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

FELTG Newsletter Vol. XI, Issue 9 September 18, 2019

Highlights and Keynotes

FELTG President Deborah Hopkins with a few much more distinguished Presidents

Over the Labor Day holiday, I spent a few days exploring the Black Hills on two wheels – not the two wheels with an engine that converge on Sturgis every year, but the kind that requires manual power and lots of sweat. One of the highlights of the trip was riding up Iron Mountain Road to the base of Mount Rushmore. While I loved every day of the trip (The Badlands! Custer State Park! Devil's Tower!), if I had to choose just one day as the most meaningful, the Iron Mountain Road day would be it.

Well, at FELTG we've adopted a training approach similar to highlights, but we're calling it Keynotes. If there's a topic you're interested in but you can't devote a full week or even a full day to the content, we can bring you the highlights in the form of a 90- or 120-minute Keynote Presentation. Whether you want to brief your agency's senior leadership on the accountability systems in the civil service, to alert your employees about the agency's position on sexual misconduct in the federal workplace, or anything in between, FELTG has you covered.

In the meantime, please enjoy the September Newsletter – the last one of FY 2019!

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

Absence, Leave Abuse & Medical Issues Week
Washington, DC
September 23-27, 2019

Employee Relations Week
Washington, DC
September 30–October 4, 2019

Legal Writing Week
Washington, DC
October 7-11, 2019

FLRA Law Week
Washington, DC
October 21-25, 2019

MSPB & EEOC Hearing Practices Week
Washington, DC
November 18-22, 2019

Advanced Employee Relations
New Orleans, LA
November 19-21, 2019

Advanced Employee Relations
Atlanta, GA
February 11-13, 2020

Developing and Defending Discipline: Holding Federal Employees Accountable
San Juan, Puerto Rico
February 25-27, 2020

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If You Don't Know Where You're Going, You'll End Up Somewhere Else
By William Wiley

Yogi Berra laid down an important principle of life when he delivered the quote in our headline. A less-gifted author, such as your reporter here, might have said something like, "You should know what you're trying to accomplish before you set out to do it." Of course, that's why Yogi is quoted more fondly than Wiley. Yogi is so much more articulate.

This leads us to an article we published a couple of weeks ago about disciplining employees. We presented the question: "Why do supervisors discipline employees?" We thought we should try to nail down our goal if we are to understand the value of and the pathway to administering discipline. Although the article was meant mostly as a thought question for all you philosophers out there, we received a lot of really good reasons from several members of the FELTG Nation.

Historically, this particular article received the second-most *FELTG Newsletter* comments from you avid readers out there, being surpassed only by Deb's "How to Dress" piece many years ago (a copy of which is still taped to the inside of my clothes closet door, for easy reference).

A number of responses focused on the statutory requirement that discipline be used for such cause as will promote the efficiency of the service. "We discipline to send a message to the employees" was a common theme. In this same line of thought, one responder said that we use discipline to "control the workplace environment." A couple of other responses took a different approach, wondering if we should really want employees working for the government who have to be coerced into behaving acceptably. One excellent thinker referenced an article published last year by the Society for Human Resource Management (SHRM) that argues that in the modern workplace, discipline has no purpose at all.

What was absent from any of the responses was the belief that we discipline employees to punish them for their wrongdoing, the old eye-for-an-eye tooth-for-a-tooth principle that an employee who has injured the agency is to be penalized to a degree similar to the harm. Frankly, we were glad to see that punishment was not articulated as an objective of discipline.

The distillation of the responses we got is that a supervisor should discipline an errant employee to correct his behavior so that he conforms his conduct to workplace norms in the support of an efficient government. Which takes us to a very real question we should all consider:

> *If we are disciplining to correct behavior, not to punish behavior, then why do we ever suspend employees as discipline?*

If an employee were to do something at work that really hurt the agency, just short of being harmful enough to warrant removal; and if we were intent on punishing the employee, we might well resort to a big long suspension of 90 to 120 days. The US Merit Systems Protection Board is on record as finding such lengthy suspensions to be warranted as mitigation in a few cases over the years in which it has found a removal to be excessive. However, if we were not interested in punishing the employee, and instead had a goal of getting the employee to change his behavior so that he does not engage in future misconduct, then we should look for tools that correct (not punish) behavior. With the corrective approach in mind, when we consider whether we should suspend an employee as discipline, we start to realize a few things about suspensions:

1. **There's no proof that they get employees to correct their behavior.**

Oh, we've all seen employees who were suspended who did not engage in future misconduct, but perhaps they would have refrained from future misconduct with something other than a suspension. I've been on the lookout for 40 years for some scientific (preferably double-blind) study out of some reputable research entity that establishes that the greater the degree of lost pay enforced as a disciplinary suspension, the less likely it is that the individual will repeat the misconduct. The closest I've come to the severity of punishment correlated with the rate of recidivism is in research done with criminals. And there seems to be no correlation between the length of a sentence and the likelihood that the individual will repeat the criminal act. Your gut may tell you that the greater the suspension, the less likely it is that the individual will repeat the misconduct, but there's no science to back that up.

2. **Suspensions are not free.** If a supervisor suspends an employee for three days, what happens to the work the employee would have done had he been at work? Does it go undone? Does it get dumped on coworkers? Do we call in contractors to do the work, or pay overtime? We've been told of cases in which agencies had to spend two to three times the employee's lost salary to get the work done during the employee's suspension. If I was going to spend that kind of government money, I'd want to be sure I was getting something of greater value in return. Suspensions as corrective tools have not been proven to be that valuable.
3. **Suspended employees often challenge the suspensions.** EEO complaints are free to the employee and resource-draining for management. Grievances take up a lot of management time, with serious costs if the union invokes arbitration. If the supervisor suspends the employee for more than 10 workdays, there's the good old MSPB appeal/discovery/hearing/petition-for-review/federal court-times-2 process to be dealt with. If the employee is a whistleblower (aren't they all?), then there are those delightful folks over at the US Office of Special Counsel who are ready, willing, and able to investigate and prosecute the pants off of a reprising management official.

If we are disciplining to control the federal workplace, to modify behavior in support of an efficient government, then we should not use tools that don't offer the promise of accomplishing that objective. Here within the FELTG neural net, that reality began to settle in about five or six years ago. When asked for advice on the development of a disciplinary policy, we recommend using two reprimands to establish progressive discipline, then removing the non-conforming employee without using suspensions at all. The SHRM article goes so far as to argue that the word "reprimand" is out of place in a modern workplace, and suggests that instead, we use the word "Notice." Something worth considering.

MSPB & EEOC Hearing Practices Week

FELTG presents a workshop-based seminar focused on practicing effectively and successfully in administrative hearings involving federal employment law -- MSPB and EEOC, plus arbitration.

This weeklong training will be held November 18-22 in Washington, DC.

We think Yogi would be proud of any agency that took this progressive discipline approach: Reprimand, Final Reprimand, then Removal. That's because we seem to all be in agreement that where we want to end up is with a more efficient federal government, not with punished individuals for the sake of punishment. Wiley@FELTG.com

We Don't Need Civil Service Reform, Part III: It Doesn't Take As Much Proof As You Think
By Deborah Hopkins

In the final installation of this three-part series, I will discuss how holding employees accountable does not take as much evidence as you think it does. Before you read this, though, take a look at the first two articles in the series:

- Holding employees accountable is not as difficult as you think it is.
- Holding employees accountable is not as time-consuming as you think it is.

I hope by now you'll agree with me that the civil service system is not completely broken, but instead is being used inefficiently. Today we will tackle the final challenge, on the amount of evidence needed to take actions against employees for misconduct or performance-related problems.

A 2015 MSPB survey found that 97% of federal supervisors thought they needed more evidence to remove a federal employee that they actually do. The most startling number was that 94% of proposing officials thought they needed evidence beyond a reasonable doubt – that's the amount you need to send someone to jail – to take an accountability action. The reality is, the evidence you must show to defend your action is far lower.

In **DISCIPLINE** cases, the level proof you need is called a *preponderance of the evidence*, which is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. 5 CFR 1201.56(c); 5 CFR 1201.4(q). If it is more likely than not that the employee violated a workplace rule (stole a laptop, falsified a time card, acted disrespectfully toward a supervisor, went AWOL, failed to follow a supervisor's instruction, etc.), the agency has enough proof to discipline. If you are a supervisor and your employee said something disrespectful to you in a one-on-one meeting, you have a preponderance of the evidence. It's as simple as that. You might have witnesses, video logs, an admission, or more, and that's fine, but you don't actually need that much evidence.

The most disempowering words a supervisor can hear from an advisor when the supervisor wants to take action against an employee who has violated a workplace rule is, "You can't do that because you don't have enough evidence." In most cases, there actually *is* enough evidence to proceed.

In **PERFORMANCE** cases, the proof you need is *substantial evidence*, which is evidence that reasonable person *might* accept [not *would* accept] to support a conclusion relevant in an unacceptable performance action, even though others may disagree. 5 CFR 1201.56(c)(1); 5 CFR 1201.4(p). If an employee might have failed a critical element in her demonstration period, that is substantial evidence – even though other supervisors might disagree with the assessment of the employee's performance. (Unless it's a widget-based, black and white standard that is not open to interpretation.)

Additionally, with performance cases, unless your agency is exempted from the performance procedures in the statute, there is no requirement to do a Douglas factors analysis. Things like harm, length of service, work record and potential for rehabilitation do not have any impact – the MSPB can't even look at those factors if the employee appeals a performance-based removal. The only evidence that matters is what happened during the 30-day demonstration period.

A special word to our friends at the VA – under 38 USC 714, which is just over two years old: Your burden of proof is substantial

for both misconduct and performance cases for all employees covered by this statute.

Hopefully, you now see that you don't need as much effort, time, or evidence as you thought you did, in order to hold a federal employee accountable. The legal minimum makes it easy to take the necessary actions so that an employee being paid by our tax dollars gets better, or else moves on to something else. Hopkins@FELTG.com

Upcoming FELTG Webinars

Suicidal Employees in the Federal Workplace: Your Actions Can Save a Life
September 26

Dealing with Unacceptable Performance: Fast and Effective Accountability Tools for Agencies
October 3

Significant Cases and Developments at the EEOC
October 10

Discipline Alternatives: Thinking Outside the Adverse Action
October 24

Threats of Violence in the Federal Workplace: Assessing Risk and Taking Action
October 31

Managing Difficult Employees When Performance or Conduct Isn't the Problem
November 7

Three-part Webinar Series
Absence Due to Illness
October 16
October 30
November 16

The Good News: At Last, Successful Last Rites Agreements
By Ann Boehm

In many training sessions, we suggest that agencies consider a "Last Rites" Agreement to handle problem employees. In my experience, despite our encouragement, many agencies still don't use this effective tool. Finally, however, I heard from a recent class participant who had success with Last Rites in 8 out of 9 employment situations. That's Good News, and I want to share it.

For those who don't know what a Last Rites Agreement is, our Grand Poobah Emeritus Bill Wiley described it in an April 2017 FELTG newsletter article:

> A Last Rites agreement is negotiated at the point that the supervisor has reached the conclusion the employee needs to no longer be employed in his position. Many times, the supervisor has already collected enough evidence to propose a removal based on either misconduct or unacceptable performance. Here's how it works in most cases:
>
> 1. The supervisor or someone on her behalf (attorney, human resources specialist, ombudsman ... whomever) approaches the employee with the offer. The employee is told that he has a removal facing him soon, and is offered the chance to resign voluntarily rather than be fired. Some employees see a resignation as an advantage to being fired because the employee's Official Personnel File will record a voluntary quit rather than a forced removal. (See the sample in the back of your copy of *UnCivil Servant*).
>
> 2. Supervisors see voluntary quits as an advantage to firing the employee because

the quit is effective immediately at getting the employee out of the workplace, and the employee has waived appeal/grievance/complaint rights in a well-worded Last Rites agreement.

3. The employee has the choice of being fired and exercising appeal rights, or quitting and foregoing appeal rights in exchange for a "clean record." [Boehm note: By acting before any final action occurs, the agency also avoids conflict with Executive Order 13839's edict that there be no more Clean Record settlements that remove items from official personnel records. This is pre-official record.] Sometimes agencies will incorporate a little time off or attorney fees as an extra incentive to resign. *MSPB has a perfect record at upholding agreements like these as long as the agency does not mislead the employee* (emphasis added).

Sounds so logical and simple, but agencies are not doing these. I suspect some folks fear it is "coercion" or a "constructive discharge." But that's not how the MSPB and Federal Circuit see it. These are perfectly legal.

Write On!

Legal Writing Week returns to Washington, DC, October 7-11, led by Ernie Hadley.

So along comes this month's hero to tell us about the situations where he had success with Last Rites Agreements. To his credit, he wanted to share this with our newsletter readers to "potentially help people in the future." We here at FELTG are very appreciative.

Here are some of the success examples:

1. Female employee bullied and demeaned other female employees for approximately 10 years. Despite investigations substantiating misconduct, her supervisors never took any action. The last straw was when she harassed a colleague who was having trouble conceiving a child. The supervisor suddenly wanted to fire her. Without any prior discipline, the Last Rites Agreement was a safe way out. The agency called in the union representative, since the employee was in the bargaining unit. They offered her 60 days of pay, and even the union thought this was fair. She accepted the agreement!

2. An employee had a long history of attendance issues, including AWOL and habitual tardiness. Supervisors failed to act, but finally did give him a letter of reprimand. He went AWOL after that. The agency offered him a Last Rites Agreement. The union representative was briefed prior to delivery. He accepted the agreement!

3. One perpetually tardy/AWOL employee had received a reprimand and suspension and removal was up next. The employee had lost his son to illness six months earlier. As a humanitarian move, the agency offered a Last Rites agreement instead of removal. He accepted the agreement!

4. Another employee was facing prison time for a DUI with bodily harm to another person. He kept postponing his court dates and lingered on as an employee, and the supervisors wanted the conviction in place before proposing removal. He knew he was facing prison time and likely removal, so he was actually relieved to get paid for 30 days and have the ability to resign. He accepted the agreement!

5. Two employees were harassing and bullying a female subordinate for several months. She filed a grievance and the agency investigated the matter. The agency was ready to remove both, but the agency elected to try a Last Rites Agreement. They both accepted the agreement!

I didn't even include all of the examples from this one agency. Last Rites Agreements work. At least give it a try. And if you try and succeed, please let me know. You too can make The Good News.
Boehm@FELTG.com.

Accommodation and Performance Issues II
By Barbara Haga

Once again, we are looking at handling performance issues in the case of an employee with a disability based on information provided in the EEOC guidance document *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities*.

Section III.c of the guidance document covers the matters addressed in this column. It is a section about conduct matters, but the examples include performance, too. Sections quoted from the EEOC document are in italics.

> *10) What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?*
> *If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.*
>
> *If the discipline is something less than termination, the employer may ask about the disability's relevance to the misconduct, or if the employee thinks there is an accommodation that could help her avoid future misconduct.*

We are going to look at the examples in reverse order since they line up with the two options discussed above that way.

> *Example 20: An employee informs her supervisor that she has been diagnosed with bipolar disorder. A few months later, the supervisor asks to meet with the employee concerning her work on a recent assignment. At the meeting, the supervisor explains that the employee's work has been generally good, but he provides some constructive criticism. The employee becomes angry, yells at the supervisor, and curses him when the supervisor tells her she cannot leave the meeting until he has finished discussing her work. The company terminates the employee, the same punishment given to any employee who is insubordinate.*
>
> *The employee protests her termination, telling the supervisor that her outburst was a result of her bipolar disorder which makes it hard for her to control her temper when she is feeling extreme stress. She says she was trying to get away from the supervisor when she felt she was losing control, but he ordered her not to leave the room. The employee apologizes and requests that the termination be rescinded and that in the future she be allowed to leave the premises if she feels that the stress may cause her to engage in inappropriate behavior. The employer may leave the termination in place without violating the ADA because the employee's request for reasonable accommodation came after her insubordinate conduct.*

This example is important for several reasons. Although it arose in a performance context (the counseling meeting), it is actually a misconduct issue in the Federal context since the action results from the employee yelling and cursing at her supervisor. It reiterates the point that employees with disabilities are expected to meet the same conduct standards as any other employee and allowing such an employee to violate an accepted standard

because of a disability is not a reasonable accommodation.

Another reason this example is helpful is it serves as a reminder that managers can require employees to stay put in meetings. My sense from training lots of supervisors is that many of them might not have responded as this supervisor did when the employee tried to leave. I think some might have felt that they could normally require an employee to stay but might have paused this time because this employee had disclosed that there was a disability. As the EEOC described the scenario, the supervisor properly told the employee she had to stay for the discussion of her work. This is one of the things that you might consider mentioning to a supervisor when you help them with actions and prepare them to deliver the notices. They need to be ready to say, "you have to stay," when discussing performance matters since sometimes employees, with disabilities and without, will refuse to listen or attempt to walk out when confronted with information about performance deficiencies.

> *Example 19: Tom, a program director, has successfully controlled most symptoms of his bipolar disorder for a long period, but lately he has had a recurrence of certain symptoms. In the past couple of weeks, he has sometimes talked uncontrollably and his judgment has seemed erratic, leading him to propose projects and deadlines that are unrealistic. At a staff meeting, he becomes angry and disparaging towards a colleague who disagrees with him. Tom's supervisor tells him after the meeting that his behavior was inappropriate. Tom agrees and reveals for the first time that he has bipolar disorder. He explains that he believes he is experiencing a recurrence of symptoms and says that he will contact his doctor immediately to discuss medical options. The next day Tom provides documentation from his doctor explaining the need to put him on different medication, and stating that it should take no more than six to eight weeks for the medication to eliminate the symptoms. The doctor believes Tom can still continue working, but that it would be helpful for the next couple of months if Tom had more discussions with his supervisor about projects and deadlines so that he could receive feedback to ensure that his goals are realistic. Tom also requests that his supervisor provide clear instructions in writing about work assignments as well as intermediate timetables to help him keep on track.*
>
> *The supervisor responds that Tom must treat his colleagues with respect and agrees to provide for up to two months all of the reasonable accommodations Tom has requested because they would assist him to continue performing his job without causing an undue hardship.*

Tom's example is a good news story. The disability was disclosed close after the performance deficiencies began, the medical provided the next day, the fix with new medication would only take six to eight weeks, and in the meantime there was a reasonable solution to help Tom successfully perform in the interim. If all goes as planned, management should be able to retain what appears to be a good employee with a successful performance record.

In this case, it appears that the supervisor agreed to the requested accommodation without any discussion about consequences tied to the outburst. If we could roll the clock back: What would have been the answer if the supervisor had wanted to discipline Tom for the outburst? From a discrimination point of view, there is nothing that would prevent the supervisor from doing so since the disability was not disclosed until after the outburst occurred. From a disciplinary standpoint, there is a choice to be made. If

the supervisor is satisfied that Tom's outburst is not likely to recur, then a memo to the record about what happened and noting that Tom was told that this inappropriate behavior wouldn't be tolerated in the future, might be appropriate. But, if the supervisor wanted to take an action such as a reprimand or short suspension and felt it was warranted given that others who engaged in similar outbursts were similarly disciplined, then it is not out of the realm of reasonableness for that to be the outcome.

On the performance side, the supervisor should certainly document what the issues were regarding deadlines and projects. A memo to Tom citing what the problems were and what the supervisor would do in the next weeks to assist Tom in bringing his performance back to an acceptable level would be appropriate. In this example, Tom's health care provider recommended that the supervisor do the very types of things that might have been suggested as part of a counseling process for Tom. I would imagine that most of us would stop short of a PIP given that there is an expectation that Tom will return to successful performance in a short period of time. Haga@FELTG.com.

Advanced Employee Relations

Let's face it: Being a federal sector Employee Relations Specialists is a tough job. It's great to know the basics, but the basics don't always help you when you're facing really challenging situations. That's when you realize that there is so much more to learn.

Join us for the three-day Advanced Employee Relations where you will receive in-depth training on leave, performance, misconduct, disability accommodation, and more.

This training will be held November 19-21 in New Orleans and it will be taught by FELTG Senior Instructor Barbara Haga.

Knock, Knock. Who's There? Harassment, And It's Never Funny
By Meghan Droste

Humor is generally a matter of personal taste. Knock, knock jokes, for example, are very popular with my nieces, but those of us no longer in the elementary school set generally find them less amusing. While my humor tends toward the more sarcastic, plenty of my friends prefer puns or other types of jokes. Regardless of what tickles our funny bone, I hope we can all agree that harassment is never funny.

Unfortunately for the complainant in *Bryant F. v. Department of Homeland Security*, his supervisors found his disability rather amusing and repeatedly joked about it. *See* EEOC App. No. 0120171192 (July 2, 2019). The complainant, a special agent, broke his wrist on the job. He had to undergo several surgeries to address the injury. Ultimately, he lost all movement in his wrist and hand. While he was recovering from the injury and the surgeries, his first-, second-, and third-line supervisors repeatedly joked about his injury, asking him about his bowling record and calling him "the bowling team captain" because his cast looked like a bowling brace. When he pushed back against these jokes, which his supervisors subjected him to on a daily basis, his first-line supervisor told him it was "just for fun."

In addition to "joking" about the complainant's disability, his first-line supervisor repeatedly attempted to assign him work that went beyond his restrictions. He provided medical documentation to the agency describing his need to remain in the office and not perform field work because of his injury and ultimate loss of mobility. Despite this, his supervisor repeatedly listed him on the roster for field work, causing the complainant to find other agents to cover those duties. The complainant's second-line

supervisor also made comments about the complainant being on light duty, asking if he was "still trying to get out of his duty."

The complainant initially requested a hearing but withdrew the request before the administrative judge issued a decision and the Commission remanded the case back to the agency for a Final Agency Decision. The agency determined in its FAD that the complainant failed to prove any of his claims of discrimination or harassment.

Unsurprisingly, the Commission reversed. It concluded that the complainant's supervisors repeatedly harassed him when they "joked" about his cast and made comments about him being on light duty. It also held that the agency failed to accommodate the complainant when his supervisor repeatedly tried to assign duties that went beyond his physical restrictions and when it failed to look for a reassignment when it became clear that he would not recover mobility in his wrist and hand.

Considering the facts, it was no surprise that the Commission found in the complainant's favor and also ordered training for several of the people involved. Harassment and disabilities are not good topics for jokes, and I hope the supervisors in the *Bryant F.* case adjusted their senses of humor after their training. Droste@FELTG.com

Tips from the Other Side: September 2019
By Meghan Droste

Last week, I had the pleasure of traveling to Nevada to do an onsite training for a fantastic group of HR professionals. In talking through various issues related to harassment, we discussed an agency's obligation to take prompt and effective corrective action when it substantiates an allegation of harassment (sexual or otherwise).

This is, of course, a legal obligation but it also goes a long way to ensuring that employees have faith in the agency and its willingness and ability to take harassment allegations seriously. If employees see that the agency takes these allegations seriously, they should be more likely to report harassment, hopefully before it rises to the level of legal liability, and less likely to commit harassment. This will result in a more productive work environment and fewer instances of liability for the agency.

During the class, we discussed examples of what would undermine employees' trust in an agency. One situation that came up was an agency giving an award to an individual after finding the employee had engaged in harassment. From the perspective of a complainant's representative, this type of situation jumps out at me. I would, of course, use such an award to argue that the agency was not taking the harassment seriously. *See Complainant v. James*, EEOC App. No. 0120123332 (Sept. 10., 2014) (finding the agency's failure to discipline the harasser "communicated to employees that the [a]gency did not take racial harassment seriously"). After all, how could it assert that it took prompt and effective corrective action if it followed any discipline it issued with a reward for the harasser? *See Quinn v. Tenn. Valley Auth.*, EEOC App. No. 01956441 (Jan. 30, 1998) (finding the agency's promotion of the harasser after the allegations of harassment to be "inexplicable").

This practice tip grew out of the class discussion: A participant said she recommends that managers send all proposed awards to HR before awarding them so that HR can cross check the potential recipient with any open or recently closed harassment complaints and investigations. This sounds like a good practice to me. While I hope that your managers are well-trained and know that giving an award to someone who harassed another employee would be problematic, this extra level of review ensures that the agency does not get tripped up by someone who doesn't see the big picture.
Droste@FELTG.com

Why Do We Suggest You Put a Douglas Analysis in the Proposal Letter?
By Dan Gephart

Here at FELTG laboratories, we create training that teaches the no-nonsense way of doing things, especially as it pertains to handling misconduct. You know the saying that the straight line is the quickest and easiest way to get somewhere? FELTG teaches that straight line on discipline.

Sometimes, however, we hear from attendees who, in the words of Col. Nathan R. Jessup, "can't handle the truth." These encounters usually start with something like … "but our HR Office says" or "our counsel told us differently."

If you've been a part of MSPB Law Week or Developing & Defending Discipline, or sat in on our flagship UnCivil Servant training, you know that we teach that the Douglas Factor analysis should be included with the advance notice, or proposal. Heaven forbid! You'd think we were suggesting you fire off a nuclear weapon to stop a hurricane. "Who told you we should do that?" "Where is that in the law?" "Where's the case law on that?" This hasn't happened once or twice. This has happened numerous times, and continues to happen.

There is no mystery, and we're going to address it right here, right now. The reason for including the Douglas analysis in your proposal letter is three-fold: There's the concept of due process, as well as a statutory reason, and, yes Virginia, there is case law – the original *Douglas* decision.

Let's get the answers directly from the brain of FELTG Past President William Wiley, co-author of *UnCivil Servant: Holding Government Employees Accountable,* 5th edition. After all, Bill is the one who has been challenged on this point more than anyone else.

Let's start with due process.

> Bill: The concept of fairness in our business requires that we tell an employee why we want to fire him so that he can defend himself before a final decision is made. We cannot have secret reasons for firing an employee. If a practitioner cannot agree with that fundamental principle of due process, we have little hope in moving them forward toward the right answer. An explanation of why we've chosen the penalty we have chosen is basic to employees being given a chance to defend themselves. For example, say that an employee engages in a loud profane argument with his supervisor. One reason the Proposing Official might think that such misconduct warrants removal rather than something less is because the argument took place in front of members of the public. The employee should be informed of that aggravating factor in the proposal notice so that he can argue that the argument did not take place in a public area, or that it was not in fact actually heard by a member of the public. We teach that by including a Douglas Factor analysis along with the proposal, we put the employee on notice of the reasons we selected the penalty of removal, thereby

Workplace Investigations

FELTG presents a week long training on conducting administrative investigations with an emphasis on employee misconduct, including harassment.

The training will be held November 4-8 in Washington, DC.

Note: This program fulfills the requirements for the 32-hour EEO investigator training and the 8-hour refresher training.

providing due process and an opportunity for defense.

Now, the law.

Bill: The proposal notice must state the "specific reasons" for the proposal. 5 USC 7503(b) and 7513(b). The selection of a particular level of penalty is intimately related to the "specific reasons" that a removal has been selected, rather than a lesser penalty. *See Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011) for a decision in which the court slammed the Board for denying due process relative to the penalty analysis.

And, finally, case law.

Bill: The *Douglas* decision itself says that the aggravating penalty factors "should be included in the advanced notice." A Douglas Factor analysis, I will concede, contains both aggravating and mitigating factors. The reason to do a complete Douglas Factor Worksheet along with the proposal notice is to avoid a misunderstanding as to what constitutes an aggravating factor as compared to a mitigating factor (or a neutral factor). If we took the narrower approach and just included what we considered to be aggravating factors in the proposal - rather than the full Douglas Factor analysis – we run the risk of omitting a factor that, on review, the Deciding Official decides is indeed aggravating.

This is where agencies sometimes mess up. Length of service is one of the most-used Douglas Factors, and we've seen it presented as an aggravating factor and a mitigating factor. Which is it? Shouldn't matter for the Proposing Official. Simply include the fact that the employee has five years of service in the Douglas analysis. That allows the Deciding Official to make his or her own judgment on how to consider the length of service.

The harder question to answer is why this concept is so hard to believe. Maybe it's because judges seem to have little interest in what the Proposing Official thinks about the penalty selection. When it comes to penalty, the judge wants to hear from the Deciding Official. But the Deciding Official will make his/her conclusions based on the Douglas Factor assessment.

And while you're at it, include the Douglas Factor worksheet with the proposal notice, too. Why do that? Mark your calendars for the next MSPB Law Week on March 9-13, 2020. Gephart@FELTG.com

Join FELTG in San Juan, PR!

Holding federal employees accountable for performance and conduct is easier than you might think. Too many supervisors believe that an employee's protected activity (EEO complaints, whistleblower disclosures, or union activity) precludes the supervisors from initiating a suspension or removal, but that's just not true.

FELTG is here to make your life easier by clarifying those misconceptions while explaining how to take defensible misconduct actions quickly and fairly – actions that will withstand scrutiny on appeal by the MSPB, EEOC, or in grievance arbitration.

Join us for the three-day seminar ***Developing & Defending Discipline: Holding Federal Employees Accountable*** in San Juan, Puerto Rico February 25-27, 2020. You'll leave with the tools you need to hold your employees accountable. Register now to get the Early Bird rate.

Note: The program meets OPM's mandatory requirements for federal supervisors found at 5 CFR 412.202(b),