interested in a tip will remedy the situation without hesitation. That’s how life works. There are no bonus points for assigning blame.

And that was the AG’s mistake. When Mueller submitted his report, and it was clear that he did not reach the legal conclusion that Barr expected, the AG simply should have returned the report to the SC and clarified the expectation. No harm, no foul. When you get scrambled eggs instead of over easy, you don’t jump up, run to the kitchen, and start frying eggs. You just ask them to do it over. That’s what Barr should have said to Mueller, and would have if he had attended the FELTG investigations seminar. The goal is to get an acceptable report (or an acceptable breakfast) in spite of any confusion as to expectations.

Here at FELTG, we exist to help you ladies and gentlemen do a better job of running the government. We do that by offering seminars and consulting services at a reasonable fee. Operators are standing by. Discounts offered for political appointees nominated by the President and confirmed by the Senate. We may be just a small training group, but apparently we know more about federal investigations than do some very important people.

Wiley@FELTG.com

A 75-cent Purchase Can Save Your Entire Case – and Help You Sleep at Night

By Deborah Hopkins



In my travels across the globe teaching federal supervisors about the federal government's accountability systems, one of the most-often-asked questions involves what supervisors can do to better their chances of defending their actions. Do they need more evidence? Witness statements? Video logs? A track record of poor performance a mile long?

All of that is fine, but I have an easier answer and it costs about 75 cents: an old-fashioned notebook. In the 40-plus years since the Civil Service Reform Act went into effect, we have seen case after case that hinged on contemporaneous note-taking – or the lack thereof – by agency supervisors or other management officials. I tell all the new supervisors I train that they need to go out to their nearest office supply store, and get a notebook pronto, since supervising in the federal government is a defensive practice.

While supervisors are generally given the benefit of the doubt in credibility determinations, the best way to supplement and enrich testimony is by producing contemporaneous notes. And the preference by administrative judges, still to this day, are hand-written notes as opposed to computer logs or even notes supervisors email themselves to document workplace events.

Let's take a look at three types of cases where notes were the make-or-break point for the agency: Discipline, Whistleblower Reprisal, and EEO Complaints. We'll look at a case the agency won (because of the notes) and a case the agency lost (because there were no notes, or there was a problem with the notes) in each category.

Discipline: Agency Winner

In our first case today, we have a removal case where the appellant engaged in multiple acts of misconduct, including failure to follow supervisory instructions. He disclosed the details of an ongoing agency investigation after his supervisor directly told him not to speak about it. The MSPB administrative judge (AJ) found that the agency failed to prove the charge of failure to follow supervisory instructions because the supervisor could not recall the exact words she used when giving an order to the employee. But the MSPB reversed the AJ's finding and determined that the supervisor's contemporaneous notes made shortly after the conversation with the employee, even though they were not a verbatim word-for-word recollection, supplemented her testimony. The charge was then sustained. *Von Muller v. DOE*, 101 MSPR 91 (Feb. 13, 2006).

Discipline: Agency Loser

In another failure to follow instructions case dealing with an agency investigation, the agency removed an employee for improper conduct because the employee failed to cooperate in an investigation, and failed to obey a supervisor's order to leave the premises after his tour of duty had ended. At hearing, the supervisor's testimony was different from what he had written in his contemporaneous notes about the situation, and that inconsistency led to a lack of credibility before the judge and, ultimately, before the MSPB. Because of the inconsistency in the notes, and the lack of any additional supporting evidence for the agency's charge, the removal was mitigated to a 21-day suspension. *Eichner v. USPS*, 83 MSPR 202 (Aug. 6, 1999).

Whistleblowing: Agency Winner

When an agency takes an action against a whistleblower, the burden of proof rises from preponderance of the evidence or substantial evidence, depending on the type of case, to clear and convincing evidence. Clear and convincing evidence is a heavy burden, defined in the case law as "That

measure of degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established.” *Schnell v. Army*, 114 MSPR 83 (2010).

A whistleblower at DOJ was given a performance rating he did not agree with, and challenged the rating as an act of whistleblower reprisal. The agency was able to show clear and convincing evidence that the rating was warranted because, in addition to the supervisor’s specific testimony about the appellant’s performance issues, the supervisor had contemporaneous documentation that supported his observations. In addition, the agency was able to show that the appellant had performance problems prior to whistleblowing, and that documented complaints about the appellant’s performance came from outside chain of command. That, folks, is clear and convincing evidence. *Rumsey v. DoJ*, 2013 MSPB 82.

Whistleblowing: Agency Loser

The appellant blew the whistle on her supervisor, alleging harassment and intimidation and claiming that management and the EEO office had not taken any action. Shortly thereafter, she was informed that she was being reassigned. According to the appellant, when she questioned the reason for her reassignment she was informed by the VA hospital’s lead employee/labor relations specialist that the reassignment was due to her allegations of a hostile work environment involving her supervisor. The only evidence the agency presented in response to this allegation was two general statements, in affidavit form, denying that the reassignment was due to whistleblowing, but that it was because the appellant was unhappy with her supervisor. No additional evidence or documentation was provided, so the agency did not prove by clear and convincing evidence that the reassignment was not whistleblower reprisal. *Moore v. DVA*, DA-1221-13-0213-W-1 (March 10, 2015) (NP).



EEO: Agency Winner

In an interesting religious accommodation case, an employee requested to be allowed to wear a nine-inch ceremonial blade in the workplace, even though she worked in a federal building and the blade violated the security requirements. The agency could have simply said no because allowing the kirpan would have been more than a *de minimis* burden, but in an exercise of good faith, the agency also contemporaneously documented attempts to accommodate the employee including considering full-time telework and alternative work locations. Neither of these options worked with the employee’s job requirements, and the agency prevailed in showing that it did not engage in religious discrimination of the complainant because it documented the accommodation attempts. *Tagore v. United States*, 735 F.3d 324 (5th Cir. Tex. 2013).

EEO: Agency Loser

The complainant applied for a promotion and was not selected. She filed a complaint alleging discrimination based on race, sex, and reprisal for prior EEO activity. The four selection panel officials admitted the complainant was qualified but could not explain why she was not selected. There were no notes, scores or specific explanations of the scoring process in the record. One of the selection panel members asserted that he did not remember why she was not selected but that he "could only assume" her application did not show she had the skills needed to work at a higher level. That lack of contemporaneous documentation cost the agency the case. *Hatcher-Capers v. USPS*, EEOC No. 07A60008 (2006).

There are hundreds of other cases that show how contemporaneous documentation – or the lack thereof – is the deciding factor. Don’t let the next Loser case be yours; go buy a notebook today.

Hopkins@FELTG.com

Don't Be Like Ben – The Perils of English-only Rules **By Meghan Droste**



Benjamin Franklin, one of my high school's most famous dropouts, is generally praised in our history books as a founding father, an inventor, and a printer. Did you know that he was also one of the first prominent voices in the

English-only movement? Yep, that's right, our very own Ben Franklin had a serious problem with ... German speakers. He apparently took issue with signs being printed in both English and German in Pennsylvania. He also stated publicly that German immigrants were "of the most ignorant Stupid Sort" and their refusal to learn English made it impossible to reach them. While Franklin's anti-German sentiment may seem like an interesting footnote more than two centuries later, the animus underlying it unfortunately has not faded from our country, although it is generally focused on other languages and countries of origin now.

Due to the connection between language and national origin, English-only rules can be a violation of Title VII. The Commission addressed this issue earlier this year in *Eric S. v. Dep't of Defense*, EEOC App. No. 0120171646 (Feb. 8, 2019). In that case, the complainant, who is from Puerto Rico, greeted a temporary supervisor who entered the work area in Spanish. The complainant and the temporary supervisor then engaged in a conversation in Spanish about their families, when the complainant's supervisor approached them and loudly said "English, English!"

In his affidavit, the supervisor stated that he directed the two employees to use English because "he need[s] to know and understand what's going on." He also asserted that the agency had "a policy to speak English during duty hours" and that

he believed all federal agencies had the same policy. The agency's EEO office confirmed to the EEO investigator that there was no such agency policy. Despite this, the agency issued a Final Agency Decision finding no discrimination.

On its review of the appeal, the Commission noted that English-only rules are permissible only when there is a "business necessity." Employers may be able to show a business necessity for communications with customers, collaborative assignments with coworkers who only speak English, and when there may be a safety issue, among other situations. The fact that some coworkers may be uncomfortable when employees speak other languages is not itself a business necessity.

The Commission found in the specific instance, there was no evidence that the exchange of pleasantries in Spanish impacted the safety or efficiency of the workplace. The agency's attempt to argue that the visiting supervisor's presence in the work area was a safety risk was unavailing, as the complainant's supervisor admitted recognizing him from another part of the facility. As a result, the Commission remanded the complaint to the agency and ordered an investigation into the complainant's damages.

The supervisor's comment might not seem like much, but it can certainly have an impact on how welcome, or not welcome, an employee feels in the workplace. Effective training on these issues will prevent similar situations in your agency and avoid harm to your employees and the time and expense of litigation. Viel Glück out there! Droste@FELTG.com

Employee Relations Week

FELTG's updated **Employee Relations Week** returns to Washington, DC, September 30-October 4, 2019. **Register** early to guarantee your seat!

The Good News: Handling Problem Employees Really Is That Easy
By Ann Boehm



After I first attended FELTG's [MSPB Law Week](#), I excitedly returned to my agency hoping to spread the good word about how to handle problem employees. Instead, I was repeatedly told, "It's not that easy." I was reminded of this recently when a class attendee said, "We love your training, but when we talk to counsel and try to take action on a problem employee, they tell us, 'It's not that easy.'"

Folks, I get it. I was a supervisor, I oversaw discipline for an agency, and I litigated employment law cases for many years. I will agree that handling problem employees can be hard because, well, you are dealing with people. Firing someone, even someone who deserves it, is not easy. But why is it important for you to dig in anyway and address the situation?

If you start handling a problem employee, it can wake that person up. He or she may turn things around. Also, other employees will take notice and see they have to behave and do their jobs well, too. It's like confronting a bully. You owe it to yourself and to your good employees.

And I feel your pain – litigating is hard work. Discovery can be exhausting, opposing counsel can be difficult, and there are crazy judges who make bad decisions. But winning lawsuits is fun, and it is vastly easier to win those lawsuits when managers handle problem employees the way Congress intended.

The processes for handling misconduct and performance really are easy. It's only hard when counsel, HR specialists and supervisors overcomplicate things. And

paralyzing fear of litigation is also a problem that makes proper management difficult. Don't be afraid of litigation; be afraid of losing a lawsuit and let that motivate you to do the right thing for the right reason. Always remember, if you have a bona fide reason for what you do, you are very likely to win any litigation.

So, keep things simple.

In misconduct cases:

- Employ progressive discipline: Reprimand, Suspension, Removal.
- Don't waste time with letters of caution/instruction/warning/admonishment.
- Remember the burden of proof in misconduct cases is only preponderant evidence, or more likely than not. It's not "beyond a reasonable doubt."
- Use the *Douglas* factors for penalty – they are helpful and they provide justification for how you address a particular employee's misconduct.
- Remember that due process requires *only* that the employee be given notice of the charged misconduct, an opportunity to reply orally and/or in writing, and a decision by an impartial decision maker. Don't complicate it! Due process does not mean you have to treat all employees the same.

In performance cases:

- Review the critical elements for your employees and make sure they are specific, measurable, and attainable.
- Once an employee fails on any one critical element (after he or she has been on a performance plan for 60 days), start the employee on a Demonstration Period (formerly known as a PIP or Performance Improvement Plan).
- Unless a collective bargaining agreement or agency policy says otherwise, use a 30-day

Demonstration Period – not 60-, 90-, or 120-day!

- Don't waste time drafting a document that recites all instances of past performance issues – it's not necessary and it will just annoy the problem employee.
- Understand that the 30-day Demonstration Period is 30 days of your life you will never get back. You will be busy meeting with the employee regularly and consulting with your advisor. But at the end, if the employee fails, he or she can be removed. Poof!
- Remember that the burden of proof in performance cases is very low – substantial evidence, which is about 40%. You can win these cases!

I hope my personnel pep talk has given you the confidence and resolve to deal with problem employees. Try it. You will see. It is that easy. Boehm@FELTG.com

Developing & Defending Discipline

Holding federal employees accountable is much easier than you think. This signature FELTG class explains how to take defensible misconduct actions quickly and fairly. Join us for upcoming training in Washington DC (**June 25-27**), Atlanta (**September 17-19**), or Puerto Rico (**February 25-27, 2020**).

Tips From the Other Side: June 2019 By Meghan Droste

To close out our discussion of discovery tips, at least for now, I thought I would bring you a cautionary tale to illustrate just how important these points can be. As you know, any party that fails to meet its obligations in discovery — whether that's the deadlines to initiate or respond to discovery, or the production of all relevant and responsive information — can find themselves on the receiving end of sanctions by an administrative judge (AJ). The sanctions will

generally be relatively small, perhaps an adverse inference that someone said or did something that is at issue in the case. They can, however, be much more significant and result in the dismissal of the hearing request or the entry of default judgment.

In *Dionne W. v. USAF*, EEOC No. 0720150040 (Mar. 27, 2018) the AJ entered default judgment as a sanction against the agency. The Commission's decision doesn't list what the agency did, or did not do, in discovery, but it appears to have been significant. The complainant filed a motion for summary judgment based, at least on part, on the agency's discovery failures and the AJ scheduled a status conference.

Prior to the status conference, the agency's attorney withdrew his or her appearance due to leaving the agency, but the agency failed to notice the appearance of new counsel and no one appeared for the status conference on the agency's behalf. Due to the issues with the agency's discovery practice and its failure to appear for the conference, the administrative judge entered default judgment. As a result, the case moved directly to the damages phase, and the administrative judge awarded the complainant \$185,000 in compensatory damages and \$155,050 in attorney's fees, and ordered the agency to place her in a new position.

The Commission upheld the administrative judge's entry of default judgment on appeal and modified the award slightly. It appears from the Commission's decision that the harassment and the resulting harm to the complainant were significant and severe, and as a result the agency might not have been able to prevail at a hearing on liability. Regardless, it lost out on that opportunity when it failed to meet its obligations. I may sound like a broken record on this, but be sure to take your discovery deadlines and obligations seriously. If you don't, you may end up having to explain why the agency did not have an opportunity to argue the merits of the case. Droste@FELTG.com

Knock, Knock. Who's There? The Efficiency of the Service.

By Dan Gephart



Since Father's Day is this Sunday, I think it's probably the safest time for me to come clean about an embarrassing habit.

I tell Dad jokes. I mean, I tell Dad jokes a lot. My sons were barely teenagers before they developed an instinctive ability to recognize an incoming Dad joke before the words even left my mouth. And once they sense a Dad joke coming, they plead for me to reconsider:

Me: Speaking of Benji ...

Son 1: Dad, we're not talking about the dog anymore.

Me: It reminded me that I saw your friend's dog yesterday.

Son 2: Don't do this.

Me: You won't believe it, I saw him doing magic.

Son 1: Please no. Dad,

Me: I guess we all know what breed he is now.

Son 2: Seriously Dad, I'm begging you.

Me: He's a Labracadabrador.

Son 1, Son 2: (Groans that sound as if they're dying.)

Years of grumbles, sighs, and finger wagging hasn't stopped me. A dad and his bad jokes are like the Golden State Warriors in the NBA Finals; they're always there. While my Dad jokes may lack taste, humor, or a single redeeming quality, at least they are rather anodyne. Not so, however, for jokes with sexual implications, especially when they're told in the federal workplace -- even if they don't rise to the level of hostile workplace or harassment.

Here's an example: David Lang, a GS-14 Deputy Security Officer at the Department of the Treasury, wandered into a conference

room where his colleagues were preparing for a meeting with VIP guests. The meeting had nothing to do with Lang's job. There was no real reason for him to be there. However, some of the attendees had arrived early, so the meeting host, who was not ready, told the crowd they could ask Lang about security. The meeting host assumed Lang would talk about security issues.

He was wrong.

With no agenda or prepared material, Lang started to adlib, which led to a sexually suggestive anecdote about a drunk person in a police station. Lang acted out the story, specifically mimicking the drunk. As he neared the end of the story, his boss walked in. Lang looked directly at her as he continued with his joke. This MSPB initial decision (*Lang v. Treasury*, DA-0752-04-0442-I-1, (MSPB AJ 2005)) didn't go into any further detail, but I imagine Lang's boss giving him the same look I've seen on my sons' faces. With his boss glaring at him, Lang paused, then continued to the punchline: "The drunk man looked down and said: 'Oh no, they stole my girlfriend, too.'"

As the boss walked out, Lang told the audience: "Well, that was my boss, so be on the lookout for my resume." Lang wasn't terminated, but he was demoted to a GS-13. Of course, he appealed the demotion. In affirming the agency's decision, the Merit Systems Protection Board administrative judge wrote:

"I find that the deciding official in this case properly considered the applicable *Douglas* factors and he adequately assessed the overall circumstances, including those that favored mitigation. He found that, under these circumstances, placing the appellant into a non-supervisory position with the least reduction in his pay was warranted and would best promote the efficiency of the service."

Lang filed a petition for review, which the Board denied.

Inappropriate jokes also led to the demotion of the GS-13 Employee Relations specialist in *Hatch v. Air Force*, 40 MSPR 260 (1989). Hatch regularly told jokes with sexual connotations, often in meetings and, per the parlance of the day, “in mixed company.” The AJ found that the jokes adversely affected the efficiency of the service because of the number of subordinates who found them to be offensive.

The term “efficiency of the service” debuted in the Lloyd-La Follette Act of 1912, and was eventually folded into the Civil Rights Act of 1978. As long as there is a nexus between the misconduct and the federal job, the supervisor can take an action. It doesn’t matter that the actions don’t meet a legal definition of hostile work environment. As the Federal Circuit wrote in *Carosella v. US Postal Service*, 816 F.2d 638 (Fed. Cir. 1987):

“An employer is not required to tolerate the disruption and inefficiencies caused by a hostile workplace environment until the wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action.”

In 1994, the MSPB published a report on sexual harassment in the federal workplace, which clearly explained the costs of boorish behavior:

“Imagine an employee who’s being bothered by a coworker who leers at her or makes comments full of innuendo or double entendres, or who tells jokes that are simply inappropriate in a work setting. The time this employee spends worrying about the coworker, the time she spends confiding in her office mate about the latest off-color remark, the time she spends walking the long way to the photocopier to avoid passing

his desk, is all time that sexual harassment steals from all of us who pay taxes.

Adding up those minutes and multiplying by weeks and months begins to paint a picture of how costly sexual harassment is. Increase this one individual’s lost time by the thousands of cases like this in a year, and the waste begins to look enormous. And this may well be a case that doesn’t even come close to being considered illegal discrimination by the courts. Whether or not they’re illegal, these situations are expensive.”

If you’re a supervisor who likes to tell jokes, think about your audience before you let the next one loose. And if you’re a supervisor of a Fed who fancies himself a cutting-edge comedian, take action *before* someone has to file an EEO claim.

I guess you could say that Dad jokes and inappropriate work jokes share one thing: Neither is a laughing matter.

Gephart@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. Gain the tools to better understand how to:

- Manage employees with mental and behavioral health issues.
- Handle sexual harassment and bullying claims.
- Manage risk in your agency.
- Handle conflicts that take your employees off-task.
- Respond to the most challenging reasonable accommodation requests.

Join us July 15-19, 2019. **Register now.**

Upcoming FELTG Webinars

Significant Cases and Developments at the FLRA

Joe Schimansky
June 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

Threats of Violence in the Federal Workplace: Assessing Risk and Taking Action

Shana Palmieri
October 31, 2019

Pregnancy in the Federal Workplace: Discrimination, Harassment, and Accommodation

Meghan Droste
November 21, 2019

Register for FELTG's **All-Access Quarterly Webinar Pass** or the **Webinar All-Access Pass**.

Drafting Unauthorized Absence Charges: How to Write the Specification(s)

By Deborah Hopkins

One of the more common categories of questions we get at FELTG involves the exceedingly technical area of drafting disciplinary charges. Here's a recent note that came to us:

I have an employee who is being charged with unauthorized absence for a period of time. The specification(s) read something to the effect "You were absent from duty beginning January 28, 2019 through March 22, 2019 without authorization."

There is a debate as to whether each day the employee was absent should be listed as a separate specification versus how it's written above. I believe either specification spells out the conduct the Agency can prove. Any recommendations?

And the FELTG response:

Thanks for the email. I can't give legal advice on your specific situation, but I can speak to the principle of drafting charges in general. When you charge an employee with misconduct you have to prove *every single word* in the charge. If there's one word you can't prove, you lose the whole charge – even if you have mountains of evidence the employee did something wrong. Check out *Parkinson v. DoJ*, SF-0752-13-0032-I-1, (October 10, 2014) (NP); *Thomas v. USPS*, 116 MSPR 453 (2011); *Burroughs v. Army*, 918 F.2d 170 (Fed. Cir. 1990); *Brott v. GSA*, 2011 MSPB 52.

When it comes to specifications for charges, you don't always have to prove every word (though that's the goal), but you do have to prove the "essence" of the specification. We know from the case law that this means you have to get it pretty close to perfect, but if you get a word or a number wrong you still

might get to keep the specification. See, e.g., *Russo v. USPS*, 284 F.3d 1304 (Fed. Cir. 2002).

Also worth noting, if you have multiple specifications and lose some of those specifications, your charge will still stand – as long as at least one specification sticks. But the more specifications you lose, the more wiggle room it gives MSPB to mitigate your penalty, if the penalty starts to fall outside the bounds of reasonableness.

The danger in [hypothetically] charging something like "absent from duty beginning January 28, 2019 through March 22, 2019 without authorization" is that if during even one of those days the employee was entitled to be absent (let's say he was incapacitated for duty because of the flu and he had sick leave on the books) then you could lose the entire charge if the adjudicator thinks you have lost the "essence" of the specification. If even a day within the entire span of absence was authorized, have you still proven the specification?

There's a strong argument to be made that the "essence" is still there, but this is now moving into a gray area. What about the weekends that are included in the span of those dates, when the employee wasn't supposed to be at work? Is that inclusion of weekends far enough away from the "essence" of the specification, for you to lose you the whole charge? I am not sure I'd

want to take on that battle, especially when there is a much easier way to handle this kind of case.

The alternative way of drafting the charge is to list each day of absence as its own specification; that way even if it turns out that for a few of those days the employee would have been entitled to leave, the charge could still stand based on the remaining specifications.

Charge: Unauthorized Absence

Specification A: 8 hours on January 28, 2019

Specification B: 8 hours on January 29, 2019

Specification C: 8 hours on January 30, 2019

Specification D: 8 hours on January 31, 2019

Etc.

It seems like a bit more work to do things this way, but we have learned to be exceedingly conservative when drafting charges. MSPB has traditionally been technical on how it looks at charge drafting, and (if we ever get an MSPB again) we can assume that the new Board members will follow nearly 40 years of precedent in this area.

For more on charge drafting plus a whole lot more, join FELTG in [Washington, DC for MSPB Law Week September 9-13](#). I hope we'll see you there. 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)