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

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Discipline for Poor Performance?

There's been some noise over the past few weeks about OPM's guidance on handling discipline and performance problems in the federal government. One of the things I have noticed is that a number of media outlets don't understand the differences between performance and conduct. As FELTG readers know, these differences are significant because the section of the law that applies to misconduct is different than the one that applies to performance. In addition, the tools are different, the procedures are different, and the burdens of proof are different, depending on whether you are dealing with a performance situation or a misconduct situation.

Just this week, I have seen articles that refer to "punishments for poor performance," stating agencies should "discipline a poor performer," and "progressive discipline … essentially gives employees multiple chances to improve their performance." Yikes. In the federal government, we don't discipline for poor performance – we utilize a demonstration period (formerly called a PIP). Discipline is a tool for misconduct, not performance. I mean no disrespect to the hard-working reporters who cover dozens of topics, but do be careful not to believe everything you read. Or, if you prefer, "Trust, but verify."

Speaking of reading, please enjoy the very first FELTG Newsletter in FY 2020, where we promise not to confuse poor performance with misconduct.

Take care,

Deborah J. Hopkins, FELTG President

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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

MSPB Law Week
Washington, DC
March 9-13, 2020

Absence, Leave Abuse & Medical Issues Week
Washington, DC
March 30-April 3, 2020

Workplace Investigations Week
Seattle, WA
April 20-24, 2020

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Discipline Alternatives: Too Good to be True?
By Deborah Hopkins

What if…

- You could discipline an employee in a way that didn't cause you more work?
- You could discipline an employee and they couldn't file a grievance or complaint?
- The discipline you issued actually helped other people?

Believe it or not, there's a way to make all these dreams come true. You see, in addition to traditional discipline (reprimand, suspension, demotion, and removal), the MSPB, for years, has blessed alternative arrangements that agencies and employees agree to, that carry the weight of traditional discipline but are not traditional disciplinary actions. These are called *discipline alternatives*.

As former MSPB Chairman Neil McPhie once put it, "The merit principles encourage agencies to be effective and efficient in how they use the Federal workforce. This includes the responsibility to address misconduct in a manner that has the greatest potential to prevent further harm to the efficiency of the service. *Under the correct circumstances, alternative discipline may be the most effective method for addressing such misconduct*." (Emphasis added.)

Alternative Discipline Webinar

Join Ann Boehm on Thursday, October 24 for ***Discipline Alternatives: Thinking Outside the Adverse Action.***

One of the most popular discipline alternatives is the **Reprimand in Lieu of a Suspension** (RLS). We first learned about these courtesy of the United States Postal Service, which back in the 1990s negotiated suspensions OUT of their master contract and replaced them with RLS.

That's right, forget about suspensions because there's no evidence they work anyway. In fact, when you suspend an employee for misconduct, the supervisor and co-workers have to pick up the slack while the suspended employee sits at home doing nothing.

Here's how an RLS works. If a supervisor determines that an employee deserves to be suspended, let's say for 5 days, the supervisor proposes the 5-day suspension. But at the bottom of the proposal letter there's an additional section with an employee signature line, that read something like this:

> *By my signature below, I accept responsibility for this act of misconduct. I acknowledge that discipline is warranted and accept a Reprimand in Lieu of a Suspension as offered to me by My Manager. I understand that the agency will consider this Reprimand in Lieu of a Suspension as equivalent to the proposed suspension for the purpose of progressive discipline should I engage in future misconduct. By accepting this Reprimand in Lieu of a Suspension I agree not to file a complaint or grievance about this action.*

Pretty cool, huh?

There are other alternatives you might want to consider as well. Here are a few, in no particular order.

- **Paper suspension or weekend suspension**: With this approach, there is no loss of pay, but the agreement is considered to carry the weight of a suspension.

- **Non-sequential suspension**: Instead of a 5-day suspension where an employee loses half a paycheck, suspend the employee one day per week for 5 weeks.

- **Leave donation**: The employee donates annual leave to a leave bank or leave transfer program. For example, if the proposed suspension was 3 days, the employee donates 3 days of annual leave.

- **Community service**: This may be a hard one to enforce, but the employee may agree to perform 24 hours of community service instead of a 3-day suspension.

- **LWOP**: Carry the employee on LWOP for the amount of time the agency would have suspended him. Because it is coded as LWOP instead of a suspension, there will be no permanent record of a disciplinary action.

- **Training or support services**: Require the employee to attend training or go to EAP in lieu of a suspension, if the type of misconduct matches up with these options.

- **Last chance agreement**: Hold the penalty in abeyance for two years. If the employee does not engage in misconduct during the two years the proposal goes away, but if the employee violates another workplace rule during those two years, the penalty immediately goes into effect.

Remember, in each of these cases you are cutting a deal with the employee and offering the discipline alternative in exchange for the employee waiving her right to appeal or file a complaint about this discipline. If you don't like it, then forget about it because you don't have to do it. But I promise, these discipline alternatives will make your life much easier.

There are more discipline alternatives, which we'll discuss in October 24 webinar Discipline Alternatives: Thinking Outside the Adverse Action. If you're interested, I hope you'll join us. Hopkins@FELTG.com

Excessive Absence and the Third Cook Factor
By Barbara Haga

In several classes recently, I have had questions regarding the *Cook* factors and what makes one of these cases successful. Just to make sure we are all on the same sheet of music, here is a quick review of what the Board wrote in *Cook v. Army,* 18 MSPR 610 (1984). The Army challenged the AJ's determination that Cook should not have been suspended for 40 days as a result of his roughly 1000 hours of approved absence over three years.

In its petition for review, the Army based its argument on guidance in the Federal Personnel Manual where OPM had set out conditions under which action could be taken on approved leave.

> FPM Chapter 752, Subchapter 3, paragraph 3-2b(4)(c) provides an exception to the general rule that an adverse action cannot be based on an employee's use of approved leave. The following three criteria must be met to satisfy the exception:
>
> (1) The record showed that the employee was absent for compelling reasons beyond his or her control so that agency approval or disapproval was immaterial because the employee could not be on the job;
>
> (2) The absence or absences continued beyond a reasonable time and the employee was warned that adverse action might be initiated unless the employee became available for duty on a regular, full-time or part-time basis; and
>
> (3) The agency showed that the position needed to be filled by an

> employee available for duty on a regular, full-time or part-time basis.

The Army was not successful in getting the decision on *Cook* overturned, but gave us the decision we still talk about 35 years later regarding excessive absence.

Assuming that your employee missed the requisite amount of time on sick leave, annual leave, or LWOP, and you properly warned the individual that if he/she did not become available for regular attendance at work that action, up to and including removal, could be forthcoming, then you have to talk about the impact of those absences.

In the following cases, the agencies were successful in demonstrating what happened when the employee was absent.

***Gartner v. Army,* 107 FMSR 200 (MSPB 2007)**

Gartner was a GS-4 Medical Support Assistant in the General Surgery Ward at an Army Community Hospital in Fort Stewart, GA. It is important to note that two blocks of hours that the Army had relied upon in removing Gartner were not sustained. She had had prior discipline twice as a result of a period of absence, so those hours were discounted. Also, this decision was issued in 2007 when an agency had to have enough LWOP to take an action, before *McCauley v. Interior,* 111 FMSR 224 (2011) was issued - which allowed counting of all approved absences, both paid and unpaid. Gartner's sick leave hours were not counted to sustain the charge. Thus, in the two *Gartner* decisions, the period that was accepted to support the charge of excessive absence was 252 3/4 hours of LWOP and 80 3/4 hours of AWOL for a total of 333 1/2 hours of unscheduled absences.

In the initial decision (AT-0752-06-0156-I-1, 2006), the AJ discussed the following:

> The appellant works in an Army Hospital where her presence is needed at work to provide much-needed patient care, such as patient check-in, patient care, and appointment scheduling. AR, Tab 4C. Because her absences were unscheduled or of indefinite duration, it made it impossible to hire someone to temporary fill her position. AR, Tab 4C. The appellant presented no evidence to the contrary.

The Board decision quoted further testimony:

> When you are not here it places an extreme burden on the rest of our General Surgery/Urology staff whom must then do your job as well as their own job. We are a very busy clinic seeing over 600 patients a month on average.

As a GS-4, Gartner obviously was not running the Urology Clinic, but the Army could talk about 1) other people who provided patient care had to stop what they were doing to cover her duties, and 2) because her absences were intermittent and of an indefinite duration, they could not hire someone to cover those duties. These arguments were sufficient even though only half of the hours included in the original removal notice were actually sustained. The AJ did not question whether 333 hours out of the original 515 hours cited still had such a negative impact on the clinic.

***Zellars v Air Force*, No. 06-3321 (Fed. Cir. 2006)**

Zellars was employed by the Air Force as an Office Assistant, GS-0318-5. She was removed in 2005 after over 800 hours of LWOP in that leave year and another 817 hours the prior leave year. Zellars' job was Secretary for the Maintenance Engineering Section. Her second-line supervisor testified that the section was customer-oriented and the secretary needed to be in the office to answer phones and communicate requests for service, among other things. He added that Zellars' absence placed an

unreasonable burden on other employees because they were then obligated to perform her work in addition to their own. The AJ summarized the information in the Initial Decision (DC-0752-05-0793-I-1, 2006) regarding the third *Cook* factor as follows:

> The agency also has shown that it needed the appellant's position filled by an employee available for duty on a regular basis and that it had reason under the circumstances to believe that the appellant was unable because of the continuing effects of her various medical ailments to return to duty on a regular basis to fulfill that requirement.

Like in *Gartner*, the agency did not produce elaborate information to explain why the absence of their clerical support person was a problem, but they were successful before the Board in showing that her services were needed. The Board (107 FMSR 171) denied the PFR filed by Zellars and the Federal Circuit did not disturb the AJ's findings.

Next month, we will continue looking at issues that arise in connection with excessive absence cases. Haga@FELTG.com

Advanced Employee Relations

Let's face it: Being a federal sector Employee Relations Specialist 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.

Supreme Court Hears Arguments on Gender Stereotyping Cases

By Dan Gephart

The Supreme Court decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) made it clear that Title VII not only protects employees from being treated differently based on their sex. It also protects employees from being treated differently because they fail to adhere to their gender norms.

> *We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'*

The *Hopkins* decision is the bedrock for protection from gender stereotypes under Title VII. In recent years, the EEOC has interpreted that protection to include gay, lesbian, and transgender employees.

In *Macy v. Attorney General*, EEOC No. 0120120821 (April 20, 2012), the EEOC concluded that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on…sex' and such discrimination therefore violates Title VII." And in *Baldwin v. Secretary of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015), the EEOC ruled that "sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."

Many courts have agreed with the EEOC. The 11th Circuit Court of Appeals may have

put it most succinctly, at least in terms of transgender employees, ruling "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."

But not all courts agree with the Commission. And neither does the Department of Justice. DOJ attorneys made their case last week before the Supreme Court, which heard oral arguments on *Bostock v. Clayton City* and *Zarda v. Altitude Express*, to determine whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of … sex" within the meaning of Title VII of the Civil Rights Act of 1964. The High Court also heard arguments in *Harris Funeral Homes v. EEOC* to determine whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

During the hearing last week, Solicitor General Noel Fancisco argued: "Sex means whether you're male or female, not whether you're gay or straight." The lawyer representing Bostock and Zarda told the Justices that all they need to do is "show that sex played a role here."

How will the Supreme Court rule? It's hard to guess. If you saw my football pools this year, you'd immediately look elsewhere for prognostication. And if you're talking legal analysis, you'd be much better off asking FELTG President Deborah Hopkins, or read FELTG instructor Meghan Droste's article in an upcoming FELTG Flash.

Many analysts see a 5-4 decision with Justice Neil Gorsuch as the deciding vote.

One thing we know for sure: A ruling in the Department of Justice's favor will allow employers, including federal agencies, to fire an employee solely for being gay, lesbian, or transgender, or even for being someone who doesn't neatly conform to gender-based standards. It'll strike a serious blow to diversity and inclusion in the federal workplace.

Let's face it, not everybody has a comfortable grip on the law as it is now. It's painful to imagine a workplace where the actions described in the following EEOC decisions go unchecked:

- In *Larita G. v. USPS*, EEOC No. 0120142154 (November 18, 2015), a supervisor referred multiple times to a lesbian employee as "the little boy" or a "guy." When the complainant told the supervisor "I am not a guy, I am a lady," the supervisor replied, "So that's why you have to be so difficult."
- In *Couch v. Department of Energy*, EEOC No. 0120131136 (August 13, 2013), coworkers told the complainant that he was unwelcome and should get another job. They referred to him as "fag," "faggot" and "gay" and told him everything he did was "gay."
- In *Jameson v. USPS*, EEOC No. 0120130992 (May 21, 2013), the EEOC found hostile work environment as the supervisor "repeatedly" referred to a transgender female employee as "he" and encouraged others in the workplace to use the male pronoun and refer to the employee by the employee's previous, male name.

Actually, behavior like that in the EEOC cases above still does sometimes go unchecked. Last week, the American Federation of Government Employees Local 3403 demanded the agency take action against managers who bullied, intimidated, and harassed LGBT employees at the National Science Foundation.

It could get a lot worse for LGBTQ+ employees depending on how the Supreme Court eventually rules on this trio of gender stereotyping cases. Gephart@FELTG.com

Civil Service Update: October 2019
By Dan Gephart

Welcome to FY 2020. Didn't it feel like we spent most of the previous fiscal year waiting? Waiting for new Merit Systems Protection Board members to be confirmed. Waiting for some type of resolution on the portion of President Trump's Executive Orders that were under injunction. Waiting for guidance from OPM.

But we're waiting no more, at least when it comes to the Executive Orders. In case you missed it, here's a quick recap. President Trump issued three Executive Orders in May 2018 aimed at curtailing union activity and increasing supervisors' ability to hold employees accountable for misconduct and poor performance. Three months later, several provisions of those Executive Orders were set aside as illegal, per a D.C. District Court decision. Several weeks ago, an Appeals Court overturned the District Court decision. The unions sought an *en banc* re-hearing, which the Appeals Court has refused.

FLRA Law Week returns to Washington, DC, October 21-25, led by Ann Boehm and Joe Schimansky.

What does that all mean? Well, the Executive Orders are now fully in play. OPM Director Dale Cabannis was quick to alert agencies, writing in an October 4 memo: "Accordingly, all provisions of these executive orders, including previously enjoined provisions, are in full force and effect and should be implemented consistent with the requirements and guidance contained in the EOs."

Agencies are now expected to set time limits on bargaining, severely restrict official time, and are allowed to charge unions rent for office space, and that's just the Labor Relations portions of the Executive Orders, and the president issued a memo to that effect last week. If you deal with federal unions, it's a good time to register for FELTG's FLRA Law Week, which takes place next week – October 21-25, 2019 in Washington, DC.

Speaking of the FLRA, the agency recently started posting quarterly case digest with summaries of its decisions. These digests contain summaries of full-length merit decisions issued by the authority. This is part of the FLRA's strategic to plan to make those decisions more easily accessible. The digests are available on the FLRA website.

That October 4 memo wasn't the only one the OPM Director sent to agencies. The previous week, Cabaniss issued *Maximization of Employee Performance Management and Engagement by Streamlining Agency Performance and Dismissal Policies and Procedures*. Among the items discussed are streamlining performance and misconduct procedures and eliminating unnecessary barriers to holding employees accountable.

If those topics sound familiar to you in FELTG Nation, it might be because that's what we've been teaching for the past 19-plus years. Those of you who have been to MSPB Law Week or Developing & Defending Discipline have a nice head start on what OPM wants. You might equate *unnecessary barriers* to what we at FELTG call "yellow donut" items. The yellow donut is full of things that are perfectly legal to do, but are legally useless in developing your performance- or misconduct-based actions. They waste your time and misdirect your efforts. As Deb puts it, the yellow donut is full of empty calories.

And hey, how about those MSPB appointments? Just kidding. I'm afraid we're still waiting for those. In the meantime, be sure check out to last month's *And Now A Word With … Tristan Leavitt*, where the MSPB General explained to FELTG readers what the agency is still doing while it waits for the return of a quorum. Lots going on, and lots more to come. We'll keep you posted. Gephart@FELTG.com

The Good News: Finally, an End to the Table of Penalties!?!
By Ann Boehm

Employee relations specialists, supervisors, and attorneys at agencies all around the country have one thing in common – they love, love, love their agency's Table of Penalties. And I just don't get it.

When I became Chief of Discipline Management at my former agency, I too thought the TOP should be the focus of all discipline.

What I learned instantly, though, was that the TOP is pretty much useless because of the way federal agencies have to charge employee misconduct. In order to comply with years of Merit Systems Protection Board and Federal Circuit law, agencies have to prove every word of a charge against an employee. The result is that the TOP often doesn't match what the agency charges.

In countless disciplinary letters I reviewed, the following phrase appeared: "Although there is no offense in the TOP directly relevant to the charge in this case, the most closely related is [Enter Offense from TOP Here]." The reference to the TOP resulted in wasted words and nothing gained. So, a nothingburger, basically.

I did a Google search for Table of Penalties and, using the first one that appeared (the agency name is withheld to protect the innocent), I noticed a couple of things of interest. First, 53 offenses are listed. In 18 of them (34%), the recommended penalty for a first offense is "Written Reprimand to Removal." Well, isn't that helpful – NOT!

That's the penalty range for anything and everything. So what in the world is good about the TOP in that respect? Second, when is the last time you saw someone charged with "Negligent or intentional injury to person or property of other employees"? Never. Because the MSPB would not sustain that charge and the agency would lose. That's also one of the ever-so-helpful "written reprimand to removal" offenses. There are almost no offenses in any TOP that would actually be used as the "charge" in an appealable adverse action.

The Good News for this month is that the Office of Personnel Management (OPM) agrees with me: The TOP is not helpful and may even be harmful.

In the proposed revisions to 5 CFR part 752 issued on September 17, 2019, OPM notes that the "creation and use of a [TOP] is not required by statute, case law or OPM regulation, and OPM does not provide written guidance on this topic." *Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions*, 84 Fed. Reg. 48794 (Sept. 17, 2019). Let me boil that down for you. OPM notes that because agencies are to discipline based upon the "efficiency of the service," agencies "have the ability to address misconduct appropriately without a [TOP], and with sufficient flexibility to determine the appropriate penalty for each instance of misconduct." 84 Fed. Reg. at 48798. OPM also states that TOPs "may create drawbacks to the viability of a particular action and to effective management." 84 Fed. Reg. at 48798. In that regard, OPM explains that "by creating a range of penalties for an offense," a TOP may "limit the scope of management's discretion to tailor the penalty to the facts and circumstances of a particular case by excluding certain penalties along the continuum." *Id.*

So what's an agency to do? Use the *Douglas* factors (*Douglas v. VA*, 5 M.S.P.R. 280 (1981)), and not the TOP.

The proposed regulations actually direct agencies to "propose and impose a penalty

that is within the bounds of tolerable reasonableness" as established by the MSPB in *Douglas*. Notably, this will now apply to any removal, demotion, or suspension, including suspensions for 1-14 days. 84 Fed. Reg. at 48798.

As OPM directs, "the penalty for an instance of misconduct should be tailored to the facts and the circumstances, in lieu of the type of formulaic and rigid penalty determination that frequently results from agency publication of [TOPs]." *Id.*

My friends, say goodbye to the beloved, if not exactly precise, TOP and start using all 12 of the *Douglas* factors. Once you break free of the TOP, I think you will see that you did not need it at all. OPM wants you to do it. Take their direction and believe! This is Good News!! Boehm@FELTG.com

Tips From the Other Side: October 2019
By Meghan Droste

Like many other large organizations, the Equal Employment Opportunity Commission issues strategic plans every few years to highlight institutional goals and identify ways in which it hopes to achieve them. During a recent webinar on EEO updates, I highlighted some of the points from the Commission's Federal Sector Complement to its Strategic Enforcement Plan for FY 2017-2021. As laid out in the plan, the Commission's priorities include eliminating barriers in recruitment and hiring, protecting vulnerable workers, and addressing emerging and developing issues.

While I encourage you to review all of the Commission's priorities to get an insight on the types of cases it will be focusing on in the federal sector, I want to draw your attention in particular to the priority of preserving access to the legal system. For the federal sector, the Commission highlighted that this priority includes improving federal employees' faith in the integrity of the EEO process.

What does this mean in practice? It means the Commission is going to start sanctioning agencies more. As noted in the report, "[w]hen Federal agencies repeatedly ignore regulatory requirements to provide files, conduct timely investigations, fail to meet hearing deadlines, etc. and are not held accountable, it erodes employee faith in the EEO program and discourages employees and applicants from accessing the system." The Commission also noted that it will be on the lookout for "repeat offenders" and considering program evaluations and issues notices of non-compliance to these agencies.

You should of course be concerned about meeting deadlines and upholding the integrity of the process just on principle. But if you need a little more incentive in light of the Commission's stated goal of increased enforcement, consider that default judgment can result in awards of hundreds of thousands of dollars for complainants who never have to prove liability. *See, e.g.*, *Dionne W. v. Dep't of Air Force*, EEOC App. No. 0720150040 (2018) (awarding $185,000 in compensatory damages and $155,050 in attorney's fees); *Lauralee C. v. Dep't of Homeland Sec.*, EEOC App. No. 0720150002 (2017) (awarding $200,000 in non-pecuniary damages, $223,116.35 in pecuniary damages, and $122,150 in attorney's fees).

I recommend you calendar every deadline and triple check that they are met, including the uploading of files before a judge is even assigned to the case. If not, you may find yourself explaining why your agency is on the hook for a six-figure award.
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Initial-Appointment Probationary Periods: Not the Same as Supervisory Probationary Periods

By Deborah Hopkins

A question recently came up in class about the difference between an initial-appointment probationary period and a supervisory probationary period in the competitive service. It turned into a more interesting discussion that I would have guessed, so I thought perhaps some FELTG readers might also be intrigued. Here goes.

Initial-Appointment Probationary Period

When an individual gets her first job with the federal government, she begins a one-year probationary period with that initial appointment – unless she works for DOD, in which case her probationary period is two years. During this time, the employee is expected to perform the work at an acceptable level, and to follow workplace rules. If, during the probationary period, there is a problem with the probationer's performance, the agency can remove the employee without putting her on a performance demonstration period. If the employee is engaging in misconduct, the agency can remove her for a first offense without utilizing progressive discipline, even if the misconduct is minor. In addition, the probationer has very limited appeal rights and generally cannot appeal her removal to MSPB. (There are a few exceptions: If she claims she was removed because of her marital status, or because of her partisan political activity, she can appeal to the MSPB. Otherwise, the Board has no jurisdiction.) A probationer does have a right to file an EEO or OSC complaint.

The reason a probationer's MSPB appeal rights are limited is because until the probationary period is successfully completed, the employee has not earned a property interest in her job, and, therefore, she is not entitled to the constitutional due process afforded to vested career employees (Advance Notice, Opportunity to Respond, Impartial Decision). Most employees are on their best behavior when they start a new job. If, in the first 12 months of employment, it becomes apparent the person is already not doing a good job, the agency should remove that person before the statutory protections attach.

The probationary period applies to initial appointments with the federal government as a whole, so an employee new to your agency may have already completed a probationary period, or part of a probationary period, at another agency.

Timing is important here so if you're thinking about removing an employee who is new to your organization, check the calendar to determine whether you can remove them without procedures.

Supervisory Probationary Period

Now let's talk about new supervisors and managers, and their probationary periods. But first some definitions. According to MSPB's research brief *Improving Federal Leadership Through Better Probationary Practices* (May 2019):

> A ***supervisor*** is someone who accomplishes work through the direction of other people and performs at least the minimum supervisory duties required for coverage under the OPM *General Schedule Supervisory Guide*. They plan work, communicate organizational goals and policies, guide performance, listen to concerns and ideas, ensure employees have the resources needed to do their jobs, play a significant role in determining the culture of the organization, and often make difficult decisions about employee recruitment, retention, development, recognition, and appraisal. In addition, because resources are scarce for many employers, supervisors are often expected to perform line work that requires technical skills.

> A ***manager*** supervises other supervisors and is not a member of the Senior Executive Service (SES). Further, a manager, as described in the *General Schedule Supervisory Guide*, directs the work of an organizational unit, is held accountable for the success of specific line or staff functions, monitors and evaluates the progress of the organization toward meeting goals, and makes adjustments in objectives, work plans, schedules, and commitment of resources.

Because the roles of supervising and managing people are of the utmost importance in agencies achieving mission success, an additional probationary period attaches when an employee first becomes a supervisor or manager. These probationary periods are governed by different regulations than the initial-appointment probationary periods. While there is no statutory timeline, most agencies set this period to a year.

Interestingly, agencies also require managers to complete a managerial probationary period once they begin their first manager job, even if they have already completed a supervisory probationary period.

So, at the end of this probationary period, how does an agency determine if a supervisor or manager has been successful? The regulations allow agencies a lot of flexibility in making this determination before the supervisory appointment is finalized. Some lay out the expectations explicitly while others leave a lot of judgment up to the next-in-command.

Let's say the supervisory probationary period doesn't go well and the agency determines the employee is not an effective supervisor. What happens now? Well, just because someone isn't a good supervisor doesn't mean that person isn't a good employee. Results from MSPB's *Governmentwide 2016 Merit Principles Survey* show that 72 percent of employees believe that their supervisor had good technical skills, but only 62 percent believed their supervisor had good people-management skills. Interestingly, though, in 2016 there were 28,467 new supervisors but agencies only took action in 192 of those cases – about .67%.

Being an unsuccessful leader does not automatically mean a probationary supervisor is out of a job at the end of the year. As long as that person has successfully completed the initial-appointment probationary period through prior federal service, she will be reassigned to a non-supervisory position in the agency at the same grade-level and pay she was earning before she became a supervisor. If, however, the supervisor or manager was not in the competitive service before beginning her supervisory probationary period, then she is also concurrently serving her initial-appointment probationary period and has no right to a non-supervisory job, so she can be removed from service. Hopkins@FELTG.com

Upcoming FELTG Webinars

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

Pregnancy in the Federal Workplace: Discrimination, Harassment, and Accommodation
November 21

Accommodating Hidden Disabilities in the Federal Workplace
December 5