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

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No More Sleeping in GSA Buildings

I was a little shocked to see that GSA posted a Federal Management Regulation banning sleeping in federal buildings. My first thought was, "Why does GSA think we need a regulation about this?"

My second thought was, "Who in the world put this on GSA's radar?"

Further articles on the topic reveal that GSA's intent was not to make it improper to snooze off at your desk after lunch, but rather to ban overnight sleeping or camping out. Read the language of the posting, though, and you won't find that detail. Does this mean employees are allowed to sleep as long as it happens during work hours? Of course not. Since the beginning of time, federal supervisors have been free to set reasonable workplace rules for employees that include, for example, not allowing employees to sleep at work.

But, while it may be a common practice to have overnights in many workplaces (including on the Hill, as it's long been reported), if you work in a GSA building, you're now out of luck.

With that it's, on to the November 2019 FELTG Newsletter.

Take care,

Deborah J. Hopkins, FELTG President

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February 25-27, 2020

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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

Developing & Defending Discipline: Holding Federal Employees Accountable
Seattle, WA
April 21-23, 2020

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Washington, DC
April 27 – May 1

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A New Way to Fire Bad Performers
By William Wiley

Actually, it's not new; it's the way Congress intended it be done starting in 1978. Check out the following situation. As a legal or HR advisor, consider what you would advise.

> Sally Supervisor tells you her problem: Ed Employee just can't do his job. He's a GS-14, and he routinely submits "finalized" reports with typos, missing data, and improper calculations. Over the past couple of months, she's repeatedly had to return reports to Ed with many mistakes marked in red and instructions that they be corrected. Ed's resubmissions sometimes still contain errors. She has reminded him that his mistakes are related to the very first critical element in his performance plan, and has told him several times that if his work does not improve, she will fire him.

We have taught for many years here at FELTG that the best advice in this hypothetical is to draft a Demonstration Period (DP, aka PIP or ODAP) Initiation Memo for Sally to issue to Ed. That memo should check off what we believed to be important legal requirements:

1. Identification of the Critical Element(s) in Ed's performance plan related to developing accurate reports,
2. Clarification as to what Sally considers to be the minimal level of performance for Ed to keep from being fired (e.g. "More than three errors during the DP is unacceptable performance and warrants removal"),
3. Establishment of a period of no more than 30 days for Ed to be given a chance to demonstrate that he can perform acceptably,
4. Assignments for Ed to accomplish during the DP related to the failed CE,
5. Weekly meetings in which Sally gives Ed specific feedback as to his errors, followed up with emails confirming the matters discussed, and
6. Explicit notification that if Ed makes more errors than allowed, Sally will take steps to remove him from his position.

Compared to the expansive, overly burdensome procedures we hear that a lot of advisors would give Sally (e.g., a 90-day PIP), we proudly felt that we had boiled the legal requirements for firing a poor performer down to the statutory minimum.

And, we were wrong. Check out this language from a recent publication by MSPB's *Office of Policy and Evaluation* (OPE). [FELTG Training Director Dan Gephart recently interviewed James Read, the Director of the Office of Policy and Evaluation.] In respect to OPM's regulation defining how an agency can fire a poor performer, 5 CFR 432.104, OPE notes:

> This regulation does not state that an agency must create a formal (or even informal) performance improvement plan. The Board has held that the communications required by OPM's regulation may occur in a formal performance improvement plan, in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements against which he is to be measured. [Citing *Baker v. DLA* 25 MSPR 614 (1985), *aff'd* 782 F.2d 1579 (Fed. Cir. !986)]
> *Remedying Unacceptable Employee Performance in the Federal Civil Service*, June 18, 2019, p. 14.

Many practitioners and policymakers read into OPM's regulations that a formal DP is required prior to removing a poor performer. That's no doubt because the earlier

permutations of OPM's regulations from the '80s mandated that a supervisor initiate a "performance improvement period." Although OPM did away with that formality as the case law developed, it never explicitly said by regulation that a structured DP was not required.

When VA's law was changed a couple of years ago to make it easier to fire employees (*Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017*, 38 USC 323), it became clear that henceforth in the VA, a formal demonstration period was not a necessary prerequisite to a poor performance removal. Many practitioners outside of VA were somewhat jealous of the reduced procedures that had become available to VA managers when dealing with a poor performer. Well, in consideration of MSPB's clarification in the recent OPE report, it seems that we have stumbled on a secret like that of Dorothy's ruby slippers: OPE serves as the good witch of the north and we Munchkins have "always had the power."

As Glenda told Dorothy, I guess they didn't tell us earlier because we wouldn't have believed it; we have to learn it for ourselves.

So now we've learned it. And we have the power. FELTG Nation! Click your little ruby-red heels together and go spread the word. Turn up your speakers, prepare for your day to get demonstrably better, and click here: The wicked old PIP-witch "is not only merely dead, it's really most sincerely dead." Wiley@FELTG.com

Advanced ER Hitting the Road

Want more guidance on handling performance challenges? Barbara Haga will tackle Performance Management as well as Leave and Attendance and Misconduct during two three-day Advanced Employee Relations courses – next week in **New Orleans** and then in **Atlanta** from February 11-13, 2020**.** Register now.

Can You Fire A Federal Employee for Body Odor or Bad Hygiene?
By Deborah Hopkins

You've probably all dealt with this situation at some point: You're sitting on an airplane, bus, or subway train, or at a concert or in church or in a meeting, and you catch an odor from the person sitting next to you. It's not a temporary odor that's the result of an accidental gas release from an upset stomach. It's a fixed odor that's likely related to bad hygiene.

I remember one time flying on Southwest Airlines and being so grateful that the seats were not pre-assigned; a seatmate who had some very unpleasant odors settled in next to me and I was able to move without having to endure a 3-hour flight in that seat. With my overly sensitive sense of smell, I had to get out of there ASAP. While it might seem mean to say it's difficult to be around people with bad odors, I'm not saying it to be mean. I think most readers would agree it can be a real challenge to be exposed to people with certain hygiene issues.

In many of these unpleasant situations, the arrangement is temporary, and in a number of cases you are able to remove yourself from the situation like I did on my flight. But what happens when the problem is coming from an employee or coworker who you have to see – and work around – every day?

Believe it or not, we have MSPB cases on the topic. A very old, foundational case addressed the matter of an employee who had unhygienic personal habits which went beyond body odor and included intentional defecation of himself in the workplace. The agency removed him on four charges including (1) non-compliance with work standard; and (4) unhygienic personal habits. The presiding official – who we now call the Deciding Official – concluded that the appellant's unhygienic personal habits alone

would have been sufficient to remove him. Interestingly, the employee argued that his disability (colitis) caused the misconduct, the MSPB didn't buy that argument and agreed with the presiding official:

> The evidence of record plainly shows the demoralizing and unhealthy environment created by appellant's personal habits. The record also reflects that the agency frequently counseled appellant as to his hygiene and that appellant made no effort to change. The agency endured appellant's poor performance and unhygienic habits for many years. It need not exercise forbearance indefinitely.

Gertzman v. INS, 9 MSPR 581, 583 (Jan. 19, 1982).

It's true that sometimes body odor is disability-related, and you may need to consider an accommodation. However, that was not the case in *Gertzman*.

In another old case, the agency removed a probationer for failure to improve her personal hygiene after repeated warnings and counseling from her supervisors and after several complaints about her odor from her coworkers and members of her trade. As many of our readers know, if a probationer is removed, she has very limited appeal rights to MSPB and may only appeal if her removal was based on partisan political reasons or marital status. 5 USC 7511(a)(1)(A)(i); *Ney v. Commerce*, 115 MSPR 204 (2010). In this case, the appellant claimed she had hygiene and odor issues because her status as an unmarried person prevented her from obtaining resources that would allow her to improve her personal hygiene. The MSPB didn't buy that argument, either, but you can't blame a person for trying. *Hilden v. USDA*, 8 MSPR 300 (Oct. 1, 1981).

I've got more. There's the Bureau of Prisons supervisor who for years urinated in a mop closet – not into a bucket but onto the closet floor – rather than walk to the restroom to use the proper facilities. As if that's not bad enough, he also encouraged his subordinate to do the same. His demotion for Conduct Unbecoming a Supervisor was upheld. *Hutchinson v. DOJ*, 211 MSPR 77 (May 5, 2014). Then there's the food inspector who was suspended for "improper conduct" because he intentionally passed gas around his coworkers on the food inspection line, and then asked them to smell it. *Douglas v. USDA*, AT-0752-06-0373-I-1 (2006)(ID).

What about the employees who bring critters in to the office with them? No, not emotional support animals (that's a different article) but things like bedbugs. Can you tell the employee they are prohibited from bringing bedbugs in to the office? Well, sure. As long as you have a business-based reason, you can set a workplace rule for an employee, and there is most certainly a business-based reason for not wanting bedbugs in a federal office. Tell the employee, then follow up in an email: "Do not bring bedbugs to the office." If necessary, you can even do an indefinite suspension until the employee demonstrates medically she is free of the little critters. See, e.g., *Pittman v. MSPB,* 832 F.2d 598 (Fed. Cir. 1997); *Moe v. Navy*, 2013 MSPB 43 (June 14, 2013), cases which don't deal with bedbugs but say that an agency can indefinitely suspend an employee, pending inquiry, for psychological or other medical reasons if the agency has a sufficient objective basis for doing so. We never have to tolerate unsafe or, for lack of a better term, unhygienic, conduct in the workplace. Hopkins@FELTG.com

More on Excessive Absence and the Third Cook *Factor*
By Barbara Haga

Following up on last month's column, I continue to look at cases which further illustrate use of the *Cook* exception to remove an employee for excessive approved absence. In last month's examples, the Army and Air Force were able to produce evidence regarding the problems created by their employees' absences. This time, we look at cases where agencies didn't succeed. To recap, Factor 3 is: 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.

In *Walker v. Air Force*, 84 FMSR 5882 (1984), the Board overturned the AJ's decision to uphold Walker's removal for excessive absence and AWOL. This decision is short and dispenses of the two issues quickly. Regarding the AWOL, the Board held that the Air Force should not have denied LWOP since Walker had already applied for disability retirement and the Air Force instruction in place at the time stated: "Leave without pay is appropriate "[f]or protecting an employee's status and benefits pending final action by the [Office of Personnel Management] on his claim for disability retirement, after all sick and annual leave have [sic] been exhausted."

More importantly for our analysis, the Board wrote the following:

> The agency was well aware of the appellant's pending application for disability retirement. Although it indicated, in the notice by which it disapproved the appellant's request for leave without pay, that its disapproval was based on its belief that the appellant's position "need[ed] to be filled by an employee who is available for duty on a regular full-time basis," memorandum from G. Potter to appellant, August 11, 1983, the record shows that the agency had been able to assign the appellant's duties to other personnel during the ten-month period prior to the disapproval, *id.* In addition, the agency has not disputed the appellant's claim that, four and one-half months after the effective date of the removal, the appellant's position still had not been filled. In view of these circumstances, we find that the agency's disapproval of the appellant's request for leave without pay constituted an abuse of discretion.

Unlike *Gartner* and *Zellars* reviewed last month, the Air Force, in this case, didn't identify problems caused by Walker's absence. The fact that the work was covered by other people and the job remained vacant without evidence of any adverse impact didn't help the Air Force's cause. This concept that there was not a significant enough adverse impact appears in the *Miles* case discussed below, and, in fact, the *Miles* decision cites *Walker* on this point.

The case of *Miles v. DVA*, CH-0752-14-0374-I-2 (2016)(ID), which is an judge's initial decision, incorporates the findings from *Savage* and *McCauley* regarding counting hours of excessive absence and is a good analysis of what can go wrong under several of the *Cook* factors.

Miles began his career with VA as a Program Support Clerk and was appointed to the position of Claims Assistant on April 22, 2012. He had a service-connected disability and verbally advised the agency of the disability during the interview for the Claims Assistant position. He requested reasonable accommodations shortly thereafter; his disability included injuries to both hands and wrists, requiring at least 12 surgeries between 2001 and 2013. The reasonable accommodations included a different keyboard and some other furniture as well as

voice-activated software. He was not provided the voice-activated software until roughly one year after his report date. When he did get the software, he reported problems with it and resorted to manual processing to avoid further problems with the hands and wrists, but he was advised that he still had to meet the performance standards for processing cases each day.

Eventually, he needed more surgery and needed to be out six months for recovery and resulting therapy. Twelve weeks of that absence was covered under FMLA. Once he recovered from that surgery, he was scheduled to have surgery on the other wrist. The agency granted some additional LWOP, before taking action under *Cook*. The agency's handling of the balance of the leave for his recovery and the need for his services resulted in this ruling by the AJ:

> Further, the undisputed evidence in the record indicates the absence at issue here cannot be described as having had no foreseeable end at the time of removal. The appellant provided the agency with information that the general recovery period for his right wrist replacement was six months, and the agency noted his inability to return for approximately six months in his monthly performance review. IAF-1, Tab 19, Ex. 5; Tab 43, pp. 302-03. I find nothing in the record suggesting the agency had such an urgent need to replace the appellant that it could not wait an additional few months for the appellant to recover fully. It had already granted the appellant over 1,000 hours of leave during the year prior to his removal. Despite the agency's evidence it is operating at fifty percent staffing levels and is under tremendous internal and external pressure to reduce and eliminate its massive backlog of claims, Ms. Hamilton testified she would have considered granting the appellant additional leave. IAF-1; Tab 42, p. 34; see also, e.g., IAF-1, Tab 19, Ex. 42. Ena Lima, the Service Center Manager, acknowledged during her testimony the agency has remained at the fifty percent staffing level present at the time of the appellant's employment. See IAF-1, Tab 42, p. 65. Furthermore, even with the reduced staff, the agency appears to have made great strides in reducing the number of pending cases from 15,000 at the time the appellant was working to approximately 8,000 current claims.

Thus, to be successful, agencies need to be able to show some real impacts of the absences – overtime money spent, temporaries or contractors utilized, employees detailed to cover the work of the employee on leave, other employees taken away from their work, deadlines missed that are attributable to the absence of the employee being removed, etc. As shown above, backlog alone may not be enough. As to recruitment, agency witnesses should also be ready to address the filling of the position. Even if it has been a while, which unfortunately is all too common these days, they should be ready to talk about the steps they have taken to initiate recruitment and where they are in the process to ensure that they can establish that some urgency has been attached to the situation.

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The Good News: Good Leadership Makes a Difference
By Ann Boehm

In case you hadn't heard, the Washington Nationals won the World Series!! Sorry Astros fans, but DC really needed this. Now that I've almost recovered from the daily fog of staying up too late to watch seven baseball games, I've had some time to reflect on the win. (Um, Ann, this is a federal employment law newsletter, not a sports journal. What's going on here?)

And so, I've concluded, good leadership is the key to success. (See, I'm getting there. I have lessons for you all.)

Before the Nationals started Game 1 of the World Series, I read an article about Nationals manager Dave Martinez and his exceptional leadership. "Things change, but Dave Martinez remains the even-keeled beating heart of the Nats," by Chelsea James, *Washington Post* (October 24, 2019). One particular part of the article really hit home to me, and that's the following:

> [M]ultiple team executives and players offer unsolicited praise of his handling of people: He doesn't berate players. He doesn't play mind games. He lets veterans lead how they see fit. He stays positive. He smiles. He cares.

Well aren't those some words to live by! Federal managers, please read that paragraph again and again. Ask yourself if your employees could say the same about you. And if the answer is no, then do what Dave Martinez does.

We know that you have to deal with problem federal employees, and we do our best to help you handle performance and misconduct matters. Sometimes you get frustrated by resistance from the human resources professionals and counsel who are risk averse, and we feel your pain. But no matter what, if you can try to run your organization a bit more like Dave Martinez runs the Washington Nationals, you may find that your employees take better care of you.

I've had my share of good and bad bosses throughout my career. The good ones were a lot like Dave Martinez. The bad ones – polar opposites. Even good employees are frustrated by bad managers.

Take a moment to think about how you run your organization, and see if you are doing what Dave does.

So let's review: Don't berate. Don't play mind games. Let veterans lead how they see fit. Stay positive. Smile. Care. Let me know if it works! Boehm@FELTG.com

Upcoming FELTG Webinars

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

Accommodating Hidden Disabilities in the Federal Workplace
December 5

"OK, Boomer" and the Truth About Age Discrimination in the Federal Workplace
December 12

Webinar Series
Legal Writing in Federal Sector Employment Law

January 16: Legal Writing for the MSPB, EEOC, and FLRA: Nuts and Bolts

January 23: Writing Performance Demonstration Period Plans That Work

January 30: Framing Charges and Drafting Proposed Discipline

February 6: The *Douglas* Factor Analysis and Writing the Decision

February 13: Writing Effective Motions for Summary Judgment

February 20: Drafting a Legally Sufficient Report of Investigation

It's Beginning to Look a Lot Like … The Holiday Season
By Meghan Droste

Time really flies — it feels like just a few weeks ago I was writing about how the EEO process should be your Valentine and now, all of sudden, we're about two weeks away from Thanksgiving. Of course, the fact that my neighborhood grocery store put away the Halloween candy and already had Christmas-themed items out days *before* Halloween certainly doesn't help with this. Regardless, we cannot ignore that the holiday season and all of its related decorations, festivities, and yummy treats are upon us once again.

To help you prepare for and navigate through this time of the year, here are some helpful decisions from the Commission on things that may or not be problematic:

For those of you wondering whether holiday decorations might be religious displays that are not permitted in government spaces, the answer is not necessarily. As the Commission has noted, according to the Supreme Court, Christmas lights and references to Santa Clause "amount to secular symbols rather than an expression of a religion" and, therefore, federal agencies can display them without running afoul of the First Amendment's prohibitions against the federal government establishing a religion. *See Garry H. v. Dep't of Transp.*, EEOC App. No. 0120181570 (Sept. 24, 2019) (citing *County of Allegheny v. ACLU*, 492 U.S. 573 (1983)).

As a result, an agency did not discriminate against an employee based on his religion when it removed a "Happy Hanukkah" sign and a garland with stars of David but kept up Christmas lights and a sign that said "Santa is coming to town in [x number] of days." *See id.*

What about accommodating an employee who does not want to see holiday decorations? The Commission addressed this issue in *Ian S. v. Department of Transportation*, EEOC App. No. 0120160622 (Apr. 27, 2018). The complainant requested a religious accommodation of being permitted to eat at his desk — employees in his unit were not allowed to have food or uncovered beverages at their desks due to the risk of damaging agency equipment — because he did not want to eat in the breakroom when it was decorated with Christmas decorations. The agency offered to allow him to eat in a breakroom in another, connected, building, but the complainant argued that this was not an effective accommodation because it would take too long to get to the other room. The Commission found that the agency's offered accommodation was sufficient, particularly because the complainant had not voiced his concerns about the distance to any of his managers. The Commission also noted that the decorations — a tablecloth and two poinsettias — were secular and not religious in nature.

New Webinar!

Meghan Droste will present *Pregnancy in the Federal Workplace: Discrimination, Harassment and Accommodations* on Thursday, November 21.

Finally, a quick reminder that not wanting someone at a holiday party is not a good reason for not hiring them. In *Ebonie L. v. Department of Transportation*, EEOC App. No. 0120171469 (Feb. 12, 2019), the complainant's supervisor reprimanded her for saying that she did not want to hire a male applicant because having a male administrative employee "makes the administrative Christmas lunch and gift exchange awkward." The Commission rejected her claim that the reprimand was discriminatory or harassing.

I hope these tidbits easy your minds and bring you some joy during the upcoming holiday season! Droste@FELTG.com

Takeaways from OPM's 2019 Federal Employee Viewpoint Survey
By Deborah Hopkins

It's that time of year again. No, not the time when the stores put out Christmas decorations and pre-black-Friday sales begin (although that is happening, too). It's the release of OPM's 2019 Federal Employee Viewpoint Survey (FEVS). Each year as I await the report, I wonder what new pieces of information we'll learn about how the federal government is doing as an employer. And each year, I learn something I didn't know before. In case you haven't had a chance to read it, here are a few takeaways, in ascending percentage order, from over 615,000 federal employees who participated:

- 17% of respondents said there were no poor performers in their work unit.
- 34% believe their supervisors take steps to deal with a poor performer who cannot or will not improve. Looking at it from the other side, this means that 66% of employees still don't think supervisors are taking action against poor performers. Not a great number, but it is still the best percentage on this question in recent memory.
- 39% believe that differences in performance among employees in their work unit are recognized in a meaningful way. Again, this means that 61% do not feel recognized.
- 56% said that poor performers remain in their work unit and continue to underperform.
- 57% believe their training needs were assessed and addressed in the past year.
- 59% think their workload is reasonable.
- 66% would recommend their organization as a good place to work.
- 67% believe they can disclose a suspected violation of any law, rule or regulation without fear of reprisal – in other words, two-thirds of employees believe it's safe to be a whistleblower in the federal government.
- 71% of respondents agree with their most recent performance rating.
- 83% believe their supervisors are holding them accountable for performance.
- And, and astounding 96% of employees who responded said that when needed they are willing to put in the extra effort to get a job done. This proves what FELTG has always known, that most of our readers are incredible, hard-working, dedicated employees who want to make the government a better place.

There's also an entire series of questions related to the impact of the 35-day shutdown, which is not very eye-opening but because it's new you might find it interesting. If you want to read it yourself, check it out here. Hopkins@FELTG.com

Tips From the Other Side: November 2019
By Meghan Droste

Long-time fans of FELTG are probably aware that our former president and professor emeritus Bill Wiley and our current fearless leader Deborah Hopkins are fans of alternative methods of discipline — ways to hold employees accountable other than suspensions and removals. One of the prime examples of alternative discipline is a last chance agreement (LCA). In an LCA, the agency holds a potential disciplinary action, such as a removal, in abeyance for a set period of time. If the employee does not reoffend during that time, the potential discipline goes away. If they do, the agency moves forward with the action and the employees cannot challenge, having waived their right to by agreeing to the LCA.

Sounds simple, right? Well, as with so much of what we do, yes and no. The concept is simple, but of course there are certain details

that, if ignored, can make things far more complicated.

First, although you can have the employee waive the right to challenge the action and any claims of discrimination or harassment that occurred up to the signing of the LCA, you cannot have the employee waive future claims of harassment. That means if something happens the day after the LCA, the employee can still file a claim of harassment, discrimination, or retaliation based on the new event.

Beyond D.C.

FELTG will hold training in San Juan, Atlanta, Denver, Seattle, Chicago, Honolulu, and Phoenix in 2020.

Check our Open Enrollment page on FELTG.com for details.

Another wrinkle is making sure that you comply with the Older Workers Benefit Protection Act (OWBPA). The OWBPA, which is part of the Age Discrimination in Employment Act (ADEA), sets out specific requirements for valid waivers of potential age discrimination claims. These requirements, which apply to employees age 40 and older, include a specific waiver of age claims, a period of at least 21 days to consider the waiver, and a 7-day revocation period after signing. If an agency fails to include a proper OWBPA waiver in an LCA, the employee may raise age discrimination claims that occurred before the LCA. *See Jaleesa P. v. Dep't of Veterans Affairs*, EEOC App. No. 2019001777 (Aug. 14, 2019). This of course defeats at least some of the purpose of having the LCA to begin with.

One way to avoid these issues is to think of the LCA as settlement agreement, because with the waiver of claims that's essentially what it is, and ensure that you keep in mind the same considerations you would in a traditional settlement agreement. If you don't, you may find yourself defending against claims you assumed were waived. Droste@FELTG.com

Do You Really Want to Give a Poor Performer the 5-Star Lyft?
By Dan Gephart

John Horton knows which rating you gave your last Uber driver.

Horton isn't a mind reader. He's a professor at New York University, and he studies online marketplaces. His research found that most Uber/Lyft customers give their drivers a 5-star rating, regardless of the quality of the ride, the choice of music, or the stink of the car. Online publisher Mic recently broke the study down: "(P)eer-to-peer apps are designed to induce customer guilt and thus promote rating inflation. The act of sitting in a car with your service provider, the study found, humanizes them."

I have a similar penchant for overly positive ratings when it comes to Goodreads. The social media app allows you to track the books you're reading, have read, or want to read, and to rate and review those books, then share that information with others. Like Uber and Lyft, it uses a five-star rating system. As the husband of an author, I know how much work goes into researching, writing, editing, and revising a book, and it sways my Goodreads ratings. Absorbing, engaging, well-written page-turners that I want to read again and share with the world? That's easy - five stars. Books that weren't bad, but quickly forgettable? Five stars. Did the book fall flat, put me to sleep, or take a huge effort to even finish? Five stars, five stars, and five stars. Basically, if your book got four stars from me, you might want to put down your pen before you hurt somebody.

Economists, social scientists, and tech experts have been raising concerns about five-star rating systems for the last several years. A recent Harvard Business Review article stated :"(W)hile simple five-star systems are good enough at identifying and

weeding out very low-quality products or suppliers, they do a poor job of separating good from great products."

There is an inherent problem with five-star ratings, whether they are being used to select restaurants or book travel. And that glitch is heightened when the reviewer and reviewed have formed a human connection. Yet when it comes to measuring the work of federal employees, many agencies still use a five-step performance rating system. And there are few humanizing situations like a performance review.

It's not as if we don't have a problem with poor performance in the federal workplace. In the latest Federal Employee Viewpoint Survey, only 36 percent of non-supervisory employees believed that appropriate steps are taken to deal with poor performers. And this problem has been around a lot longer than the FEVS. When looking through old MSPB reports for my recent *And a Word With …* interview with James Read, I came across the agency's *Federal Supervisors and Poor Performers*, submitted to the President and Speaker of the House in 1999. The report's executive summary states the following:

> *Federal employee surveys and other indicators over at least the last 18 years suggest that most employees, including supervisors themselves, judge the response to poor performance to be inadequate.*

FELTG training attendees know that in any given year only three or four percent of removal actions (aside from suitability, probationary, or other less-common removals) are performance-based, while the remaining removals are conduct-related. Even a math-challenged Training Director can tell you those statistics are out of whack with 40 years of concern about performance.

There are dozens of reasons why poor performance problems continue to flourish seemingly unabated, and five-step performance systems probably won't make anyone's top five of those reasons. Not that there aren't others reason to oppose five-step performance systems. They can even lead to overturned performance actions, as FELTG Past President Bill Wiley has explained previously.

Here's the issue: The five-step performance systems offer sympathetic supervisors a gray area, giving them an out on a tough decision, and allowing performance problems to linger. In the tech world, the five-star rating systems fail to separate the good and great. In the federal workplace, those systems also fail to separate those successfully meeting their job requirements from those who aren't.

In a five-step system, the third level is usually "fully successful" and the second level is usually "minimally successful." As Barbara Haga points out during the Performance Management portion of her three-day Advanced Employee Relations course, an employee can be rated at Level 2 for his entire federal career and a performance-based action cannot be taken. [Side note: Don't miss Barbara's upcoming Advanced ER sessions in New Orleans or Atlanta.]

Why should we allow an employee who is not fully successful to continue working at that level with no apparent end? Oh, he won't get any step increases. And he may lose some retreat rights in RIFs. Do you think that matters to the coworker watching this minimal performer do the absolute minimum?

By the way, if you did not give your Uber/Lyft driver a 5, kudos to you. You are *not* an uncaring human. In fact, the most altruistic customers are the ones who give honest feedback, according to Horton. As a result, they improve the rides for everyone.

So supervisors: Next time you're making a decision on performance ratings, be as honest as possible, and improve the employment ride for the rest of your employees. Gephart@FELTG.com