Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter Vol. XIII, Issue 11 November 17, 2021

How Are You Doing – Really?

The days are getting shorter, the COVID-19 pandemic is approaching its two-year anniversary (is that even the right word?), and many of us still haven't been back to the physical workplace since March 2020. While we are so fortunate to have virtual tools to stay in touch with friends, family, and colleagues, and to work from home on such a long-term basis, this pandemic has taken a toll on people, and Federal workers are no exception. And I would be remiss if I didn't mention the toll it has also taken on the workers who have been on the front lines every day, putting themselves at risk in order to provide important services to the American people.

That's why on December 9, FELTG is holding a two-hour virtual training event Managing Employee Mental Health Challenges During and After the COVID-19 Pandemic. You'll learn important tools you can use to help when an employee is dealing with a behavioral or mental health struggle. As the name suggests, these tools will be helpful even after the pandemic is over.

We discuss more on mental health in this month's newsletter, along with articles about avoiding due process violations when enforcing the vaccine mandate, directives encouraging union membership, reasonable accommodation, and more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

Successful Hiring: Effective Techniques for Interviewing and Reference Checking
December 7

Managing Employee Mental Health Challenges During and After the COVID-19 Pandemic
December 9

Calling All Counselors: Initial 32-Hour Plus EEO Refresher Training
January 24-27

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
February 9-10

Advanced Employee Relations
February 15-17

Workplace Investigations Week
February 28-March 4

Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace
March 9

*For the full list of virtual training events, including EEOC Law Week, Investigations Week and more, visit the **FELTG Virtual Training Institute**. If you'd like to bring any of these classes to your agency – onsite or virtually – email info@FELTG.com.*

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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Is Removing Fed for Lack of Vaccination a Potential Due Process Violation?

By Deborah Hopkins

With Executive Order 14043 requiring all Federal employees to be fully vaccinated against COVID-19 by November 22, unless the employee qualifies for a legal exemption (disability or religious belief), it's all but certain your agency is currently dealing with a significant number of exemption requests. And with that deadline fast approaching, agencies will soon be disciplining employees who fail to provide proof of full vaccination by that date.

OPM and the Safer Federal Workforce Task Force recently put out guidance about the progressive discipline process agencies should generally use in instances where employees refuse or fail to be vaccinated as required by EO 14043.

In a recent training class, a student brought up this question:

The guidance says that employees who fail to comply with the vaccine mandate should be counseled, and then suspended, and if they continue to refuse to be vaccinated, they should be removed. Isn't this a due process issue since the discipline is pre-decided in these cases?

And our FELTG answer:

It's wise to be thinking of these potential concerns before the disciplinary process begins en masse. Fortunately, if Deciding Officials are sufficiently prepared and understand their limited role in the process, due process violations can easily be avoided.

The steps of due process in agency disciplinary actions under 5 CFR § 752 are:

1. Notice to the employee of the charge(s), the proposed penalty, and the material the agency relied upon in the proposal;
2. Employee's opportunity to respond, with the assistance of a representative if desired; and
3. An impartial decision, where the decision is made based ONLY on the proposal and the employee's response.

While the guidance says generally employees should be removed for failing to comply, the Deciding Official has the final say. And even if every DO ultimately decides to remove an employee who does not get vaccinated (and does not qualify for an exemption), as long as the DO can credibly testify that she did not make her decision until after the employee's reply, then there is no due process violation.

Think of a few of statutory penalties that exist for Federal employees: minimum 30-day suspension for misuse of a GOV; 3-day suspension for a first offense of whistleblower reprisal under 5 USC 7515; removal for Treason. These do not raise a due process issue if the DO considers the employee's response before making the decision about the proposed discipline. The same principle applies here.

We've been busy at FELTG helping agencies prepare for these processes. If there's anything we can do to help you, please don't hesitate to let us know. Hopkins@FELTG.com

UnCivil Servant Training is Back!

Mark your calendars now. FELTG will be presenting its flagship program UnCivil Servant: Holding Employees Accountable for Performance and Conduct on February 9-10 from 12:30-4 pm ET each day. Register for both days and receive a copy of the *UnCivil Servant* text book.

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The Good News: Administration's LR Oxymorons Aren't as Bad as They Seem
By Ann Boehm

I think oxymorons are kind of fun. An "oxymoron" is "a combination of words that have opposite or very different meanings," according to the *Merriam-Webster* Online Dictionary. You know — jumbo shrimp, military intelligence (I have to include that since my husband spent his Federal career in military intelligence), small crowd, pretty ugly, freezer burn.

But are they fun in the Federal labor relations world? The administration's emerging Federal sector labor relations policy has thus far created two oxymorons. (Full disclosure — I coined these myself based upon Administration directives.)

It started with Executive Order 14003 and this Administration's directive (like the Clinton and Obama Administrations before it) for heads of agencies to engage in permissive bargaining under 5 U.S.C. § 7106(b)(1). In other words, we now have "mandatory permissive" bargaining. An oxymoron. I'm not going to go into detail about mandatory permissive bargaining in today's article. We've hosted webinars on the topic, and it's part of our labor relations training classes. Suffice it to say, though, mandatory permissive bargaining has been around before, and it's not as onerous as agencies fear. (And just for good measure, the Trump Administration directed agencies *not* to engage in permissive bargaining, so we had "prohibited permissive" bargaining. Who knew Federal labor relations could have so many oxymorons?)

Let's add a new oxymoron that emerged from two recent OPM directives. As of Oct. 20, 2021, agencies are being strongly encouraged by OPM to engage in what I call "neutral encouragement" of employee bargaining unit rights. An oxymoron.

According to two OPM memoranda to Heads of Executive Departments and Agencies, OPM wants agencies to highlight bargaining unit employee rights in the hiring and on-boarding processes and highlight bargaining unit employee rights to join a union and their rights as bargaining unit members.

What's the problem with that, you may ask? Well, the Federal Service Labor-Management Relations Statute requires agencies to remain neutral regarding Federal sector unions. According to 5 U.S.C. § 7116(a)(2), it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." OPM acknowledges this little conundrum in the Frequently Asked Questions attached to one of the memos.

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

OPM acknowledges that "Agencies and their managers and supervisors should remain neutral, but this does not mean agencies are prohibited from providing information to employees or removing certain obstacles that might inhibit a union's ability to exercise its rights under the law." Hmmmm. Could you call that splitting hairs? Wonder how many lawyers it took to come up with that distinction.

The memo further explains, "OPM is simply encouraging agencies to inform employees of the Government's policy relating to labor-management relations and representation and informing employees of their rights under the law."

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There you have it. "Neutral encouragement." The latest oxymoron.

And what is it, then, that OPM is "strongly encouraging" agencies to do?

- Include in job announcements whether a position is in a bargaining unit or not.
- Include in job announcements the name/local/chapter of union.

Ann's take: I do not think these two requirements are a good or bad thing. For me, if I had known one of my past jobs was in a bargaining unit, I might have declined the position (despite 16 years of Federal service, I was lowest on the seniority rung because the Collective Bargaining Agreement provided that service within the agency counted above Federal service). Putting this information in announcements could encourage some people to apply and discourage others.

- Encourage unions to be part of new employee orientation.

Ann's take: I do not think is a good thing or a bad thing. Employees are often overwhelmed by the information they receive during orientation. The union presentation will be just one additional piece of information for them to absorb. And let's face it: If they are in a bargaining unit, they have bargaining unit rights. No reason to hide that from them.

- Provide new bargaining unit (BU) employees information regarding their labor relations rights.
- Provide BU employees notice of their labor relations rights on a quarterly or biannual basis.
- Highlight the BU employees' rights to join a union and include contact information for the union representative.

Ann's take: Providing employees notice of their labor relations rights is likely to be a good thing. Employees and even union officials often misunderstand and misinterpret their representation rights. Providing the statutory language to employees initially -- and on a regular basis -- may actually help agencies deal with BU employees. Whether an employee pays dues and joins the union really has no impact on the agency.

Are these requirements really neutral?

Probably not.

Personally, I take this neutrality stuff seriously. If it weren't for the neutrality requirement, I may never have worked in the Federal labor-management relations world.

Way back in 1992, I was hired by the Fort Campbell Schools (FCS) because they had a union election overturned (the union lost that election) because the FLRA decided the FCS management did not remain neutral during the election process. In the second election, the union won.

FCS decided they needed a labor attorney to guide the FCS administrators on all things Federal sector labor relations, and that was how I got hired. Throughout my career, I remained acutely aware of the management obligation to remain neutral.

Even though agency "neutral encouragement" of bargaining unit rights is arguably an unfair labor practice under the Federal labor statute, what OPM is asking agencies to do is really not the end of the world. And that's good news.
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Go the Extra Yard to Support Feds With Mental Health Conditions
By Dan Gephart

On the day Philadelphia Eagles' offensive lineman Lane Johnson returned to action after a three-game absence, Atlanta Falcons' wide receiver Calvin Ridley announced that he was stepping away from football for a while. What's the big deal? The NFL injury report is a constantly fluid and ever-changing list, especially in the age of COVID. What made this particular Sunday's roster moves unique was that Johnson and Ridley cited mental health as the reason for their absences.

Earlier this year, tennis star Naomi Osaka and gymnast Simone Biles took their own leaves of absence from sports to address their mental health.

Elite athletes are not alone. There was a mental health crisis in this country before the pandemic, which has only exacerbated it further. Four in ten adults are reporting symptoms of anxiety and depression – up from one in ten during pre-pandemic times. There has also been a significant increase in substance abuse and suicidal ideation.

The pandemic-related increase in mental health challenges has hit essential workers the hardest. While most Americans immediately think of Uber drivers and Grub Hub deliverers, we all know the critical essential work of Federal employees in health, science, emergency assistance, and their supportive fields.

As a Philly sports fan, I watched the Lane Johnson situation closely. I was pleased with how the Eagles organization handled this very public health issue. (It's one of the few things the 3-6 team has correctly done this year). It appears that the Atlanta Falcons are providing the same support for Ridley.

There is a mental health crisis in this country. And so having well-known figures discuss their challenges can be a real positive. Unfortunately, misinformation continues to spread.

Someone sent me a clip of a Fox Sports show where former NFL player Marcellus Wiley (no relation to FELTG's Founding Father and former President) launched a several-minute tirade about mental health and sports. I highly recommend that you do *NOT* waste your time watching the clip. I think you will learn all that you need to know about his perspective from the tweet he sent out in advance of his show:

"The NFL is not a job for the physically weak or the mentally weak! #darwinism (But, there's always work at that the post office.)"

In one sentence, the former linebacker found a way to demean mental illness *and* Federal employees. That's a quick way to get on my @*#! list.

As we wrote two years ago, it's *not* true that:

- People with mental illness are unstable employees and more prone to violence.
- People with mental health issues are unable to hold down a job.
- Personality weakness or character flaws cause mental health problems.

So how do you provide a positive environment for employees with mental health conditions? One, you educate yourself. Personally, I'm a big fan of programs developed by the National Association of Mental Illness (NAMI) – a great organization that has been a savior to many families during difficult times.

For a more specific approach for Federal supervisors and HR/EEO professionals, attend the two-hour virtual training event Managing Employee Mental Health Challenges During and After the COVID-19 Pandemic, presented by Shana Palmieri, LCSW, on December 9, starting at 1 pm ET.

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In the meantime, consider the following suggestions by Shana for creating a trusting partnership with employees with mental health challenges.

- Develop clear expectations and agreed upon solutions to meet the goals and expectations of the job
- Communicate in a clear and concise manner, especially the policies and procedures that may impact their performance
- Provide respectful, but direct feedback. Also, ask the employee how they prefer to receive the feedback,
- Avoid judgments or assumptions.
- Avoid using language that promotes stigma (crazy, insane, loco, nut job…).

Shana will provide plenty of specific examples of reasonable accommodations and offer useful insight into numerous mental health conditions. Gephart@FELTG.com

A Great Way to Get Your Required EEO Training

The world of Federal EEO is constantly changing, and the expected deluge of complaints relate to vaccine exemption denials is going to make it more challenging.

Prepare yourself for these unique challenges in 2022 by attending Calling All Counselors: Initial 32-Hour Plus EEO Refresher Training provides the most engaging, up-to-date, and comprehensive way to get your required training whether it's the initial 32 hours or the 8-hour refresher.

Even if you don't need the requirements, join us for the latest guidance on the EEO world's most timely topics.

Training will take place January 24-27, 2022. Register now.

The Word 'Reasonable' is Half of Reasonable Accommodation

By Deborah Hopkins

Numerous EEOC decisions were recently published, and one case dealing with disability accommodation caught my attention. As most FELTG readers know, after receiving a request for reasonable accommodation, an agency "must make a reasonable effort to determine the appropriate accommodation" for the qualified individual with a disability. 29 C.F.R. Part 1630, app. § 1630.9.

In this case, the complainant worked as a rural mail carrier for the U.S. Postal Service. She had several medical conditions that required her to limit her walking and standing time to 1-2 hours per day, to limit the time she spent lifting to no more than 1-2 hours per day, and to limit the amount of weight she lifted to 10 pounds or less. Medical documentation supported these restrictions.

The agency modified some of her job requirements, but not all. The complainant asserted that the agency did not accommodate her fully because it:

- Assigned her to run the "Blue Door," which meant she had to walk to the warehouse to speak with supervisors and carriers concerning customer complaints. The total walking time averaged 4-6 hours per day, which violated her medical restrictions; and
- Required her to deliver Express Mail, which included walking stairs and hills and carrying items in excess of 10 pounds. That also violated her medical restrictions.

The complainant reported that her assignments were violating her medical restrictions. She said rather than be accommodated, she was warned she would be sent home if she could not do the work as assigned.

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She also reported that a supervisor threatened to discipline her after she made the supervisor aware the assigned work was violating her medical restrictions. In EEOC's decision, they found the agency did not properly accommodate the complainant:

> Upon review, we find that the record reflects that Complainant was denied a reasonable accommodation for her disability when Agency management required that she work the Blue Door, which required Complainant to walk in excess of her medical restrictions causing her further injury. Complainant asserted that she notified multiple management officials that she was being made to work in excess of medical conditions.
>
> We note that the record reflects that Complainant informed multiple management officials herein that she was provided with duties in excess of her restrictions, but no action was taken to address Complainant's concerns. In fact, management engaged in retaliatory actions by threatening to send Complainant home for exercising her right to seek out an accommodation and be allowed to work within her restrictions. Based on a review of the record, we find that Complainant established that she was denied reasonable accommodation for her disability when she was made to work in excess of her medical restrictions and subjected to reprisal for attempting to exercise her rights under the Rehabilitation Act.

Marleen G. v. USPS, EEOC No. 2020003464 (Sept. 7, 2021)

The EEOC ordered the agency to ensure the complainant was provided a reasonable accommodation that allowed her to perform her work within her medical restrictions. Remember, partially accommodating an employee without considering all restrictions, is not reasonable accommodation at all. Hopkins@FELTG.com

What are Management Rights?

By Michael Rhoads

If your agency's union hasn't already started the process of renegotiating your collective bargaining agreement, then now is the time to consider what your strategy will be when the union does come calling.

When it comes to negotiability, management holds most of the cards. Management typically determines whether a union proposal must be bargained, whether an arbitrator's award is improper because it abrogates a management right, and whether management-initiated changes must be bargained substantively, or only as to its impact and implementation.

Luckily, management rights are already outlined in 5 USC 7106(a).

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(I) among properly ranked and certified candidates for promotion; or

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(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

One recent example of how the FLRA has decided on management rights is *Indep. Union of Pension Emp. for Democracy & Just., 72 FLRA 281 (2021)*. The Authority ruled in favor of the agency terminating a special achievement awards program, which interfered with management's right to determine its budget. However, Chairman DuBester partially dissented because the program does not dictate the amount the Agency must allocate to its overall awards budget. Rather, it determines the portion of this budgeted amount that will be devoted to a particular type of award. FLRA Quarterly Digest Report: April 1, 2021 – June 30, 2021.

To catch you up on the latest FLRA decisions and the current state of federal LR, mark this date on your calendar: **January 13.** We'll be announcing a two-hour LR training program shortly. Keep an eye on FELTG's website for more details.

Happy Thanksgiving, stay safe, and remember, we're all in this together. rhoads@feltg.com

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

If one of your agency's employees had a mental health crisis in the workplace, what would you do? And if a remote worker had one at home, how would you even know?

On December 9 (from 1-3 pm ET), Shana Palmieri will explain the impact various mental health conditions have on individuals, and those they work with, and provide strategies for effectively supervising employees with those conditions. Register now.

Performance Plans Work When they Include Effective and Timely Feedback

By Barbara Haga

You have a very clear and understandable and reasonable performance plan in place. That's great. What now? Is this something you will pull out at progress review time or at the end of cycle and use to provide a rating – or will you use it to provide feedback to employees as the cycle progresses?

When the current version of 5 USC 43 was designed as part of the Civil Service Reform Act, the idea was that management would identify performance elements and the standards by which those elements would be measured in advance of holding employees accountable to meet them.

At that time, appraisal systems in agencies were often very routinized with employees being rated on things like "quantity" or "quality" with no explanation of what that meant for one position as opposed another. Congress set out requirements in 5 USC 4302(c) regarding communicating the performance requirements to each individual and providing on going appraisal throughout the cycle.

This system was supposed to make things better. It was (and is) a tool that should have improved the effectiveness of appraisals. It should have improved performance at both individual and organizational levels – the theory being, "if everyone is singing from the same sheet of music" you should get a better result than if each employee is interpreting requirements their own way. The system established in Chapter 43 wasn't designed to make onerous work requirements for supervisors or to torture employees. Unfortunately, some of that intent seems to be lost in how agency systems have been implemented. (That's a topic for another column.)

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How Was it Supposed to Work?

5 CFR 430.204(b)(1) lists what appraisal systems should include. One of the items is that employees should be evaluated during the appraisal period on their elements and standards.

The regulations at 5 CFR 430.206(b)(2) require that "Performance plans shall be provided to employees at the beginning of each appraisal period (normally within 30 days)." But then what? The following section in 5 CFR 430.207(b) sets out the requirements for ongoing appraisal:

> An appraisal program shall include methods for appraising each critical and non-critical element during the appraisal period. Performance on each critical and non-critical element shall be appraised against its performance standard(s). Ongoing appraisal methods shall include, but not be limited to, conducting one or more progress reviews during each appraisal period.

Hiring Right!

Barbara Haga presents the half-day training Successful Hiring: Effective Techniques for Interviewing and Reference Checking on December 7.

Progress reviews are good, but feedback once every six months is probably not going to get the job done.

For this system to operate in an optimal way, employees need to have elements and standards that they understand, and they should be receiving information throughout the cycle (not just at progress review time) so that they have a clear picture of where they stand in comparison to that plan.

I mentioned when I wrote about setting conduct expectations that most people will try to comply if they know what the requirements are. The same idea applies here. Where managers run into difficulties is when they have plans that they can't even explain. Perhaps they included measurers they can't actually track. Or, employees were told everything was great during the cycle, but the end of cycle rating is significantly lower.

Sometimes managers have tried to pull in things that were never in the plan to begin with as justification to explain a rating lower than what the employee believed he/she deserved.

Feedback on Accomplishments

On their webpage on feedback, OPM points out how feedback fits into the overall concept of performance management:

> Effective and timely feedback is a critical component of a successful performance management program and should be used in conjunction with setting performance goals. If effective feedback is given to employees on their progress towards their goals, employee performance will improve. People need to know in a timely manner how they're doing, what's working, and what's not.

OPM uses the analogy of playing "Hot or Cold" to describe how some managers handle performance feedback. They hand out performance plans and then the game begins:

> "You're cold! Now you're getting warmer! You're HOT!" Even children playing the popular "Hot or Cold" game know that to perform well (find the hidden object) people need to be told how they're doing. Without feedback, you're walking blind. At best, you'll accidentally reach your goal. At worst, you'll wander aimlessly through the dark, never reaching your destination.

This is so fundamental it seems I shouldn't have to say it. But playing "hot or cold" with

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performance unfortunately is real. Think about these types of rating discussions:

Scenario A

Employee: I appreciate the nice words you included in the narrative for this Level 4 rating, but I'd like to do better on my next rating. What would it take to get a Level 5?

Supervisor: (Uncomfortable wiggling in seat) Well, umm. I can't say for sure. I would have to see what you do next year, but I'll know it when I see it.

Scenario B

Employee: You mentioned in the narrative that the reports you've listed didn't have citations to the most recent guidance, but some of these are from four months ago. Why didn't you tell me then?

Supervisor: I was saving up the information so we could have this meeting.

Performance Management IRL

IRL means "In Real Life." Work is real life for a portion of every employee's day. Performance management is about ensuring that employee performance is meeting minimum requirements and hopefully doing much more than that. By having employees meet performance requirements, then the organization should be meeting the mission, hitting the goals, taking care of the needs of the serviced population, and/or giving the customers what they are due. It is not an esoteric exercise. It's about giving clear guidelines and then letting people know whether they met them or not.

Employees may do better because they figure out on their own how to achieve more, but a manager can get them there more quickly if they address things when they happen. That's not just big errors, either. It could be just day to day things like, "this paragraph could be clearer if you added this information," or "the data you included is absolutely accurate, but too much detail for this audience," or "there is an assumption in your analysis that isn't explained and needs to be addressed."

It's just not honest not to give feedback based on what the person did or didn't do as measured by the performance plan. Haga@FELTG.com

<u>Upcoming Webinars</u>

Workplace Investigations: Trauma and PTSD – Considerations for Interviews
January 20
1-2 pm ET

High Times and Misdemeanors: Weed and the Workplace
March 3
1-2 pm ET

Tools for Accountability, Part I: Effective Performance Plans
April 7
1-2:30 pm ET

Tools for Accountability, Part II: Position Descriptions, Medical Requirements, and Other Must Haves
April 14
1-2:30 pm ET

Charges and Penalties in Disciplinary Cases
May 5
1-2 pm ET

Got Nexus? Accountability for Off-duty Conduct
June 7
1-2 pm ET

Have a group you'd like to train? FELTG's popular webinars and onsite training classes can be presented virtually to your agency. For more information, contact FELTG Training Director Dan Gephart at Gephart@FELTG.com

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