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

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Step Two: A Grounded View

Last month I shared a photo of the Capitol building, taken from the top of the Washington Monument. This month I wanted to show you a different perspective – a view from inside the Capitol Rotunda, looking up 180 feet to the inside of a dome that's recognized around the world. The painting on the ceiling (the Apotheosis) covers almost 4,300 square feet and contains a scene of the founding fathers sitting next to mythological characters while George Washington ascends into heaven. I always enjoy visiting the Capitol because it is where Congress debates the bills that become law, and there's something incredible about being on the ground, in the place where that happens.

Speaking of the law, beginning March 3, FELTG is offering its famous webinar series for supervisors on all the laws – plus the regs, executive orders, best practices, and more – they need to know to effectively manage the federal workplace. Topics include performance, discipline, reasonable accommodation, leave, whistleblowing, harassment, and more. Early registration discounts are available until February 24, and this series meet's OPM's mandatory training requirements for supervisors at 5 CFR 412.202(b). Just one hour every two weeks is well worth the lessons learned.

It's now time for the February 2020 newsletter. Look inside for articles on "informal" discipline, the Hatch Act, EEO, and more.

Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

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

Developing and Defending Discipline: Holding Federal Employees Accountable
San Juan, Puerto Rico
May 5-7

Advanced Employee Relations
Washington, DC
May 12-14

Employee Relations Week
Denver, CO
June 15-19

You Can't Be Halfway Pregnant, and Informal Discipline is Not a Thing
By Deborah Hopkins and William Wiley

Have you ever heard this saying: *You can't be halfway pregnant -- either you are, or you aren't*? There are a number of things in life that are all or nothing, with no halfway. Either it is, or it isn't.

One of those things is discipline. An action taken against an employee who has committed misconduct in the federal workplace is either discipline, or it isn't. There's no halfway. I can't tell you how many agency policies we have seen – yes, even recently -- that list the items that constitute Formal Discipline, but then have other sections highlighted as "Informal Discipline" or "Other Discipline" or, perhaps most confusingly, just Discipline. Other policies list the steps of Progressive Discipline and include items such as Counseling and Oral Reprimands. That's another mistake and isn't legally accurate.

Here's what we know about the requirements for an action to be considered discipline in the federal workplace, as laid out in *Bolling v. Air Force*, 9 MSPR 335 (Dec. 21, 1981):

Discipline must be in writing. If a supervisor yells and screams at an employee, calls the employee all kinds of nasty names , throws a chair, slams a door, threatens to fire the employee, or anything else along those lines, that supervisor might feel like she is disciplining the employee, and indeed, the employee may even feel disciplined from the sting of those words. However, under the law, the employee has not been disciplined. Those words and gestures matter not one iota under the law. If it isn't in writing, it isn't discipline. (It's definitely bad management, but we'll save that conversation for another article.)

Discipline must be grievable. As explained in *Bolling*, for an action to count as discipline, the employee must be "given an opportunity to dispute the action by having it reviewed, on merits, by an authority different from the one that took the action." Just because an item is in writing, doesn't make it grievable. An agency needs to look to its administrative grievance procedure or its union contract to see what types of written documents are grievable. Typically, items such as counseling memos, emails, letters of caution, or written expectations, do not meet these criteria and, therefore, are excluded from the definition of discipline.

The action must be made a matter of record. This requirement essentially means that there is official agency paperwork involved; the item belongs in the employee's OPF. A lot of supervisors put notes and memos into the OPF, but the only things that truly belong there, for the purposes of counting as discipline, have an SF-50 attached. A reprimand does not have an SF-50 because it is not a pay action. However, it is commonly stored in the OPF in the temporary section (for those who remember OPFs before they were electronic, on the left side of the folder), where it does not remain in the file past its expiration date. A reprimand is considered discipline until its expiration date, because it meets all the legal requirements of discipline: It is written, grievable, and a matter of record.

All this brings us back to the confusion around "informal discipline," or whatever your agency calls it. There is no accepted definition for informal discipline, and it does you more harm than help if you try to draw a distinction.

If a supervisor mistakenly issues three types of informal discipline against an employee, and on the fourth offense decides that it's time for a removal under progressive discipline, she is going to be upset when she realizes the informal procedures she followed in her agency's policy have carried exactly ZERO legal weight for the purposes

of progressive discipline. At the very most, she might have some evidence for the *Douglas* factor on notice, but that's about it. Here's why this is important:

Efficiency: As we have taught in our FELTG seminars since the cooling of the Earth, the best practice is to do as little as required by law when dealing with a problem employee. The more you do, the longer it takes, the more you give the employee to grieve and complain about, and the greater your chances of making a mistake. If you create a category of actions unrecognized by law or otherwise unnecessary, you make it more difficult to efficiently correct behavior.

Confusion: If you create something called "informal discipline," you confuse the poor front-line supervisor. When should the supervisor engage in informal discipline? Is there a requirement to use informal discipline before he uses the real thing? How is the employee supposed to view the administration of an informal disciplinary action? Most importantly, what is the judge or the arbitrator supposed to do with an informal discipline policy? Confusion does you no good when trying to manage workplace behavior.

Litigation: MSPB administrative judges closely review the removal of employees from federal service. If a judge discovers that you have mistakenly considered an act of "informal discipline" as a step in progressive discipline, then you stand a big fat chance of the removal being mitigated or even set aside on appeal. Litigation is hard. Don't create the potential for mistakes that are unnecessary.

If you're stuck with one of these policies and aren't in a position to change it, don't sweat it. Most of these policies do not *require* a supervisor to start with the informal before going the disciplinary route, so a supervisor should be free, to go right to the reprimand and skip the Letter of Whatever. Hopkins@FELTG.com

The Good News – Don't Worry, Be Jolly!
By Ann Boehm

I know, I know. The Bobby McFerrin hit song was "Don't Worry Be Happy," not "Don't Worry Be *Jolly*." But I want to provide a way to make you remember one of my favorite Federal Circuit cases in recent years – *Jolly v. Department of the Army*, 711 F. App'x. 620 (2017). (And yes, I'm sorry that song will now be in your head for the next three days. It was either this or "Hello, *Jolly.*")

Why is *Jolly* a favorite, you may ask?

Well, for one thing, it says pretty darn clearly that it is NOT a due process violation for a Deciding Official in a discipline matter to know about the employee, the facts of the case, and the employee's background.

And why is this important? I hear too often from agencies that they won't let a second-level supervisor serve as the Deciding Official because they "know too much about the case," and it would be a due process violation. Agencies then rope in some other unsuspecting supervisor from another office to serve as Deciding Official. According to *Jolly*, this is not necessary!

Jolly also indicates that agencies may remove federal employees for making threats. I've seen people visibly shaken due to fear about employees who make threats, and far too often agencies are afraid to terminate the employee. *Jolly* says you can. In my opinion, you should!

So, here are the facts in *Jolly*.

Employee Jolly was a Health Systems Administrator at an Army medical center. During a meeting with a unit chief to discuss concerns about her supervisors and work schedule, employee Jolly asked the chief "if she had heard about the [recent] Camp Lejeune and Fort Hood shootings." *Jolly,* 711 F. App'x. at 621. She added that "her supervisor, and Col. Barrow, her second line supervisor, needed to be careful, to leave her alone and not to mess with her." *Id.*

YIKES!

The Army proposed her removal on the very sensible charge of "conduct unbecoming a federal employee," based upon her "inflammatory and/or menacing comments which reasonably placed fellow employees in fear." *Id*.

So, guess what Jolly did? She appealed. She argued her punishment was too harsh. She also argued her due process rights were violated because Col. Barrow — as target of her remarks and Deciding Official — was not impartial. The MSPB Administrative Judge, the MSPB, and the Federal Circuit all agreed that the punishment was appropriate and that there was NO DUE PROCESS violation!!

Here's some of the lovely language from the Federal Circuit about due process:

> "First, '[a]t the pre-termination stage, it is not a violation of due process when the proposing and deciding roles are performed by the same person. The law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case.'" *Id.* at 623 (quoting *DeSarno v. Dep't of Commerce*, 761 F.2d 657 660 (Fed. Cir. 1985)).

But wait, there's more:

> "Second, the standards of impartiality applicable to post-termination adjudications do not apply in the context of pre-termination hearings. 'Nothing … limits the deciding official to being a neutral arbiter or requires that the deciding official be unfamiliar with the

> individual, the facts of the case, or the employee's prior conduct' during the pre-termination hearing." (quoting *Norris v. S.E.C.*, 675 F.3d 1349, 1354 (Fed. Cir. 2012)). *Jolly*, 711 F. App'x. at 623-24.

And here's my favorite part:

> Relying upon holdings in the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, the Federal Circuit noted:
>
> > [u]sually, an employment termination decision is made initially by the employee's direct supervisor ... — a sensible approach given that such person often is already familiar with the employee ... Yet, these individuals are also likely targets for claims of bias or improper motive simply because of their positions. . . . [T]o require . . . an impartial pretermination hearing in every instance would as a practical matter require that termination decisions initially be made by an outside party rather than the employer as charges of bias always could be made following an in-house discharge.
>
> *Jolly* at 624 (quoting *McDaniels v. Flick*, 59 F.3d 446, 458-60 (3d Cir. 1995)).

Pretty clear, eh? Second-level supervisors can and should be Deciding Officials. End of story.

And as much as I love the due process analysis in *Jolly*, I also think it is an important case for the crazy times in which we live.

If an employee is threatening anyone in the workplace, take action. Removal may be appropriate. According to the Federal Circuit, "[w]here an employee makes 'threats ... against her supervisor [that are] unprofessional and inappropriate, and ... they adversely affect the work atmosphere," the penalty of removal is "within the permissible range of reasonableness." *Jolly* at p. 6 (quoting *Harrison v. Dep't of Agr.*, 411 F. App'x 312, 315–16 (Fed. Cir. 2010) (per curiam)).

HR folks and Counsel, when supervisors or employees are scared of an employee due to threats, do not act like there is nothing you can do. Let the supervisor propose removal. And don't tell second-level supervisors they can't be Deciding Officials because they know about the case. Of course they do — that's their job. But now you know it is not a due process violation.

And heck – Don't worry, be happy!

[Writer's note: *Jolly* is "nonprecedential." According to Federal Rule of Appellate Procedure 32.1(d), a court may "refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning." Also, the *Jolly* court relies on established precedent in reaching its conclusions. If in doubt, rely on those cases.] Boehm@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.

A Valentine to Not *Being Creative*
By Meghan Droste

"Learn the rules like a pro, so you can break them like an artist."

– (Possibly) Pablo Picasso

It's Valentine's Day as I write this column for you, dear readers. And so it is with great love for my fellow practitioners, the EEO process, and (of course) the rules that I have to share that while creativity is wonderful, sometimes it's a terrible litigation strategy. I truly admire great artists and creative types, and creativity can be helpful in our line of work, such as in coming up with out-of-the-box ideas during settlement discussions. But there are times when it can go too far.

I have been doing this (researching, litigating, teaching) long enough that I am rarely surprised by arguments employers raise to avoid liability. *Leon B. v. Department of State*, EEOC App. No. 012018144 (Nov. 5, 2019), is one of the exceptions. The claims are fairly run of the mill: The complainant alleged that the agency discriminated against him on the basis of race, color, age, and disability when it did not select him for a special agent position.

The complainant made it through the initial stage of the application process, including an oral assessment conducted by two agency employees. Following the assessment, the agency notified the complainant that he failed to meet the cut off score and, therefore, was not eligible to continue.

During the investigation of the formal complaint, the investigator asked the agency to provide documents regarding the scoring process, and asked both of the employees who conducted the assessment for information on what questions they asked and how the complainant's answers compared to those of other employees. The investigator also asked the agency for information on the other candidates who were selected and those who also failed to meet the cutoff for the scoring of the oral assessment.

The agency refused to provide the requested information.

Why? Well, here comes the creative part: The agency asserted that the information was exempt from disclosure under the Freedom of Information Act, specifically exemption (k)(6). (Notwithstanding the statements by at least one of the employees who conducted the assessment, the agency appears to be relying on the Privacy Act and not FOIA.)

This exemption allows agencies to withhold information regarding testing material in responding to Privacy Act requests when providing the materials would compromise the objectivity or fairness of the selection process.

You can probably guess that this did not end well for the agency. Because the agency failed to produce any specific information as to why the complainant did not score high enough to advance in the process, the Commission found that the agency could not articulate a legitimate, non-discriminatory reason and therefore the complainant prevailed.

The Commission ordered the agency to assign the complainant the same score as the highest scoring candidate and then continue the application process. Assuming the complainant received a clearance and passed the medical exam, the Commission also required the agency to put the complainant in a special agent position.

In your brushes with the EEO process, it is probably best to ignore Picasso's advice in most circumstances and leave your creativity and artistry to other pursuits.

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A New Goofus and Gallant Navigate the Hatch Act
By Dan Gephart

As a young child, I never dreaded a trip to the doctor's office because that meant I would get my hands on an issue of *Highlights for Children*. I'd flip right past that boring Timbertoe family and dive into the latest adventures of Goofus and Gallant.

These cartoon brothers (or were they the same person?) explained right and wrong in the simplest of terms. You know what's not so simple? Navigating a hyper-partisan presidential election season as a federal employee.

For more than 80 years, the Hatch Act has kept political activity out of the day-to-day running of the federal government. But the Hatch Act is under fire. High-ranking administration officials flaunt the law, and critics claim that the Hatch Act restricts free speech. In an op-ed for Federal News Network, Special Counsel Henry Kerner countered these claims and declared that the Hatch Act remains "foundational to good government."

I agree with the Special Counsel.

In these unique times, it's critical that you, your employees and all others who fall under the auspices of the Hatch Act execute your duties as civil servants in a non-partisan manner – and that the taxpayers you serve know they can count on you to do that. It's not easy, and it's about to get even more difficult. Super Tuesday is a couple of weeks away, but it's still 9 long months until Election Day. If you feel like you're being assaulted by political clatter now, hold on. This racket is getting turned all the way up to 11.

So we're introducing you to a new Goofus and Gallant to help you understand how you can participate in the political process without violating the Hatch Act. Please welcome Hero and Half-wit.

[Note: These examples are not meant to make any political statements themselves. Also, these examples were created by FELTG, not OSC, but they are based upon OSC guidance. It is the OSC who would have to determine whether to bring a Hatch Act violation before the Merit Systems Protection Board. And those decisions are made on a case-by-case basis. These examples are meant to provide a distinction between various levels of political speech.]

Photographs

- **Hero** has the official Presidential photograph of Donald J. Trump framed on her office wall.

- **Half-wit** has the official Presidential photograph of Donald J. Trump hanging upside down on her office wall with the words "Impeached" written in big red letters.

- **Hero** has had a framed photo of herself and her then-new husband with Michael Bloomberg hanging on her cubicle wall for the last eight years. The photo was taken at her wedding, and the former New York mayor, who is her second cousin, was a guest.

- **Half-wit** has a picture of herself and her husband with Joe Biden on her cubicle wall. The photo was taken at a recent Biden campaign event.

It's not a stretch to conclude that the Hatch Act prohibits federal employees from displaying pictures of political candidates in the federal workplace. There is an exception. However, it's an awfully difficult bar to reach, as OSC pointed out way back in a 2008 advisory opinion.

"We advise that an employee would not be prohibited from having a photograph of a

candidate in his office if *all* [our emphasis] of the following apply: the photograph was on display in advance of the election season; the employee is in the photograph with the candidate; and the photograph is a personal one."

In a 2019 advisory opinion, OSC stated that the Hatch Act does not prohibit the display of official photographs of the president in the workplace. However, the photograph must be from an official source – either the White House or the Government Publishing Office. That means no pictures distributed by a political party, the president's campaign or any other partisan organization. Also, official presidential photographs may not be altered in any way, and must be displayed in a traditional size and manner. Sorry, no life-size cutouts.

Political books and campaign material

- During her lunch break, **Hero** quietly reads the latest political screed by a cable news personality in the cafeteria.

- While away from her desk on lunch break, **Half-wit**'s computer screen saver flashes Make America Great Again, which her coworkers and some members of the public can see.

OSC says that displaying campaign material qualifies as a political activity, so that's a big NO on MAGA screen savers. On the other hand, merely reading a book about politics or political candidates while in the federal workplace is not a Hatch Act violation.

Bumper Stickers

- **Hero** parks her SUV with its Trump/Pence 2020 bumper sticker in a private garage for which the employee receives a subsidy from her agency.

- While on federal duty, **Half-wit** drives her car, which not only has a Trump/Pence 2020 bumper sticker, but also has the front hood covered with a wrap of President Trump giving a thumbs up.

The Hatch Act regs at 5 CFR 734.306 state that an employee may place a partisan political bumper sticker on his personal vehicle and park that vehicle in a federal parking lot or garage. An employee may also park the car with a bumper sticker in a private lot or garage for which the employee receives an agency subsidy. OSC has even ventured to suggest that two bumper stickers for different candidates is probably OK.

However, a May 2018 advisory letter cautioned against "displaying other partisan political materials, or even bumper stickers, in such a way that makes the vehicle appear to be a campaign mobile." It's my opinion, that a hood wrap is probably crossing that line, and without question, that's the case when the car is being used while on duty. Oh, and if you don't think car wraps like Half-wit's exist, you should spend some time in Florida.

Email

- **Hero** receives an email on her work account inviting her to contribute to Pete Buttigieg's campaign. She immediately deletes the email.

- **Half-wit** clicks on the link in the Pete Buttigieg Campaign email, and then forwards the email to her co-workers.

This is a real Hatch Act danger area. The definition of a partisan political email is broad – it's any email that is directed at the success or failure of a partisan group or candidate in a partisan race. Simply receiving a partisan political email while on duty does not violate the Hatch Act. If that happens, hit delete. Once you forward the email, you've committed a Hatch Act violation.

Social media

- At home, while no longer on duty, **Hero** likes a friend's Facebook post expressing anger at Senator Majority

Leader Mitch McConnell's failure to act on specific legislation. The post suggests that friends in Kentucky vote for McConnell's competitor Amy McGrath.

- At home while no longer on duty, **Half-wit** refers to her official government bio whenever she posts on her Twitter account titled Moscow Mitch, which regularly suggests that followers contribute to Amy McGrath's 2020 Senate campaign.

Social media complicated the Hatch Act so much that OSC had to create a whole new set of guidance several years ago. With time, those guidelines have started to make a lot of sense. Whether you are a less-restricted or further-restricted employee, you may express your opinions about a partisan group or candidate by posting, liking, sharing, tweeting or retweeting. However, you *cannot*:

- Engage in political activity on social media while on duty or in the workplace.
- Refer to your official title or position while engaged in political activity.
- Suggest that anyone make political contributions.

Further-restricted employees are also cautioned against posting and linking to a partisan group or candidate's Facebook or Twitter accounts, as well as sharing or retweeting content from those accounts.

For more information, I suggest you read our recent interview with the OSC Hatch Act Unit and visit the OSC website where there is a lot of guidance. And if you can't find an answer, no problem. All you need to do is ask. If you are seeking advice about your political activity or the activity of another employee, you may request an advisory opinion from OSC by calling (800) 854-2824 or (202) 804-7002. You can also email the Unit at hatchact@osc.gov.
Gephart@FELTG.com

Takeaways from MSPB's Annual Report for FY 2019

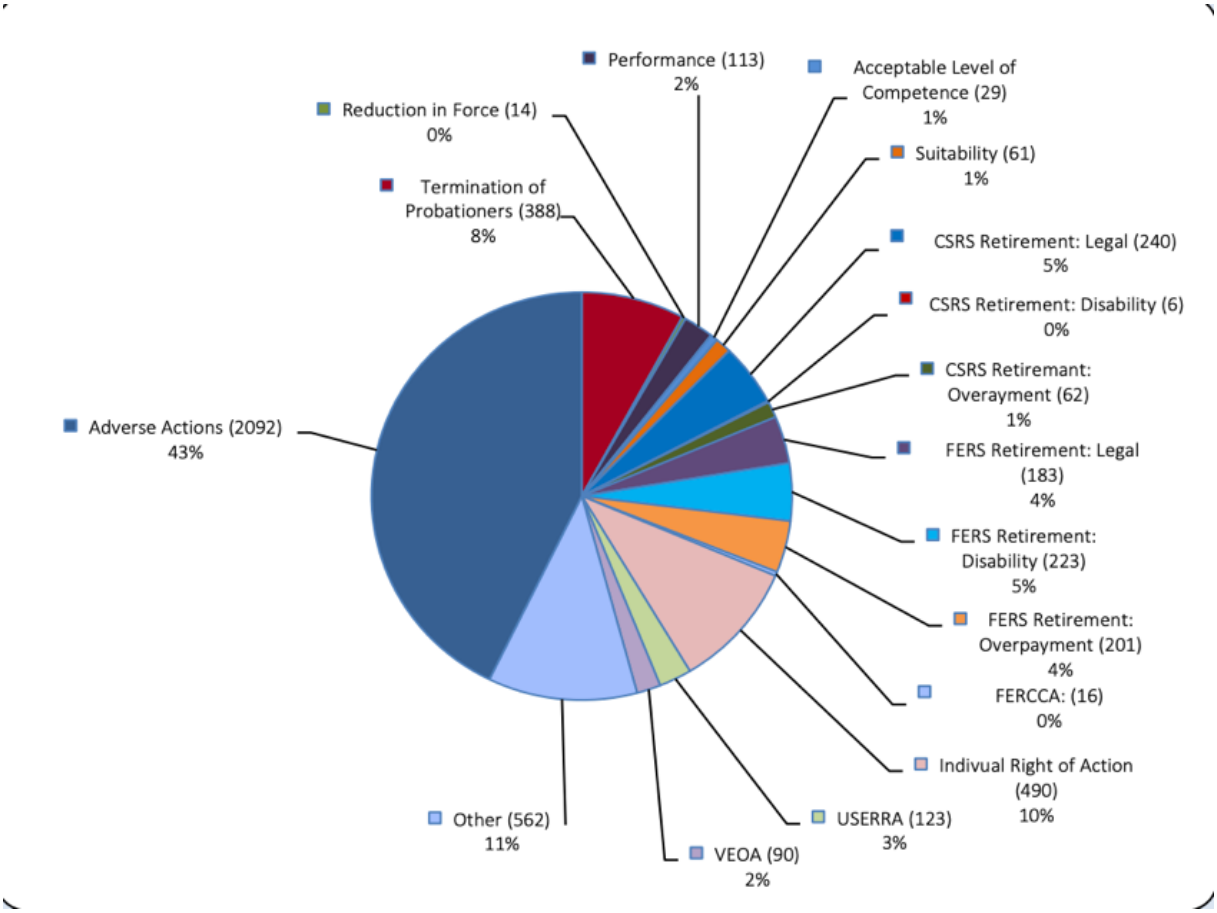
Agencies Continue to Win Appeals, but Don't Litigate Very Many Cases
By Deborah Hopkins

A couple of weeks ago, MSPB issued its Annual Report for FY 2019. This report is similar to a "State of the MSPB" document, which highlights the priorities, strategies, and numbers from the previous fiscal year. Because we have no sitting members of the MSPB for the first time in history – and it's been almost a year since the Board has been vacant – the report is more abbreviated than it has been in years past. But there's still some interesting information we at FELTG want to share with you, in case you haven't had a chance to look at the report yet.

As of the end of FY 2019, MSPB had 2,378 Petitions for Review (PFRs) pending at HQ. That was the end of September, of course. As of last week, MSPB's website showed more than 2,600 pending PFRs. The backlog has been growing for more than three years and will continue to grow until the Senate votes to confirm the nominees, who have been patiently waiting – two of the three for nearly two years.

The Administrative Judges (AJs) in the regional and field offices continue to hold hearings and review cases. Last FY, they issued 5,112 decisions. Of those, 4,893 were initial appeals, 190 were addendum cases, and 29 were stay requests. Let's look at a further breakdown of these numbers:

- 2,092 of the AJ decisions involved adverse actions.
- 388 cases were probationer removals. (As most FELTG readers know, probationers have limited Board appeal rights. If you didn't know that,



attend MSPB Law Week in March and we'll tell you all about it.)

- 113 cases involved performance-related removals or demotions.
- 490 were Individual Right of Action appeals – with most of those, if not all, undoubtedly being appeals of alleged whistleblower reprisal.
- 61 appeals were related to suitability.
- USERRA and VEOA appeals combined for 213 appeals.

Another interesting statistic involves settlement. In years past, around 60 percent of MSPB appeals government-wide were settled before they ever went to hearing. Of course, some agencies tend to settle more often, and others less frequently, but overall the majority of cases still settled. I often get asked what that looks like, and why agencies settle cases after the disciplinary action has already been decided. Well, it costs the government time and money to litigate a case in front of an MSPB AJ, and if the agency can offer the employee something (usually a sum of money) in order to resolve the appeal *today*, then it often will.

This decision to settle usually comes from someone further up the chain of command, and in many cases includes the employee's agreement that they won't apply for another job at the agency again. Whether you like it or not, that's how the system works.

Well, last year we had the lowest number of post-appeal settlements I can ever recall seeing: only 47 percent of cases settled after the appeal was filed to MSPB. A likely reason for this is Executive Order 13839, which went into effect in 2018 and removed the agency's authority to take discipline out of an employee's official record. A clean record is often the determining factor in getting an employee to agree to withdraw an appeal and go away, so it's not surprising to see this number decrease so significantly.

Of the 915 appeals that went to hearing (in other words, they weren't settled, withdrawn, dismissed, or otherwise disposed of) and were adjudicated on the merits, agency actions were upheld 85% of the time -- a 2% increase from FY2018. Only 2% of agency actions were mitigated and about 12% were overturned.

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.

So, who went to hearing the most? By the numbers, the VA far and away adjudicated the most MSPB appeals (161), more than doubling the number of its closest followers, Army and DHS. Not far off the podium were DOD, USPS, Navy, and Air Force, followed by DoJ, USDA and Treasury. Considering the size of the top three agencies, this is not entirely surprising as one could assume the number of hearings is related to the size of the workforce. However, several decent-sized Departments only adjudicated appeals in the single or low-double digits:

- Department of Health and Human Services: 15 appeals; 79,000 employees
- Department of Transportation: 15 appeals, 58,000 employees
- Department of Commerce: 14 appeals; 46,000 employees
- Department of the Interior: 12 appeals; 70,000 employees
- Department of Labor: 4 appeals; 17,000 employees
- Department of Energy: 3 appeals; 14,000 civilian employees
- Department of Housing and Urban Development: 3 appeals; 8,000 employees

The fact that some agencies adjudicated so few appeals is not *necessarily* directly related to the number of personnel actions taken. A number of Departments employ groups of people who do not fall under MSPB jurisdiction – for example, Department of Energy employs more than 100,000 contractors who do not have MSPB appeal rights. Some agencies have very high settlement rates, and other agencies see very few employees file an appeal of a removal. That said, it is true that some agencies just don't take action against most employees who engage in misconduct or perform at an unacceptable level. I share these numbers not to point fingers, because these numbers standing alone don't tell us the complete story, but as a way of starting the conversation about accountability in the federal government.

There's lots more in the report including a statement on the lack of a quorum (or any members at all) and summaries of important Federal Circuit decisions. Check it out here for a full read. Hopkins@FELTG.com

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

Supervisor Survival Series: Talk to Employees Regularly

This may seem obvious, but it's worth stating: Supervisors and managers should have regular conversations with their employees throughout the appraisal year. In the course of those conversations, supervisors should provide feedback on the employee's performance and conduct – positive and negative. The benefits to regular interactions are too many to list here but include improved employee morale, clarity of provided expectations, an increase in employee willingness to be honest with the supervisor, and a better understanding of the challenges employees are facing.

Standards that Actually Measure Performance – A Look at Whistleblower Protection
By Barbara Haga

Before I talk about requirements related to whistleblower protection and performance plans, I need to talk about the reason behind the Congress' action in the *Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017*. The events leading to the law's passage are a tragedy, and I don't think anyone could suggest there shouldn't have been action to deal with the reprisal that took place. However, agencies would be much better off with a different approach than incorporating it in performance plans.

Dr. Chris Kirkpatrick

Dr. Kirkpatrick was a 38-year old clinical psychologist at the Tomah Veterans Affairs Medical Center in Wisconsin. According to his obituary, Dr. Kirkpatrick died on July 14, 2009. In a detailed story published by *USA Today* on April 12, 2015, details are filled in regarding Dr. Kirkpatrick's employment.

Dr. Kirkpatrick completed his doctorate in clinical psychology in August 2008 and was picked up on two-year appointment a month later. This was a conditional position that could have become permanent if he passed the necessary exams and obtained his license. Prior to his appointment, Kirkpatrick completed an internship at a VA facility in Chicago where he had worked with patients with PTSD and other conditions.

According to *USA Today*, an AFGE rep was present for the meetings with management we are about to discuss. Kirkpatrick received a reprimand in early 2009. He had raised in a providers' meeting that his patients were too heavily medicated for them to be properly treated. A physician's assistant, who was in the meeting and had prescribed some of that medication, reported this to the hospital chief of staff. The reprimand said Dr. Kirkpatrick should not further criticize the PA, should focus on his own work, and should not comment on the use of medications as that was not part of his practice.

Three months later, Dr. Kirkpatrick reported that a veteran had threatened him and his dog. Although a treatment team recommended that the veteran be discharged, that didn't occur. Kirkpatrick missed two days of work thereafter. On the third day, he returned to duty. He was fired that morning. The charges included taking leave on Fridays and Mondays, improperly recording a 90-minute absence, and two other minor issues.

After receiving the termination notice, Dr. Kirkpatrick asked the union representative to get a support system so that no one else would have to go through what he did. He went home, and shot himself in the head, and died.

Legislation

Sen. Ron Johnson introduced a bill intended to prevent such situations in the future in March 2017. It easily moved through Congress and was signed on Oct. 26, 2017.

A summary about the legislation posted on *govtrack* provides further information about the situation at the Tomah Medical Center:

> A VA investigation -- triggered earlier this year by the revelation that a veteran died at Tomah last August from "mixed drug toxicity" -- found Kirkpatrick's concerns had been warranted. Tomah veterans were 2½ times more likely to get high doses of opiates than the national average. Further investigations found retaliation against whistleblowers has become a major problem at VA facilities across the country. The U.S. Office of Special Counsel is investigating 110 retaliation claims from whistleblowers in 38 states and the District of Columbia.

The bill attempts to stop whistleblower retaliation in several ways; the *govtrack* summary includes this description:

> The bill provides enhanced protections and expedites investigations of instances in which probationary federal employees are fired for whistleblowing; enacts reforms to ensure that managers who retaliate against whistleblowers are held accountable; provides the Office of Special Counsel with adequate access to information from federal agencies to allow for complete investigations and better protect whistleblowers; ensures that all federal employees are informed of their rights as whistleblowers and provides training to managers on protections; and establishes measures to hold VA employees that improperly access the medical records of their fellow VA employees accountable.

The Kirkpatrick Act was included in the NDAA for FY 2018. It amends provisions in both Chapters 43 and 75.

What's Wrong?

The change to 5 USC 4302(b)(2) requires agencies to set performance standards that require supervisors to:

- Respond constructively when employees make disclosures covered under either subparagraph (A) or (B) of 5 USC 2302(b)(8),
- Take responsible actions to resolve such disclosures, and
- Foster an environment in which employees feel comfortable making such disclosures to supervisory employees or appropriate authorities.

The suggestion that this should be handled under performance to me shows a lack of understanding of the process. By the time the superiors of the offending supervisor find out that a supervisor engaged in such behavior, it is likely well after the fact. If you were taking the position that this was unacceptable performance and proceeding under Chapter 43, you would have to do a demonstration period (DP) no matter how long it had been since the act of reprisal. If the supervisor didn't reprise again during the DP or within one year of the beginning of the DP, there's no formal performance action.

But let's look at a more basic issue: What are demonstration periods supposed to be for? To provide assistance on performance to ensure that an employee can come out of the period with the skills to perform successfully. Do you think that those who take reprisal action need to be taught that what they did was wrong? Shouldn't she know that taking disciplinary action against someone who has pointed out wrongdoing is not tolerated and the manager acts at her peril when she does it? This is similar to the matter of protecting classified material that I talked about last month; it is a rule that must be followed -- and following it is a condition of staying in the job. In this case, reprisal is a prohibited personnel practice that is already illegal.

Another concern is how will a senior manager ever be able to assess this? If there are no disclosures, then it doesn't apply. If the whistleblower never complains to higher management, they will never know that the manager didn't respond constructively or take a responsible action. And how does a senior manager assess whether employees are "comfortable" in making disclosures?

What happened in Dr. Kirkpatrick's situation is horrible, but the tools to take appropriate action to stop this were already there. Adding this to appraisals is just form over substance. Haga@FELTG.com

Tips from the Other Side: February 2020
By Meghan Droste

When counseling clients on how to proceed in their cases, I recommend requesting a hearing rather than a Final Agency Decision (FAD) far more often than not. Why? Well, as I point out to my clients, a FAD is an agency deciding whether or not it violated the law, and how often do any of us want to publicly admit that we did something wrong? It often feels like a foregone conclusion that no matter the evidence, the agency will issue a FAD finding no liability.

I get it. Although the offices issuing FADs are, of course, intended to be neutral, and I'm sure the people drafting FADs make every effort to be unbiased – and many do a great job, at the end of the day, the agency is rendering a decision based on (sometimes limited) information collected by the agency.

This month my tip to you is to recognize that, in some cases, the evidence compels a decision in favor of the complainant.

The recent decision in *Felton A. v. U.S. Postal Service*, EEOC App. No. 0120182134 (Dec. 17, 2019) is a great example of when the agency should not have issued a FAD finding in its own favor. The complainant alleged that the agency discriminated against him when it barred him from entering an agency facility while representing another agency employee in the coworker's EEO complaint. According to the complainant, his supervisor told his union steward that the complainant was not permitted in the facility because the complainant was on the "Threat Assessment List" due to his PTSD.

At various times during the investigation, the supervisor denied that a Threat Assessment List existed *and* testified that the complainant could not enter the facility due to a Threat Assessment. The supervisor also denied being aware of the complainant's disability, despite documents in the record establishing that the supervisor had knowledge prior to barring the complainant from entering. Finally, the supervisor could not specifically say what she said to the union steward regarding the complainant. The agency failed to interview the union steward in its investigation, leaving the record without a clear picture of the crucial conversation.

The supervisor's internally inconsistent testimony, which directly contradicted the documents, should have raised a red flag for the agency when drafting the FAD. The lack of testimony from the union steward also should have been an issue. The agency would have been better served to order a supplemental investigation rather than issuing a FAD based on an incomplete record. Ultimately the Commission reversed the FAD and entered a finding of discrimination, ordering the agency to conduct a supplemental investigation on damages.

When drafting FADs, I encourage you to look critically at the record and issue findings of liability when supported by the report of investigation. Droste@FELTG.com

EEOC Law Week

If you're looking for training that covers a broad swath of EEO issues, and provides usable guidance for all practitioners, regardless of skill levels, then join us for EEOC Law Week April 27-May 1 in Washington, DC. The instructors draw on years of experience from all sides of the litigation table, deliver a fast-paced week of strategies, principles, and authorities, relative to the major aspects of discrimination law in the federal workplace.

Topics include substantive law, contractor complaints, current trends in EEO, harassment, accommodations and mixed cases. Most people attend the full week, but you can choose to opt for any of the days you don't plan to attend. As a bonus, you can earn EEO refresher hours each day. Register now because EEOC Law Week regularly sells out.