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

FELTG Newsletter | Vol. XIII, Issue 8 | August 18, 2021

The Answer is Still 'No'

Every couple of weeks, we receive a call or email from someone asking, in some version, whether it's truly illegal for a Federal employee to use marijuana. We always tell them we can't dispense (haha, get it?) legal advice over the phone, but it doesn't stop them from asking. Some memorable questions include whether getting high in Canada would preclude a Federal employee from being disciplined in the U.S., if being very tall and therefore more susceptible to getting high from secondhand smoke is a valid defense to failing a drug test, and whether it is against the law for a Fed's spouse to grow marijuana in the home and sell it for profit.

We'll tackle this topic in detail in a session called **High Times and Misdemeanors: Weed and the Workplace** during our second annual Federal Workplace: Accountability, Challenges and Trends virtual showcase the last week of September. Plus, we'll look at timely challenges such as COVID-19 EEO issues, medical requirements, re-boarding employees, and more. This month's newsletter features stories on an important Fed Circuit decision, vaccination requirements, and much more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

Writing Final Agency Decisions
August 23-24

Advanced Employee Relations
August 24-26

The Performance Equation: Providing Feedback That Makes a Difference
August 31

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

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
September 8-9

MSPB Law Week
September 13-17

EEOC Law Week
September 20-24

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

Conducting Effective Harassment Investigations
October 5-7

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.

Undoing the Last Four Years: Federal Circuit Clarifies the Burden of Proof in VA Discipline
By Deborah Hopkins

Over the last four years, the VA has enjoyed a lower burden of proof in taking disciplinary actions against employees covered by the *VA Accountability and Whistleblower Protection Act*, 38 USC 714. Indeed, Congress passed this law in 2017 to make it easier to fire bad employees at the VA.

Between then and today, we have learned that the law is not retroactive for actions that occurred prior to its enactment (*Sayers v. VA*, 954 F.3d 1370 (Mar. 31, 2020); *Brenner v. VA*, No. 2019-2032 (Mar. 9, 2021)) and that, while MSPB has no penalty mitigation authority in actions taken under this law, agencies must show by substantial evidence that their selected penalty is reasonable. *Mogil v. VA*, No. 2018-1673 (Fed. Cir. May 1, 2019). Ok, fine. We can live with that.

Now, get ready.

On August 12, the Federal Circuit hit us with a big one. In this case, a Supervisory Consumer Affairs Specialist named Ariel Rodriguez yelled and used profanity at a patient in a VA facility. The confrontation escalated and the police were called. The police had to escort Rodriguez to his office because he was so agitated. After that, Rodriguez returned to the reception area, where he again confronted the patient. During the investigation that followed, Rodriguez was dishonest in his account of the events that occurred. He also attempted to influence one of his employees to alter her testimony to the investigator.

Rodriguez was removed on three charges: (1) disruptive behavior toward a veteran patient; (2) conduct unbecoming a Federal supervisor, and (3) lack of candor. The facts justified an easy removal for the VA – or so we all thought. Plenty of witnesses, police activity, a patient's wellbeing in danger, clear nexus – no question there was substantial evidence of misconduct and substantial evidence to support removal.

But wait.

The Federal Circuit saw things differently. There are two huge new takeaways that every management official at the VA must be aware of, courtesy of this case, *Rodriguez v. VA*, No. 2019-2025 (Fed. Cir. Aug. 12, 2021).

1. The standard of proof for a VA to take a disciplinary action is a PREPONDERANCE of the evidence; the substantial standard in the statute only refers to MSPB's review of the action.
2. The VA must complete a Douglas factors analysis for its disciplinary actions, even though the MSPB lacks authority to mitigate the agency's penalty.

Let's look at each in turn.

1. Burden of Proof

For the past four years, just about everyone in this business has been under the impression that the language in 38 USC 714(d)(2)-(3) "if the decision is supported by substantial evidence" meant that the agency action also required the substantial evidence standard. It's even in the VA's Discipline policy. But the Federal Circuit said otherwise:

> The references to "substantial evidence" in section 714 are all explicitly directed to the standard of review to be applied by administrative judges and the Board. Those references do not address the standard of proof to be applied by the DVA in making disciplinary determinations, nor does the remaining text of section 714 explicitly address the standard of proof in

> proceedings before the DVA…[T]he language of section 714 **implies that the proper standard is the preponderance of the evidence.** Section 714 provides that an employee may be removed, demoted, or suspended "if the Secretary determines the performance or misconduct of the covered individual warrants" such action. In the case of a disciplinary action based on misconduct, the requirement that the Secretary "determine" that the misconduct in question warrants disciplinary action implies that **the Secretary must find that it is likely, i.e., more likely than not**, that the employee has engaged in the misconduct that justifies the proposed discipline. [bold added]

The court's explanation included discussion that if substantial evidence was the standard used, a Deciding Official would be required to find against the employee with regard to the charged misconduct even if the Deciding Official did not personally agree with that conclusion, because when substantial evidence is applied, a reasonable person might disagree and yet the standard is still met. The court said in no uncertain terms that the *VA Accountability and Whistleblower Protection Act* does not contain "any language stating explicitly, or even implicitly, that the burden of proof in disciplinary actions should be substantial evidence."

Because the agency applied the substantial evidence standard in this case, what we now know is an incorrect standard, it was remanded back to the MSPB.

2. Douglas Factors

Because the *VA Accountability and Whistleblower Protection Act* explicitly states that the MSPB does not have the authority to mitigate the agency's penalty (38 USC 714(d)(2)(B)), in the first year or two after the law's enactment the VA was (and the rest of us were) under the impression that Douglas factors were not required. In other words, if a penalty could not be mitigated, then there was no need to justify the penalty – and penalty defense is the primary reason why agencies use the Douglas factors.

Starting in 2019, the Federal Circuit determined that there must be substantial evidence the agency's penalty is reasonable, otherwise the MSPB could remand a case back to an agency to determine a more appropriate penalty. *Mogil, above.*

The court in *Rodriguez* takes things further and says, "this court has made clear that the absence of mitigation authority does not deprive the Board of the authority to review penalties for substantial evidence" and that mitigation authority is completely divorced from "the power to review and strike down the DVA's imposition of penalties that are arbitrary, capricious, an abuse of discretion, or not in accordance with law." To that end:

> For a reviewing tribunal to find a decision not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, that decision must have been based "on a consideration of the relevant factors and whether there has been a clear error of judgment…" [citation omitted] Accordingly, because the Board must review the DVA's penalty selection in a section 714 case, that review must ensure that the DVA considered the relevant factors bearing on the penalty determination.

The court emphasized this point by declaring the Deciding Official must "weigh the relevant factors bearing on the appropriateness of the penalty, including the relevant *Douglas* factors" in cases of misconduct. So, there it is.

There is a whole lot more to discuss from this decision, but we'll tackle those issues another time. As for now, we are anticipating multiple years' worth of cases will be remanded to determine whether the VA had

a preponderance of the evidence, and not merely substantial evidence, in taking appealable disciplinary actions. The good news for the VA is, preponderance is not too difficult to show, and I would bet they can meet this burden in nearly every case. The bad news is there's a whole lot more work ahead. Please let us know how we can help – and attend UnCivil Servant September 8-9 or MSPB Law Week September 13-17 for all the details on what happens now. Hopkins@FELTG.com

Federal Workplace 2021: Accountability, Challenges, and Trends (September 27 – October 1)

This weeklong event will prepare you for the Federal employment challenges that will be new, complicated, and critical to your agency's success in the upcoming FY.

Some "conferences" going virtual force you to register for the whole event and offer pre-recorded sessions. FELTG's Federal Workplace 2021 is not a conference. It's a training event that allows you to register for only the sessions you prefer to attend – and every FELTG session will be LIVE, which means you get to ask questions and engage in live interactive elements.

Topics covered during these 75-minute sessions include:

- Off-duty misconduct
- Medical certification requirements
- Re-boarding employees
- Resolving conflicts before they become complaints
- The changing nature of discrimination complaints
- Weed and the workplace
- A day of labor relations training

And kick it all off with the half-day EEO Challenges, COVID-19, and a Return to Workplace Normalcy pre-session. Click here to get descriptions/learning objectives for every single session. Register now.

If Feds Want to Force You to Discipline Them for Disobeying Mask, Testing, and Vaccine Rules, You May Do So
By Ann Boehm

I'm pretty sure that you, my FELTG friends, are aware that the Biden administration issued some strong guidelines on vaccines, masks, and COVID-19 testing over the past few weeks. And along with this guidance has come direction from the administration that an employee's failure to comply with the guidelines could result in disciplinary action or even criminal prosecution (for providing false information on the Certification of Vaccination form).

For those who manage people or for those responsible for advising those managers, this may seem like an enforcement nightmare. My job in this article is to give you an incentive to take action against the noncompliant, and to provide you the tools to reassure you that such actions are legally defensible.

So first, the incentive.

A few weeks ago, the VA issued a vaccine mandate for Title 38 VA employees. Soon after, articles about the mandate appeared with quotes from employees determined to resist the direction. Some employees plan to quit or retire. But one comment really got me (and here's the incentive). One quoted employee said she was encouraging her colleagues *not* to retire or quit, and instead "force the department to fire them to maximize legal recourse." *Many VA Employees Apprehensive About Vaccine Mandate as Department Begins* by Eric Katz, *Government Executive* (July 30, 2021).

If the employees want to force you to fire them, I think you should accept the challenge.

Now, the legal justification.

On July 29, the administration issued the guidelines that are binding on all Federal employees. Employees have two options. Certify that you are vaccinated (and possibly wear a mask in areas of substantial or high transmission areas) or wear a mask at all times, get tested, and physically distance. Employees do have options, at least. But they also have rules to follow. Break a rule, and you may be disciplined.

There's precedent for enforcing these kind of rules. There's even precedent for firing employees who do not comply with a vaccine requirement.

Let me give you a little history lesson. Way back in the 1990s, long before we could have imagined this past year's pandemic experience, anthrax existed as a potential biological weapon. Anthrax can be deadly, but there is a vaccine for it.

In the early 1990s, the Department of Defense started vaccinating service members against biological warfare threats for which vaccines were available. By 1998, the anthrax vaccine immunization program included service members and civilian personnel who could be at high risk for biological weapons exposure.

Two civilian Navy employees being deployed on a ship bound for Korea were ordered to get the anthrax vaccine. They refused. The Navy removed them. They appealed their removals to the Merit Systems Protection Board. The MSPB Administrative Judge upheld their removals. They then appealed to the U.S. Court of Appeals for the Federal Circuit.

The Federal Circuit also upheld their removals. *Mazares v. Dep't of the* Navy, 302 F.3d 1382 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 960 (2003). The court expressly recognized the Navy's authority to protect the health of civilian and military personnel. *Id.* at 1385. The court also determined that removal was a reasonable penalty for the employees' charged misconduct: "'failure to obey a direct order to receive mandatory injections of an anthrax immunization vaccine.'" *Id.* The employees tried to get the Supreme Court to consider their case, but the Court denied the petition for writ of certiorari. 538 U.S. 960 (2003)

Just like anthrax, COVID-19 presents a legitimate danger to the health of the Federal workforce. The guidelines issued by the administration are intended to minimize that danger.

I fully acknowledge that there is a vast divide among people all over the world regarding vaccine and mask mandates. Just a few minutes reading through Facebook, Twitter, neighborhood listservs, and a multitude of media articles, or even conversing with friends and family makes that patently clear. But Federal employees now have been given the instructions. They must comply. Agencies: If employees choose to disobey the guidelines, they are subject to discipline. And *Mazares* strongly suggests that removal may be the appropriate penalty.

Good luck out there! Boehm@FELTG.com

MARK YOUR CALENDARS: FELTG WEEKS ARE BACK!

Calling all attorneys. And EEO, HR, and Labor Relations specialists. Starting next month, FELTG's popular weeklong training classes are back as full-day virtual offerings. These live 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.

MSPB Law Week
(September 13-17)

EEOC Law Week
(September 20-24)

FLRA Law Week
(October 18-22)

Averting Retaliation: Fear is OK, but Don't Act on Anger
By Dan Gephart

I remember very little about second grade, but I can vividly recall sitting in class when my fellow classmate Teresa C. tapped me on the shoulder and very matter-of-factly said, "I know you did it."

"Did what?" I replied. "You murdered my father," she said, "and I'm going to tell the teacher."

Thanks to Catholic guilt, already deeply ingrained in me at seven years old, my first thought was: When did I do this horrible thing? I eventually realized the claim was ludicrous. I mean, my parents still weren't letting me cross the avenue by myself. How the heck could I pull off a murder without leaving my side of Fitler Street? Yet, I was certain the teacher would believe Teresa and the police would storm into Room 202 (yes, that really was my second-grade classroom) at any moment. I was terrified.

Fear is a common reaction when an individual feels they've been unfairly accused, particularly if they have a lot to lose, such as a job or the respect of peers. Perceived injustice creates psychological discomfort – and the person instinctively tries to find a way out of that discomfort.

I never found a way out of my second-grade discomfort. I spent the next couple of days terrified that the police were going show up at school or my house and take me away. But then again, I was just a seven-year-old kid. For an adult supervisor in the Federal workplace, there is a more common, easier path out of the discomfort. And that's anger. Unfortunately, while anger may make help you forget your pain for the moment, if can also lead to retaliation when unchecked, especially if:

- The accusation is very serious.
- The accusation will negatively impact relationships with others at work.
- The accused feels that he/she/they are being judged.
- The accused believes his/her/their job is in jeopardy.

It's no surprise then that retaliation is asserted in almost 45 percent of EEO complaints, or that findings of discrimination based on retaliation comprised between 42 and 53 percent of all findings from 2009 to 2015. And in many of those findings of retaliation, the original claim under which the complaint was filed was dismissed.

It's so counter-intuitive, but if you're named in an EEO complaint -- even if you are certain you are wrongly accused -- you must find a way to deal with your anger. The other thing you can and, quite frankly, should do is be aware of what retaliation looks like so you know exactly what to avoid. For example, never publicly discuss EEO complaints, don't make jokes about EEO, and don't try to isolate the complainant. All of these actions have led to findings of discrimination on the basis of retaliation.

To learn more, join Attorney Meghan Droste on August 24, for the 60-minute webinar EEO Reprisal, Handle It, Don't Fear It. In this the penultimate session in our Supervising Federal Employees webinar series, Meghan will discuss specific cases involving retaliation and provide you with several steps you can take to ensure you avoid retaliation. Reprisal will also be discussed along with intentional discrimination and contractor complaints during Day three of FELTG's EEOC Law Week September 20-24.

After a couple of days, I began forgetting to worry about my imminent arrest. When I eventually told my parents, they laughed. Oh, and before Teresa C. transferred to another school a couple of years later, I became aware that her father was very much alive. Gephart@FELTG.com

What A Long, Strange Trip It Has Been
By Meghan Droste

Litigation, even when it all goes according to plan, can end up being a long and winding road. And when it doesn't go quite as it should … well, a long, strange trip is one way to describe what can happen.

Randolph A. v. Department of Veterans Affairs, EEOC Pet. No. 2020004882 (June 23, 2021) is a journey filled with many twists and turns. The story starts in September 2010 when the complainant filed a formal complaint regarding a non-selection. The agency investigated the complaint and issued an ROI. The complainant requested a hearing and then subsequently appealed the administrative judge's grant of summary judgment in favor of the agency. On appeal, the Commission found in favor of the complainant and awarded several remedies, including placement in a position and back pay, and ordered the agency to conduct a supplemental investigation regarding compensatory damages. The agency filed a request for reconsideration, which the Commission denied.

So far everything seems straightforward. But here's where the journey gets a bit strange: Instead of implementing the Commission's decision, the agency sent a letter in 2016 to the Commission, asking the Commission to vacate its decision based on a November 2010 global settlement agreement with the complainant. The complainant objected to this and filed a petition for enforcement. The Commission found that the agency's arguments regarding the settlement agreement were untimely, and that the agency had waived them, having waited until after the investigation, hearing stage, and appellate process to first raise the existence of the agreement. In November 2017, the Commission ordered the agency to comply with the previous order.

Unsatisfied with this result, the agency wrote to the EEOC acting chair in January 2018 to seek review and reversal of the Commission's decision. A month later, the agency issued a final order awarding damages. The complainant appealed the award, which the Commission modified. In response, the agency filed request for reconsideration and again raised the arguments regarding the settlement agreement.

As the Commission notes, "[d]espite repeatedly addressing the Agency's assertion in prior decisions, the Commission nonetheless provided the Agency with further reasoning and explanation" as to why its very untimely arguments failed. The case then ended up before the Commission yet again because the agency refused to comply with the decision and instead sent its January 2018 letter to the compliance officer.

In its most recent decision, the Commission provided a lengthy discussion of why the agency's arguments failed, drawing comparisons to the Federal Rules of Civil Procedure to highlight how the agency failed to act with due diligence in 1) keeping track of the 2010 settlement agreement, and 2) timely raising arguments regarding it. The Commission yet again ordered the agency to pay compensatory damages to the complainant. It also informed the agency that if it failed to do so, it might refer the matter to the Office of Special Counsel under the memorandum of understanding (MOU) between to the two agencies. Under the MOU, OSC could initiate disciplinary action.

It's unclear where the agency will go from here, but hopefully the potential involvement of OSC will prompt the agency to finally follow the Commission's order and pay the damages it was ordered to pay years ago.

One last thing — the title of this article isn't just about the *Randolph A.* case. It's also because, to borrow from another song and a completely different genre, it's time for me to

say so long, farewell, auf Wiedersehen, and goodbye to the wonderful FELTG community. Starting next month, I will be joining the ranks of many you as a Federal employee. Thank you to all of you who have joined me in the classroom over the past four years. I have learned so much from you and will take many fond memories with me. To paraphrase my source material, what a (not) long (enough), (wonderful) trip it has been – I hope this is more of a see you later rather than a real goodbye. Droste@FELTG.com

Top 10 Tips From the Other Side
By Meghan Droste

The time has come, FELTG readers, for my final Tips from the Other Side. It has been a pleasure providing you with insights on what to do, and what not to do, and how to do the best job possible when handling a variety of EEO-related issues. I hope you have enjoyed the journey and picked up some valuable lessons along the way.

Before I go, here is a top ten list of sorts. These are in no particular order and the list is not meant to be exhaustive, but I hope you can use this collection of final tips as a roadmap to avoid common pitfalls.

10. Understand timeliness issues: The EEOC is pretty clear on how long complainants have to contact an EEO counselor, file a formal complaint, request a hearing, etc. While these issues can be confusing for complainants who are unfamiliar with the process, they shouldn't be for agencies. Remember that harassment complaints include a series of events, so employees have 45 days from any of the events — not necessarily the first one — to contact a counselor. Failure to accommodate claims can also be timely after more than 45 days. Each time an employee needs an accommodation and the agency doesn't provide it can be a new violation, it restarts the 45-day clock.

9. Reasonable accommodations must be effective: Speaking of accommodations, remember that agencies are required to provide effective accommodations to qualified individuals. That means that an agency's obligations don't end just with providing the accommodation. You need to follow up and make sure that it's actually effective before you can consider your work done.

8. Don't cut corners or jump to conclusions: Far too often, agencies seem eager to dismiss complaints before they should. Don't dismiss a complaint just because the complainant worked for a contractor; you need to gather enough information to actually do a joint employer analysis and determine whether the agency was an employer. Also, don't look to the merits of a complaint in order to dismiss it; all you should be doing is determining whether or not the facts could state a claim for relief. Even if you don't think the complainant will prevail, you still have to accept the complaint if it's possible they could. You might be trying to save time or agency resources by getting rid of complaints early, but you will likely create more work for the agency in defending the dismissal and then still have to investigate the complaint in the end.

7. Know what to do with medical information: Agencies may only request medical information from employees in very specific circumstances (when it's job related and consistent with business necessity). Be sure you don't ask for it when you're not entitled to it, and if you do collect, make sure you know what to do with it. Don't share it with anyone who doesn't need to know it, and don't commingle medical documentation with other, non-medical, information.

6. Retain your documents: More on documents. Make sure you don't destroy things before you're allowed to. The Commission's regulations require agencies to retain documents regarding personnel actions, such as selection and removal decisions, for one year following the action. This retention requirement is extended if there is litigation. If someone involved files an

EEO complaint, you will need to keep all of the documents until the end of the litigation. If you destroy them before you should, the agency could face sanctions or find itself in a situation where it cannot adequately explain its actions.

5. Make sure your investigators create an appropriate record: Agencies are responsible for the quality of the ROIs their investigators produce, even if those investigators are contractors. Be sure to review the ROIs before finalizing them—did the investigator interview all of the relevant witnesses and collect all of the relevant documents? If not, send it back for the investigator to do so. If you don't, you might find your agency on the end of an unfavorable decision by the Commission.

4. Meet your deadlines: Another way to end up on the wrong side of the Commission is to miss your deadlines. Agencies have 180 days to complete their investigations and issue ROIs. This is not a suggestion. You also need to be mindful of appeal deadlines, as missing those could result in the Commission rejecting your arguments on appeal without considering them at all.

3. Take allegations of harassment and discrimination seriously: Agencies need to act promptly when they learn of discrimination or harassment. Don't delay in separating the individuals, starting an investigation, or issuing discipline if appropriate. Failure to act promptly can result in a finding of liability, but it may also undermine the confidence your employees have in the agency. Also, don't forget to make the victim of harassment whole—even if you do everything else right, if you fail to address the harm they suffered, you can still be on the hook.

2. Follow the Commission's orders: Orders from the Commission, whether they come from an individual judge or from OFO, aren't suggestions. Ignoring them can land your agency in (even more) hot water.

1. Make sure your employees, supervisors, EEO staff (everyone!) is well trained: I promise I'm not saying this because I have been helping to provide that training to agencies for four years. It's my top tip because I truly believe that if people receive the training they need, they will avoid so many of the common mistakes that end up before the Commission. I've been saying for years that in a perfect world I would train my way out of a job, because no one would ever violate the law again. That hasn't quite happened, but I hope the past few years have at least made some progress towards that.

As I say at the end of all my classes, good luck out there! Droste@FELTG.com

NEW WEBINAR SERIES!

NAVIGATING THE RETURN TO THE FEDERAL WORKPLACE

Between the delta variant sweeping most of the country, the administration's requirement that employees attest to their vaccination status, and the general challenge of managing a hybrid workforce, the long-awaited mass return of Federal employees to the physical workspace is going to be anything but easy.

Let FELTG guide the way. Our three-part Navigating the Return to the Federal Workplace webinar series will answer all of your questions, and more, including:

- Where do you store certificates of vaccination?
- Must you accommodate employees who refuse to get vaccinated?
- How do you discipline an employee for lying on his certificate of vaccination?
- Is failure to comply with a COVID-19 test a performance or conduct issue?

Click here to get more information on this new webinar series, which starts on October 12.

And Now a Word With …
Marcus Hill, on Resolving Conflicts Before They Lead to Litigation
By Michael Rhoads

'She hit me!' 'Don't touch me!' 'I'm not touching youuu…' 'You're so annoying!'

My children are now out of diapers and forming their own opinions and developing their own interests. Among the three of them, they are a fun-loving, carefree bunch. But no matter how much they love each other, the occasional argument over the new toy, or simply vying for mom and dad's attention can get heated from time to time. My wife or I will step in to resolve these little spats, and then we move on with our day.

Conflict is unavoidable at any age. Even after we've grown up and start our careers, there will always be someone you work with who may pose a greater challenge than others. I recently spoke to Marcus Hill (pictured above right), FELTG instructor and Principal of Hill Management Consultancy (HMC) LLC, about his experiences related to conflict management over his 37-year career in the Federal civil service.

MR: What is the most common type of conflict in the workplace?

MH: In my experience, the most common type of conflict in the workplace relates to assignment or task interdependences in which employees must coordinate, interface or team to accomplish them. Think about it. If you are a part of a work unit in which your job responsibilities typically require you to perform independently, no problem. However, if what you do requires you to interface, coordinate, rely upon or team with others, that just might be a problem.

MR: How can you promote a more harmonious environment for all?

MH: I will respond to this question from the standpoint of any employee within a working environment, whether non-supervisory or supervisory. I believe it is imperative to possess and demonstrate the ability to effectively lead oneself first, in the workplace. Let's unpack that a little. It starts with understanding yourself and how you relate to others. Being knowledgeable of and practicing emotional intelligence. Also having an awareness of your personality type and sense for others in the workplace can also be beneficial to harmonizing employee engagements. By demonstrating behaviors you desire others to emulate, you have an opportunity to influence co-workers' actions from wherever you are in the organization. Simply put, "walk the talk." Typically, high-performing, harmonious organizations are saturated with employees that have invested in the organization's vision, actively engaged in achieving its mission and aligned behaviorally with the business unit's core values.

MR: Is there a one-size-fits-all approach to conflict management?

MH: Based on the various natures and intricacies related to conflict, I don't believe there is a one-size-fits-all approach managing them. However, there are proven strategies, methodologies and processes that can be used to effectively address conflict. I will be addressing some of these in my upcoming training delivery, *Resolving Conflicts Before They Lead to Litigation*!

MR: What is the best tool in your toolbox for managing conflict between employees?

MH: Active listening is the most effective tool for managing conflict between employees. To quote Dr. Stephen Covey: "Seek to

understand before being understood." By exercising active listening during conflict, the parties have the best opportunity to identify and address the *specific, not perceived,* issue(s) at dispute. Many times, the parties are focused more on defensive posturing to justify their actions in response to what they perceive the problem to be, reacting on filtered information. The goal is to be cognizant of the symptoms stemming from the conflict but focus on identifying and addressing the root cause creating it.

MR: What role does management play in resolving disputes between co-workers?

MH: Management plays a primary role in resolving disputes between co-workers. By creating a working environment that establishes an organizational culture, reflective of values, that promote harmony, managers can set the tone for healthy debate instead of unproductive disputes.

Be more effective in resolving conflict at your agency! Join Marcus on Wednesday, September 30 from 11:15-12:30 PM ET for Resolving Conflicts Before They Lead to Litigation. Click here to view our other courses during Federal Workplace Week 2021: Accountability, Challenges and Trends.

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

BRING FELTG TO YOUR AGENCY – IN-PERSON OR VIRTUALLY

Have a group you'd like to train? FELTG's popular webinars, virtual training, and onsite classes can all be presented to your agency virtually. Or you can bring one of FELTG's experienced and engaging instructors to present a class onsite. For more information, contact Training Director Dan Gephart at Gephart@FELTG.com.

Establishing Conduct Expectations: A Sample Policy
By Barbara Haga

After the last column was published, I heard from a practitioner from one of those agencies that didn't have a lot of written guidance on conduct issues. She was asking if I had a sample of such a set of expectations. I didn't have a sample, but I have seen bits and pieces in various agency documents that I thought would be helpful. So, I decided to take a stab at putting a policy together.

I have started with work schedules, attendance, and related matters. Next month, I will work on other discipline-related topics. If you have some suggested topics or language you've developed, please feel free to e-mail me.

WORK AND CONDUCT EXPECTATIONS

This memorandum sets forth expectations regarding work behaviors and general procedures employees are expected to follow in our workplace. Establishing clear expectations is intended to ensure that employees are aware of basic requirements regarding attendance and work practices and also to ensure that consistent practices are followed throughout the organization. Meeting these expectations will facilitate effective, timely, and accurate work outcomes which are the key to meeting our mission.

ATTENDANCE AND REPORTING. Employees are to be dependable and prepared to fulfill work requirements during scheduled duty hours, whether working on government premises or at an alternate worksite.

WORK SCHEDULES. Work schedules are set based on the needs of the organization. That doesn't mean that employee

preferences are not taken into account, but ultimately such decisions rest on the when the customers need our services, when organizations we typically deal with are open, and other factors that impact when our work needs to be performed.

The work schedules that are authorized include (fill in options here). Details on use of these schedules can be found here (insert link).

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

In the event that an employee wishes to request a change in work schedule, requests must be submitted to the supervisor in writing (in advance, or a set time frame in advance.) Supervisors will respond to requests for schedule changes as soon as possible.

WORK LOCATION. Telework is authorized in the same manner as schedules are set. The ability to work remotely depends on when and where our services are needed, what types of interactions must take place and how these can be effectively accomplished, the need for sharing information and coordination among work team members, and other similar factors. We will consider employee preferences, but the demands of the work are always key in such determinations.

Telework is authorized (fill in options). Details on our telework policy are located here (insert link).

LUNCH PERIOD. Daily work schedules include a _____ minute lunch period. The lunch period is a non-work period. Shifts without lunch periods are generally not authorized, meaning employees may not skip lunch and end their shifts earlier.
BREAKS. Formal breaks are not authorized. Employees are free to take reasonable short breaks to get a beverage or to take a restroom break. Smoking breaks are authorized…… (Fill in if you have such a policy).

LEAVE SCHEDULING. Employees request leave from their immediate supervisors. Leave requests may be submitted by e-mail, in the timekeeping system, or by telephone (adjust this to fit your requirements). If requesting leave by telephone, the employee should speak to the supervisor directly. If the supervisor is not available, the employee should leave a message with a telephone number where he or she can be reached to be advised whether the leave has been approved. Procedures and time frames for various types of leave requests are outlined in the following paragraphs. Failure to comply with the procedures may result in the leave not being approved.

Annual Leave. Employee requests for annual leave are to be submitted in advance. (Union contracts and leave policies may provide specifics regarding dates by which leave periods must be scheduled.) Approval of annual leave is dependent on mission requirements. In the rare event that previously approved leave must cancelled, employees are expected to cooperate in rescheduling.

Sick Leave. Employees are entitled to utilize sick leave for the six authorized uses contained in 5 CFR 630.401. (A reference to a directive or language in a union contract that lists the uses would be more informative). Employee requests for sick leave for anticipated absences such as planned surgery or scheduled treatment should be submitted in advance. (Your policy may ask for a week or ten days' notice, for example.) Certain sick leave uses and sick leave over three consecutive days may require written documentation. Details on sick leave usage requirements are found here. (insert link)

Emergency Annual and Sick Leave. The need for leave for annual leave emergencies, such as a car breaking down on the way to work or a plumbing emergency in the home, is to be reported to the supervisor within ____ hours of the beginning of the work shift. The same time frame applies for short notice sick leave requests for unexpected illnesses or medical appointments. As noted above, documentation may be required before leave can be finally approved. Supervisors will advise employees whether the emergency leave is approved as soon as possible.

Other Leave Types. There are a variety of types of leave for special circumstances such as court leave, leave without pay, Family and Medical Leave, etc. Information on these types of leave can be found at (insert link).

TIMEKEEPING SYSTEM. Employees must maintain accurate information about their work status in the timekeeping system. While timecards are approved biweekly, the best practice is to ensure that the information is input each day. This minimizes problems with omitting leave use or a late arrival from earlier in the pay period and also helps supervisors fill in information if an employee is unexpectedly out and not able to complete the timecard by the deadline.

It is the employee's responsibility to ensure that leave is accurately input, including any special coding necessary for certain kinds of leave. For example, if you are using Family Care Sick Leave you must identify in the dropdown menu which category of leave you are using (customize this to the specifics of your leave system). If an employee is unsure about how to properly code an absence, it is his or her responsibility to do the necessary research or reach out to the appropriate timekeeping personnel to verify how to properly complete the entry.

MAINTAINING UP-TO-DATE CONTACT INFORMATION. Employees must provide contact information including addresses and telephone numbers and personal e-mail addresses to ensure that, should it be necessary to reach employees outside of work hours, this may be accomplished.

Providing contact information also extends to an employee's location while on leave for potential recall should that become necessary in the event of an emergency. Haga@FELTG.com

FINAL AGENCY DECISIONS

EEOC decisions are littered with reversals of agency final decisions finding no discrimination. An employee has the right to appeal and you cannot interfere with that. However, you can ensure that your FADs are written in a way that withstands the scrutiny of the EEOC. It starts with knowing and understanding discrimination law, as applied to the federal workplace

Join FELTG Instructor/Attorney at Law Katherine Atkinson on August 23-24 for two half-days of Writing Final Agency Decisions. Ms. Atkinson will present you with everything you need to know to write an effective FAD, including the pitfalls that often lead to EEOC reversals.

MICROAGGRESSIONS AND BIAS

Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace returns on September 1. Learn how to identify acts of microaggression and respond appropriately. The two-hour class is important training for HR professionals, EEO specialists, managers and supervisors, and employees.