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

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If You Go, You Won't Feel Worse

Some long-time readers may know that I'm a triathlete, though I consider myself more recreational than competitive in recent years. One of the mantras that has consistently gotten me through training slumps when I just didn't feel like getting in a workout is, "You won't feel worse."

One morning last week, I was feeling a bit unmotivated. As I debated whether I was going to lace up my running shoes or skip the run that day, I reminded myself that if I got out the door and went for a run, "You won't feel worse."

So I put in a few miles, and I didn't feel worse. In fact, as happens almost every time, I felt a lot better. Consistent exercise has been essential to keep me grounded during the past several months, as life has changed dramatically. I hope that you've been able to find something to bring you peace, or joy, or a moment of calm – whether that be a run, a walk, deep breathing, thoughts of gratitude, or even an escape to reruns of *Caribbean Life*. We're all in this together, and we'll get through it together. And let's hope we won't feel worse on the other side.

In this month's newsletter, we discuss precedent-breaking decisions from the FLRA, medical inability to perform removals, mental health in the workplace, and much more.

Take care,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

COVID-19 and EEO: What Agencies Need to Know Today
October 22

The Performance Equation: Providing Feedback That Makes a Difference
October 28

Handling Cases Before the EEOC, MSPB and in Arbitration: Best Practices for Representatives
November 5

Workplace Investigations Week
November 16-20

Advanced Employee Relations
December 1-3

Managing Employees With Mental Health Challenges During the COVID-19 Pandemic
December 9

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
February 10-11, 2021

Conducting Effective Harassment Investigations
February 23-25, 2021

EEOC Law Week
March 15-19, 2021

Absence, Leave Abuse & Medical Issues Week
April 12-16, 2021

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Good News: With This FLRA, It is a Good Time to be an Agency
By Ann Boehm

You may be aware that the FLRA recently issued three decisions that are definitely on the pro-agency side of the spectrum: *U.S. Department of Education and U.S. Department of Agriculture*, 71 FLRA 968 (Sept. 30, 2020), which changes the standard for an agency's obligation to bargain changes to conditions of employment; *U.S. Office of Personnel Management*, 71 FLRA 977 (Sept. 30, 2020), which makes zipper clauses a mandatory subject of bargaining; and *U.S. Department of Agriculture, Office of the General Counsel*, 71 FLRA 986 (Sept. 30, 2020), which allows for Agency head review of expiring, existing collective bargaining agreements.

As you can imagine, these decisions have drawn the ire of the major Federal unions. They also received some media attention. The headline for an October 2 *Government Executive* article is pretty strong: "Labor Authority Abandons Decades of Precedent, Eviscerates Union Bargaining Rights."

Also, the lone Democrat on the FLRA, Member Ernest DuBester, dissented in all three decisions.

So, what's going on here?

Is this the end of collective bargaining in the Federal government as we know it?

Not necessarily. But with these three decisions, this FLRA is trying to make things easier for agencies in the collective bargaining context.

Here are some of my general observations on these three cases.

Observation Number 1

Each of these cases is a "Decision on Request for General Statement of Policy or Guidance." Section 2427.2 of the FLRA's regulations allows for issuance of such decisions, and section 2427.5 sets forth the standards the FLRA is to follow in determining whether to issue a general statement of policy or guidance. 5 C.F.R. §§ 2427.2, 2427.5.

These types of decisions have been rare in the history of the FLRA, but more common with the current FLRA. The issuance of three such decisions on one day is notable.

Why is the FLRA proceeding in this way? I suspect it is because there is no General Counsel for the FLRA. A nomination has been pending, but the Senate has not confirmed. That means no unfair labor practice (ULP) complaints are being prosecuted before Administrative Law Judges (ALJ), since only the FLRA General Counsel can prosecute ULP complaints. ALJ decisions can be appealed to the FLRA for review. Without ULP complaints and ALJ decisions to review, there are areas of Federal sector labor-management law that this FLRA has not been able to consider – or perhaps more significantly, reconsider.

Agencies are aware of this FLRA's pro-agency tilt, so they are cleverly utilizing 5 C.F.R. § 2427.2 to seek general statements of policy or guidance. The FLRA is happy to oblige.

In one of his dissents, Member DuBester notes that "[i]n several recent decisions, my colleagues have reversed long-standing and well-reasoned [FLRA] precedent based solely upon their view that it was inconsistent with the plain language of the Federal Service Labor-Management Relations Statute." *U.S. Dep't of Agriculture, OGC*, 71 FLRA at 990. He also states, "[i]f one thing is clear from the rash of policy statements that the majority has recently issued, it is that this is no way to establish precedent on

significant matters affecting federal-sector labor relations." *Id.* at 991. No doubt, the unions will challenge these decisions in Federal court. It will take a while to get through that process, but stay tuned over the next year to see whether the courts think the FLRA has overstepped its bounds.

Observation Number 2

Good golly, these decisions have a lot of footnotes. If you have taken our legal writing courses (or really any writing course), the usual guidance is to avoid footnotes. They are distracting. If it's important enough to mention, put it in the text. OK, I'm off my soapbox now.

Observation Number 3

I don't think these decisions are horrible. Granted, I spent a good part of my career on the agency side of matters. For purposes of this month's article, let's focus on the FLRA's decision in *U.S. Department of Education.* (I'll cover the other two decisions in subsequent articles. Or, if you just can't wait, attend the webinar **Precedents Broken: The New Future of Collective Bargaining** on November 2 for more information.)

Based upon my reading of the decision, I think it would be fair to say the FLRA pushed a reset button on management bargaining obligations with unions. I would not say that the decision deprives unions of their bargaining rights.

The decision focuses on the bargaining obligations under 5 U.S.C. § 7106(b) — "when an agency makes a change to a condition of employment, it may be required to bargain over either procedures or appropriate arrangements (sometimes referred to as 'impact and implementation bargaining')." *U.S. Dep't of Education*, 71 FLRA at 968.

Has the FLRA diluted the management bargaining obligation? Yes. Eviscerated the unions' collective bargaining rights (as announced by *Government Executive*)? Not so sure.

In this recent decision, the FLRA returned to a bargaining obligation standard originally set under interpretations of Executive Order 11491, *Labor-Management Relations in the Federal Service* (Oct. 29, 1969), and applied by the FLRA until 1985. That standard required bargaining "only when a change had a 'substantial impact' on conditions of employment." *U.S. Dep't of Education*, 71 FLRA at 968.

This standard is also applied by the National Labor Relations Board (NLRB) in determining whether private sector employers are obligated to bargain over work changes. *U.S. Dep't of Education*, 71 FLRA at 970. NLRB case law is regularly used by the FLRA and even the courts for guidance on labor issues. *Id.* n.30.

Since 1985, the FLRA has applied a different standard that required bargaining "whenever a change to a condition of employment was 'more than de minimis.'" *Id.* According to this decision, "the [FLRA] has effectively extended the bargaining obligation under the de minimis test to conclude that a matter triggers an agency's duty to bargain, no matter how small or trivial." *Id.* at 969. I think that's a fair point.

One of my favorite cases that illustrates a pretty heavy, and in my opinion, ridiculous bargaining obligation on the part of an agency involved vending machines. The agency changed the vending machine cost of a soda from $.50 to $.55. *Marine Corps Logistics Base and AFGE*, 46 FLRA 782 (1992). The FLRA found that the agency's failure to bargain over this change in working conditions was an unfair labor practice. *Id.* OK smarty pants lawyers out there – the agency in that case did not argue that this was a *de minimis* change not subject to bargaining. But the FLRA did find that there was an obligation to bargain over a five-cent change in vending machine cost. If that's not *de minimis*, I don't know what is.

Interestingly, in the D.C. Circuit case cited in Member DuBester's dissent, where the court adopted the FLRA's *de minimis* standard, the union challenged the standard as too onerous. *Association of Administrative Law Judges v. FLRA*, 397 F.3d 957, 963 (Jan. 28, 2005).

The union argued that the de minimis standard would damage union bargaining efforts and cause confusion and extensive litigation. *Id.* Wow. Think that one through. Anyway, the court agreed that the FLRA properly interpreted its own statute by establishing the *de minimis* standard. And now the FLRA has decided to change that interpretation. Technically, that's the FLRA's job — to interpret its statute.

I'm sure there are agency labor relations specialists and counsel who have negotiated minimal changes to working conditions with unions. Congress explicitly stated in 5 U.S.C. § 7101(a) that collective bargaining "safeguards the public interest" and "contributes to the effective conduct of public business," but did it really intend for just about anything to be negotiated? The FLRA's change to the higher "substantial impact" standard may be a healthy reset. Of course, the courts will have to agree. But for now, it's a good time to be an agency! Boehm@FELTG.com

How to Provide Effective Feedback

There is one action you can take that, when done effectively, could have a major impact on your team's morale and productivity. And that's giving your employees honest and ongoing feedback. Why does this simple act sometimes seem so hard?

During the half-day virtual training The Performance Equation: Providing Feedback That Makes a Difference on October 28, Dr. Anthony Marchese will give you the tools you need to nurture a culture of candor. And Dr. Marchese will show you how to effectively communicate performance expectations in a virtual environment. Register now.

Precedential Fed Circuit Decision: Which Expert Determines If Employee is Unfit?
By William Wiley

Last month, the Federal Circuit issued *Ramirez v. DHS*, No. 2019-1534 (Sept. 15, 2020), which dealt with the concept of an "unfit" termination.

What the court is calling an "unfit" termination is more precisely a "medical inability to perform" removal. This is a somewhat standard, though relatively infrequent, cause for firing someone from a government position. One can be unfit because he sustained an injury and can no longer physically do the work that's assigned. Or, as charged in this case, the employee can be unfit for mental reasons. Although DHS chose the less common word "unfit," the more classical term of "medical inability to perform" is commonly found in the case law. We can't tell you exactly how often these are done relative to other 752 removals, because the Board does not parse them out, but they do not stand out as unusual by any means. FELTG has been teaching how to conduct these sorts of removals for several years now as part of our weeklong Absence, Leave Abuse & Medical Issues Week. [**Editor's note:** Save the date! The next AMI Week will be held April 16-21, 2021.]

How do these compare to other types of 752 removals? The agency has to have preponderant proof that the employee is medically unable to perform, just as the agency would have to have preponderant evidence that the employee was absent from work, stole from the supply locker, or beat up a coworker. The agency must also follow the reasonable accommodation process to determine whether the employee can be reassigned to a position he can perform within his medical restrictions.

The main difference with these types of removals is that medical evaluations by

health case "experts" often are more subjective in nature, and can easily be in conflict with each other, even when performed in good faith. That's when arbitrators and judges have to resolve a battle of the experts and decide which conclusions seem to make the most sense based on the objective medical findings. As you can imagine, its exceedingly difficult to make these sorts of judicial determinations. The arbitrator is not trying to decide who is telling the "truth" as is his responsibility in routine misconduct cases, but whose medical judgment is most likely to be correct. Even highly trained medical experts cannot always agree on that.

In some ways, this makes it easier for the employee to defend himself in an unfit for duty removal as compared to a misconduct termination. If you fire me for theft and you have video of me stealing the laptop, there's not much I can do to defend myself. However, if you fire me because of a subjective medical assessment of my behavior by your expert, I can relatively easily find my own expert who will view the same behavior and subjectively assess it as not warranting removal. Read the legendary *Woebcke v. DHS* for a mind-blowing subjective medical assessment.

The *Ramirez* case is categorized as a precedential ruling from the Federal Circuit, but it is new only in that it addresses the specific evidence derived from a third-party psychological exam relied on by the agency to fire an employee. The legal principle put into motion in making this assessment is as old as the hills. Our Constitution requires agencies to produce all the important evidence it relies on to fire a federal employee. The cases cited by the Federal Circuit are as foundational to civil service law as legal precedent can be, several going back to the early 70s and one even dated 1959. That's how well-established this bedrock principle is.

Had the psychological exam (MMPI) been interpreted independent of the agency, I doubt that the court would have ordered its production by the agency for evaluation by the appellant's expert. For example: If a state revokes an employee's driver's license, and the agency fires him because he needs a license to perform his job duties, it does not have to produce the evidence relied on by the state in revoking the license. It is free to accept the results of the state's decision as an independent assessment. In comparison, the MMPI in this case was ordered by the agency. Therefore, it is agency-controlled and should have been produced as evidence relied on.

In my view, the agency had an obligation from the beginning to produce the evidence of the MMPI assessment. It caused the assessment to be done, it controlled who did the assessment, and the assessment was at the heart of the reason for firing the guy. Bottom line: The court's holding is "new" in a very limited sense of the specifics, but the legal principle of due process that controls the outcome of this decision goes back to the second Magna Carta, the one issued in 1215. Wiley@FELTG.com

What President Trump's EO on Mental Health Issues Means for Agencies
By Deborah Hopkins

We've all learned by now that this COVID-19 thing is intense. Not just the virus, but the effects it has on everyday life. From kids being at home to masks being required in public places, from social isolation to the loss of loved ones, every single American has been affected in some way.

And it's taking a toll.

In a July 2020 poll from the Kaiser Family Foundation, 53% of U.S. adults said their mental health was harmed because of the worry and stress they've experienced over COVID-19 – and that was THREE MONTHS AGO. I can't imagine what the percentage is

today. There have been also been increased reports of substance abuse suicidal ideation among Americans since the onset of the pandemic.

Last week, while he himself was a COVID-19 patient at Walter Reed, President Trump issued an *Executive Order On Saving Lives Through Increased Support For Mental- and Behavioral-Health Needs* in an attempt to prevent suicides, drug-related deaths, and poor behavioral-health outcomes, as a result of the COVID-19 pandemic. This is a topic FELTG has been covering since the start of the pandemic, and will again discuss during the December 10 virtual training program Managing Employees With Mental Health Challenges During the COVID-19 Pandemic.

I spoke with Shana Palmieri, FELTG's resident behavioral health instructor, after this EO was issued, about how agencies can best handle some of the related mental health challenges that come along with the pandemic.

DH: What are some of the tells or signs that might indicate an employee is struggling with depression, anxiety, or other mental health challenges?

SP: The increase in stress and drastic life changes as a result of the pandemic are significant risk factors for increasing rates of depression, anxiety, suicidal ideation and substance use disorders. Key symptoms that may indicate an individual is suffering from a worsening mental health condition include low mood, emotional withdrawal, withdrawal/socially isolating (beyond what is required by CDC guidelines); excessive tearfulness; difficulty with focus and concentration; sleep disturbance/insomnia; anger/moodiness/irritability; forgetfulness; guilt; panic attacks; racing or unwanted thoughts; feelings/expressing pending doom; and excessive worry or fear.

High-risk symptoms that indicate the need for immediate crisis intervention include suicidal thoughts, plans or behaviors; psychotic symptoms (a loss of touch with reality evidenced by delusions, hallucinations or extreme paranoia); change in mental status evidenced by severe confusion; evidence of a significant increase in alcohol or drug use; and extreme agitation, aggression or expression of thoughts/intent to harm others.

DH: What are some practical suggestions for agencies to help employees who are dealing with mental health issues?

SP: In order to effectively assist employees dealing with high levels of stress or mental health issues, agencies should engage in a number of proactive steps to keep employees healthy, provide assistance to those who need mental health treatment, and be prepared to intervene should a mental health crisis present itself.

Tip #1. Ensure ease of access to behavioral health treatment. Proactively provide employees with information on how to access treatment such as EAP, behavioral health treatment through their health insurance provider, or through digital telehealth solutions.

Tip #2: Proactively provide key messaging to the agency workforce about:

- How the agency is responding and able to provide assistance
- The impact of the pandemic on mental health and substance abuse
- How employees can access assistance from the agency, resources available, and information for the suicide crisis hotline. (National Suicide Prevention Hotline: 800-273-8255; Veterans Crisis Line: 1-800-273-8255; Veterans Text Line: 838255)

Tip #3: Ensure your agency has a policy and procedure developed for managing a mental health crisis in the workplace. It is crucial to have a plan in place that identifies protocols on the management of a suicidal employee, violent threats/behavior, and risk of or on-site

overdose. Ensure supervisors and employees receive training on the protocols for a behavioral health crisis in the workplace.

Tip #4: Provide mental health training to supervisors, managers, leadership and HR staff. This training should include:

- An overview of mental health symptoms and conditions and how they can impact employee work performance
- Implementation of appropriate workplace accommodations
- How to appropriately – and safely – intervene in a behavioral health crisis

Tip #5: Ensure the agency has a culture that promotes mental health wellness. Create a culture of physical and emotional wellness within the agency. Ensure a culture that eliminates stigma and promotes mental, emotional and physical wellness through:

- Improved access to care
- Training of supervisors, managers, and leadership
- Communication strategies from leadership to agency workforce encouraging employees to access resources and engage in strategies and behaviors that promote overall wellness

DH: Do you have any advice for supervisors who suspect an employee might be suicidal but are afraid to ask?

SP: Remember to take all concerns and statements about suicide seriously. Your actions can save a life! Below are some key tips and recommendations if you are worried about an employee being suicidal:

Suicide Warning Signs

- Making comments or direct statements about suicide
- Seeking out lethal means or a lethal plan to kill self
- Expressing a preoccupation with death
- Expressing a lack of hope and despair about the future
- Self-loathing, self-hatred
- Saying goodbye and getting affairs in order, unexpectedly
- Self-destructive behavior
- Withdrawing socially from others (a change from the individual's normal personality)

How to Talk with Someone About Suicide

- Have an open conversation and state your concern for the individual
- Stay open and non-judgmental
- Actively listen and express concern
- Offer support and guide the individual on how to receive help
- Access mental health crisis services if necessary

Helpful Things You Can Say

- "I have been feeling concerned about you lately."
- "I wanted to check in with you because you haven't seemed like yourself lately"
- "You are not alone, I/we are here to support you"
- "It may not seem like it is this moment, but the way you are feeling can change"
- "I may not be able to understand the exact way you are feeling, but I am here for you. How can I help?

As you can tell, these issues can quickly become serious. FELTG provides training for agency supervisors and employees on how to safely, and legally, handle behavioral health issues in the workplace. Please let us know if there's anything we can help you with. Hopkins@FELTG.com

Are You Prepared to Handle Violent Threats?

Join Shana Palmieri for a 90-minute webinar Threats of Violence in the Federal Workplace: Assessing Risk and Taking Action on Nov. 12 at 1 pm ET.

Ignoring History Will Only Harm You in the Present
By Meghan Droste

"Those who cannot remember the past are condemned to repeat it." I am sure you are familiar with George Santayana's famous saying, or some version of it. While it might not seem like we are in the business of teaching history — rather than law — here at FELTG, in a lot of ways we are. After all, what is any discussion of what the law is without a review of past decision from the Commission or the courts? But that's not the only way in which history plays an important role in what we do here. As we'll see from a recent EEOC decision, it is important to understand the history of certain words and phrases because they can provide clear evidence of animus.

In *Marleen G. v. Department of Justice*, the complainant alleged that her first-line supervisor subjected her to discrimination and harassment based on her race and sex. *See* EEOC App. No. 2019003172 (Aug. 18, 2020). During the investigation, the complainant and several witnesses testified that her supervisor repeatedly screamed at her, chased her down the hall, and on at least two occasions, touched the complainant in a way she found intimidating. The record also showed that the Agency counseled the supervisor and offered her training, but this did nothing to stop the harassment.

As evidence that the harassment was based on her race and sex, the complainant provided several examples of the supervisor's statements. These included the supervisor telling the complainant that she lacked common sense and her assumption that this was due to the complainant's "culture." Other examples included the supervisor calling the complainant and another Black female employee "uppity," and her comments about the "ridiculousness of weaves worn by African-American women." The complainant also shared that in discussing rumors that the complainant was having an affair with a married subordinate, the supervisor stated, "I know it seems unlikely because what would an older white man have with a middle-aged black woman."

In its Final Agency Decision, the Agency held that there was no evidence that the supervisor's harassment was directly tied to the complainant's protected bases and there was nothing to create an inference of animus. The Commission reversed, finding sufficient evidence in the supervisor's comments to support a finding of discrimination and harassment. The Commission noted that historically the word "uppity" has had a racial connotation. The Commission also reflected on the "significant history" of criticism of Black women's hair, and the "significant trope with an extensive history" of depicting Black people as less intelligent. The supervisor's use of these historically offensive ideas and language was more than enough for the Commission to conclude that the supervisor's actions were based on the complainant's race and sex.

Language changes and evolves over time, which can be a wonderful and helpful thing. But we are doomed to continue — and agencies will be liable for — a pattern of unlawful harassment if we do not acknowledge that some language has not changed and still carries with it the same offensive meaning as it has in decades past. We would all do well to learn from and about the past as we build a better workplace now and in the future. Droste@FELTG.com

Best Practices for Agency Reps

Litigating cases in federal sector employment law is a unique prospect and it's not for the unprepared. Join FELTG for a half-day virtual training Handling Cases Before the EEOC, MSPB and in Arbitration: Best Practices for Representatives with Attorney Katherine Atkinson on Nov. 5.

Dolezal *is a Doozie: '90s Case Highlights Lack of Potential for Rehabilitation*
By Barbara Haga

Last month, I wrote about *Lee v. Federal Aviation Administration*, No. 2019-1790 (Fed. Cir. July 29, 2020) and explained that it had a lot of issues in it that I wanted to cover. This month, we will continue with the discussion of the Douglas factor "potential for rehabilitation."

A Favorite Case
Anyone who has ever been in a discipline course with me has heard about this case. It demonstrates important issues related to the lack of potential for rehabilitation. This case is so unbelievable that it could have been on an episode of *Ripley's Believe it or Not!* The case is *Dolezal v. Army*, 58 MSPR 64 (1993). The decision was affirmed without opinion by the Federal Circuit in 1994.

Dolezal was the Assistant Deputy Chief of Staff for Base Operations Support (Civilian Personnel) for the Training and Doctrine Command of the Army. He was the chief civilian personnel officer for 40,000 civilian employees nationwide. He was appointed to the Senior Executive Service in 1991 and held an ES-3 position at the time of the events that led to his removal.

As the director of personnel for TRADOC, he supervised an employee named Cline, who was the GM-15 Director of the Peninsula Civilian Personnel Support Activity (PCPSA). One of Cline's direct subordinates was Hamilton, a GM-13 HR practitioner who held the position of Chief of the Operational Support Division at PCPSA. Dolezal was the reviewing official for all personnel actions that pertained to Hamilton, including performance appraisals, promotions, and awards. Both Dolezal and Hamilton were married, but they began a social relationship in the fall of 1991 and by the end of that year the relationship had become sexual. They used the agency's e-mail system to "… conduct voluminous personal and, occasionally, sexually suggestive correspondence …." So, we have two HR practitioners engaged in a sexual relationship and one is the second-level supervisor of the other and it is all being recorded in the agency e-mail system.

I cannot imagine how anyone involved in this situation could have expected this would have a happy ending.

In 1992, Cline began to suspect that Dolezal was sexually harassing Hamilton. She asked Hamilton if this was the case, but according to Cline, Hamilton gave an equivocal response about whether the apparent relationship was consensual. Subsequently Cline reported the matter to the agency's IG.

Response to the Allegations
As a result of the investigation, Dolezal was charged with:

> a. Conduct unbecoming a Federal employee, with two specifications: (1) the "adulterous relationship with a subordinate female employee" in violation of Army disciplinary guidelines and (2) he made "disparaging and demeaning comments" about Cline in some of his e-mails to Hamilton.
>
> b. Violations of the standards of conduct in that his relationship with Hamilton could reasonably be expected to create the appearance of giving preferential treatment to Hamilton; could reasonably be expected to result in impeding Government efficiency; could reasonably be expected to create the appearance that he had lost independence or impartiality … and, could reasonably be expected to adversely affect the confidence of the public in the integrity of the Government and (2) that he wrongfully and without authority misused Government equipment in violation of Army guidelines by sending "numerous

messages of a personal nature" to Hamilton via the e-mail system.

What was Dolezal's response? He admitted he had an affair with Hamilton, that he used the e-mail system to send numerous love letters to her, and that some of those e-mails contained remarks that disparaged Cline. What did Dolezal raise as a defense?

There were several. He claimed that the penalty was too severe, that the penalty didn't fit the table of penalties, and that comparators were subject to lesser penalties. He also said that his use of the e-mail system to send notes to Hamilton was part of widespread misuse throughout the organization and thus it was unfair to discipline him. His answer regarding his comments about Cline were private remarks between friends and, in his words, "… were common in the workplace and not actionable." The attempts to deflect responsibility seem minor compared to Dolezal's main argument that the affair was none of the agency's business.

Dolezal had 23 years of service, no prior discipline, and what was described as an exemplary record. However, the agency decided to remove him. The AJ upheld the penalty, as did the Board.

Hamilton was also disciplined. According to the Dolezal PFR, she was demoted from a GM-13 to a nonsupervisory GS-12 position for her part in the misconduct and for making a false statement to the IG investigator.

Potential for Rehabilitation

The first time I read this decision, I was in shock. The head of HR for a headquarters-level Army command doesn't know that an affair with a second-level subordinate is a work issue? Instead of taking responsibility for the things he admitted to, his answer is that it has no impact on his job?

How did the AJ respond to this argument? She wrote, Dolezal "… is not a good candidate for rehabilitation because he has yet to recognize that he committed actionable offenses."

The Board noted that the argument was raised again on the PFR, writing, "Even at this late date, the appellant still does not understand the serious nature of his misconduct. He still contends that his affair with Hamilton was none of the agency's business and he still denies that his flagrant misuse of PROFS (the e-mail system) and his offensive and demeaning comments about Cline are actionable misconduct."

In the PFR, Dolezal claimed he showed contrition for the misconduct. The deciding official characterized it differently. The deciding official recounted that Dolezal showed some remorse for the difficulty caused by the IG investigation but never took ownership of the underlying inappropriate behavior. Would things have been different if he had taken responsibility when the IG investigation began? What if he had said he would go to counseling, or if he said he would not have further contact with her, or if he just said I did those awful things that no head of HR should ever do and I deserve some significant disciplinary action? Would the Army have chosen a lesser penalty? We will never know.

> ***Did You Know?***
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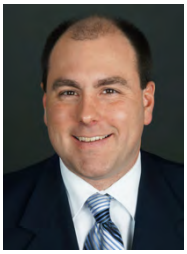
> We're now taking registrations for Advanced Employee Relations on Dec. 1-3.

Dolezal was guilty of one other thing – very bad timing. The Tailhook scandal grew out of events that took place in the fall of 1991, so attention on inappropriate behavior of a sexual nature in DoD was at an all-time high at that point. Dolezal argued in the PFR that he was being treated as if he were a military officer in regard to this action because the deciding official testified that a military officer who engaged in similar misconduct would have been court-martialed. The Board interpreted that to mean that the deciding official felt that the misconduct was serious, not that an inappropriate standard was applied. Haga@FELTG.com.

Make a Plan to Create Order Out of Chaos
By Michael Rhoads



Happy (Fiscal) New Year! Here in the Northeast, the leaves are changing color, the temperature is falling, and just like any other new year celebration, it's good to take time to look at where you are and where you're going. Fortunately, OPM and FELTG have multiple resources to help you focus your employees' goals for the coming fiscal year to maximize your unit's contribution to agency's mission.

Workforce Planning
Are you looking to bridge the gap between your current workforce and the needs your agency is facing to complete its mission? It would be nice to wave a magic wand and have it all appear at once. However, as Ben Franklin once said, "If you fail to plan, you are planning to fail."

Having a framework and a step-by-step outline is the best way to begin the planning process. This 5-step model from OPM is a great tool for novices and experts.

Step 1: Set Strategic Direction. Start by linking the workforce planning process to your agency's annual performance or business plan and consider both the long-term and short-term objectives of your plan.

Step 2: Analyze Workforce, Identify Skill Gaps, and Conduct Workforce Analysis. What are your resources? What are the gaps between the current resources and the goals of your plan? What human capital will you need to accomplish your plan's goals?

Step 3: Develop an Action Plan. Identify strategies to close the gaps, implement strategies, and measure progress.

Step 4: Implement Action Plan. Ensure the resources identified are in place, market your ideas to those involved, and execute the plan to achieve your goals.

Step 5: Monitor, Evaluate and Revise. Monitor progress against milestones, evaluate to improve goals, and adjust goals.

SWOT Analysis
Another tried-and-true method to evaluate and plan new fiscal year goals is a SWOT Analysis.

- **Strengths.** What does your agency do well? What are your internal resources (e.g., skilled workers)? What are your Capital Assets such as proprietary technology or intellectual property?

- **Weaknesses.** Where can your agency improve? What resource limitations might hold you back?

- **Opportunities.** How can your agency leverage its current strengths to create new opportunities? Could press or media coverage highlight your agency's strengths? What are the emerging markets in need of your services?

- **Threats.** Will the agency have to deal with any changing regulations?

As part of FELTG's half- or full-day Strategic Planning course, IG-2: Strategic Planning, Scott Boehm will demonstrate how to formulate the OIG Mission and Vision Statements and conduct SWOT analysis.

Also, on November 19, Scott will give an hourlong webinar presentation about how organizing and annual planning can help your Office of Inspector General to make your agency more effective and achieve the annual goals you are planning right now. Register now for Properly Executing Planning and Outreach: A Guide for OIGs and get a jump start on your annual goals.

Stay safe out there, and remember, we're all in this together. Rhoads@FELTG.com

Tips from the Other Side: Accommodate, Don't Rewrite Position Description
By Meghan Droste

Last month, we looked at *Cecille W. v. U.S. Postal Service*, in which the Commission held the agency failed to accommodate the complainant because it looked only to the position description, and did not conduct an individualized assessment, when determining the essential functions of the complainant's position. We have a slightly different spin this month, but the same underlying message: Agencies have an obligation to accommodate employees with disabilities when doing so is not an undue hardship. I recommend you keep that goal in mind as you evaluate requests for accommodations.

In *Frederick A. v. Department of Defense*, EEOC App. No. 2019002604 (Aug. 18, 2020), the complainant had limited vision due to a damaged retina in one eye, a cataract in the other eye, and glaucoma. When the complainant applied for his position as a Transportation Assistant, the vacancy announcement described the position as sedentary. The complainant passed a physical exam before entering on duty and successfully performed the duties of his position for one year. At that time, the agency directed him to obtain a driver's license so that he could operate a forklift.

The complainant submitted a request for accommodations but then withdrew it because he did not believe operating a forklift was an essential function of his position — in part because of his position description, and in part because in one year he had never needed to as part of performing his duties. Although he withdrew his request, the complainant submitted medical documentation explaining his vision limitations. In his response, his supervisor asked him what accommodations would allow him to operate a forklift; the complainant again stated that he did not believe doing so was an essential function on his position.

At this point, you might assume that everyone moved on from what was obviously confusion about what the complainant did on a daily basis. However, the complainant's supervisor took a different approach, rewriting the position description to remove the word "sedentary," and specifically requiring the complainant to operate a forklift, something he had not needed to do at all during his first year on the job.

As we learned last month, the position description cannot be the only step in the analysis to determine the essential functions of a position. And while I often appreciate creativity in trying to address an issue, rewriting the position description to include functions that are not actually essential is definitely not going to help an agency. In this case, the administrative judge found that the agency failed to accommodate the complainant and the Commission upheld that decision.

Remember, Congress intended for the federal government to be a model employer when it comes to accommodating employees. Failing to determine the actual essential functions of position—or trying to alter the record when it doesn't support your view of essential functions—is not what a model employer should do. Droste@FELTG.com

If You Have 60 Minutes, We Have Some Webinars …

FELTG's fall webinar series features our experienced, knowledgeable and engaging instructors providing support on everything from medical removals to the Employee Federal Paid Leave Act. These hourlong webinars, held on Tuesdays from 1-2 pm ET, give you an opportunity to re-educate yourself on the critical legal issues in today's federal workplace.

Visit our Fall Webinar Series page for more information on all of the remaining events along with how to register.

Don't Ignore the Energy Vampires, Zoom Zombies, or Garish Ghouls
By Dan Gephart

This time of year is celebrated widely and wildly in the neighborhood where I once lived. Faux spider webs, mock tombstones, humongous inflatable black cats, and DIY haunted garages would overtake North Palm Beach Heights, drawing trick-or-treaters, gawkers and street drinkers from miles away.

I don't know if anything has changed in the Heights. My guess is that it's as wacky as ever. I'm glad I'm not there. It's hard to get into an appropriately festive mood this Halloween. Numerous events over the last several months – acres-ravaging wildfires, multiple hurricane threats, social unrest, and a pandemic that has killed more than 200,000 Americans – have made real life a little too scary. Heck, we've been wearing masks (at least those of us who care about our fellow humans) for several months already.

So excuse me if I don't have the Halloween spirit this year. You too can certainly ignore this holiday. It's easy. Forgo the costumes. Turn off your outdoor lights. And don't answer the door.

Unfortunately, Halloween-like behaviors are happening every day at work – and your fate will be worse than a house-egging if you ignore the Energy Vampires, Zoom Zombies, or Garish Ghouls.

Energy Vampires
The majority of employees, maybe 80 percent, are good workers. You wouldn't call them stellar. You'd probably call them "OK" or "fair" or consider them your "no problem" employees. Then you have the 10 percent of employees who actually are stellar – your top performers.

And then you have the bottom 10 percent. That's where the "toxic" Energy Vampires reside.

They are the ones who, either because of performance problems or misconduct, drain everything from you. They are exhausting. You take them and their issues home with you. They're a big the reason for your stress and anxiety. They take up an inordinate amount of your time, meaning those 80 percent aren't getting the kind of management they need to join the top 10 percent. And those 10 percent stellar employees are probably not getting the recognition they deserve.

So what do you do? You take action, and you do it quickly and effectively. If you're not sure how to do that, well I have good news: We do. That's what FELTG is known for. Email me and we'll bring one of our instructors to your supervisors. To find out more, read what we cover in our *UnCivil Servant*, *Developing & Defending Discipline*, and *Managing Accountability* classes, as well as our other Supervisory Training offerings. All of these trainings are offered both virtually and, in person, depending on your circumstances.

Zoom Zombies
The Zoom Zombies are a relatively new creature in the workplace. As work moved remote, agencies have relied on platforms like Zoom, Teams, Webex, and Skype to meet. The Zoom Zombies don't seem quite there during these virtual meetings. Truth is, they know where the mute button is – and they're not afraid to use it.

Are they even there? What are they doing? Honestly, they're probably doing other work, talking to their children or their fellow teleworking spouse/partner. What can you do here? FELTG instructor/author Dr. Anthony Marchese offers four ways to put to an end to the Zoom Zombie:

1. Don't structure your virtual meetings the same as your face-to-face meetings. Make them less about information dissemination

and more about "doing." Use your meetings to collaborate and brainstorm. Create the expectation that everyone will contribute and not use mute unless absolutely necessary.

2. To promote involvement and rebuild team cohesion, devote a portion of your meeting to positive aspects of working remotely/life during a pandemic. Select a different person each week to share something new he or she has learned about themselves during the past six months. Your zombies will likely tune in to hear more.

3. Fully embrace the technology to encourage interactivity. Add video, whiteboards, polls, and chats to make the meeting more interactive.

4. Avoid getting into a rut. Think of different approaches for your meetings. First, what is the reason for having the meeting in the first place? Next, consider: Am I defaulting to a "meeting" because that's what I've done before? If I only have 60 minutes with my team this week, what can we do to best use that time? What does my team really need from me? From one another?

To hear more from Dr. Marchese, join him for the half-day virtual training event The Performance Equation: Providing Feedback That Makes a Difference on Wednesday, October 28 starting at 12:30 pm ET.

Garish Ghouls

Any time I read recent EEO case law, I feel like I'm watching a particularly cringe-worthy episode of Mad Men. People don't really still do these things, do they? Yes, they do. Want a recent example? Read Deb Hopkins' article last month about a now-former (thankfully) Fed named Dave.

There is way too much harassment and bullying going on in the federal workplace these days. Yes, some EEO claims are frivolous, over-reactions to being held accountable. But a lot of harassment that is going unreported. The #MeToo movement has brought light to the issue, yet much, sadly, remains hidden away due to embarrassment or fear.

Ghouls can thrive whether in the office or at home. In fact, the home environment makes some harassers more comfortable to take their actions. Regardless of where the workplace harassment takes, there is one important thing you need to know: You CANNOT wait to discipline the employee.

If you're aware of inappropriate sexual conduct, you must take action. Right away. It doesn't matter if a complaint hasn't been filed. The other thing you'll notice from reading EEO decisions is that they take a long time to get resolved. If you wait for that process to unwind, the agency harasser will commit more offensive actions. It's your responsibility to protect your employee from harm and protect your agency from liability.

And here's how you do that:

- Take all harassment allegations seriously.
- Stop the harassment, separating the alleged harasser from the situation.
- Promptly investigate and take quick action.

Harassment Investigations will be covered on the second day of Workplace Investigations Week Nov. 16-20. Register here.

If you're looking for something shorter, join instructor Katherine Atkinson for the 60-minute webinar Preventing and Correcting Hostile Environment Harassment next week (October 20 starting at 1 pm ET). Gephart@FELTG.com