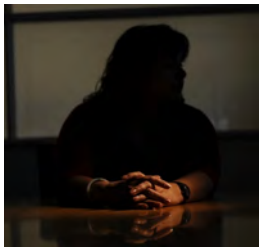
Federal Employment Law Training Group
Teaching the Law of the Federal Workplace

FELTG Newsletter | Vol. XIII, Issue 7 | July 21, 2021

Interviewing a Difficult Witness? It Begins With Understanding



A few weeks ago, during a training class with agency investigators, an interesting discussion arose about the best way to interview a witness whose behavioral health condition or experiences with trauma make them difficult to talk to. How can an investigator get the answers needed, not trigger an episode, de-escalate emotions, and show empathy, all while maintaining neutrality?

That's not something a lawyer can easily answer. Luckily, FELTG has an instructor who specializes in this area. Shana Palmieri, LCSW, will present information on interviewing difficult witnesses during Workplace Investigations Week (August 2-6) and on October 21 in the 60-minute webinar Workplace Investigations: Successfully Interviewing Witnesses With Mental and Behavioral Health Conditions. Anyone who conducts IG, misconduct or EEO investigations, or meets with employees for any reason, will benefit from this practical advice.

This month's newsletter includes a to-do list for the new MSPB members, why progressive discipline for probationers is probably a bad idea, lessons on leadership, and much more.

Take care,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

The Post-Pandemic Federal Workplace: Managing Accountability and EEO Challenges
July 26-30

Workplace Investigations Week
August 2-6

Absence, Leave Abuse & Medical Issues Week
August 9-13

FELTG Town Hall: Creating and Promoting a Federal Workplace That Looks More Like America
August 17

Writing Final Agency Decisions
August 23-24

Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace
September 1

EEOC Law Week
September 20-24

Federal Workplace 2021: Accountability, Challenges, and Trends
September 27-October 1

For the full list of virtual training events, visit the **FELTG Virtual Training Institute**.

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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The To-Do List for the New MSPB Board Members
By William Wiley

By now you probably have heard that the White House finally has nominated two individuals to be Board members over at the US Merit Systems Protection Board. After more than four years of the civil service having no oversight agency to protect the fundamental rights of federal employees, Cathy Harris and Raymond Limon are now grinding their way through the Senate confirmation process, hopefully to be confirmed sooner than later. Based on my many years working at MSPB, with 12 of the 20 Board members we have had in history, I think I can speculate with some degree of accuracy what awaits them once they get there:

- When I joined the newly confirmed MSPB chairman's staff in 1993, there were 62 holdover cases awaiting his vote. That felt like a HUGE number of cases to dig through, given that a Board member needs to vote on about five appeals a day just to stay even (i.e., a member who is voting out five cases a day is doing a full day's work in service to our great country). Our next Board members will be facing a holdover backlog of almost *3500 appeals*!
- The Board will have to decide how it will attack this overwhelming backlog. The obvious options would be to address cases first-in/first-out (oldest first), work the removal cases first because they are the most serious matters within MSPB's jurisdiction, or perhaps try to pinpoint pending cases that have the most significant controversial issues that need to be cleaned up ASAP so their principles can be applied to other cases. Or, quite frankly, any other way the Board decides to plow forward: alphabetical, random, or eeny, meeny, miny, moe. There is no legal standard nor precedence for the new members to look to when deciding how to move forward.
- I say "the Board" because historically big decisions like this would be made through consensus of the sitting Presidentially appointed Board members. However, as a strictly legal matter, the new chair has the sole authority to make decisions like this. During the early days of the new MSPB, the hierarchy of decision-making and comity among the members will have to shake itself out. Although Board members have worked together (with occasional exception) with a respectable degree of deference and cooperation in the past, nothing guarantees that such mutual respect will carry forward into the future. By law, all three members cannot be from the same political party. As I understand it, the current two nominees are Democrats. A third member would no doubt be a Republican, and we've all seen what can happen when that happy mix occurs.

Speaking of a Republican appointee, I must admit that I'm unsure what's happening there. Historically when confronted with multiple vacancies requiring a mix of Democratic and Republican nominees, a White House would seek suggestions from the Senate leadership of the other party for the out-party seats. Then, a package would be put together that incorporated who the White House wanted and who the leadership of the other party wanted into a nice uncontroversial package that would receive a prompt Senate confirmation vote. Has this White House decided not to package? Or is it going to accept an individual already nominated by the past Republican administration for the third vacancy at

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MSPB? Readers better connected than am I may have picked up on what's going on, but I haven't seen it from where I sit.

Aside from these incredibly important matters of Board protocol, each member will be considering several personal matters that are part of being a Board member:

- **Staff:** MSPB employs a fine headquarters staff of career employment law attorneys. No doubt, some of those career attorneys will be detailed to each new Board member immediately once they take the oath and start considering cases. Beyond that initial period, each member will be allowed to select political appointees to serve as legal counsels, sort of like a federal judge would appoint law clerks. In many agencies, these second-level political appointees would be controlled by the Executive Office of the President or the Office of Personnel Management. A White House often has a long list of political supporters who would just love to have a good government job. However, by law the chair of the Board can make these political appointments without having to get approval from anyone else, 5 USC 1204(j). For those of you readers out there interested in a little career change, we can expect to see the new Board members quickly putting out recruiting feelers.
- **Issues:** Some newly appointed Board members, especially those with extensive federal law experience, walk in the door with issues they want to address in a new decision with their name on it. Others may have to vote on several cases before they develop a feel of issues that really matter to them. One Board member I worked with had an alcoholic in the family, so he closely reviewed any case involving an alcoholic to make sure that the appellant's rights were protected. Another member I worked with had represented unions in the private sector and strongly believed in the importance of independent decision-making by arbitrators. Another had grown up in a military family where adherence to rules and order was important. Just like Justices on the Supreme Court, each member will develop a particular interest in some aspect of federal employment law and devote significant time to making sure that issue gets well-analyzed in any final opinions that are issued.
- **The next appointment:** As is true for just about any Presidential appointment in the executive branch, these jobs come with an expiration date. Although the law provides that a Board member's term is for seven years, that seven-year period starts on March 1 of a particular year, *regardless of when the individual is confirmed to serve in that position*. To my knowledge, no one has ever served a full seven years as a Board member. One of the Board member positions to which this White House will be nominating an appointee expires in just about 18 months. So, unless an appointee is at the end of a career, he or she needs to be thinking down the road and working toward the next job. Very few individuals have used an appointment as an MSPB Board member as the steppingstone to an even higher-level government position.

And finally, there will be lots of odds and ends to decide:

- Will the members consider and vote cases remotely, so they never have to come into the office?
- Should the members personally discuss the arguments in the appeals before they are voted on?

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- Can the members engage in public outreach by speaking at conferences and seminars, or is their time better spent cloistered in some warehouse reviewing appeal files and reading case law while subsisting on energy drinks, caffeine tablets and meat-lovers pizza?

These new members will have an unprecedented herculean task before them. Although I was honored to serve on the three occasions I was tapped as counsel to a member, I am happy that I have now taken a downgrade into civilian life. I am hopeful that the new members and their staffs enjoy themselves in their service as much as I did. I appreciate the good that they are doing for our country by helping to keep the federal government based on deserved merit and not strictly political philosophy. May the force be with them.

Also, it would be a good idea for them to put a cot and pillow in the corner of their offices. Wiley@FELTG.com

MARK YOUR CALENDARS …

Calling all attorneys. And EEO, HR, and Labor Relations specialists. Starting next month, FELTG's popular weeklong training classes return as full-day virtual offerings. These virtual events run from 9 am ET – 4 pm ET each day and offer in-depth training and updated guidance, from FELTG's faculty of practitioners and topic authors.

Absence, Leave Abuse & Medical Issues Week
(August 9-13)

MSPB Law Week
(September 13-17)

EEOC Law Week
(September 20-24)

FLRA Law Week
(October 18-22)

Should Your Agency use Progressive Discipline or Performance Demonstration Periods with Probationers?
By Deborah Hopkins

The question in this article's title has come up a few times over the last several weeks, particularly during our flagship UnCivil Servant training classes.

We'll give you the short answer, and then the longer answer.

Short answer: No.

Explanation: According to OPM, "The law and regulations specifically exclude probationary/trial employees from the procedures that require the use of an opportunity to improve. This exclusion is because the entire probationary period is similar to an opportunity period. These employees should receive closer supervision, instruction, and training as needed during the first year of their employment." The same principle is true when it comes to discipline. The agency doesn't have to justify its penalty in removing a probationer, so even minor misconduct that wouldn't justify removal of a career employee can warrant a probationer's removal.

As soon as there's a performance or conduct issue, the law allows to the agency to remove the probationer, even if the offense is minor.

Here is why removing a probationer without a Demonstration Period or progressive discipline makes sense:

- The proof necessary to remove a probationer is very low.
- The action can be taken and effected in one day.
- If the probationer is ALREADY having performance or conduct issues, just imagine how they might

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behave once their due process rights attach.
- It expedites the process to get the position posted again.

Now, read the headline again and then check out the next piece of discussion.

Longer answer: Maybe, probably not, but if you do then you'd better realize WHY you're doing it.

Explanation: If a probationary employee is already having performance or conduct issues, the supervisor needs to think very hard about whether the additional time and effort spent to coach, train, work closely with, mentor, and help the probationer along is worthwhile. Because once that probationer hits their one-year mark (in most jobs, anyway), they become a fully vested career employee where civil service protections attach. It's still possible for the agency to take an action against a career employee, as FELTG readers well know, but the simplicity of a probationer's removal cannot be overstated.

The below situations might be reasons why a supervisor decides to keep a probationer around:

- The position is difficult to recruit for or the job is located in a remote place.
- The benefit to the government of working with the employee outweighs the drawback to the supervisor.
- The employee has a unique skillset that it is worth the extra oversight to keep that person employed by the agency.
- The employee's attitude shows willingness to learn and improve.
- The misconduct cannot be forgiven, but the supervisor doesn't think it requires the probationer's removal.

Surely, there are multiple other reasons why supervisors might keep probationers around.

And let me be clear: I am not advocating pro- or con- removal, one way or the other. I just think it is important to point out that probationers have very few rights to their jobs while in the probationary period. If an agency is having a problem with a probationer, that supervisor should think very hard about making life easier and handling the problem now. However, if the supervisor thinks there's hope for the employee, I can absolutely understand and support that position as well. Regardless of your stance on this issue, best of luck with all your probationary employees.
Hopkins@FELTG.com

The Post-Pandemic Federal Workplace: Managing Accountability and EEO Challenges

This special weeklong FELTG event starts **NEXT WEEK** (July 26-30). Several experienced and engaging FELTG instructors will provide you with *timely* and useful guidance to meet the specific challenges you'll be facing in the upcoming months as they relate to key facets of federal employment.

The half-day programs cover:

- Holding employees accountable for conduct and performance
- Managing leave abuse
- Handling EEO challenges related to COVID-19
- Addressing complaints of discrimination based on race, color, or national origin

And on the fifth and final day, attendees will learn how to apply what they've learned in the previous four days to handle these challenges in a remote work environment. These sessions are LIVE. Programs run from 12:30 – 4 pm ET each day. Register now for as one, a few, or all the days.

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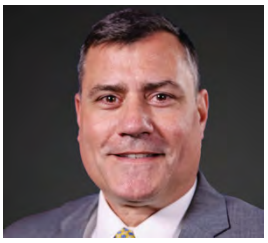
The Good News: You Can Be an Effective Leader! (Part 2)
By Scott Boehm (with Ann Boehm)



I hope you have spent the past month reflecting on leadership. This month, we want you to focus on four leadership tenets (integrity, accountability, empathy, and humility). And we are going to have you test your own leadership instincts by giving you some scenarios to ponder. These scenarios are based upon real life situations we have seen occur as Federal managers.

1. During recurring staff meetings, do you do most of the talking or are you more interested in hearing from your employees? Further, do you include your employees in annual/strategic planning sessions?

Humility and Accountability. It's not about you. Employee engagement increases significantly when employees are included in work decisions and own the policies and procedures.

2. Do you continually try to improve your organization's procedures /internal controls and include your employees' suggestions in the process, or do you block attempts to do so?

Accountability and Empathy. As a leader, you are accountable for the efficiency, morale, and work environment of your subordinates. Through your empathy, make their work as stress-free as possible.

3. If your boss and your employee violated the same serious ethics rule, would you treat both the same?

Integrity. This is a really tough one, but you must stay objective and do the right thing for the right reason. It's difficult to tell The Emperor they have no clothes. But if you don't, they probably will never hear it.

4. When you hire employees, do you look for those who are smarter, or more accomplished, than yourself, or do you hire those who don't threaten your own promotion potential? Also, do you look for complementary skills to further your organization's mission and Human Capital Plan, or do you choose only skill sets you are comfortable with?

Integrity and accountability. You are responsible for making your organization the best it can be. You cannot succeed if you only hire mediocre employees.

5. Do you look for novel (non-monetary) ways to reward YOUR employees and compose meritorious award recommendations for those who significantly exceed expectations? Do you regularly provide team-building opportunities for employees including luncheons?

Humility and Empathy. Everyone deserves a pat on the back when they exceed expectations. And everyone appreciates it!

6. Do you micromanage? Do you give your employees a mission or project and then tell them how to do it? Do you ask for continual updates and critique nearly every step of the process? Do you edit work just to say you reviewed it?

Wow, this encompasses all four leadership qualities. General George S. Patton said, "Never tell people how to do things. Tell them what to do and they will surprise you with their ingenuity." In our humble opinions, nothing stifles initiative like outstanding micromanagement.

7. Do you task new employees to observe your business processes/policies/handbooks or

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other internal controls to suggest potential improvements or do ask them to merely follow those processes?

Accountability and Empathy (see #2 above). You are accountable for the efficiency, morale, and work environment of your subordinates. Make their work as stress-free as possible. Welcome a fresh set of eyes to improve your organization and get "buy-in" from your employees.

8. When an official from outside your organization comes to you with an issue regarding one of your employees, do you just take their word for it and blame the employee or do you say, "Thank you. I will research your issue, speak with my employee and let you know?"

Empathy and Integrity. Employees need to know that you have their backs even when they make mistakes. You would want your boss to do the same and allow you to explain the situation before making any decisions.

9. When you identify an employee performance problem, do you enforce the standards by counseling them and, if their performance doesn't improve, take a performance-based action, or do you ignore it and redistribute the work among other employees so your organization still accomplishes its mission?

Integrity, Accountability and Empathy. Other than micromanaging, letting substandard employees get away with not pulling their weight is the second-best way to kill morale in an organization.

We hope these got you thinking and assessing your own leadership skills. Great leaders have fewer employment issues. Improving your leadership skills will lead to a better workplace for all. And that's good news! Boehm@FELTG.com

Don't Just Flag Hostile Symbols; Do Something to Stop Them
By Dan Gephart

Residents from our cozy colonial-era town of Haddonfield, NJ, returned in droves to this year's July 4 parade. (Last year's parade was canceled due to COVID.) The streets were packed with enthusiastic and smiling (no masks!) residents, who watched as the Shriners drove circles in their tiny cars, a group of Mummers strutted, and the town's oldest resident (102 years young) waved from a convertible.

The Stars and Stripes was ubiquitous. Parade-watchers held high the tiny flags handed out by the local Boy Scout troop, while larger American flags fluttered from every light pole in town.

As we walked home after the parade, I noticed our town was full of flags, and not all of them Old Glory. Flag makers reported an increase in sales during the pandemic, and we were seeing the results of it. I'm guessing it had something to do with people spending more time stuck at home.

The Rainbow Pride flag was the one we saw most. We saw a couple of Thin Blue Line flags. A Black Lives Matter flag hung from a porch. Another bright flag summoned us to celebrate summer, while another shouted "Freedom!" The one that made us laugh was giant black flag with white lower-cased letters spelling "freak."

And on the corner a couple of blocks off the main street was a house flying the Gadsden flag. That's the one depicting a rattlesnake with the words "Don't Tread on Me" over a yellow background. If you're in the Federal EEO community, you may know the Gadsden flag from the EEOC's decision in *Complainant v. US Postal Service*, EEOC Appeal No. 0120141334 (June 20, 2014). Or,

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you probably know it from the clarification the EEOC sent out after its ruling:

> The EEOC noted that while the Gadsden Flag originated in a non-racial context, it has since been "interpreted to convey racially-tinged messages in some contexts." The EEOC cited its use by persons associated with white-supremacist groups who used the flag to drape the bodies of two police officers they had just murdered, and its display at a Connecticut fire house that was met with protests by African-American firefighters, ultimately resulting in the flag's removal. The EEOC underscored the fact that it did not find that the Gadsden Flag in fact is a racist symbol. Instead, the EEOC found only that the complaint met the legal standard to state a claim under Title VII, and therefore should have been investigated by the USPS rather than dismissed.

With the rise of white supremacist and anti-Semitic groups, flags have taken on meanings that may not be that obvious. The Gadsden flag isn't the only one that's been appropriated by hate groups.

To the left is a flag based on a Benjamin Franklin cartoon published in 1754, urging the eight colonies (all New England is represented as one) to unite.

A few years ago, the Philadelphia 76ers embraced the Franklin cartoon for their NBA playoff logo, a flag of which can also be seen flying from a house on my block these days. [Sidenote to that neighbor: Are you lazy or what? That Game 7 loss to the Atlanta Hawks was nearly a month ago. Why must you keep reminding me of that disappointment?]

Meanwhile, white supremacist groups have seized on the cut snake logo, as seen by the poster that promoted the deadly "Unite the Right" rally in Charlottesville. Instead of uniting colonies, the poster proposes uniting hate groups.

During the video replays of the Insurrection at the Capitol, I saw numerous flags and symbols that I did not recognize, but later read were used routinely by white supremacist groups. Undoubtedly, those flags and symbols would create a hostile work environment if displayed in an office.

You don't have to be a vexillologist (flag expert) to ensure a discrimination-free environment, but you do need to know the elements of a hostile workplace, which are:

1) The conduct is unwelcome. That conduct could be words, jokes, touching or objects and pictures displayed.
2) The conduct is based on a protected EEO category: race, color, national origin, religion, gender, disability, age, genetic information, or reprisal.
3) The conduct is severe and/or pervasive.

If a flag heralded by a white supremacist group is displayed in your workplace, I'm pretty sure it's going to check off all the boxes. (For a thoughtful legal analysis of a more challenging potentially hostile environment case, read FELTG President Deborah Hopkins' Does Saying 'All Lives Matter' Create a Hostile Work Environment?)

The next step is up to you: It's your responsibility to protect employees from harassing conduct. Take action. Immediately. An example of what *not* to do can be found in *Complainant v. United States Postal Service (Southeast Area)*, EEOC Appeal No. 0120132144 (Nov. 1, 2013). In that case, the EEOC reversed the agency's

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final order and remanded the matter to the agency because it found that complainant had established that he was subjected to unlawful harassment based on race and the agency was liable for harassment.

In this case, the offending objects were t-shirts emblazoned with the Confederate flag worn by two white clerks. Initially, the AJ, while finding discrimination, did not find agency liability. The Commission saw it differently.

The shirts were worn about a dozen times over several months starting in August 2010. The agency took no action against the shirt-wearers until prompted to do so by a union grievance in May 2011, when one of the clerks was sent home to change. In fact, at one point in April 2011, the clerk was told there was "nothing wrong" with his shirt.

The agency's supposed corrective step was a stand-up talk about work attire. During that talk, however, employees were never instructed not to wear or displays images of the Confederate flag.

When symbols of hate take hold in the federal workplace, there's no room for mixed messages. Gephart@FELTG.com

Dealing With Employee Mental Health Challenges During and After the COVID-19 Pandemic

On April 30, OPM released a memo on the importance of the mental health and well-being of Federal employees.

What are you doing to prepare yourself and your agency for the influx of challenges you'll face when employees return to the office, particularly those with a mental health diagnosis? If one of your employees had a mental health crisis at work, would you know what to do?

Join Shana Palmieri, LCSW for this timely and important training on July 21. For more information or to register, visit here.

Mamma Mia, Here We Go Again: Commission Reminds Agencies About Joint Employment
By Meghan Droste

Repetition can be a good thing. That's why practice makes perfect, and you measure twice before cutting once. We repeat things to make sure we get them right. But repetition isn't always a good thing. Sometimes, it means that we're not learning from our mistakes. And in a recent decision, it seems like the Commission may be tired of repeating itself on the issue of agencies improperly dismissing complaints from contractors.

In *Alfredo S. v. Department of the Army*, EEOC App. No. 2021001400 (June 7, 2021), the complainant was a Lockheed Martin employee working on a military base. He filed an EEO complaint alleging a hostile work environment and a discriminatory termination of his employment. The agency dismissed the complaint without an investigation in a decision that did not describe "any relevant facts, case law, or analysis ..." The agency merely stated that the complaint failed to state a claim because the complainant was not an employee or applicant for employment.

After reciting the standard description of joint employment and the various factors it weighs in determining whether an agency is a joint employer, while also noting that the agency "has not even touched on any supportive evidence in its decision," the Commission took issue with having to repeat itself in these types of improper dismissals. It notes that "[t]his is not the first time a dismissal for lack of standing, by *this* Agency, has been found to be deficient." (emphasis in original). The Commission addressed the agency's analysis of the joint employment factors, presented for the first time in its response to the complainant's appeal. The Commission rejects the analysis, finding it insufficient and

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not supported by the evidence presented in the appeal. In part, the agency's argument failed because it did not conduct an investigation and, therefore, did not have relevant documents to support its arguments, including a copy of the contract with Lockheed Martin and documents relating to an earlier complaint raised by the complainant.

Although, in this decision, the Commission is taking issue with this specific agency, it could write the same thing in reference to many other agencies. Unfortunately, this remains a recurring mistake across the federal government, with agencies seemingly automatically dismissing complaints from contractors without any analysis, or with an analysis that places too much emphasis on the language of a contract and fails to acknowledge or address the day-to-day reality of a complainant's work situation. There are at least seven other decisions already this year involving the same issues with other agencies.

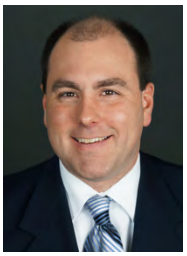
I strongly encourage you not to repeat this mistake as so many others have already. It is not a winning strategy. It only results in delaying the inevitable — a complete investigation of the complainant's allegations along with evidence regarding joint employment. Droste@FELTG.com

[**Editor's note:** For guidance on handling contractor complaints, join FELTG for Day 3 of EEOC Law Week on September 22 from 9 am – 4 pm. For more information or to register, click here.]

FELTG Reasonable Accommodation Webinar Series Continues

Our five-part webinar series on Reasonable Accommodation in the Federal Workplace continues tomorrow (July 22) with Accommodating Invisible Disabilities. Upcoming webinars will cover telework (July 29); accommodation mistakes (August 5) and religious accommodation (August 12). Click here to register.

Return to the Office and the Telework Tango
By Mike Rhoads



When I was a Rotary foreign exchange student in Argentina, the hardest thing this Yankee with two left feet did was learn the basic step of the tango – an intimate and graceful dance once mastered. The key to dancing the tango well is learning how to communicate to your partner the next step you want to take to avoid stepping on toes – or even worse, tripping over one another altogether. Just like any novice, I had my fair share of trips and sore toes while learning.

The pandemic forced us to learn new moves and ways of working. Now that we've learned how to telework, employees and managers alike are now faced with a new question: How much telework is the right amount?

Return to Work?
This return to work will not be as cut and dry as simply returning to the office and resuming what was once considered "normal." After successfully teleworking for over 16 months, many employees will want to retain some of the flexibility that telework provides.

Federal agencies are in the phased re-entry period, defined by the Biden Administration for the White House as July 6 – July 23. FELTG recently hosted a webinar dedicated to getting your agency's return to work guidance ready, which was due July 19th.

It will be important for you to look at your agency's guidance when considering an employee's request for telework. In the meantime, OMB has offered some guidance and recommendations. When dealing with employees who are currently teleworking, OMB recommends flexibility. M-21-25 states the government is: "Open with maximum telework flexibilities to all current telework eligible employees, pursuant to direction

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from agency heads." When scheduling telework, consider whether in-person work is necessary to "satisfy business operations, team-building, and other needs." During the transition back to the office, your agency may also authorize telework for those with dependent care obligations.

Some employees are ready to return to the camaraderie and in-person interaction with co-workers. To ease the transition, some agencies have offered voluntary return-to-work as offices allow for increased capacity.

The Way Forward

The working relationship between managers and employees is as intertwined as two tango dancers. There may be times you trip over one another but remember: Communication is the key. If that communication is clear, you can avoid stepping on each other's toes when the telework requests start to come in from employees.

While your agency is still trying to master the new telework dance, FELTG has looked at all the complexities of telework, and how your agency can navigate the changes and requests as employees transition back to the office.

Join us July 26-30 for The Post-Pandemic Federal Workplace: Managing Accountability and EEO Challenges. Our event will cover a broad array of telework challenges:

- Holding teleworkers and other remote workers accountable for performance and conduct
- Special telework performance and conduct challenges
- OPM's telework flexibilities; telework as reasonable accommodation
- Agency options when employees refuse to report to the physical workplace

I'll see you at the next milonga, and remember, we're all in this together. Rhoads@feltg.com

Tips From the Other Side: What is Retaliation?

By Meghan Droste

This month, we continue the discussion of retaliation. Last month, the tip was not to do it. While that might seem obvious, it happens regularly and the EEOC has cautioned that may be, in part, due to a lack of training for supervisors on how to manage interactions with employees. This month, we focus on the next question that naturally follows: What is it? In order to stop yourself from doing it, it's important to know what retaliation actually is.

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

The easy answer is that a retaliatory action is anything done in response to protected activity that might have a chilling effect. That means, any action that might discourage the complainant from engaging in protected activity in the future. Sometimes, this can be obvious to identify.

For example, in a recent decision, the Commission found per se retaliation due to a supervisor speaking about the complainant's EEO complaint in an angry voice, and another supervisor telling the complainant that he was offended by her allegations. *See Tomeka T. v. Dep't of the Treasury*, EEOC App. No. 2020000390 (June 15, 2021).

So, the first part of this tip is to avoid discussing an EEO complaint with an employee unless there is a specific need to (for example, asking for more information to clarify a request for official time). If you make comments that specifically reference an employee's complaint, there is a good chance that you are at risk for committing per se retaliation.

One thing that often trips agencies up in the processing of retaliation claims is looking for

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something "bigger" that has happened and dismissing a claim or finding no retaliation if the retaliatory act seems too small. While of course not everything will rise to the level of a chilling effect, it is important to remember that the adverse action does not need to be an "ultimate employment action." It does not have to be something as big as a removal, demotion, or a suspension. The Commission's recent decision in *Ronnie R. v. Department of Defense*, EEOC App. No. 2021001510 (June 14, 2021) is an example of how agencies can make this mistake.

In this case, the complainant alleged the agency retaliated against him when his supervisor denied his request for official time to speak with an EEO counselor and instructed him to go to the security office for an investigation of theft involving four bolts. The agency dismissed the claim for failure to state a claim, finding that "there was not a disciplinary action or harm resulting" from the alleged retaliatory actions.

As the Commission noted in its decision reversing the Agency's dismissal, "when an individual alleges retaliation in a complaint, they do not need to make a showing of adverse employment action." The action need only have a chilling effect, or the potential of one, to state a claim of retaliation. That brings us to the second part of the tip: Be careful not to apply the incorrect standard when looking at whether something was retaliatory. Droste@FELTG.com

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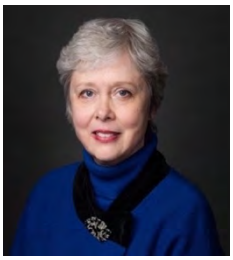
Position Descriptions and Performance Plans – Part 3
By Barbara Haga



Over the past two columns, we reviewed what position descriptions should cover to give you maximum ability to determine qualifications, establish accountability, and to hire well. We also looked at crafting performance standards that effectively build on position requirements. There's another aspect of establishing accountability that often ties in with the position description. That's setting conduct requirements. This brings us back to the issue I started with when I began this series.

The idea expressed by a supervisor was that if something wasn't in the performance plan, she wouldn't be able to hold the employee accountable for it. If that "something" was how well a particular job function was performed – was it done correctly, in accordance with policy, on time, notifying appropriate team members or customers. etc. – she would have been correct. However, what she had in the standards was a requirement for an accountant to take continuing education courses toward a Financial Management Certification.

There seems to be a myth out there in the world of Federal HR that the performance plan is intended to cover everything that happens between 8 and 4:30 (or whatever your schedule is). Nothing could be further from the truth.

The performance plan only captures how well the individual performs on those things covered in the critical elements as measured by the performance standards. All other things inevitably fall into the conduct world if things go wrong. If the individual can't meet medical standards, we would be looking at a conduct action. If the employee loses his membership in the bar, a performance action

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wouldn't make any sense since the employee couldn't perform the duties to begin with. If the employee misuses a travel card, the remedy will come from the conduct world.

Setting Conduct Standards

The amazing thing about setting standards regarding conduct is that most of the time employees will comply. My experience tells me that most people will stay within the lines – if they know where they are. The problem is that sometimes employees aren't told where those lines are.

In many of my classes, I am teaching HR practitioners and managers from large, unionized agencies. In those agencies there are usually detailed handbooks and policies controlling employment matters, and union contract provisions add additional detail to what is contained in the agency documents.

Sometimes, I am at a small agency where they don't have that sort of structure. This issue usually comes up quickly in a leave class. Even though I should be ready for it, I am often surprised. It starts like this:

> Me: When employees don't call in for emergency leave within the allotted time frame, you could disapprove the leave. So, what is the allotted time frame here?
>
> Students: (Blank stares.)
>
> Me: (I think they didn't understand what I meant.) How long does an employee have to call in for unscheduled annual leave or sick leave here?
>
> Students: (Uncomfortable wiggling in chairs begins. But no response.)
>
> Me: (Maybe an example would help them.) In many Federal agencies, there is a set time frame like two hours from the start of the shift or one hour prior to the start of the shift for certain jobs.
>
> Students: (Eyes cutting around the room.)

Finally, some brave soul admits they don't have a policy on this, and they have never told their employees anything. Employees call in when they choose to.

If there are no standards for something like short-notice leave, then I would suspect that employees are not likely to be clear on many other things, such as when Government property can be removed, what happens when employees engage in harassment, and other similar issues.

Not only is that poor management, but it would also make it difficult getting past Douglas Factor number 9, regarding whether the employee knew or should have known that what she was doing was wrong.

Clarifying Expectations

Not everything is something that a supervisor need create. For example, jobs that require licenses and certificates usually are covered by some type of agency guideline that explains what types of certificates are required for what grades. For example, DoD sets very specific requirements for firefighters and paramedics.

The same thing applies for IT professionals and contracting positions. The policies may also explain what happens when someone fails to get a certificate or license on the first try. Even with these policies in place, it would behoove the supervisor to make clear what happens if there is a failure. There may be a grace period and an opportunity to retest. But, if an employee fails the retest, then typically the answer is that the individual can't hold the position. For some jobs where the license is required to be qualified to enter and hold the position, such as a driver's license or a medical clearance, there likely

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isn't a grace period to try to retest. The employee can't be allowed to perform the duties without the license.

I wrote a series of articles for the FELTG Newsletter in early 2019 on conditions of employment cases. One of the cases I wrote about was a firefighter who was also an EMT. He hid the fact that he had let his EMT certification lapse. The fact that he did not inform management would lead one to believe that he understood the consequences of practicing his level of medicine without a license. *Saline v. Army*, DE-0752-14-0567-I-1 (2015)(ID).

What other types of things might managers need to explain? What would happen if an employee needed to take government property out of the facility? What kind of documentation is necessary? What would happen if the proper permissions weren't obtained, and the individual is caught with that government property? Is there an agency guideline on this topic that employees are expected to follow?

When could an employee use their personal vehicle for work purposes and how do they pay for gas? This question comes from an actual case. A GS-14 criminal investigator was removed based on credit card misuse because he used his travel card to buy the gas. Apparently, the agency policy was to apply for mileage reimbursement. There was no allegation that he used the gas for anything other than official business. The proposing and deciding officials testified that they "assumed" that he knew the policy requirement. Needless to say, the Board mitigated the penalty. *Johnson v. Treasury,* 15 MSPR 731 (1983), *aff'd without opinion* (Fed. Cir. Jul. 22, 1983).

It's clear that there are many things with conduct consequences that would warrant explanation by the supervisor, but none of them need to be in the performance plan for the employee to be held accountable. Haga@FELTG.com

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