Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter Vol. XII, Issue 12 December 16, 2020

A Hopeful Look Ahead

Happy holidays to the FELTG Nation. It's been quite a year and we are cautiously hopeful that better things are in store in 2021, especially with the positive vaccine news from the past few weeks.

That considered, we have decided to put some of our most popular open enrollment classes on the calendar for the second part of next year with the hope that we will be able to meet again in person in just a few months' time. Check out the FELTG website for the details on when and where we'll be holding MSPB Law Week, EEOC Law Week, Employee Relations Week, Managing Federal Employee Accountability, and more.

Our instructors are also available to travel to your agencies for onsite training (with precautions of course) any time you'd like, even before a vaccine is widely available. But if web-based training is still your comfort zone, we have a number virtual training classes and webinars that are open for registration now. With a lot of pending changes on the horizon, you know we'll keep you updated on all the latest in the federal employment world.

In our final newsletter of 2020, we cover the latest on the new OPM regs, reasonable accommodation reassignment, a 2021 Wish List, and much more.

Have a wonderful rest of the year,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

An OIG Guide to Benchmarking for Best Practices
January 27

The Performance Equation: Providing Feedback That Makes a Difference
February 3

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

When Employees are Absent: Sick Leave, FMLA, and Paid Parental Leave
February 17 & 24

Conducting Effective Harassment Investigations
March 2-4

EEOC Law Week
March 15-19

An OIG Guide to Measuring Return on Investment
March 24

MSPB Law Week
March 29-April 2

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

FLRA Law Week
May 10-14

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OPM Finally Answers the Question About Notice of Appeal Rights at the Proposal Stage
By Deborah Hopkins

During our recent webinar on implementing the new OPM regulations on performance and conduct (if you missed it, you can still view the recording), the following question came in:

> *There has been some discussion in my agency about providing employees with a notice of appeal rights in the proposal letter. Can you please help clarify whether this notice is now required, and if not when it will be required?*

And here's the FELTG response:

First, the notice of appeal rights is not required in actions taken under 5 USC 315 (probationary removals), 432 (performance-based actions), or 7515 (discipline for whistleblower reprisal). See the discussion on p. 127 of OPM's regs:

> As noted above, the amended regulation will not require that agencies include appeals rights information in a notice of proposed action taken under section 7515. Notwithstanding, it is important that the commenters understand that current and amended parts 315 and 432 do not require that agencies provide advance notice of appeal rights ... Further, it is well established in statute, regulation, and case law that an employee cannot appeal a proposed action.

As far as chapter 75 removals, the 2018 NDAA (Pub. L 115-91, Section 1097) says:

> (b)(2) INFORMATION ON APPEAL RIGHTS.— (A) IN GENERAL.—Any notice provided to an employee under section 7503(b)(1), section 7513(b)(1), or section 7543(b)(1) of title 5, United States Code, shall include detailed information with respect to— (i) the right of the employee to appeal an action brought under the applicable section; (ii) the forums in which the employee may file an appeal described in clause (i); and (iii) any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file an appeal. (B) DEVELOPMENT OF INFORMATION.—The information described in subparagraph (A) shall be developed by the Director of the Office of Personnel Management, in consultation with the Special Counsel, the Merit Systems Protection Board, and the Equal Employment Opportunity Commission.

Our understanding at the time this law was issued in 2017 was that OPM would provide the official language after consulting with the other agencies mentioned, and that until such language is developed, there was no requirement to include appeal rights at the notice stage. By the way, providing a notice of appeal rights at the proposal stage really doesn't make sense, as the timing is preliminary (Bill Wiley wrote about this when the law first came out), but hey, we didn't write that law.

But, then the regs were published and we started to think that maybe OPM was kicking this down to agencies because the regs, including this one, became effective last month:

> **752.203(b) Notice of proposed action.** "... The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Pub. L. 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file."

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There was no indication in the regulations or the response to the comments that OPM had consulted with MSPB, EEOC, and OSC to develop the appeal rights notification as required by law. In fact, as far as we know, none of the other agencies has acknowledged formally or informally that they have been consulted with regarding the development of appeal notification language.

Have a question about federal employment law? Ask FELTG.

But then last week OPM issued further guidance that does indeed leave the language development up to agencies.

Here are a few takeaways from the answer to this question:

Are agencies required to provide appeal rights information in an adverse action proposal notice?

- Yes. The requirement to provide the appeal rights information at the proposal notice stage is a statutory requirement under section 1097(b)(2)(A) of Pub. L. 115-91.
- Part 752 requires that a notice of proposed action under subparts B, D and F include detailed information about any right to appeal any action upheld, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.
- This regulatory change does not confer on an employee a right to seek redress at the proposal stage.
- The appeal rights language included at the proposal stage specifically relating to choice of forum and limitations related to an employee's choice of forum will vary depending on circumstances, the nature of a claim and the type of employee.
- Appeal rights may include but are not limited to filing an Equal Employment Opportunity complaint with the Equal Employment Opportunity Commission; a prohibited personnel practice complaint with the U.S. Office of Special Counsel; a grievance under a negotiated grievance procedure; or an appeal with the Merit Systems Protection Board.
- OPM does not view the addition of procedural appeal rights language in the regulation to constitute a requirement to provide substantive legal guidance at the proposal stage or to serve as a substitute for advice an employee may receive from an employee representative.
- Agencies are encouraged and advised to consult closely with their agency counsel to develop the best course of action for implementation of this requirement.
- Employees are encouraged to consult with their representatives to determine the best options available to them at the proposal and/or decision stage if an employee believes that an agency has taken an action which triggers the right to file a complaint, an appeal or a grievance.

Ugh. Seems like it could be a lot of work for no reason other than to comply with a law that requires notice at the wrong stage. OR, given the flexibility, it could also be interpreted that a general notice of potential appeal rights would satisfy this regulatory requirement since the proposal stage is preliminary.

The good news is that whatever notice is provided should not affect the merits outcome of the case on appeal. If the final decision contains a fulsome description of the employee's appeal rights, any error in not providing an appeal rights notice with the proposal (or, alternatively, providing a notice not developed by OPM) would be harmless and the adverse action would not be set aside on procedural grounds. See next page for our sample notice. Hopkins@FELTG.com

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APPEAL RIGHTS

Forums in Which You May Seek Redress

ADVERSE ACTION STATUTORY APPEAL RIGHTS

US Merit Systems Protection Board
If the decision regarding this proposal is that you be removed, reduced in grade or pay, or suspended for more than 14 days, you will then have the right to appeal that decision to MSPB. Specific details for filing, including mailing addresses, time limitations, and representation rights, will be included along with the final decision. For more information, you may visit www.mspb.gov.

Administrative Grievance Procedure, Non-Bargaining Unit
If the decision regarding this proposal is that you be suspended for 14 days or fewer, you will then have the right to grieve that decision to higher-level management within the agency. Specific details for filing a grievance, including mailing addresses, time limitations, and representation rights, will be included along with the final decision. For more information, you may contact a Human Resources advisor.

US OFFICE OF SPECIAL COUNSEL

If you believe that this proposal or any subsequent action is in reprisal for your engaging in protected activity, such as whistleblowing, you may seek corrective action with OSC by filing a complaint at www.osc.gov. However, you will be limited to alleging those matters within OSC's jurisdiction and foreclosing your appeal of other issues.

US EQUAL EMPLOYMENT OPPORTUNITY COMMISISION

If you believe that this proposal or any subsequent action is in reprisal for your engaging in EEO activity, or because you are a member of a protected group, you may initiate a complaint with a local EEO counselor. However, you will be limited to those matters within EEOC's jurisdiction and foreclosing your appeal of other issues. www.EEOC.gov.

COLLECTIVE BARGAINING UNIT EMPLOYEES

If your position is within a collective bargaining unit, you will be allowed to grieve the final decision. You should review the collective bargaining agreement relative to your position for specific details and time limits and seek the advice of a responsible union official.

PUB. L. 115-91 SECTION 1097(B)(2)(A)

IN GENERAL.—Any notice provided to an employee under section 7503(b)(1), section 7513(b)(1), or section 7543(b)(1) of title 5, United States Code, shall include detailed information with respect to—
(i) the right of the employee to appeal an action brought under the applicable section;
(ii) the forums in which the employee may file an appeal described in clause (i); and
(iii) any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file an appeal.

5 CFR SEC. 752.203(b)

The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Pub. L. 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

STATUTORY AUTHORITY

https://www.congress.gov/115/plaws/publ91/PLAW-115publ91.pdf

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Should Old Dismissals Be Forgot: EEOC Reverses More than A Third of Procedural Dismissals
By Meghan Droste

Somehow, despite it still feeling like it's just April or May, it's that time of year again — time to look back on where we've been (at home) and what we've done (a lot of video calls). In that spirit, this month I'm highlighting an interesting statistic from the Commission's look back at fiscal year 2019 and adding in some data of my own from recent months.

In its Fiscal Year 2019 Annual Performance Report, the Commission provides updates on its performance in several areas, including closing hearing requests and appeals that have been pending for a lengthy period of time, and the number of findings in favor of complainants and appellants. The Commission notes that it resolved more than 4,000 appeals in FY19, with 37 percent of the appeals resolved within 180 days of their receipt. Also, 762 of the appeals it resolved in FY19 were appeals of procedural dismissals of complaints, when an agency dismisses a complaint before engaging in an investigation. The Commission highlights that it reversed more than 34 percent of the procedural dismissals, remanding them back to agencies for continued processing.

This number stood out to me because it matches what I have observed in my own practice — that the Commission is moving quickly to address and reverse improper dismissals — and because it seems like such an easy fix for agencies. With more care, and possibly more training for EEO staff, agencies can avoid defending unnecessary appeals. But wait, this is "old" data, you might be thinking, from a prior fiscal year. Maybe this was a fluke or agencies have already improved. Well, I'm here to tell you that neither of those things appear to be the case.

I conducted a completely unscientific and not-guaranteed-to-be-statistically-significant review of some recent EEOC decisions and found that the same appears to be true this year. From October 1 through November 19, the Commission issued 204 decisions that contain the phrase "Agency dismissed." I reviewed a sample of 50 of those cases and found 40 cases in which the Commission issued a substantive decision on the issue of a procedural dismissal. The most common reasons for the dismissals were untimeliness (29), failure to state a claim (20), and raising a claim that was raised in a prior complaint (10). (Before you question my math, some agencies dismissed claims for multiple reasons in the same case.) The Commission reversed the dismissals in at least 30 percent of these categories, reversing 40 percent of the dismissals for claims raised in a prior complaint.

Hopefully, we'll see a reversal of this trend in the new year, and you can avoid revisiting cases your agency has improperly dismissed. In order to do so, I recommend reviewing a few of the recent decisions for a refresher on what an agency needs to prove in order to prevail on an appeal of a procedural dismissal. Droste@FELTG.com

[Editor's note: If you're looking for training that covers the gamut of EEO issues, and provides usable guidance for all practitioners, regardless of experience level, register for EEOC Law Week, which will be held virtually March 15-19, 2020.]

Conducting Effective Harassment Investigations

Ensuring your investigation is legally compliant and protects employees, while helping the agency minimize liability, is a taxing task – especially during the COVID-19 pandemic. Join FELTG For the three-day virtual training Conducting Effective Harassment Investigations March 2 – 4, from 12:30 – 4 pm eastern. Register now.

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The Good News: A Letter to Santa
By Ann Boehm

Dear Santa:

I think I have been very good this year, although 2020 needs to be on the naughty list. I hope you and Mrs. Claus are doing OK during the pandemic.

For Christmas this year, here are some Federal employment law things I'd like:

1. A quorum at the Merit Systems Protection Board (MSPB). (Two members will do. Three would be really great.)
2. A General Counsel at the Federal Labor Relations Authority (FLRA).
3. Simplification of the Federal equal employment opportunity complaint process. (I know, I've been asking for this for a very long time. It's kind of like the pony I keep asking for – I just know it will show up someday.)
4. Labor-management partnerships that are actually balanced exchanges of ideas between unions and management.
5. Performance improvement plans /demonstration periods/opportunities to demonstrate performance that stay 30 days long (because that's always been long enough according to the MSPB).
6. Recognition by the Federal unions that bad employees hurt the good ones, even bargaining unit members – and then (this is a big ask) union cooperation with management when management takes care of the bad ones through discipline or performance.
7. Decisions from the MSPB (see number 1), the FLRA, and the Equal Employment Opportunity Commission that are based more on the law than on political biases.
8. Some kind of amazing alternative dispute resolution process at the MSPB that will help them with their backlog of more than 3,000 appeals.
9. Smooth transitions for Federal employees and agencies as people start returning to the workplace, whenever that happens.
10. A pony. (I know it's not really a Federal employment law thing, but I still really want one, and I have to keep trying.)

Thanks, Santa. Be safe out there on Christmas Eve! I can't wait to see what you bring me! Boehm@FELTG.com

Schedule F, Politicized Policy or Top-to-Bottom Transformation?
By Michael Rhoads

The Trump administration is looking to make sweeping changes to federal employment by introducing a new schedule which could, if fully implemented, convert career conditional employees to at-will employees. In the Executive Order, the administration cited a need to give "a greater degree of appointment flexibility with respect to these employees than is afforded by the existing competitive service process." The process for implementing Schedule F as outlined in the EO requires agencies to submit a review of the positions to be covered by Schedule F within 90 days of the order or Jan. 19, 2021.

While it is not widely known how agencies are moving forward with this process, it has been reported by Real Clear Politics that The Office of Management and Budget has identified 425 positions – 88% of their workforce – to be reclassified to Schedule F. The Washington Post reported, through an anonymous source, OPM may be rushing to move some of its budget and personnel offices to Schedule F "to be test cases for the controversial policy."

The first challenges to impede the EO have been legal and legislative. The National

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Treasury Employees Union filed a lawsuit naming the president and Michael Rigas as defendants. The NTEU claims in the lawsuit: "The president's sweeping order fails to make a meaningful showing that shifting large numbers of federal employees into a new excepted service category so that they can be fired more quickly and without cause is necessary or supported by good administration principles."

On the legislative side, Democrats are looking to block implementation of Schedule F through the budgetary process. Language has been included in the NDAA which would block or nullify funds meant to implement Schedule F. There has also been language proposed to ensure employees affected by any changes due to Schedule F would automatically restore employment to those removed, fire anyone who was hired under it, and give back pay to anyone who was fired.

In a GovExec Daily Podcast, Erich Wagner explained the timing of when Schedule F is implemented will determine how much work the Biden Administration will need to do to undo Schedule F, if they choose to do so.

If legislators can pass the NDAA with language to nullify Schedule F, we should not see much trouble for federal employees.

We understand the bad press government employees receive related to the complexity of hiring and firing delinquent employees. We focus on how to rehabilitate problem employees, but also how to terminate those who are beyond help. Although this system is by no means perfect, it does allow career employees some relief from political pressure and allows them to do their job in a manner which serves the good of the American public as a whole.

In this holiday season, I am happy to know there are a dedicated men and women who are working hard every day to make my life better and provide for the common good. Enjoy your holidays, and remember, we're all in this together. Rhoads@FELTG.com

Don't Throw Out the Baby with the Bath Water
By Barbara Haga

This expression is bizarre – who would lose track of their baby in the bath? It is interesting, though. I did a bit of research. The phrase is German in origin and by the 1600s, it was commonly used and appeared in writings of astronomer Johannes Kepler. One site explained that the German version would actually be "you must empty-out the bathing-tub, but not the baby along with it." The message is simple: One shouldn't discard something valuable along with something undesirable. That's my request to the new administration.

Dear President-Elect Biden and Transition Team

At FELTG, we train HR practitioners, attorneys, and managers on how to hold employees accountable. Whether the issue is performance, conduct, or attendance, we teach those responsible for effective human resource management how to navigate a complex system of procedures for taking action when Federal employees don't live up to expected standards.

I realize that the prospects of anything in EO 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, surviving the first few days of your new administration are slim, but I hope that at least there will be consideration of maintaining certain provisions that are important to supervisors faced with the task of managing Federal employees. The fact that EO 13839 was issued with the two orders that set limitations on union matters may mean that worthy provisions relating to conduct and performance actions will be cancelled in the same fell swoop that will undo EO 13836 and 13837. However, I hope

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you will agree that accountability in Federal service is a worthy goal – whether there is a Democrat or a Republican in the White House.

Unacceptable Performance

I want to specifically focus on dealing with unacceptable performance because it has been recognized for many years that failure to deal with poor performance is an issue in Federal agencies. The Civil Service Reform Act (CSRA) of 1978, which passed during the Carter Administration (and during your tenure in the Senate), included the nine basic principles that set the guidelines for recruiting and retaining a high-quality workforce.

Medical Inquiries and the ADA

Register now for the 90-minute webinar [Dealing With Medical Issues Under the ADA: Medical Exams and Inquiries] to be held on February 18 at 1 pm ET.

One of the nine principles addressed the need for dealing with poor performance. 5 USC 2301(b)(6) states: "Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards."

The law directs managers to hold employees to standards of acceptable performance and to take action when they do not improve and set the procedures by which actions could be effected.

While those procedures gave managers what were supposed to be more effective tools to maintain accountability for acceptable performance, the process hasn't been used as most expected. In 1995, the MSPB reported that of the 8,785 initial appeals decided by the Board's Judges only 146, or 2 percent, were unacceptable performance actions. The relative percentage has never varied significantly. The MSPB's 2019 annual report stated that there were 4,893 appeals and 113 (again 2 percent) were performance actions.

The Federal Employee Viewpoint Survey has shown that federal employees don't see that employees in their organizations are held accountable to performance standards. Since the inception of the survey, there has been a question designed to elicit this information.

Question 23 on the survey is "In my work unit, steps are taken to deal with a poor performer who cannot or will not improve." In response to the first survey in 2002, only 25 percent of Federal employees answered that they strongly agreed or agreed that their units dealt with poor performance appropriately. That was the lowest positive score on the entire survey. Over the years, the numbers in the survey have increased somewhat.

The 2019 survey results showed that 33.7 percent answered that they agreed or strongly agreed with the statement. It's no longer the lowest positive score on the survey. It's number two from the bottom. That's not much improvement.

In years since, this issue has been recognized but no action taken to try to correct the situation. The Bush Management Agenda for FY 02 addressed "real consequences for failure," but there were no changes implemented at the time. The White House deficit reduction plan submitted in September 2011 included reform of personnel system, highlighting the need for addressing poor performance. The GEAR (Goals-Engagement-Accountability-Results) Report issued in 2011 under the auspices of the National Council on Federal Labor-Management Relations noted that there needed to be accountability at all levels, yet OPM did not make revisions. There were multiple calls for action, some from the last time you were part of the Administration, but no action ensued.

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What Did EO 13839 Do?

The Order states: "Failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies … to accomplish their missions. This order advances the ability of supervisors in agencies to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections." The performance-related provisions of EO 13839 directed agencies to take certain steps to make unacceptable performance actions easier, including:

- Minimize burden on supervisors (Sec. 2.(a)). In some cases, HR advisors had added extra requirements beyond what the law and regulation required to performance actions, such as documenting pre-demonstration period performance.
- Eliminate pre-demonstration period requirements (Sec. 4.(b)(ii)). In some agencies, there were extra steps built in. Supervisors had to give formal notice of an "assistance period" before initiating a performance action. In one agency, that totaled 150 days – a 30-day assistance period before a 120-day demonstration period. For a manager at that agency to take action was an investment of 150 days, even though many of those employees performed transactional work where the supervisor would have ample time to determine if the employee could perform acceptably or not in much less time.
- Eliminate any requirement to use 432 procedures (Sec. 4.(b)(ii)) and use 752 (conduct) when appropriate (Sec. 2.(h)). An illustration comes from the VA. A pharmacist was making mistakes in filling prescriptions. In some cases, it was the wrong medicine and in others it was the wrong dosage. Any mistakes not caught could potentially kill one of our veterans. Yet, for some reason, the agency put that employee on a demonstration period. This action should have been handled under disciplinary procedures. The demonstration period was dangerous.
- Limit demonstration periods to 30 days in most cases (Sec.2(a)/Sec.4.(c)). This was the most controversial performance-related provision of the Order. For most jobs, 30 days is enough to judge whether there is improvement. Demonstration periods are not limited to 30 days by the Order when the nature of the work demands something different, which is exactly what the regulations provide. 5 CFR 432.104 states "… the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position."

President-Elect Biden, I hope I've made a case to keep these tools in the hands of the managers who will be charged with carrying out the programs that you want to establish during your administration. Give them the things they need to manage effectively. Please don't throw the baby out with the bath water! Haga@FELTG.com

Sick Leave, Annual Leave, AWOL, FMLA, Medical Documentation – It's ALL Covered Here

FELTG's Absence, Leave Abuse & Medical Issues Week provides you with the critical foundation you need to address the most complex areas of federal employment law, including the challenges related to the COVID-19 pandemic. This weeklong training will take place virtually April 12-16. The program runs from 12-4 pm eastern each day. Register now.

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Tips from the Other Side: Reassignments and Reasonable Accommodation
By Meghan Droste

We've made it, readers. It's finally the end of 2020 and that seems like as good a time as any to wrap up our ongoing look at reasonable accommodation issues in this space. I'm sure we'll touch on them again at some point in 2021, but for now let's look at one more area in which I see agencies struggle when it comes to handling requests for accommodations: searching for reassignments.

As a complainant's representative, I often get involved in reasonable accommodation issues for my clients before litigation. Obviously the preference is to find a way to accommodate a client's needs in the current position. Unfortunately, there are times when this isn't possible.

At that point, we move to discussing a reassignment. When this happens, I have found agencies often make one of two mistakes. The first is to take far too long in searching for a reassignment. I know, and explain to my clients, that these things don't happen overnight. But too often it seems that agencies move very slowly in searching for vacant positions, waiting months before offering a potential position.

As I have mentioned before, the answer to the question of how long is too long to provide an accommodation is very fact-specific, so if your search starts to drag on, you should be sure you have clear documentation of all of the steps you have taken to locate a position.

The other common mistake is that agencies improperly limit the search for a position. I have seen agencies limit the search to only positions at the same grade level, forgetting that if none are available, the agency must search for a position at a lower grade. I have also seen agencies only search for positions in a specific geographic area. As the Commission emphasized in a recent decision, an agency's obligation "to offer reassignment is not limited to vacancies within a particular department, facility, or geographical area." *See Lisa C. v. U.S. Postal Serv.*, EEOC App. No. 2019005689 (Nov. 16, 2020). This means that "absent undue hardship, the agency must conduct an agency-wide search for vacant, funded positions that the employee can perform with or without reasonable accommodation." *See id.* While it may make sense to start the search in the location in which the employee already works, that should not be the only search or the end of the search.

Finally, if an employee identifies a potential position for reassignment and the agency rejects it, be sure you can articulate a reason why. In my own work, I have seen agencies outright reject a potential option but give no reason why. In the *Lisa C.* case, the complainant identified a position at another facility and it appears the agency made no effort to consider it. As a result, the Commission found the agency failed to accommodate the complainant.

Good luck out there and happy new year! Droste@FELTG.com

Toolkit for a New Administration: Essential Skills and Knowledge for Supervisors, Managers, and Leaders

The next few months will be filled with change and new priorities. Being successful in that environment will require adaptability, flexibility and the most up-to-date knowledge of federal employment law. FELTG's new three-part webinar series will prepare you, your team and your agency.

Jan. 21 – Federal Employment Law: The Current Landscape

Jan. 28 – Navigating Change Through Effective Management and Communication

Feb 4 – Effective Performance Under Stress

Register now.

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Have Discipline or Performance Problems? Take the Right Forking Path
By Dan Gephart

Back in pre-GPS days, my older brother and his wife were driving to a holiday celebration at her family's house in a small backwoods New Jersey town. They were still many miles away from their destination when they hit a fork in the road. My brother turned to his wife and asked: Which way do we go?

She replied: It doesn't matter.

My brother told me this story a couple of years ago. I had just moved to the Garden State and I was struggling to find some semblance of reasoning to the left-turn-denying, circle-embracing, ever-winding road system. His story perfectly encapsulated driving in New Jersey, where two roads going in seemingly opposite directions will sometimes lead to the same place.

A couple quick things about my brother. He's an accountant. Everything comes down to cold hard numbers. Also, he's a bit of a geek. That's not an insult; he fully owns and embraces his nerdiness. Every purchasing decision he makes, no matter how minor, is based on extensive research, usually tracked on a complicated multi-column spreadsheet. So "it doesn't matter which road we take" wasn't going to work for him.

That December morning, he went right at that fork. He tracked the miles, counted the traffic lights, factored in the speed limits, and noted the potholes. Next time he made the trek, he turned left at the fork and made the same calculations. From then on, he got to his destination via the shortest, least-complicated route.

When it comes to supervising federal employees, all roads are forked. When conduct and performance challenges rise, supervisors are faced with a hard decision about which path to take. Unfortunately, they often take the one that seems less difficult, at least at the time. But the easy path is never easy. You may eventually get to the same place, but it's going to take longer and it could be quite painful for you and your agency.

Here's a story we often hear, in one variation or another: An employee's misconduct seems minor or simply annoying at first, so the supervisor ignores it. After a few more instances, the supervisor tells the employee: This has to stop. It doesn't, and now the behavior is impacting the rest of the staff. The supervisor issues a Warning Letter. Instead of correcting behavior, the employee ratchets up the misconduct a few notches. It's months later and the supervisor just wants to be rid of this employee.

If you're keeping score at home (and you've been to FELTG training), you'll note that this supervisor has taken *zero* disciplinary actions so far. But what about when she admonished the employee, you ask? That's not discipline. And neither is the Warning Letter. Letters of warning, caution, counseling, and requirement are what FELTG calls "lesser letters." These lesser letters are *not* acts of discipline. But you know what they can be? Grievable. So by taking that "easy path," this supervisor has basically just driven in circles – and put herself and her agency at risk. If you want to write a letter, start with a Letter of Reprimand. Now that is a disciplinary action. Read Ann Boehm's September Good News column for more on how this action can save you time and money.

If back at the original fork in the road, the supervisor had taken a disciplinary action, say the aforementioned Letter of Reprimand, then she would be in a much better place now and further along to her destination.

FELTG is like my nerdy older brother. Instead of tracking miles and creating

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spreadsheets, we're reading cases, studying the law, and reviewing regulations – and then sharing the strategy with you. FELTG's *Developing & Defending Discipline: Holding Federal Employees Accountable* and *UnCivil Servant: Holding Employees Accountable for Performance and Conduct* courses give you the latest GPS coordinates to take necessary disciplinary or performance action in the most efficient way with the fewest potholes.

If you care about accountability, you can bring either of these courses to your agency. Just email me, and we'll get your supervisors on the right path. Or you can register for our upcoming UnCivil Servant open enrollment virtual training, which takes place February 10-11 from 12:30 – 4 pm eastern. Gephart@FELTG.com

How Much Information Does an Employee Have a Right to at the Proposal Stage?
By Deborah Hopkins and William Wiley

Here's an email that recently came across the FELTG desk:

Dear FELTG,

Our agency has encountered an issue we haven't seen, and were wondering if you might have some insight.

Typical for my agency's chapter 43 removals is that the employee objects to not having access to their work documents, work laptop and programs, etc. (because they are put on admin/notice leave simultaneous with the issuance of the proposal) and thus isn't able to offer a meaningful reply. We wonder if this is a common issue, and if perhaps there is an easy remedy that we're overlooking.

Our proposals for chapter 43 removals include specific descriptions of each performance deficiency, with identifiers to specific instances (such as case numbers or project names and dates), but do not include or attach primary documents like screenshots or work files; the materials relied upon (outside of the proposal's detailed description of the unacceptable performance) are usually the supervisor's letter from the end of the opportunity period notifying the employee of the unacceptable performance, and if the timing lines up, the performance appraisal in which the supervisor rates the employee unacceptable.

So if an employee wanted to base their defense on individual case files, they would not have access to them through the materials relied upon; case files/documents/screengrabs aren't provided with the proposal. We can't anticipate every file an employee would want, so it's hard to handle this prospectively, but options that have occurred to us are to (1) acknowledge in the decision that the employee objected to not having access, but did not actually identify or request any documents/files that would support a defense; or (2) when an employee objects to lack of access, the deciding official can ask the employee to identify what documents they need, and we can provide them and incorporate them into the materials relied upon. Option 1 may be risky (what if an administrative judge construes their objection to be a request that we failed to respond to?), but option 2 seems like it could delay the process and blow by mandated timelines.

What do you think? Is there a simple solution (or reassuring case) we're missing, or a risk we're misevaluating?

And here's the FELTG response.

Well, we can't give you specific advice on your situation, but we can speak to the principle in general. There's a case we cover in MSPB Law Week (next offered virtually

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March 29 - April 2), that involves a misconduct removal but covers the same principle of access to documents during the notice period. In the event that an agency refuses to voluntarily make pertinent documents reasonably available prior to a Board proceeding, the Board's rules provide for the issuance of orders compelling discovery by interrogatory or deposition, and for the issuance of subpoenas. *See Kinsey v. USPS*, 12 MSPR 503 (1982). This language "prior to a Board proceeding" assumes there is a Board appeal, which, of course, is not the case during the notice period.

The agency has no obligation, until the discovery phase, to produce any materials it did not directly rely upon in making the proposal. As long as the employee is given the material relied upon (and in a 432 action that's entirely what happened during the performance demonstration period, PIP, or whatever your agency calls it now), the agency has fulfilled its obligation.

In another case we talk about during MSPB Law Week, the agency referenced shortcomings in medical care the employee provided to patients, but did not provide the employee the specific deficiencies or the records themselves that contained a description of the deficiencies. In reversing that removal, here's what the Board said:

During the processing of the appeal, the appellant continued to express her confusion over the nature of the charge and attempted, without success, to discover the specific reason for her removal. For example, in "Appellant's Motion to Compel Production," the appellant's attorney stated that the appellant was "charged with failure to maintain her clinical privileges, which, so far as she can determine, calls into question the quality of care she has given to inmates for the undetermined period of time."

In "Appellant's Prehearing Submissions," the appellant's attorney asserted that "there is complete lack of constitutional due process" because the appellant "never knew prior to the time she was fired, nor does she know now, what acts of omissions on her part are the reasons for her termination nor what standard she fell below." *Alexander v. DoJ,* DE--0752-97-0313-I-1 (1998).

The principle involved in situations like these is as old as the Constitution: "Fundamental due process requires that notice of charges against an employee be sufficiently detailed to provide a meaningful opportunity to be heard. In analyzing a claim of denial of due process, the Board will examine, among other things, whether the lack of specificity in the notice affected the appellant detrimentally or caused her any surprise during the hearing." *Mason v. Navy,* 70 MSPR 584, 586-87 (1996). In your case, if the proposal said something like: "In case XYZ, you failed to attach an appendix," then, in our opinion, that would satisfy due process. However, if it says something like: "In case XYZ, you did not conform with our SOP," then that would not satisfy due process.

A basic way to look at which documents have to be provided is to ask the proposing official what he personally looked at in drafting the proposal. Did he look at a screen shot? If so, then the safest approach would be to include the screen shot along with the proposal. If he did not, then there's no right for the employee to have access at this stage. The good news is that the employee is not entitled at the proposal/response stage to a fishing expedition to look for exculpatory documents or other evidence. That's what he gets during discovery. Hopkins@FELTG.com

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