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

FELTG Newsletter Vol. XIII, Issue 3 March 17, 2021

Announcing Emerging Issues in Federal Employment Law II

VIRTUAL TRAINING INSTITUTE FELTG

It's that time of year when we officially announce the agenda for our annual **Emerging Issues in Federal Employment Law** virtual training event. The dates are April 27-30. Over 15 sessions, our talented instructors will cover the latest on the Biden Executive Orders and relevant OPM guidance, EEO-related COVID-19 issues, Paid Parental Leave, emotional support animals at work, microaggressions and bias in the workplace, and much more. Attend one session, or attend them all. Earn CLE and HRCI credits. Have fun while you learn. Early bird discounts are available.

As we contemplate a return to the physical classroom, we want to know what you think of virtual training, and what your agencies are saying about future travel. If you don't mind participating in a brief 5-question anonymous survey on SurveyMonkey, it will help us plan the future with you in mind.

This month's newsletter covers an important new decision undoing 40 years of PIP precedent, how to *not* handle complaints of harassment, guidance for working with unions, and much more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

Strategic Planning for Federal, State, and Local Offices of Inspectors General
March 24

MSPB Law Week
March 29 – April 2

Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace
April 7

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

Emerging Issues in Federal Employment Law
April 27-30

Advanced Employee Relations
May 4-6

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
May 19-20

EEO Counselor and Investigator Refresher Training
May 25-26

The Performance Equation: Providing Feedback that Makes a Difference
May 27

FELTG is an SBA-Certified Woman Owned Small Business that is dedicated to improving the quality and efficiency of the federal government's accountability systems, and promoting a diverse and inclusive civil service by providing high-quality and engaging training to the individuals who serve our country.

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Say Goodbye to 40 Years of Case Precedent: Agencies Must Justify PIPs
By Deborah Hopkins

For the past 20+ years, we have taught a principle in performance cases that has been around since the beginning of the *Civil Service Reform Act*: An agency does not need to justify putting an employee on a performance demonstration period, what we at FELTG now refer to as a DP, formerly known as a PIP. In teaching that well-established principle, we relied on the statute (5 U.S.C. 4302-4303), relevant OPM regulations, and a number of foundational MSPB cases, such as *Wilson v. Navy*, 24 M.S.P.R. 583 (1984); *Wright v. Labor*, 82 M.S.P.R. 186 (1999); and *Clifford v. USDA,* 50 M.S.P.R. 232 (1991).

Imagine our surprise last week when the Federal Circuit issued a decision that said an agency must have substantial evidence that the employee was performing poorly BEFORE it is allowed to put an employee on a PIP. *Santos v. NASA*, No. 2019-2345, (Fed. Cir. Mar. 11, 2021)

Not long after beginning work for a new supervisor, the appellant (Santos) was placed on a 45-day PIP, and given 11 deliverable assignments. His supervisor met with him to discuss his progress and give him feedback on his work product. The supervisor ultimately determined that Santos's performance on the deliverables was unsatisfactory, so she proposed removal for unacceptable performance, and the deciding official concurred in the penalty.

Santos appealed and claimed, among other things, that he was mistreated because of his military service, and that work he did not perform while he was on military leave was unfairly used to assess his performance. Part of his appeal included a claim that he should never have been put on a PIP in the first place, something the Board AJ did not address because the matter was well-settled in MSPB case law: "[A]n agency is not required to prove that an appellant was performing unacceptably prior to the PIP." *Wright v. Labor*, 82 M.S.P.R. 186 (1999). On review of the Board's case, the Federal Circuit said:

> The Board has held that … an agency [is not required] to prove that an employee was performing unacceptably prior to the PIP in order to justify a post-PIP removal. See *Wilson* [supra] … (finding "no statutory or regulatory basis" to require an agency to establish appellant's unsatisfactory performance prior to the PIP[1]). The Board has consistently applied this interpretation to PIP removals.

Yes, this is as old as time, in our business. But here's where things change:

> We have not directly addressed the question of whether, when an agency predicates removal on an employee's failure to satisfy obligations imposed by a PIP and that removal is challenged, the agency must justify imposition of a PIP in the first instance under 5 U.S.C. § 4302, though we have discussed the general relevance of pre-PIP performance to a PIP removal. See *Harris v. Sec. & Exch. Comm'n*, 972 F.3d 1307, 1316–17 (Fed. Cir. 2020). **Today we confirm that the statute's plain language demonstrates that an agency must justify institution of a PIP when an employee challenges a PIP-based removal.** [bold added]

The Federal Circuit arrives at this by focusing on the 5 U.S.C. § 4302(c)(6) requirement that agencies remove, reassign or demote employees who continue to have unacceptable performance but only *after an opportunity to demonstrate acceptable performance*. That opportunity period is the DP/PIP. That's not new. But then:

> To "continue to have unacceptable performance" during the PIP, as the statutory text requires, **an employee**

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> **must have displayed unacceptable performance prior to the PIP**. Under the plain meaning of the statute, then, **an agency must defend a challenged removal by establishing that the employee had unacceptable performance before the PIP** and "continue[d] to" do so during the PIP. [bold added]

Santos also relies on discussion in the notice of proposed rulemaking for OPM's recently amended regulation at 5 C.F.R. § 432.104, which says agencies are not relieved "of the responsibility to demonstrate that an employee was performing unacceptably – which per statute covers the period both prior to and during a formal opportunity period – before initiating an adverse action under chapter 43." More from the court:

> Confirming an agency's obligation to justify initiation of a PIP where the PIP leads to removal is particularly appropriate, moreover, in situations resembling Santos's, where an employee alleges that both the PIP and the removal based on the PIP were in retaliation for protected conduct. Otherwise, an agency could establish a PIP in direct retaliation for protected conduct and set up unreasonable expectations in the PIP in the hopes of predicating removal on them without ever being held accountable for the original retaliatory conduct. Indeed, these are the circumstances in which the issue of pre-PIP performance would be most relevant.

We used to teach that as long as an agency could articulate the reason for poor performance, they could put an employee on a PIP, and the employee could not challenge the placement on a PIP. So, where does that leave us, post-*Santos*?

What's New:

- Agencies must have substantial evidence of poor performance in order to justify putting an employee on a PIP.
- The decision about *how* to justify the PIP is up to the agency, so documentation of the reason(s) the supervisor begins the PIP should suffice. That's something we at FELTG have always taught supervisors to do, in case they ended up defending against a reprisal complaint at some point in the future. But a big question lingers: is that enough?
- The Federal Circuit does not prescribe any particular evidentiary showing with respect to the employee's pre-PIP performance, but the emphasis is on continued poor performance. So how long is long enough, before implementing a PIP?
- The burden is on the employee to prove that the motive for imposing the PIP was *discriminatory*. Not just retaliatory.

What's Still the Same:

- "[A]n employee may not seek review of the decision to implement a PIP at the time it is instituted, either at the Board or otherwise."
- The institution of the PIP satisfies the notice component of 5 U.S.C. 4303.

Go ahead and absorb that. It changes 40-plus years of precedent. It's completely doable, and we'll explain exactly how to do so during MSPB Law Week later this month, or on April 13 at 11 am ET when we present Justifying Your PIP? What Precedent-Breaking Fed Circuit Decision Means.

And before I go, let me just say this: some of the facts in this case don't look good for the agency – the actual administration of the PIP was fine, but the proximity of certain management actions to Santos's military service should be scrutinized. The Federal Circuit remanded the case back for a Board determination about whether Santos was the victim of reprisal under USERRA, so we don't have an answer on that yet. But regardless of the outcome, we appreciate his service.
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EEOC Decision Details Everything a Manager Should NOT Do
By Meghan Droste

When I started writing this article, I was planning to make the headline something about not being an ostrich. This seemed like a somewhat amusing way to highlight one of the points from the case I'm bringing to you, *Thomasina B. v. Department of Defense*, EEOC App. No. 0120141298 (Feb. 9, 2021). The point being that supervisors shouldn't ignore obvious evidence of harassment — so don't stick your head in the sand … hence, the ostrich — and should instead take action right away. But the more I thought about it, the more I realized that didn't quite capture the issue in *Thomasina B.* because the supervisors in this case didn't just ignore the harassment, they actually participated in it. They also failed to take any appropriate action to end it. Also, fun fact I learned in the process: It turns out that the whole ostriches burying their heads in the sand thing is a myth. The more you know.

So, what is actually going on in *Thomasina B.*? It's a textbook case of everything an agency shouldn't do in a harassment case. The issues started when the complainant's ex-husband, who also worked for the agency, started rumors that the complainant was a lesbian and that she was in a relationship with another coworker (CW1).

As the Commission found, there was evidence that nearly everyone in the workplace, coworkers and supervisors, were aware of the rumors. Rather than putting a stop to them, some of the complainant's supervisors helped spread them. They also repeatedly took actions against the complainant based on the rumors. They moved her to a different location, told her not to enter the building CW1 worked in, and denied the complainant's request for a minor schedule modification all because they believed the complainant was spending too much time socializing with CW1 and not enough time doing her own work. The Commission found no evidence that the complainant was doing so. She received a fully successful performance rating, so her performance wasn't suffering. At least one supervisor wanted her to work more in the same building as CW1, and the supervisors never had an issue with any other employees socializing during the workday. This wasn't a case of burying their heads in the mud like a flamingo (another bonus animal fact for you), this was a case of supervisors engaging in harassment and opening the agency up to liability.

Unfortunately for the complainant, the harassment did not end there. For nearly a year, another coworker (CW2) repeatedly harassed the complainant because of CW2's beliefs about the complainant's sexual orientation. The harassment included CW2 telling the complainant that she was going to hell, that homosexuality is an "abomination," and that the complainant was harming her children because of her "lifestyle."

When the complainant reported the harassment to a supervisor, she requested that the agency move CW2 away from her. The supervisor asked CW2 if she wanted to move and when she declined to do so, the supervisor did not take any other action. He didn't move anyone, he didn't tell CW2 to stop, and he didn't investigate the harassment.

The agency issued a FAD finding no liability. It concluded that although CW2 harassed the complainant because of her sex, the agency was not liable because it took appropriate action once it learned of it.

The Commission, unsurprisingly, did not agree. It found the agency liable for two years of harassment by both coworkers and supervisors. I encourage you to read the Commission's decision in this case, and use it as a blueprint of everything you should **not** do. Droste@FELTG.com

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The Good News?
'He Left the Job Because He Just Couldn't Take the Union Any Longer'
By Ann Boehm

I overheard an agency employee quote the headline above when explaining why a supervisor left his job for another position. The supervisor couldn't deal with the union any longer.

This is a sad statement. And yet, I've heard it before. Heck, I've felt that way myself at various times during my career.

Many of you are probably nodding your heads in agreement. But that's not the way it is supposed to be. And with a pro-union Administration, what's an agency manager, labor relations specialist, or attorney to do?

If you read my articles, you know by now that I am a hopeless optimist. When drafting this article, I wanted to help those of you in the trenches deal more effectively with the unions, so that you don't want to leave your jobs.

We know that Congress 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 that doesn't seem to be the case with the supervisor mentioned above. Causing an agency supervisor to leave a job does not seem to be in the public interest. (OK, it could be if the supervisor is a real jerk, but I did not get the sense that was the case with this individual.)

We also know that President Biden's Executive Order 14003 says, "it is also the policy of the United States to encourage union organizing and collective bargaining." The President believes that in supporting the "[c]areer civil servants" who "are the backbone of the Federal Workforce" and "necessary for the critical functioning of the Federal Government," unions must be empowered.

But aren't managers and supervisors necessary for the critical functioning of the Federal Government? Of course. There needs to be a balance between labor and management. Creating that balance, however, is an age-old dilemma.

In an effort to help, I've thought of some things I believe may help everyone work effectively together (remember – I'm a hopeless optimist).

1 - Read the Federal Service Labor-Management Relations Statute (Statute). Yes, the whole thing. It's right here. Don't be frightened. I just re-read the whole thing and timed myself. It took me 15 minutes. You may not understand every word of it, and you don't need to become an expert on what it says, but it may help you better understand how labor and management are supposed to interact.

Why am I telling you to do this? Because knowledge is power. The Statute is the basic rulebook for all things labor-management relations in the Federal government.

Believe it or not, sometimes even well-meaning unions do things that are contrary to what the Statute says. But if the managers and supervisors dealing with them don't know that, they just feel like the darn union is too hard to handle.

2 - Read the entire collective bargaining agreement (CBA). This may be more of a time commitment. Although it boggles my mind, the reality is that many of you have to work with 300-plus page CBAs!?! But if you don't know what it says, you are at the mercy of the union officials who tell you their interpretation. At least skim it and focus in on the areas that seem to arise most frequently with your bargaining unit employees.

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3 - Be prepared to fight the union if they legitimately are violating either the Statute or the CBA. That's the main reason the FLRA exists – to resolve disputes between the agencies and unions. If you complete steps one and two, above, you will be better positioned to challenge the union when it's legally appropriate.

4 - Stay mission focused. This should be the mantra for *all* Federal employees – bargaining unit members, managers and supervisors, attorneys, labor and employee relations specialists. Everyone! If you can assert that any union activities are interfering with the agency's ability to fulfill its mission, you will be better positioned for any potential litigation (and heaven forbid, media interest).

5 - Communicate with the union. Remind them of the agency's mission. Let them know you have read the Statute and the CBA. Understand that sometimes they will have good ideas that could make the workforce happier and more effective. Tell them, logically and legally, when they are putting bargaining unit employee rights ahead of the rights of the American people on whose behalf you are obligated to serve.

I hope all of this helps. I know the unions feel vindicated by this Administration after feeling attacked by the last one. It is probably frustrating. Stay strong. And I hope none of you want to leave your jobs because you are tired of dealing with the union!
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Mandatory Permissive Bargaining: What Does That Really Mean?

Executive Order 14003 raised many questions for Federal labor relations practitioners. Ann Boehm will answer those questions during this 60-minute webinar on April 22. Attendees will learn best practices for dealing with negotiation determinations. Register now.

When is a Judge not a Judge?
By William Wiley

Perhaps you've heard of this issue. In 2018, the US Supreme Court caused a bit of a civil service uproar when it held that a certain group of administrative law judges were "inferior officers of the United States." That meant that each had to be appointed by a Senate-confirmed Presidential appointee to comport with the US Constitution and, thereby, to legally perform their duties. *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

You see, the Constitution sets up several categories of Federal civil servants. By far, most people who work for the government are simply "employees" hired by whoever the agency identifies to be the selecting official, and appointed to fill a vacant position. However, there's another much smaller group of employees who are considered to be "inferior officers of the United States" because they exercise significant authority on behalf of the government. Those individuals – those inferior officers – must be appointed subject to the Appointments Clause of the Constitution. To comport with the Appointments Clause, the individual must be appointed (i.e., hired) by the President or by someone appointed by the President who has been confirmed by the Senate (such as the agency head). A regular old selecting official at an agency does not have the authority to appointment someone to an "inferior officer" position. (The third group of appointees in the executive branch, not at issue here, are the "Principal Officers," also known as "non-inferior" officers. Those individuals are appointed only by the President with confirmation by the Senate.)

In *Lucia*, unfortunately for the SEC, the ALJs at issue there had been appointed without consideration for the appointments clause.

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When the Court concluded that those SEC ALJs were "inferior officers" rather than just regular old Federal employees, the validity of the decisions that those ALJs had been issuing were called into question. You don't have to understand what an SEC ALJ does to appreciate from a civil service adjudication aspect what a nightmare *Lucia* has caused.

Well, it didn't take long for some smarty-pants agency practitioners to think, "Hey! administrative law judge (ALJ) sounds a lot like administrative judge (AJ). If SEC ALJs have no authority to issue decisions because their appointments don't comply with the Appointments Clause, then the same must be true for MSPB AJs." And off they went to object to any appeal filed with the Board subsequent to *Lucia,* thereby causing roughly 200 Board appeals to be blocked. As there have not been any Presidentially appointed Board members at MSPB for several years, there has been no resolution of these objections. That means that a couple of hundred appellants have nowhere to go with their appeals until we get a functioning Board again, which will happen after President Biden names his nominees and they get confirmed by the Senate.

Obviously, this is a big deal for the entire civil service. Will all the decisions issued by all the MSPB AJs be mooted out once the Justices on the Supreme Court eventually rule on this issue? What about the AJs over at EEOC; are they in the same category? To test your potential to be a Supreme Court Justice, let's go through the criteria for identifying a position as an "inferior officer" and see what you come up with.

The Appointments Clause of Article II of the Constitution reads as follows:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U. S. Const., Art. II, § 2, cl. 2.

Early Supreme Court cases that wrestled with this article concluded that inferior officers of the Federal government exercise "significant authority pursuant to the laws of the United States." In later cases, the Court reasoned that individuals who are either principal or inferior officers subject to the Appointments Clause "hold a continuing office established by law" and exercise "significant discretion when carrying out 'important functions.'"

Here are some functions the courts have concluded suggest that work being done is an important function requiring significant authority and discretion:

- Taking testimony at hearings
- Receiving evidence and examining witnesses
- Administering oaths, ruling on motions, and generally regulating the course of a hearing
- Ruling on the admissibility of evidence, thereby shaping the administrative record

Wow, that's starting to sound a lot like what an MSPB AJ does. If I were arguing that Board AJs are "officers" of the government that had to be appointed personally by the Chairman of MSPB, I'd rely on a lot of these facts to support my argument.

However, to my read, the whole argument that Board AJs are subject to the appointments clause of the Constitution falls apart when I see that it is the *independence* of this "significant" authority that has caused the courts to find similar hearing adjudicators to be officers of the government. MSPB

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administrative judges do not act independent of supervision when adjudicating appeals. They have no guarantee of independent decision-making in law. 5 USC 1205 states that the power to hear and adjudicate appeals within MSPB's jurisdiction rests in *the Merit Systems Protection Board*. The Merit Systems Protection Board is defined at 5 USC 1201 as *the three Board members* appointed by the President with the consent of the Senate. Once appointed, the Board can designate employees to administer oaths, examine witnesses, and receive evidence (5 USC 1201(b)(1)), but nothing in law allows the Board to designate employees as the final arbiter of appeals within MSPB's jurisdiction.

Relatedly, the Board can appoint by law two categories of individuals to perform these designated functions: "administrative law judges" and "employees." There must be a meaningful distinction between the two categories or the statute would not have bothered to identify them separately. Courts that have dealt with questions regarding the applicability of the Appointments Clause to adjudicatory positions have found that individuals occupying "administrative law judge" positions to be exercising "significant independent authority." Most likely, those individuals identified simply as "employees" do not have equivalent independent authority even though they may be performing functions that appear to be similar.

AJs have no more authority to act than the authority they are delegated by their supervisors. Supervisors of AJs get the authority to delegate authority as it is delegated to them pursuant to statute by the Board members. AJs issue "Initial Decisions," subject to challenge by either party or simply to unilateral reopening by the Board members themselves. In my opinion, MSPB AJs do important difficult work and are deserving of all the respect that we can give them. However, it seems to me that they are technically below the "significant authority" requirement necessary for the Appointments Clause to be applicable to them. My guess would be that we can continue to rely on their decisions being valid even though they were not hired personally by the Board Chairman. Wiley@FELTG.com

FELTG Forum 2021: Emerging Issues in Federal Employment Law

A brand-new Administration with starkly different priorities than the previous White House occupants. A massive effort to return to pre-pandemic normalcy. New case law emerging from the EEOC and FLRA. 2021 is a year of change and challenge.

Over four days, the FELTG Virtual Institute's second annual Emerging Issues in Federal Employment Law event offers 15 *live* instructor led sessions with the latest legal and practical guidance.

Sessions include:

- What to Expect When You're Expecting a New Board

- The Roller Coaster Employee: Managing Up-and-Down Performance

- When Employees Go Insubordinate: Don't Mess With the Wrong Elements

- COVID-19 and EEO: What We've Learned and What We Still Need to Know

- Leave for the Federal Employee in 2021

- The Telework Tango: Communication and Feedback for a Remote Workplace

- Impact and Implementation Bargaining in the Federal Workplace

- Addressing Microaggressions and Bias in the Federal Workplace

- Barking Up the Wrong Tree? Service and Therapy Animals in the Federal Workplace

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Not only do you get answers from FELTG's experienced instructors in real time, but you can earn CLE credits and EEO refresher training credits.

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Tips from the Other Side: It All Starts With a Good Faith Effort
By Meghan Droste

This month, we continue our discussion of religious accommodations. In January, we looked at what an agency needs to do to establish that providing a religious accommodation to an employee would be an undue hardship (namely that there would actually be some kind of burden or hardship). This month, we're going to take a step back in process and look at what an agency must do before it can even think about raising the issue of a hardship.

An agency cannot put forward a defense of undue hardship unless it can show that it made some effort to accommodate the complainant. This does not have to be the accommodation the complainant requested. If that accommodation would require more than a de minimis burden, the agency can look at alternative accommodations. But it must show that it made a good faith effort to provide some kind of effective accommodation before it can deny a request because of the burdens associated with it.

The Commission's decision in *Mac O. v. U.S. Postal Service*, EEOC App. No. 0120152431 (Nov. 29, 2017) provides a good illustration of what an agency needs to do. In this case, the complainant's position as a city carrier assistant required him to work up to six days a week, twelve hours per shift, including holidays, Saturdays, and some Sundays. After working for about one month, the complainant submitted a request to not work from sunset on Friday to sunset on Saturday for religious reasons. The agency denied his request, saying that granting it would require the agency to pay overtime to other employees. When asked what efforts the agency made to provide an accommodation to the complainant, his supervisor testified that she wasn't aware of any.

In its decision, the Commission agreed that having to pay overtime to other employees would be more than a de minimis burden on the agency. However, the Commission still found in the complainant's favor on this issue. Why? As the EEOC noted, "it bears repeating that the Agency cannot raise the issue of overtime or any other financial or logistical issue as an undue hardship until it demonstrates that it made a reasonable effort to find an accommodation that would enable Complainant to practice his religion without having to worry about losing his job."

In *Mac. O.*, the agency made no effort to determine whether it would be possible for the complainant to swap schedules. It also failed to consider the complainant's request for a transfer to a location that was closed on Friday evenings and Saturdays. Now it's possible that schedule swaps wouldn't have been possible or that there was no available position to transfer the complainant to, meaning that the agency couldn't have accommodated him without an undue hardship. But because the agency made no effort, let alone a good faith effort, to look into these possibilities, the Commission found it liable for failing to accommodate the complainant.

Just as with requests for disability-related accommodations, make sure you are making a good faith effort to actually provide accommodations before denying a request. Doing so will save you the headache of unnecessary litigation, and will also make sure your agency's employees can stay on the job and keep working.
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Reasonable Accommodation

FELTG's five-part webinar series Reasonable Accommodation in the Federal Workplace begins on July 15. Updated for 2021, this series of 60-minute webinars, presented weekly, will tackle everything from the basics of the law to challenges, such as providing accommodation to teleworkers and accommodating invisible disability.

Register for all five webinars and save.

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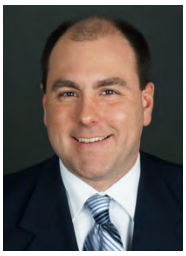
And Now Another Word With … Scott Boehm
By Michael Rhoads



A goal without a plan is just a wish. – Antoine de Saint-Exupéry

There are many wishes I have for 2021, but the short list is:

- Lose a little weight.
- Take my wife and kids on a "road trip" vacation.

So how can I make these dreams a reality? I'm sure I'm not alone in this, but losing weight takes a lot of effort on my part. I've been successful in the past using different weight loss programs, but once I've achieved my weight-loss goal (or even if I haven't), I slide back into old habits and the weight comes back. While the goal is achievable, I know I have my work cut out for me.

When thinking of the open road, I'm reminded of the maps and travel guides my dad would take out to plan our family's next adventure. He would sit at our dining room table and meticulously pore over those guides and maps to plan out rest stops, hotels, and major attractions at various points along the way. The important lesson I learned from my dear old dad was research, plan, and execute – and have fun while you're at it! Now if I can just get as excited about losing weight as I am about planning my family vacation, I'll be in great shape.

Any goal is achievable, but strategic planning is the key to turning those goals into reality. I recently spoke with Scott Boehm about how strategic planning can keep the goals of the Office of Inspector General on track.

MR: Why is strategic planning so important for an Office of Inspector General?

SG: All Offices of Inspectors General (OIGs) have mandated quality standards that include strategic planning. But that's not the most important reason. We all have limited resources and a properly executed strategic plan ensures that your OIG resources (budgets, personnel, infrastructure, training, and time) are focused on accomplishing the mission, reducing risk, and maximizing return on investment (ROI) and public benefit.

MR: How often should Inspectors General conduct an internal strategic overview of their own office?

SB: Every three to five years, federal, state and local OIGs should conduct a strategic planning process and publish a revised OIG strategic plan. This is because agency missions, operations, strategies and authorities change over time. As an oversight organization, the OIG must understand these agency changes.

IG Corner

FELTG's IG Corner is your one-stop site for information about our upcoming training for Offices of Inspectors General and relevant news.

MR: What is a good time frame for a strategic plan? One year? More?

SB: Three years is a good time frame. It allows your OIG to execute its Plan of Actions and Milestones (POA&M) and gather enough metric-driven data to assess if you are executing your oversight mission as efficiently and effectively as possible.

MR: Who should participate in the strategic planning process?

SB: Everyone in the OIG should participate at some point, especially during the first step - "Mandate Analysis." And the IG should lead the process. A Best Practice is to use a facilitator, but the IG must be there to act as "the tie-breaker."

MR: What role do values, such as agency mission, play in the strategic planning process?

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SB: The higher headquarters mission and strategic plan should drive the OIG strategic planning process. However, the OIG Mandate Analysis step often identifies missions that the higher headquarters may have omitted. The bottom line is that your OIG cannot validate all of its oversight mission without conducting a comprehensive strategic planning process. The process itself is way more important than the document that comes out of it.

MR: What is the best way to analyze your goals?

SB: The best way to analyze your goals is to use the Balanced Scorecard approach. This forces your OIG to examine its missions through the eyes of your stakeholders, including the legislature, and your own OIG employees.

MR: Once the strategic goals are set, how do you follow up to ensure your goals are on track?

SB: You ensure your OIG goals are on track through 1) developing strategies for every goal, 2) establishing a Plan of Actions and Milestones (POA&M) that assigns time-bound responsibilities and deliverables to implement those strategies, and, finally, 3) developing OIG-wide metrics to track your progress toward accomplishing your strategic goals.

MR: How will strategic planning help the Inspector General demonstrate return on investment?

SB: A comprehensive Strategic Plan improves:

- Identifying all OIG Mission Requirements
- Integrating OIG-Wide Annual Planning
- Digital Forensics and Fraud Detection Tools
- The OIG Stakeholder Outreach Process
- The Brevity and Timeliness of all OIG Reports
- The Report Routing, Editing and Review Processes
- Hiring a Workforce with More Diverse Skill Sets
- Training, Developing, and Rewarding that Diverse Workforce to Decrease Staff Attrition
- The Timeliness of the OIG Follow-Up Process

All of these positively impact measuring your OIG's Return on Investment (ROI).

Join Scott on Wednesday, March 24 for the half-day Strategic Planning for Federal, State, and Local Offices of Inspectors General. Scott will take you through the fundamentals of strategic planning to help your organization thrive. Put your current strategic plans to the test or see how you can make your agency's wish list a reality. Register Today!

As always, stay safe, and remember, we're all in this together. Rhoads@feltg.com

When Negotiations Reach Impasse: FSIP Under the Biden Administration

Oftentimes when bargaining, parties simply can't agree and they reach an impasse. During the previous administration, those impasses resulted in an unprecedented number of decisions in which the Federal Service Impasses Panel imposed terms on the parties.

Former FSIP Executive Director Joe Schimansky, explains the impasse process in light of President Biden's directive to agencies to renegotiate their CBAs. Attendees will learn tips on how to avoid impasse, and get a former insider's view of Panel. The 60-minute webinar will be held on March 25. Register now.

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What Do You Charge When Someone Buys Marijuana on Duty, in Uniform?
By Deborah Hopkins

One of the topics we spend an entire day discussing during FELTG's MSPB Law Week (next offered virtually March 29 – April 2) is disciplinary charges. Poorly drafted charges too often cause agencies to lose cases that they otherwise should easily win, because there's no problem with the evidence.

Charge drafting is a highly technical area of the law, and a small mistake can often cost an agency an entire case. Sometimes you get lucky, but why leave it to luck when you don't have to?

As FELTG has taught for more than 20 years, an agency must prove every word in a charge in order for the charge, and corresponding discipline, to be upheld. So imagine the flutter of panic I felt when a longtime FELTG reader sent me a recent Federal Circuit case, with the charge from the case as the subject line:

"Unacceptable Conduct/Purchase and/or Possession of an Illegal Drug While on the Clock and in Uniform."

Yikes. There are a few things that make me nervous about this charge, including:

1. Multiple slashes – punctuation marks are almost always a no-no
2. The words "and" and "or" – conjunctives are dangerous
3. Too many descriptive terms – terms such as "while on the clock" and "in uniform," can be difficult to prove

Before we get into why this charge makes me nervous, allow me to provide a summary of the facts in the case, *Holmes v. USPS*, No. 2019-1973 (Fed. Cir. Feb. 8, 2021).

- During an OIG investigation, the appellant, named Holmes, was caught on video "engaged in alleged narcotics transactions with Mr. Baxter [another USPS employee] while on duty."
- Baxter later admitted to selling marijuana from his USPS vehicle.
- Six other employees who were also observed in the surveillance video admitted to purchasing marijuana from Baxter.
- Holmes initially denied purchasing marijuana from Baxter while on duty, despite video surveillance showing two separate instances where Holmes appeared to give money to Baxter in exchange for some kind of substance that looked like a "rolled cigar," and turned out to be marijuana.
- Holmes received a notice of proposed removal with the above-mentioned charge.
- In his oral response, Holmes told the Deciding Official that he was "so embarrassed," "really wanted to apologize," and that he "made this little mistake." The agency removed him, and he appealed his removal.
- The Federal Circuit ultimately affirmed the removal.

There's nothing earth-shattering in this decision (though you might be interested to know that five of the other employees who were removed for the same misconduct took their removals to arbitration, and the removals were mitigated to suspensions), but there are some lessons to learn from the charge. Next time around, the agency might not get so lucky with a detailed charge.

Let's look at similarly drafted charges, that went the other way for agencies.

Slashes and Punctuation Marks
The case: *Bennett v. DVA*, CH-0752-15-0367-I-1 (2016)(NP)

The charge: "Disrespectful, intimidating language toward supervisor/Conduct unbecoming a Federal employee."
The outcome: Because of the way the charge was drafted, the MSPB merged the

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"conduct unbecoming" with the "disrespectful, intimidating language" clause. The MSPB found the appellant's speech was disrespectful, but not intimidating, and reversed the removal.

Conjunctives
The case: *Brott v. GSA,* 116 M.S.P.R. 410 (2011)

The charges:
1. On July 23, 2008, disorderly conduct and failure to follow instruction, specifically, using abusive language to a coworker, while loading the packing belt line, and leaving the facility when his supervisor ordered him to stop using abusive language.
2. On July 24, 2008, failure to follow instructions to report to the facility manager, James Gorman, regarding the incident of July 23, 2008, and absence without leave (AWOL).

The outcome: Because of the way these charges were drafted, there was some confusion and discussion about what had actually happened. The MSPB found the agency failed to prove charge 1 because the agency did not prove both the disorderly conduct and a failure to follow instruction. Removal reversed.

Descriptors
The case: *Parkinson v. DoJ,* SF-0752-13-0032-I-1 (October 10, 2014)(NP)

The charge: "Unprofessional conduct - on duty."

The outcome: The employee engaged in unprofessional conduct by having inappropriate relationships with contractors, but the agency did not provide evidence the conduct occurred while the employee was on duty. The charge fails.

Takeaways
In the *Holmes* case where the USPS employee purchased marijuana, there could have been a very different outcome if only minor things were different:

- Had the employee successfully argued to the MSPB that he was on a break when he purchased the marijuana, the charge would have failed. See *Downey v. DVA*, 2013 MSPB 24.
- Had the employee been wearing only part of his uniform, he may have successfully argued that he was not in uniform, and the charge would have failed.
- The MSPB may have gotten picky about the slashes and discussed the and/or conundrum, and decided the agency did not prove both sides of the charge.

The agency's removal action in *Holmes* was ultimately upheld. But might there have been a bit safer way to draft the charge?

In *Parkinson*, above, MSPB said, "An agency is not required to affix a label to a charge but may simply describe actions that constitute misbehavior in narrative form in its charge letter; however, if the agency chooses to label an act of alleged misconduct, then it must prove the elements that make up the legal definition of the charge." I couldn't have said it better myself. Hopkins@FELTG.com

MSPB Law Week

As we await the nomination of members to the Merit Systems Protection Board, the civil service world continues to change quickly. And it's important for you to be aware of the laws, regulations, and executive orders that apply to you.

There is one place you can consistently get the best guidance and most up-to-date information you need. Join top MSPB practitioners and topic authors on March 29 – April 2 for MSPB Law Week and learn the law, strategies, and techniques from their many years of combined experience.

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Director of EEO Oh No! When HR Practitioners Fail to Perform Part II
By Barbara Haga

This month, I'm going to focus on how an agency might deal with the situation described in last month's column.

Just a quick recap: An IG investigation resulting from an OSC complaint found that the head of the EO Office at an Air Force Base had " … actively discouraged employees from filing EEO complaints, improperly modified and rejected EEO complaints and allegations, provided false and misleading information about the EEO process, and failed to identify conflicts of interest by management during the EEO mediation process."

The Air Force reassigned the EO Officer to another office with no involvement and influence over EEO filings and issued a Letter of Counseling. Apparently, that was sufficient to satisfy OSC.

Let's say that this wasn't an OSC/IG issue where other people are looking over your shoulder about a remedy. You have a manager on the phone who is telling you that they have the results of a pre-action investigation that show that his/her employee has "… improperly and unlawfully handled complaints involving sexual harassment and discrimination." (Those were OSC's words in the Dec. 22, 2020 press release, not mine.)

What do you advise?

When these types of errors occur, which tools make sense? Should this type of situation be dealt with using performance procedures or conduct procedures?

Performance Errors
These are performance errors from what I can see. There is nothing mentioned in any of the documents that I read that indicated that the EO Officer gave this bad advice for some nefarious reason or received any benefit from doing so. I read the report to say that the person believed that her actions were proper. She was wrong. These are mistakes. Horrible mistakes.

What do you do with performance mistakes under normal circumstances? You would probably talk about providing a chance to improve the performance. But is that always the best answer? Sometimes a performance approach doesn't make sense.

Let's revisit the facts of this case. The director had previously been an active-duty military equal opportunity specialist from 1994 to December 2007 when she retired from active duty. She had worked as a civilian EEO specialist from 2008 until August 2016, when she took over as the EO director. She had served as the ADR program manager prior to becoming the EO director. Here's my first question about a performance approach: Does an opportunity to demonstrate acceptable performance make sense when you are talking about someone who has been in the program for 20 years who doesn't understand these fundamental principles? The areas where mistakes were made were not fine points from some recent case. These were extremely basic issues including interfering with the right to file a complaint, not identifying conflicts of interest, and more.

> ***Ask FELTG***
>
> *Do you have a question about federal employment law? A hypothetical scenario for which you need guidance?*
>
> *Ask FELTG.*

If you were to advise that an Opportunity to Demonstrate Acceptable Performance (ODAP) was the recommended course of action, how would you advise management to handle it? You have the most senior person in the function who is failing. Who would be the ODAP reviewing official who would assess the work? It certainly wouldn't be the military officers who were the likely superiors of this position. How could you do

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it? I suppose you could bring someone in from the headquarters for 30 days (or 60 or 90 since EO 14003) so that you had a technical expert who could evaluate the work. How could you maintain the EO Officer's ability to perform in a normal setting with this HQ person around looking over her shoulder? The EO Officer supervised five EEO specialists and an EEO superintendent. How can a manager be expected to effectively continue to supervise the work of her own subordinates when her technical skills fall so short?

What is the risk to the agency to allow the person to continue to do this work during an ODAP?

What if the reviewing official is not aware of some decision made by the EO Officer or advice given on a particular complaint, or misses an error in the processing of a complaint during the review process? What if that complainant challenges that down the road?

Are you looking at accepting a complaint well after it should have been untimely, with attendant problems gathering evidence and potential costs and attorney fees?

The EO office in this case was responsible for EEO programs for 21,000 military and civilian employees. There could be a lot of complaints.

Maybe this is a little too close to home since we are talking about a practitioner in our business and it's hard to step back from that. But let's say instead that your deputy director calls you and tells you that he/she has the results of a pre-action investigation that shows that the head of contracting has "improperly and unlawfully handled certain aspects of contracts." What if a district manager for Social Security has "improperly and unlawfully handled certain Social Security applications?" What do you advise?

When I worked for the Navy, I did a performance action from a regional level office on an HR Director at a location many states away. I racked up a lot of frequent flyer miles working on that case. He was ultimately removed. He reported to a civilian technical director whose expertise was in aircraft testing and design; however, in this case, the issues that the HR director was having were that he was not being responsive to managers (including the technical director) on required actions and was not properly carrying out management responsibilities for his own staff. It wasn't a question of the quality of his work – when he did it. There was no problem in that case with the non-HR supervisor judging whether the HR Director succeeded during the ODAP. Things would have been quite different if he were giving bad advice or directing his staff to do things that didn't comply with law, regulation, policy, and I needed someone to judge whether the work was technically correct.

Given the information published by OSC on this case, I don't see how 432 procedures would work here.

Performance Errors and Conduct

It's important to remember that performance errors don't have to be intentional to be actionable under conduct procedures. There are many cases where employees have been negligent or did their work carelessly where actions were taken under conduct procedures and upheld by the Board. We'll talk about how those concepts apply to this case next month. Haga@FELTG.com

Absence, Leave Abuse, & Medical Issues Week

Whether you're a HR professional, EEO specialist, supervisor or agency counsel, you have undoubtedly faced a leave-related challenge. Or two. Absence, Leave Abuse & Medical Issues Week (April 12-16) will give you the critical foundation you need to address the most complex areas of federal employment law, include the recent challenges related to the COVID-19 pandemic. Find out more or register here.

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A Future of Dramatic Workplace Change is in the Cards
By Dan Gephart

A few years back, I read that a Topps 1973 Mike Schmidt rookie baseball card in mint condition could fetch $10,000. Like me, my Schmidt rookie card didn't quite make it out of childhood in mint condition. Still, I optimistically took the corner-frayed, slightly torn, decidedly non-glossy card to a sports memorabilia collector. When the collector told me the card was in fair condition, I took that as promising. Then he explained that "fair" is the lowest grade he gives to baseball cards, and, by the way, my card barely qualified for that grade. Forget $10,000. I'd be lucky if my card could cover a large cold brew and a scone at Starbucks.

Starting this year, I could purchase a pack of the NBA's new Top Shots, where a $15 investment could land me a Lebron James card, currently valued at $208,000. These cards are guaranteed to always be in mint condition because they will never be physically touched by human hands. These investments won't be devalued by card flipping or bike spoke-propelling.

You see, the NBA Tops Shots are crypto-collectibles purchased as a non-fungible token (NFT) created through blockchain technology.

If you're as confused as I am by what the heck that last sentence means, then you better buckle up. If sports cards can make that kind of sudden leap in technology, imagine what's in store for the workplace. Numerous workplace experts have already wondered about that. They predict numerous dramatic changes in the workplace in the future.

But not all change will be technology-fueled. Job market changes could lead to major reorganizations, experts predict. Some change could result from the very real potential of future health crises. Look at how the workplace changed during the current pandemic.

Years of telework initiatives, COOP plans, and Snowmaggedons failed to move the needle on remote work. But when the virus hit pandemic levels last year, most Federal employees immediately started working from home. Work travel, except when absolutely essential, screeched to a halt. Crowded meeting rooms were replaced by Zoom, Microsoft Teams and Webex.

And, as the FELTG Nation knows very well, change could be driven by law and policy. It's happening now, as agencies adjust to the Biden Administration's reversal of the previous administration's federal workplace initiatives. As FELTG President Deb Hopkins said, the whiplash is real.

To protect your organization against constant whiplash, workplace experts say that you need employees with creativity and critical thinking skills, and a continuous learning environment. If you take care of hiring the right employees, we'll be here to provide the continuous learning. In the next couple of months, we are offering several training events to help manage change, both current and future.

Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace on Wednesday, April 7. Talk about a sharp shift. Just a few months ago, diversity training was frowned upon. However, the new administration has made it clear that training on diversity and inclusion is a key piece in advancing racial equity and strengthening workplace protections based on sexual orientation and gender identity. In this two-hour virtual training, FELTG Instructor Meghan Droste, attorney at law, will explain what microaggressions look like in their various forms — microinsults, microassaults, and

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microinvalidations. She will share an implicit bias test, explain its impact, and provide examples. She will also review EEO law so you can determine when bias or microaggression rises to the level of discrimination.

Biden Executive Orders, OPM Guidance and an Update on the Status of Civil Service on Thursday, April 8. FELTG was the first out of the gate with comprehensive training events on the new president's Executive Orders impacting the Federal workplace. If you attended any of those training events, then you have a huge step up on your peers. FELTG President Deborah Hopkins and Instructor Ann Boehm will dive into the language of recent OPM guidance, and interpret what it means for your day-to-day operations. They will also share all of the latest information on Federal employment law-related news.

What to Expect When You're Expecting a New Board on Tuesday, April 27. This 75-minute session kicks off the FELTG Forum 2021: Emerging Issues in Federal Employment Law. We have a glimmer of hope that a new Board could soon be in place at the MSPB, and that's the kind of dramatic change that we all would applaud. What does this mean for federal HR professionals? What does this mean for all those agencies and employees whose cases have been piling up unread at the board? FELTG President Deborah Hopkins will give an overview of what we can expect in the upcoming months from a new MSPB, and where the board will stand on critical issues like performance and conduct accountability.

Legal Update: Recent Developments in Federal Employment Law, Part I (MSPB, EEOC, Federal Circuit) on Thursday, April 29 and **Legal Update: Recent Developments in Federal Employment Law, Part II (FLRA, FSIP)** on Friday April 30. These two sessions are also part of the FELTG Forum 2021: Emerging Issues in Federal Employment Law and will be presented by FELTG Instructors Ann Boehm and Joseph Schimansky.

Not a One-Way Street: How OIGs and Agencies Can Successfully Work Together on Thursday, June 24. Navigating all of this change requires leadership and coordination. And there is a resource right at your agency that can help with both. Scott Boehm brings his 32 years of leadership experience and nearly 20 years of experience in Offices of Inspectors General to this hourlong webinar. If you work in your agency's OIG, you will learn what you can do to foster this coordination. And if you're an attorney, HR professional, EEO specialist or supervisor, you'll learn how the tap your OIG's knowledge and resources.

Visit the FELTG website for information on these and other training events. And if you'd like to bring these trainings to your agency virtually, contact me. Unlike my Mike Schmidt rookie card, FELTG training will retain its value. Gephart@FELTG.com

Training for Supervisors

With the Biden Executive Orders, updated OPM guidance, and continuing pandemic-related challenges, there has never been a more important time to ensure that your supervisors are well-trained. FELTG's annual supervisory webinar series is completely updated for 2021, including guidance on managing virtual employees. The training meets OPM's mandatory training requirement for new supervisors.

Register for one, two, or all of the remaining 60-minute webinars.

Next up:

March 23: Disciplining Employees for Misconduct, Part I

April 6: Disciplining Employees for Misconduct, Part II

April 20: Writing Effective Performance Plans

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