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

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Keeping Perspective in 2020

I've lived in Washington DC for eight years. Every now and then, though admittedly not often enough, I take the time to embark on an adventure or see a sight available in my neighborhood. So on a recent blustery Sunday afternoon, I did something I've only done once before: I took a trip up the Washington Monument to see how the city has changed since my last trip up, in 2014.

There are dozens of new condo buildings, of course, a fancy new waterfront neighborhood and a new sports stadium. (Buzzard Point sure looks different than it used to!) But some of the enduring symbols of America look exactly the same as they have for more years than any of us have been alive. The stately pillars of the Lincoln Memorial at the end of the reflecting pool; the museums lining the National Mall; the flag flying atop the White House; and the iconic dome of the Capitol building, topped with the statue Freedom. And from this perspective, 500 feet above all the divisive things happening in this city, across the country and around the globe, I hold on to hope that America will continue to endure as she has for over 243 years.

And now I invite you to read FELTG's first newsletter of the decade, with articles on Douglas factors, poorly-written performance standards, EEO document receipt timing pitfalls, workplace resolutions, and more.

Happy New Year,

Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

Advanced Employee Relations
Atlanta, GA
February 11-13

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

MSPB Law Week
Washington, DC
March 9-13

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

Maximizing Accountability in Performance Management
Washington, DC
April 15-16

Workplace Investigations Week
Seattle, WA
April 20-24

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

EEOC Law Week
Washington, DC
April 27-May 1

MSPB Law Week
Phoenix, AZ
June 1-5

Creating a Thriving Work Environment in 2020: It's Not a Laughing Matter
By Dan Gephart

Chip is a hard-working and successful comedian. A few years ago, he was named the funniest stand-up comic in Philadelphia. He moved to Los Angeles and wrote for television shows. He returned to the East Coast and grew his reputation for hilarious headline sets, working an impressive array of comedy clubs.

On this recent January evening, however, he was telling jokes on a tiny stage in the back room of a South Jersey Pizzeria Uno.

A camera light flashed in Chip's eyes. He saw the culprit, and reminded her of his pre-set warning against taking pictures, politely explaining how the flashes are distracting. The slightly annoyed audience member coldly told Chip she wasn't even paying attention to his set. She was taking a picture of her dessert.

Sometimes you're writing jokes for television stars. And then suddenly you find yourself competing for attention with a subpar pizza chain's deep-dish sundae.

So how are things going in your job so far this year?

If you're like most, you started the new year with resolutions, goals, and promises to improve your professional life. However, while we control whether we're going to get our butt off the couch and our legs onto that treadmill, there are certain factors in the workplace that keep us from becoming our best professional selves.

As supervisors and HR professionals, you have some control over whether your workplace environment is one in which you, your colleagues, and your employees can thrive. Here are three specific actions you can take that will help your employees reach their professional goals and resolutions in 2020:

1. Don't ignore toxic employees

We discuss the 10-80-10 rule in some of our training classes. It's a generality, sure, but attendees tell us it's right on target. Here's the rule: Approximately 10 percent of employees are rock stars – the people who get their work done really well before it's due. They make your job easier and fun.

About 80 percent of employees are just fine, maybe not spectacular, but they get the job done and they don't give you too many problems.

And then there's the final 10 percent.

Some are just poor performers. But many of them are toxic employees. Their bad habits and de-energizing destruction take up the majority of your time and energy. And they generate noxious stress, which weaves its way into your life outside of work. If you ever had a toxic employee under your charge, you likely brought that stress home with you. Toxic employees do not wash off easily. And it's not only you being served that daily dose of trauma. Toxic employees impact everybody in the workplace.

If you want to keep your rock stars and get the most from the 80 percenters, you *must* hold toxic employees accountable. They *must* meet the acceptable level on their performance standards. Their misconduct must be addressed immediately. Unfortunately, according to OPM's *Federal Employee Viewpoint Survey* of every year since I've been reading them, that's not happening much.

FELTG is there for you: Join us next month in Puerto Rico or April in Seattle for our flagship course *Developing & Defending Discipline: Holding Federal Employees Accountable*. Or contact me about bringing

this class or another FELTG favorite, *UnCivil Servant: Holding Employees Accountable for Performance and Conduct,* to your agency.

2. Set the tone on EEO issues.

Few can thrive in a workplace where employees feel unsafe, disrespected, or ignored based on their color, gender, religion, sexual orientation, disability status, or other EEO category.

As we've learned from the #MeToo movement, it's not enough to simply state that you won't tolerate harassment or discrimination. You need to take clear and distinct actions to prevent harassment and discrimination. One of those actions needs to be giving supervisors and employees the skills and knowledge to respond quickly, effectively, and appropriately when they see any inappropriate behavior, even if it doesn't rise to the legal level of harassment or discrimination.

For years, many people in EEO-protected categories have done incredible work despite workplaces that failed to recognize their worth and dignity. Taking down those barriers requires more than lip service. It requires action. And it requires strong leadership.

Join us for EEOC Law Week in April. Or contact me to learn more about the many onsite EEO training programs we offer, including *Preventing and Correcting Sexual Harassment in the Federal Workplace* or *Defending Against Discrimination Complaints: The Supervisor's Role in EEO*.

3. And, finally, get some darn sleep.

More than a decade ago, the Centers for Disease Control and Prevention called insufficient sleep "a national health epidemic." With the ubiquity of smart phones and the distraction of TV binge-watching, this epidemic has gotten worse.

I find it odd how so many people revere those who can function on little sleep. A few years ago, *Forbes Magazine* profiled 19 tech giants and celebrities who thrive on much fewer than 8 hours of slumber, dubbing them the "sleep elite." At the time of his presidency, much was made of Bill Clinton's ability to lead the free world while snoozing just a few hours each night. That's cool, but it's not something to emulate. Very few of us fall into the sleep elite category.

When is the last time you had a rough night of sleep? If it wasn't yesterday, it was likely in the last week or month. I'm guessing you didn't thrive the next day. Recent studies suggest you probably had trouble concentrating at work, and that lack of focus resulted in more errors than usual. Whether you recognized it or not, your emotional processing was severely hampered, too. And that's if you even got to work. Other studies claim that insufficient sleep leads to a 20-percent higher chance of getting in a car accident.

So put that phone down at least an hour before you decide to close your eyes for the evening. Make that afternoon drink a decaf. And try to fall asleep and wake the same time every day – even on days off.

It's time you took the lead in creating a workplace environment in which your employees thrive. Otherwise, we might as well all be working the back room at a South Jersey Pizzeria Uno. Gephart@FELTG.com

Developing & Defending Discipline in San Juan, Puerto Rico

Learn how to take defensible misconduct actions quickly and fairly – actions that will withstand scrutiny on appeal to the MSPB, EEOC, or in grievance arbitration. Deborah Hopkins presents this three-day seminar February 25-27, 2020 in **San Juan, Puerto Rico**.

The Great Debate: Douglas in the Proposal or Douglas in the Decision?
By Deborah Hopkins

When Bill Wiley and I teach MSPB Law Week (next held in Washington, DC March 9-13), we get a lot of great questions.

And occasionally, we get pushback from an attendee on some of our practice methods. One hot topic that always generates discussion – and the occasional challenge – is where to use the Douglas Factors analysis in a removal case.

We have written about this topic multiple times, because it's a topic people always have questions about. So it's a fitting discussion for the first newsletter of the year, and the decade.

At FELTG, our approach is to attach a Douglas Factors Worksheet to the proposal notice. We don't just do that because we think we're smart; we do that because the law requires us to give the employee the reasons relied upon for the proposed action, and attaching said worksheet ensures we comply with the law, every single time.

Here's a direct quote from *Douglas v. VA,* 5 MSPR 280 (1981):

> [A]ggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors …

That's right, all the way back in 1981 when the ink was barely dry on the Civil Service Reform Act, the famous *Douglas* decision laid out 12 factors to consider in determining a penalty for misconduct, and the aggravating factors (those factors which work against the employee and weigh in favor of a harsher penalty) must be included in the proposal notice.

And who is responsible for the proposal notice? The Proposing Official (PO), of course, usually in conjunction with an advisor from L/ER or OGC. The proposal letter, along with any attachments, such as a Douglas Factors Worksheet, is what gives the employee the "advance notice" required by the *Douglas* decision.

Sometimes a person in our class wants to get into a debate about why we include all 12 factors in the proposal when *Douglas* only requires the employee to be given notice of the aggravating factors.

It is true that the legal minimum is to give the employee only the aggravating factors, but at FELTG this is one of the few times we go beyond the legal minimum. We don't want to get into a fight about whether a particular factor is aggravating or mitigating, so we include them all upfront.

One of the examples we use in class to illustrate this principle is length of service. Let's say the employee has worked for your agency for nine years. Is that length of service aggravating or mitigating? The PO might think it's mitigating, but if the Deciding Official (DO) thinks it's aggravating and we haven't given the employee the "Length of Service" factor in the proposal notice, we run the risk of a due process violation. In addition, the Federal Circuit has highlighted that the employee must be put on notice of *any* penalty factors on which the Board is going to rely in making its decision. *Ward v. USPS*, No. 2010-3021 (Fed. Cir. 2011).

If the Proposal Letter contains only three or four aggravating factors, and the Deciding Official does a full Douglas analysis and decides there's a fifth aggravating factor and does not provide notice to the employee, that DO has committed a due process violation because the employee has now been denied his legal right to fully defend himself. That

due process violation is an automatic loser, regardless of the evidence on the merits.

The safest thing to do is to include all the *Douglas* factors in the proposal. Then we don't have to make the call on whether a factor that could go either way is more aggravating or mitigating. Makes sense, doesn't it?

Here's the process:

1. Employee is given the proposal notice, an attached Douglas Factors Worksheet, and any evidence relied upon.
2. Employee responds to the Deciding Official based on the proposal notice and its attachments.
3. Deciding Official makes a decision based only on the proposal, which includes the Douglas Factors worksheet, and the employee's response.

As discussed above, the *Douglas* decision says the employee gets notice of the factors relied upon when the *proposal* is made – not the decision. So, if the DO agrees with the Douglas analysis in the proposal, there's no need to add a word to the penalty assessment. Her decision letter will just say: "I have considered the penalty assessment factor analysis contained in the Proposal Letter, and I concur." No new information, no due process violation.

If the DO disagrees is some way with the Douglas analysis in the proposal, or comes across new information that was not in the proposal or the employee's response (let's say she gets an email from a former coworker, discussing how the employee always cheated on his time cards when they worked together), the safest thing to do is to send the employee what we call a *Ward* letter, describe the new information that was considered, and give the employee a chance to respond to that new information.

If the case ends up on appeal before the MSPB, the Administrative Judge will certainly be more interested in what the DO has to say, than what the PO has to say. This does not mean the DO has to do a separate Douglas Factors analysis, though; it just means that the DO should be intimately familiar with the PO's Douglas analysis and be prepared to answer any questions about the content therein, since she is signing off on the analysis and agreeing with it.

I hope you agree that in the Great Debate of 2020 (and 2019, 2018, 2017, 2016….all the way back to 1981), the clear winner is Douglas in the proposal notice. We've even helped agencies rewrite their discipline policies to reflect this legal requirement. Let us know if you want help with yours; we'd be happy to assist. Hopkins@FELTG.com

Webinar Series: Navigating Challenges in the EEO Process

Equal Employment Opportunity can be a long and often complicated process. And some challenges are more troublesome than others. It's those topics that FELTG instructors Katherine Atkinson, Meghan Droste and Barbara Haga will tackle during this four-part webinar series.

March 5: EEO Claims: When to Accept, and When to Dismiss.

April 9: When the ADA and FLMA Collide

May 7: What Do You Do When Contractors File EEO Complaints?

June 4: When Investigations Go Bad: Keeping Integrity in the EEO Process.

Webinars will be held on Thursdays from 1-2 pm ET. Joins us for one of the webinars. Join us for two. Or join us for all of them and learn strategies to ensure that you successfully navigate the often perplexing EEO process.

Why a Supervisor Should Never Give a Summary Performance Rating of Unacceptable
By William Wiley

Here's an issue that comes up frequently in FELTG training and consulting. Supervisors who have a non-performing employee are sometimes advised by well-meaning attorneys and HR specialists to give the employee an Unacceptable performance rating at the same time (or just before) the supervisor issues a memo initiating a Demonstration Period (aka PIP). Well, that advice is not legally incorrect, but it's still bad advice from a practical standpoint. A recent question presented to "Ask FELTG" highlights the problem and allows us the opportunity, once again, to explain why a supervisor should never give a Level 1 Unacceptable rating:

> Dear FELTG,
>
> We have received guidance from headquarters on assigning unacceptable performance ratings. Specifically, I wanted to make sure about the three times the guidance identifies we can assign an unacceptable rating of record, and then proceed with corresponding action under Chapter 43:
>
> a. At the end of the rating period, if the employee was put on written notice of performing at an unacceptable level, we can assign an unacceptable rating. No Demonstration Period would be needed, and we can move forward with corresponding action under Chapter 43.
>
> b. If the WIGI is denied when it is coming due. We can assign an unacceptable rating. No Demonstration Period would be needed, and we would be able to move forward with corresponding action under Chapter 43.
>
> c. At the end of the standard Demonstration Period process we are currently implementing.

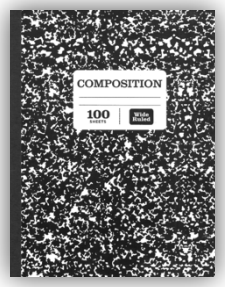
So here's our always insightful and entertaining FELTG response:

> Dear Concerned Reader-
>
> Your headquarters' guidance speaks to three occasions in which a supervisor can assign an unacceptable rating. However, it is not necessary to assign an unacceptable rating to initiate a Demonstration Period (DP), to deny a WIGI, or at the end of a failed DP. All that's required is that the supervisor reach a determination that the employee's performance is unacceptable to initiate a DP. See 5 CFR 432.104.
>
> We recommend that the supervisor never issue an unacceptable rating. Instead, when confronted with a non-performer, just initiate a DP. If you initiate the DP, the results of the DP are all that the employee can challenge. However, if you coincide the DP initiation with an unacceptable rating, the employee can independently challenge the rating through EEOC separately from what you are doing on the DP. A DP process resulting in removal is over in 60 days. The appeal of the removal to MSPB takes about 100 days for a judge's decision. Unfortunately, a challenge to an unacceptable rating can take several years to be adjudicated through EEOC. If you give an unacceptable rating while dealing with a DP-failed poor performer, conceivably you could have a judge at EEOC set aside the unacceptable rating years into the future, thereby destroying the foundation of the DP removal, resulting in big buckets of backpay and a reinstated employee.
>
> We'd suggest you not worry about the guidance from your HQ because you never need to issue an unacceptable rating. Just DP 'em. Best of luck- Wiley@FELTG.com

Monthly Observations, Guidance, Tools, and Tips to Make Your Job Easier

Supervisor Survival Series #1: Buy a Notebook and Use It

If you're a supervisor in the federal government, you need a notebook. Because federal employees have multiple avenues to challenge management actions, contemporaneous documentation is critical evidence that will help you demonstrate bona fide, legitimate reasons for your workplace decisions. You don't have to write a novel; simply include a date, time, and any relevant details.



Here's an example: "On January 10, 2020, I received Employee X's annual leave request for January 13, 2020. I denied the request because Employees Y and Z are already on annual leave that day and Employee X is needed to cover Project A in their absence. Employees Y and Z requested leave for January 13, 2020 on November 19, 2019."

It might seem obvious, yet many supervisors don't take the time to make contemporaneous notes. You might never need them, but you'll be very glad you have them if the situation calls for evidence in addition to your testimony.

How About Standards That Actually Measure Performance?
By Barbara Haga

I've looked at quite a few performance plans recently and I keep seeing the same problems showing up. Performance plans full of boilerplate measures that deal with what should be conduct issues, lists of tasks with no discussion of how the quality of that work will be performed, and pages and pages of measures that probably neither the manager nor the employee actually has a grasp of what that means in their daily work.

For the next few columns I am going to focus on what these problems look like and what can be done to fix them.

I wrote about many of these issues when I first started writing for FELTG way back in 2013, but I still see these issues cropping up when I am leading classes on performance.

Putting Conduct Issues into Performance Plans

In many of the situations I am going to describe, the "blame" for including these falls largely on high-level agency officials and Congress and whomever is advising them!

First, let's step back a minute. The performance plan is not the document that sets standards of behavior for Federal employees. The performance plan should identify the key aspects of the job and what acceptable performance (and other levels if you write them) looks like. Expectations regarding behavior or conduct standards are set in multiple ways – some things are established by 1) common sense (you can't murder anyone at work), 2) program folks in the organization (you can use your government computer to do this at lunch and before and after work but not that), 3) supervisors (if you need to leave the work area, please find me and let me know before you go), 4) agency policies (you must have EMT certification to be a firefighter), and 5) union contracts (you have up to two hours

from the start of the shift to call in and request unscheduled leave). If we need to discipline somewhere down the road, the questions will be: Was it a valid rule? Did or should the employee have known about it?

For some reason, however, it seems every time management wants to send a message, agencies start adding required critical elements to cover what should be a conduct expectation. I've seen a host of them -- everything from protecting classified material to acting ethically and completing yearly IT security training. Let's look at these in a little more detail:

Protecting classified material

Here's an example:

> Exhibits individual and personal accountability for classified information under their custody and control by taking precautions to ensure unauthorized persons do not gain access to classified information through proper marking, transmission, and safeguarding; reports unauthorized disclosures, security incidents, violations and vulnerabilities to the appropriate management official and/or security official; completes initial/annual refresher security awareness training, initial/biennial derivative classifier training and other related security training as required.

Let's think through this. If an employee intentionally discloses classified material for gain or political reasons, for example, I don't think there is any doubt that person would end up in jail, so the appraisal would be a moot point. Even if the failure was unintentional, there is likely to be significant action, depending on the sensitivity of what was disclosed. I really don't think anyone will be writing a demonstration period or improvement notice about it.

The other concern with a standard like this is that it's essentially a pass/fail measure – the person either follows it or they don't. That wouldn't be a problem except that most of you don't rate elements at two levels. You have something higher than Fully Successful. So how does an employee demonstrate performance above Fully Successful on this? They do a little briefing in a staff meeting, or they write an article for an agency newsletter, or they stand up and swear they REALLY believe? Better yet, I suppose an employee could bring a sleeping bag and spend the night on the floor guarding the classified safe, thereby demonstrating his or her commitment!

Demonstrating Integrity

> Employee consistently demonstrates integrity and accountability in achieving Departmental program and management goals.

That statement is part of a benchmark Fully Successful standard for one agency. The accountability part might apply to performance, but it's kind of like repeating a word in its definition – the whole performance plan is about accountability. If an employee is not demonstrating integrity, they could be providing inaccurate information, hiding information, falsifying documents, and a host of other things that are all likely conduct issues. If an employee truly acts in such a manner, he or she is likely to be the subject of a disciplinary action and not given a warning period to demonstrate that they can behave properly.

Completing required training

There are lots of variations on this one – everything from safety training to IT security training to continuing education requirements. I know from personal experience that a standard on IT security training was used as a hammer to make employees do their annual training because they wouldn't do it otherwise; they would put it off until the supervisor threatened them with "You're not going to get the highest rating this year if you don't do your training

on time." Is that a performance issue? I don't think so. It would make more sense to me to just order the employees to do it and then follow up appropriately if needed.

But, let's say the manager wanted to deal with it as a performance matter, so you spend your time writing an opportunity to demonstrate acceptable performance letter. Unless the employee is completely oblivious, he or she would complete the training during the window and now they've improved. And, you can repeat it all again next year since there is no record to use to build a more severe action next year.

More importantly, going to training should not be a performance measure for anyone. We're talking about a few hours of work in most cases. A couple of hours out of 2087 in a cycle: Is that critical? Maybe doing something with what you learned in the training might make sense as a measure. There's an easy way to see whether any of these elements are used effectively or not. Look through a sample of performance appraisals and see how the supervisors documented performance on them.

Check back next month for more thoughts on performance measures. And, if you want to attend an in-depth session -- from system requirements to within-grades, writing good measures, and taking action on unacceptable performance -- join me for in Washington April 15-16, 2020 for Maximizing Accountability in Performance Management. We will spend two days on everything you need to know about performance. Haga@FELTG.com

Case and Program Consultation

FELTG's team of specialists has decades of experience. They can help you tackle your most challenging workplace issues. If you have a difficult case or situation and think FELTG can help you, email us at info@feltg.com or call 844-283-3584.

The Good News: A Cheat Sheet to Help Overcome the Office of Folklore!

By Ann Boehm

Those of you who attend FELTG training and read our newsletters know that supervisors regularly tell us, "These are great ideas, but our HR staff or counsel won't let us do this." I have come to realize that it is not the fault of the fine folks in HR and counsel offices.

I blame the Office of Folklore (OOF). Yes. I coined this term. It's not a real office. But it really exists. The Federal personnel community is a small one, and its insularity results in bad information being circulated as the truth. In our training, we try to defeat OOF, but it's a formidable opponent driven by a risk-averse culture.

At a recent training, some astute students suggested it would be very helpful to have a "cheat sheet" for supervisors, that would enable them to demonstrate to OOF that they indeed have the authority to properly handle problem employees. (Let me also take this opportunity to remind supervisors, HR staff, and counsel of this important piece of information – HR and counsel are advisors and not decision-makers. Typically, agency policies state that line managers should make discipline and performance decisions with the *advice* of HR and counsel.)

So to start off the new decade right, I have created the requested Cheat Sheet, which you will find spread out over the next two pages. Clip it out and keep it with you. I hope you find this to be helpful.

And if you think of anything that I need to add to the cheat sheet, send me an email. We are here to help. Boehm@FELTG.com

FELTG's Supervisor Cheat Sheet
(How to Overcome the Office of Folklore)

PIPs/DPs should be 30 days long.

> E.O. 13839, Section 4(c): no agency shall "generally afford an employee more than a 30-day period to demonstrate acceptable performance under 4302(c)(6) of title 5, United States Code, before removing an employee for unacceptable performance."
>
> *Melnick v. HUD*, 42 MSPR 492, 101 (1989)—30-day PIP is sufficient

You don't have to "prove" anything to put an employee on a PIP/DP; just articulate failure of a critical element.

> "To prevail in an appeal of a performance-based removal under chapter 43, the agency must establish by substantial evidence that: . . . (3) **the agency warned the appellant of the inadequacies of her performance during the appraisal period** and gave her an adequate opportunity to improve." *Towne v. Dep't of the Air Force*, 2013 MSPB 81 (2013) (emphasis added).
>
> The rationale for restricting the performance considered in a Chapter 43 action to the period occurring after the date of the notice of deficiency and opportunity to demonstrate acceptable performance is that **consideration of earlier performance is ordinarily unnecessary when the employee fails the PIP**. If the PIP provided the employee is adequate to fulfill the statutory purpose of affording a meaningful opportunity to demonstrate acceptable performance, then proof that the employee failed to perform at even a minimally acceptable level during that period usually is a sufficient basis for removal or reduction in grade. **Evidence of the performance failures which preceded the PIP would therefore not be required**. *Brown v. VA and OPM*, 44 MSPR 635, 640 (1990).

Performance standards do not have to be lowered for an employee with a disability.

> "An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job. Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation. However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard." *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities*, Section III.A.1, Equal Employment Opportunity Commission Guidance.

Some acts of misconduct warrant removal for a first offense.

> Destruction, mutilation, or theft of a government record by custodian warrants termination (18 USC 2071).
>
> Both the courts and the Board have held that removal from employment is an appropriate penalty for failure to cooperate with an investigation. *Weston v. HUD,* 724 F.2d 943 (Fed.

Cir. 1983); *Negron v. DoJ,* 95 MSPR 561 (2004); *Sher v. VA,* 488 F.3d 489 (1st Cir. 2007) (Courts have repeatedly held that removal from employment is justified for failure to cooperate with an investigation). *Hamilton v. DHS,* 2012 MSPB 19.

Another 1st offense removal:

- An employee's verbal threat to a supervisor warrants removal despite the appellant's lack of prior discipline and 4 years of service.
- Such behavior affects the agency's obligation to maintain a safe work place for its employees, thus impinging upon the efficiency of the service.

Robinson v. USPS, 30 MSPR 678 (1986) *aff'd.,* 809 F.2d 792 (Fed. Cir. 1986)

E.O. 13839, Section 2(b): "Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances."

E.O. 13839, Section 2(d): "Suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require suspension of an employee before proposing to remove that employee, except as may be appropriate under applicable facts."

Different employees may receive different penalties, even for similar misconduct.

E.O. 13839, Section 2(c): "Each employee's work performance and disciplinary history is unique, and disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time — particularly where the employees are in different work units or chains of supervision — and agencies are not prohibited from removing an employee simply because they did not remove a different employee for comparable conduct. Nonetheless, employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions."

A reprimand can be issued without a prior warning.

There is no law that requires warning prior to issuance of a written reprimand. Union contracts *may* require this, though it's unlikely.

Any past misconduct counts for progressive discipline—not just the same misconduct.

E.O. 13839, Section 2(e): "When taking disciplinary action, agencies should have discretion to take into account an employee's disciplinary record and past work record, including all past misconduct — not only similar past misconduct."

You can remove an employee for medical inability to perform before a disability retirement is granted.

Not only can an agency remove an employee for medical inability to perform before a disability retirement is granted – a removal on this grounds provides a rebuttable presumption that the employee is entitled to disability retirement. *Bruner v. OPM*, 996 F.2d 290 (Fed. Cir. 1993).

Please Mr. (Sometimes Electronic) Postman: How Do You Determine Receipt?
By Meghan Droste

Happy New Year to our wonderful FELTG community! With the holidays, and their many related treats behind us, it's time to get back to work. I decided to follow the example of my swim class coach and ease all of you back into things this month with a return to some fundamentals (unlike in my class, I promise not to make you break a sweat with these).

We talk a lot about deadlines when it comes to the EEO process. I have covered many different ones in this column. It may seem repetitive in a way, but really, they are so important to ensuring the integrity of the EEO process that it's worth returning to them with some frequency. One key part of handling deadlines correctly is knowing what it takes to trigger them. After all, if the agency doesn't send something to a complainant or their representative, the clock never starts running. Two relatively recent Commission decisions highlight the ways a small error can end up in a reversal of an agency's decision.

In *Orson R. v. Department of Veterans Affairs*, EEOC App. No. 2019005308 (Oct. 2, 2019), the complainant initially made EEO contact without a representative. During the process of scheduling mediation, the complainant verbally notified the agency that he had retained counsel, and his attorney emailed the EEO program manager. The complainant's attorney attended the mediation, which ultimately did not result in a resolution. When the agency subsequently mailed the notice of right to file (NRTF), it sent it only to the complainant. Three months later, the complainant's attorney reached out to the agency for an update and learned about the NRTF. The complainant's attorney then filed a formal complaint, which the agency immediately dismissed as untimely. In response to the complainant's appeal, the agency argued that the complainant had failed to properly notify the agency that he was represented, because he did not send a written notification that included the attorney's contact information. The Commission reversed the decision finding that the agency had notice that the complainant was represented and the clock starts from when the attorney, and not the complainant, receives the NRTF.

In *Scarlet M. v. Department of Veterans Affairs*, EEOC App. No. 2019005240 (Oct. 31, 2019), the agency sent the NRTF to both the complainant and the complainant's representative via email on May 13, 2019. The complainant's representative filed the formal complaint on May 29, 2019. In response to the agency's request for an explanation for the apparently untimely complaint, the complainant's representative acknowledged that although she opened the email on the day the agency sent it, the complainant was unable to open the email until May 15, 2019. The agency dismissed the complaint as untimely. Based on the *Orson R.* decision, you probably expect the agency to prevail in this case — the complainant's representative received the email on May 13, but did not file the complaint until 16 days later. There is one key difference here: The complainant's representative in *Scarlet M.* was not an attorney. As a result, the clock started running when the *complainant* and not the representative received the NRTF. In this case, the agency did not receive a read receipt from the complainant so it could not prove that she opened the email before May 15. The Commission reversed the dismissal. While I doubt that any of you are spending time waiting at a mailbox for formal complaints, particularly as so much happens electronically these days, I do encourage you to spend an extra minute or two triple checking your files before sending out notices and before dismissing complaints so that you can avoid a reversal by the Commission. Droste@FELTG.com

Tips from the Other Side: January 2020
By Meghan Droste

In addition to representing federal employees (and having the pleasure of teaching many courses with FELTG), I spend about half of my time representing private sector and local government employees. This gives me an interesting comparison of how attorneys and judges handle cases in federal court with how agency attorneys and administrative judges handle cases before the Commission. I am happy to report that the experience before the Commission is often more pleasant. Things (generally) move more quickly, although I know that might be difficult to imagine, and the formal complaint process creates a record from the start, avoiding some of the hassles of fighting over information in discovery.

There is one notable difference that makes things more difficult in the federal sector process and I hope you will indulge my moment on the soapbox discussing it. In several recent cases, I have found that agency attorneys are not producing emails from key witnesses as part of their document productions. I always ask for at least some emails in every case. I have yet to see a case where nothing was discussed over or sent by email. Unlike in my other types of cases, it seems that the attorneys on the other side in federal sector cases do not even think about checking with witnesses or even named harassers when gathering responsive documents. As a result, we end up spending unnecessary time on deficiencies letters and phone calls, and sometimes even motions to compel, to get documents that are clearly relevant to a complaint. If any of this sounds familiar to you, I *strongly* encourage you to reconsider your discovery practices.

As a quick reminder, the Commission considers discovery and the hearing process in general to be an extension of the investigation. That means that parties are entitled to obtain "relevant information" for a "reasonable development of evidence on issues raised in [a] complaint." *See* EEOC Management Directive 110, Ch. 7, § IV(A)(1). If witnesses, harassers, or management officials have discussed the issues in the complaint (or, in some cases, engaged in harassment) by email, those emails are relevant. You should be issuing litigation holds to anyone who might have relevant information at the outset of a case and also gathering emails from them as part of your normal litigation practice. Even if a complainant does not request emails in discovery, you should still be gathering them for yourself so you know what is out there and to avoid any surprises when witnesses testify during a deposition or at hearing. Droste@FELTG.com

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