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

FELTG Newsletter | Vol. XIV, Issue 6 | June 22, 2022

One Word Can Make All the Difference

Last week, Grammy-winning artist Lizzo made headlines when she changed the lyrics of a recently released song after being made aware that one of the words used was a slur against people with physical disabilities. Her response to the fans who pointed out the error: "As a fat black woman in America, I've had many hurtful words used against me … Let me make one thing clear: I never want to promote derogatory language … This [lyric change] is the result of me listening and taking action."

While many people applauded this move, some thought it was extreme and said, "you can't say anything anymore without offending someone." I believe that's an oversimplification. How difficult is it to change a word to something that isn't steeped in hurt, negative history, or dehumanization? Not difficult at all. Whether it's correct pronoun use, a term charged with racial or religious undertones, or something else, I encourage all of us to do better. The right word can make all the difference. So can the wrong one.

This month, we tackle the biggest case to come out of the MSPB in over a decade, and much more.

Take care,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

Managing Ongoing COVID-related EEO Challenges in the Federal Workplace
June 28

Honoring Diversity: Eliminating Microaggressions and Bias in the Federal Workplace
July 13

Handling Threats of Violence in the Federal Workplace
July 19

Back on Board: Keeping Up With the New MSPB
July 20

Hearing Advocacy: Presenting Cases Before the MSPB and EEOC
August 3-4

Addressing Pregnancy Discrimination in the Federal Workplace
August 10

Workplace Investigations Week
August 15-19

Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion, and Accessibility
August 16

Visit the **FELTG Virtual Training Institute** for the full schedule.

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.

Biggest MSPB Decision in Over a Decade: The Comparator Framework for 2022 and Beyond
By Deborah Hopkins

We've had a quorum for more than three months and a full front office at the MSPB for about three weeks. And now, thanks to what might be the most significant case issued in over a decade, we have a clear, specific, and reasoned answer about who counts as a comparator employee in an adverse action under Douglas factor 6.

Why is this such a big case? In its first three decades when assessing appropriate comparators, the Board required there to be a close similarity in offenses, and generally that comparators worked in the same unit, and worked for the same supervisors. Anything further out was too far removed to be reasonable for the agency to consider. See *Jackson v. Army*, 99 MSPR 604, ¶ 7 (2005); *Fearon v. Labor*, 99 MSPR 428, ¶ 11 (2005); *Rasmussen v. USDA*, 44 M.S.P.R. 185, 191-92 (1990); *Archuleta v. USAF,* 16 MSPR 404, 407 (1983).

Those of you in the business in 2010 probably recall when the Board changed the comparator framework. It issued what we at FELTG started referring to as the Terrible Trilogy:

- *Woebcke v. DHS*, 2010 MSPB 85
- *Lewis v. VA*, 2010 MSPB 98
- *Villada v. USPS*, 2010 MSPB 232

In case you weren't around back then, or you've forgotten since it was a long time ago, we called those cases The Terrible Trilogy because they expanded the comparator analysis to include nearly anyone in the agency who engaged in broadly similar misconduct to the appellant.

This created a huge burden for agencies, particularly the large agencies, to determine which employees had been disciplined for misconduct and then to apply a consistent penalty to all employees who engaged in somewhat similar conduct, regardless of their location, their job duties, or their supervisors. It also caused potential problems for agencies when employees engaged in specific acts of misconduct but weren't disciplined at all, which is a too-common occurrence in the Federal government.

At FELTG, we are all about fairness of penalty. However, we felt that this broad requirement was cumbersome and unnecessary to fulfill the intent of the Douglas factors. And, according to the new MSPB in this precedent-setting 2022 case, under the Terrible Trilogy standard "the universe for potential comparators was seemingly limitless" and broader than *Douglas* requires. *Singh v. USPS*, 2022 MSPB 15 (May 31, 2022).

The Board also said of the Trilogy framework: "[I]n some cases the consistency of the penalty has become not only more important than any of the other Douglas factors, it has become the sole outcome determinative factor. We hereby reiterate that the consistency of the penalty is just one of many relevant factors to be considered in determining an appropriate penalty."

Who is a comparator employee today under Douglas factor 6, consistency of penalty?

- Employee in the same work unit,
- With the same supervisor,
- Who engaged in the same or similar misconduct as the appellant.

In most cases, employees from another work unit or supervisory chain will *not* be proper comparators. There is an exception when, in certain unique circumstances, an employee from another work unit or supervisory chain might be a comparator for penalty purposes – but only if there is an "unusually close connection" in the type of misconduct. And even still, comparator employees cover just one of the 12 Douglas factors.

A few other notable words from the Board in *Singh*: "In assessing an agency's penalty determination, the relevant inquiry is whether the agency knowingly and unjustifiably treated employees differently…**We hereby reiterate that the consistency of the penalty is just one of many relevant factors to be considered in determining an appropriate penalty." [bold added]**

Therefore, the Terrible Trilogy and their related cases are overruled, and the question that has been lingering for over half a decade (What will be the fate of the Trilogy under a new Board?) finally has an answer. We'll be discussing this case, plus others, in much more detail on July 20 during the virtual class Back on Board: Keeping Up with the New MSPB. Hopkins@FELTG.com.

REASONABLE ACCOMMODATION

One of the most challenging and complex areas in Federal employment law is the obligation to provide reasonable accommodation, whether it's to qualified individuals with disabilities or individuals with sincerely held religious beliefs. And that was the case *before* the pandemic.

FELTG's Reasonable Accommodation in the Federal Workplace webinar series returns for 2022 with the following sessions:

July 21- Reasonable Accommodation Framework: Disability Accommodation Overview and Analysis

July 28 – The Importance of the Interactive Process

August 4 – Telework as a Reasonable Accommodation

August 11 – Reasonable Accommodation: The Mistakes Agencies Make

August 18 – Religious Accommodations: How They're Different From Disability Accommodations

Register now for one session, two sessions, or the whole series.

Two Discipline Best Practices Everyone Should Know

By William Wiley

In a recent, relatively unremarkable, non-precedential decision from the Merit Systems Protection Board, I ran across this line:

> *After reviewing … the appellant's written reply, as well as the information provided during the oral reply, the deciding official issued a decision … mitigating the proposed removal to a 30-day suspension.*

We've been teaching the best practices of Federal civil service law for more than 20 years. Most of these best practices were not invented by us. They grew from a careful reading of the 20-plus years of MSPB case law that preceded our founding. The above quote tells us some agencies still don't understand these basic best practices of civil service accountability. What do we see here that sticks out like a sore thumb? What best practices appear to have been violated here?

BEST PRACTICE No. 1: Do not suspend for more than 14 days. If an agency suspends an employee for 14 days or fewer, the employee's challenge to that action stays within the agency (except for affirmative claims that the employee will have to prove before EEOC or the US Office of Special Counsel). There are three good reasons for keeping suspensions short:

1. An employee can challenge a longer suspension of more than 14 days to the MSPB. At the discretion of the employee, an appeal to MSPB will include an in-person hearing before an administrative judge (with all the related legal filings, official-time testimony, and untoward publicity), review and an opinion by the three Presidentially appointed Board members, review and a

decision by at least three Federal judges on the Federal Circuit Court of Appeals, and even consideration by the nine Justices of the US Supreme Court. An employee's challenge to a suspension of 14 days or fewer stays within agency management, usually just one step above the manager who implemented the suspension (unless the employee is in a union that agrees to hire an arbitrator to hear the grievance). You should not have to think about these two redress options to appreciate why a longer suspension is more resource-hungry and less certain of a righteous conclusion than 14 days or fewer.

2. Suspending an employee adversely affects the agency. Either the employee's work does not get done for the length of the suspension, coworkers must assume the extra burden of the employee's workload, or the work is done by outside contractors ($$$). The longer the suspension, the greater the cost to the agency.

3. Discipline should be corrective, not punitive. The government gains nothing by punishing employees unless that punishment acts to correct the employee's misconduct. Although it may seem counterintuitive, there are no science-based studies that conclude that a longer suspension is more likely to dissuade the employee from future misconduct than is a shorter suspension. Look it up.

- Do you *really* want to punish employees to get them to do their darned job? There's good reason to *never* suspend an employee for disciplinary reasons, but if you must, at least keep it short.

BEST PRACTICE No. 2: Do not mitigate a proposed removal to lesser discipline. Hopefully, you know how adverse actions usually work in the Federal government. First, the immediate supervisor issues a proposal notice to the employee that specifies (a) the misconduct and (b) the level of discipline that the supervisor thinks is warranted. Then, a higher-level manager, the "deciding official", hears the employee's defense and decides whether the proposed level of discipline or some lesser discipline is warranted. It appears from the above statement that the DO concluded that the proposed discipline was excessive, and unilaterally mitigated the proposed removal to a suspension.

That's all perfectly legal. However, there is a better way to approach this situation. When a DO concludes that a lesser penalty is warranted, the best approach is to have someone on behalf of the DO talk with the employee and his representative to see if the employee would be willing to voluntarily accept a lesser penalty than the one proposed: "Pat, the Director has considered the proposed removal and heard your response. She thinks that what you did is wrong and that your removal is warranted. However, the Director also believes that you might have learned your lesson and might be able to follow our rules in the future. If you would be willing to admit your mistake, acknowledge responsibility for your actions, and voluntarily accept a lesser disciplinary action, she would be willing to impose a 14-day suspension instead of a removal."

If the employee accepts the offer, you draft a nice agreement that says that the employee waives all appeal/grievance/complaint rights in exchange for the lesser discipline. If the employee says, "Heck, No! I'll see you in court, you stinkin' management goon!!" the DO can still mitigate the proposed removal to a suspension if that's what's warranted. Or even stick with the proposed removal, referencing the employee's refusal to accept responsibility as an aggravating *Douglas* penalty-selection factor.

There are a lot of people in our field who provide advice to agency management officials. Some use the best practices that we teach at FELTG and do a good job. Others … well, let's just say that for the sake of our great country, we hope they learn to do better. Wiley@FELTG.com

The Good News: Lack of Candor is Better than Falsification, So Use It!
By Ann Boehm

In a misconduct case involving an employee providing false information, don't charge "falsification" even if it's for improperly filed time cards. I know — it isn't logical but trust me on this one. In the office, you can call it "falsification of time cards," but don't use that terminology if you discipline the employee, and I wouldn't even use it in an email. Use the kinder and gentler charge that we use in government speak – "lack of candor." Don't believe me? A recent MSPB case makes this crystal clear.

In *Sheiman v. Department of the Treasury,* SF-0752-15-0372-I-2 (May 24, 2022)(NP), a GS-13 senior appraiser for the Internal Revenue Service seemed to think he was entitled to play golf during work hours, and while on sick leave too. An investigation revealed that "between August 2006 and August 2013 the appellant 'golfed during official IRS duty hours on at least 205 days for which he claimed no annual leave on his official IRS timesheets.'" *Id.*, slip op. at 2.

Out of those 205 days, he claimed sick leave on 30 days, was on official travel for 5 days, and either he or his vehicle were observed at various Hawaii golf courses during official duty hours on 4 days." *Id.*

You gotta feel for the guy. He lived in Hawaii. Golf was calling him. Ok, maybe not. Fire him!

The agency removed him based upon two charges: "168 specifications of providing false information regarding his official time and attendance records, and 29 specifications of providing misleading information regarding his official time and attendance records." *Id.* He appealed his removal to the MSPB, and the administrative judge found the agency failed to prove the "providing false information" charge because it "*failed to demonstrate that the [employee] had the intent to defraud or deceive necessary to prove a falsification charge*." *Id.*, slip op. at 3 (emphasis added).

Aargghhh. We at FELTG warn agencies about such things. Properly charging misconduct in the Federal government is something of an art. There are two universal truths to charging: An agency must prove every word of a charge by a preponderance of the evidence; and when using certain labeled charges, the agency not only has to prove every word of the charge, but also the elements of the charge by a preponderance of the evidence.

> ***ASK FELTG***
> *Do you have a question about Federal employment law? Ask FELTG.*

"Falsification" (which includes "lying" and "misrepresentation") is a labeled charge. It requires proof that the employee supplied incorrect information, provided with the intent to mislead, for private material gain. *Boo v. DHS*, 2014 MSPB 86.

It is very hard to prove intent. Agencies frequently lose cases because they use a labeled charge that they cannot prove. There's not a good reason to use a labeled charge, like falsification. The rest of the *Sheiman* case explains why.

You see, the MSPB AJ did sustain the second charge—the "providing misleading information" charge that the AJ "*interpreted as akin to a lack of candor, thus requiring a lesser showing of intent than falsification*." *Sheiman,* SF-0752-15-0372-I-2, slip op. at 4 (emphasis added). You get that? The agency won on the "lack of candor" charge.

Sadly, this case resulted in long drawn-out litigation. The AJ mitigated the removal to a 30-day suspension. When you fail to prove a charge, the MSPB can reweigh the penalty factors. When the AJ did that, he decided removal was not reasonable.

The agency appealed to the MSPB and waited years for a quorum. The MSPB agreed with the AJ's findings on the charges – the agency failed to prove the "falsification" charge but proved the "lack of candor" charge. However, the MSPB disagreed with the AJ's determination on penalty and reinstated the removal. Fortunately for the agency, the deciding official "stated in his decision letter that removal was an appropriate penalty for each charge independently." *Id.*, slip op. at 12. Hooray for the deciding official!! According to the MSPB, "the administrative judge erred in revisiting his penalty assessment on the basis that the agency only proved one of its two charges." *Id.*

Phew! The right decision emerged from this mess. But the agency never should have put itself in this disastrous place.

Learn from this case. Don't charge "falsification." There's simply no need to do so when "lack of candor" works just as well (removal was justified under that charge!!), and it's easier to prove. Easier is better! And that's Good News. Boehm@FELTG.com

MANAGING ONGOING COVID-RELATED EEO CHALLENGES IN THE FEDERAL WORKPLACE

How should agencies prioritize all those exemption requests that were on hold for several months when the vaccine mandate was enjoined?

Is COVID-related harassment and reprisal illegal under EEO statutes?

What documentation should agencies maintain to defend against the complaints that will inevitably be filed?

FELTG instructor Katie Atkinson will answer these questions and more during Managing Ongoing COVID-related Challenges in the Federal Workplace on June 28 from 1-4:30 pm ET. Register now.

EEOC Shares Good News/Bad News Re: Feds With Disabilities
By Dan Gephart

Good news is at a premium these days, so pardon me for still regaling in last month's announcement from the EEOC about Federal employees with targeted disabilities. Back in a previous life, I worked with then-EEOC Commissioner Christine Griffin on a series of columns she wrote about improving participation rates for employees with disabilities, particularly those with targeted disabilities. I kept a close eye on reports that showed participation numbers slowly ticking up. However, according to a recent EEOC report that looks at a longer span of time, those rates *are* improving at a much better pace.

Here's the information straight out of the EEOC's Annual Report on the Federal Workforce for 2019:

- The overall participation rate of individuals with targeted disabilities increased from 1.05 percent in 2003 to 1.80 percent in 2019. This was driven by increases in the participation rates of individuals with serious difficulty hearing, serious difficulty seeing, and significant psychiatric disorders.

- More agencies are meeting the 2 percent goal for the participation rate of individuals with targeted disabilities. Twelve of 28 independent agencies, 11 out of 17 cabinet departments, and 34 out of 98 subcomponents of cabinet departments meeting the 2 percent goal. In 2016, only 10 independent agencies and subcomponents reached that goal.

Targeted disabilities include blindness, deafness, partial and full paralysis, missing extremities, dwarfism, epilepsy, intellectual disabilities, and psychiatric disabilities. Individuals with these disabilities typically have the greatest difficulty finding employment, according to the EEOC.

There's more good news: The percentage of Federal workers with disabilities (not just targeted) has increased more than 8 percent since 2014. Federal workers will disabilities now make up just under 9.5 percent of the workplace, according to the latest EEOC data.

Unfortunately, there is also bad news via the EEOC's recent report Status of Workers with Disabilities in the Federal Workplace.

People with disabilities are still underrepresented in Federal sector leadership. Among persons with targeted disabilities, 10.7 percent are in leadership positions and 89.3 percent are in non-leadership positions. That compares to 16.4 of people without disabilities in leadership positions, and 85.6 percent of people without disabilities in non-leadership positions.

Also, employees with targeted disabilities are involuntarily leaving the Federal workplace at more than twice the rate of people without disabilities. Individuals with any disability were 53 percent more likely to involuntarily leave than those without disabilities.

The report also reveals that over a five-year period, Federal sector physical disability-based complaints increased by 22 percent. Mental disability-based complaints increased by a whopping 72 percent. These statistics outpaced the overall increase in Federal sector EEO complaints.

Kudos for those hiring, retaining, and accommodating employees with disabilities. For everyone else, it's beyond time to get on board. Here are three suggestions to help you do that:

1. Take advantage of Schedule A authority. Do you have a hiring need? Are you already dreading the long and complicated road to filling the open position? Consider Schedule A. It allows you hire a qualified individual with a disability without posting a job announcement or going through the certificate process.

And the process is simple. Contact the correct person at your agency who handles Schedule A. (It could be an HR professional, a disability program manager, an EEO specialist, or a special placement program coordinator.) Explain the competencies you're looking for, along with the essential and non-essential functions of the job. You will soon receive several resumes of qualified individuals who have the prerequisite skills and are looking for an employment opportunity.

For more guidance, read through the EEOC publication The ABCs of Schedule A Tips for Hiring Managers on Using the Schedule A Appointing Authority.

2. Prepare yourselves for a huge increase in reasonable accommodation requests. Yes, we know you have a reasonable accommodation process in place. But when is the last time you seriously reviewed its effectiveness, and how well your managers are following it? And are you ready to handle the huge influx of accommodation requests that has already started to happen and will only increase as more employees return to the physical workplace?

Before you can tackle your processes, you need to know the law. Join us for the five-part Reasonable Accommodation in the Federal Workplace webinar series, especially the first session on July 21 that takes a look at Reasonable Accommodation Framework: Disability Accommodation Overview and Analysis.

You'll learn about important information such as:

- Understanding what "qualified individual" means.
- How to properly identify a reasonable accommodation request.
- When to deny a reasonable accommodation request.
- And much more.

3. Make sure supervisors understand the interactive process. An employee does not have to specifically state "I want a reasonable accommodation" when making a request. Also, the RA request does not have to come from the employee. It could from a coworker, family member. Heck, it could even come from a customer. And this is only the first part of the "interactive process."

You also need to know the essential functions of the job, hold discussions with the employee – that means *listen* to the employee – and then get creative. Just because a supervisor knows the "best way" to complete a job doesn't necessarily mean that's the only way. And, likewise, the employee isn't guaranteed to get his/her/their accommodation of choice if there is another accommodation that is just as effective. The interactive process is a team effort, and one that requires supervisors to be on top of their game. We'll tackle the Importance of the Interactive Process in the second part of the Reasonable Accommodation in the Federal Workplace webinar series on July 28. Gephart@FELTG.com

FELTG Returns to the Classroom … In Person

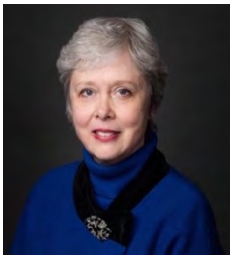
Developing and Defending Discipline: Holding Federal Employees Accountable
Washington, DC
July 12-14

Advanced Employee Relations
Norfolk, VA
August 2-4

Register early for these sessions. Class size is limited.

Applying Santos: *It's a Good Time to Take a Look at Your Appraisal System*

By Barbara Haga



Santos v. NASA changed the landscape last year, placing an additional requirement on agencies to prove that the person who was being placed in an improvement period for unacceptable performance actually was unacceptable at that time. *Santos v. NASA,* 990 F.3d 1355, Fed. Cir. 2021.

It's not the biggest leap one could imagine. In some agencies, HR staff routinely gave a recounting of prior unacceptable behavior as part of their PIP notices anyway. I certainly did it in the old days and taught it that way – until someone convinced me that I didn't have to do it.

Now, times have changed.

With the recent decision from the Board in *Lee v. VA*, 2022 MSPB 11 (May 12, 2022), cases decided previously are being remanded for proof in this regard.

In November 2020, OPM wrote in the supplementary material regarding 5 CFR 432.104: "The amended rule does not relieve agencies of the responsibility to demonstrate that an employee was performing unacceptably – which per statute covers the period both prior to and during a formal opportunity period – before initiating an adverse action under chapter 43." That's what the Federal Circuit quoted in *Santos*. In its January 2022 proposed regulations (87 FR 200), OPM stated that the Federal Circuit "misread" its position. We will have to wait and see what happens when the Federal Circuit next looks at the issue. In the meantime, *Santos* is controlling.

So, what am I adding to this discussion? Just a caution for those agencies who have a Minimally Successful/Needs Improvement

(Level 2) rating on their critical elements. If you don't have such a level on your elements, you can stop reading now and move on to another article. If you do have a Level 2 on your elements, there is a point you should be aware of in applying *Santos*.

The Sky is Not Falling

I am sure some of you are thinking, "Oh, no, what now?" Before you get excited, I should note that not many agencies have a Level 2 element rating. A lot of agencies have switched away from systems that included that. For example, most of the Department of Defense eliminated Level 2 in recent years. The Department of Interior doesn't have it anymore. Neither does NASA.

Not even everyone with a Level 2 in their system has an issue. You could have a Level 2 summary rating without having a Level 2 on an individual critical element. This could be done with non-critical elements (e.g., the person fails a non-critical element and ends up with a Level 2, but if they fail a critical element that's a Level 1).

Most who have a Level 2 summary rating have a Level 2 element rating, too. Still, that may not be a problem. If you have a decent written Level 2 standard in place throughout the cycle, you're fine. The problem could come up in two ways:

1) You need to adjust your Level 2 because it is very generic and you need to make it specific enough to adequately communicate Level 2 to the employee with the PIP notice, or 2) You never wrote it at all until you issued the PIP. If you fall in these two groups, *Santos* is going to make you change your process.

Tracing Board Cases on this Issue

I have a list of cases on this topic that I include in my Advanced Employee Relations course materials every time I teach it. [**Editor's note:** Register now for Barbara for Advanced ER in Norfolk on August 2-4.]

There are a few famous – or infamous – cases where agencies lost their 432 actions because they had a Level 2 on the element but never communicated a Level 2 standard to the employee during the PIP.

I always emphasize the point that this is a procedural error, and it doesn't matter how many boxes of evidence of poor performance that you may have, you lose.

Here's a quick list of those cases:

- *Jackson-Francis v. OGE,* 103 MSPR 183 (MSPB 2006)
- *Henderson v. NASA,* 2011 MSPB 12 (MSPB 2011)
- *Pace v. Army,* CH-0432-14-0335-I-1 (MSPB 2015)(NP)

The employee in *Latimer v. Air Force,* CH-0432-17-0114-I-1 (May 17, 2017)(ID) was covered under the Defense Civilian Intelligence Personnel System (DCIPS). The vast majority of DOD employees were rated under a system without a Level 2 when this decision was issued. However, DCIPS had one.

Henderson v. NASA was decided before NASA eliminated Level 2 from its rating system. The decision includes a succinct paragraph that explains the problem:

> The administrative judge correctly found that each element of the performance plan has five possible ratings, i.e., "fails to meet expectation[s]," "needs improvement," "meets expectations," "exceeds expectations," and "significantly exceeds expectations." ID at 5; IAF, Tab 4, Subtab 4w at 3. The performance standard for the appellant's position, however, only sets forth one level of performance, i.e., what one must do to "meet" the standard. ID at 5, 12; IAF, Tab 4, Subtab 4w at 4-6. Where an appellant is rated on a five-tier system for his critical elements, the agency must inform him, at a minimum, of what he

must to do to perform at the "needs improvement" level to avoid a performance-based action. *See, e.g., Jackson-Francis,* 103 M.S.P.R. 183, ¶¶ 6-7, 10 (the agency erred by requiring the appellant to reach a "fully successful" level of performance during the PIP to avoid removal under chapter 43 because under a five-tier system, an employee's performance can be "not satisfactory" without falling to a level that requires removal). Therefore, because the agency's five-tier performance appraisal plan is based on a single written standard of satisfactory performance, the administrative judge correctly found that it violates the statutory requirement of objectivity because it requires extrapolation more than one level above and below the written standard. Id. at 5, 12; *see Donaldson,* 27 M.S.P.R. at 295-98. (underlining added).

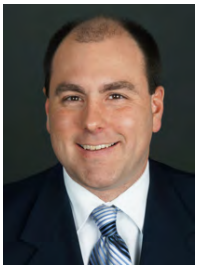
If the Board requires the Level 2 standard to be in place to judge whether the performance is unacceptable during the PIP, it seems logical that they will also find that without it being in place you cannot prove that the person was unacceptable prior to the PIP. Just a word to the wise. Haga@FELTG.com

A WIN-WIN WEBINAR FOR LABOR RELATIONS

Congress intended for collective bargaining to "encourage the amicable settlement of disputes." Then why are labor-management relations perpetually adversarial? In Federal Labor-Management Relations: Working Together to 'Safeguard' Public Interest, FELTG Instructor Ann Boehm will explore strategies agencies and unions can explore to fulfill their mutual obligation to the public.

The 60-minute webinar will take place on June 23 at 1 pm ET. Register now.

Ensuring Workplace Safety Through a Model EEO Program
By Michael Rhoads



I recently attended a meeting of the Federal EEO and Civil Rights Council where Dexter Brooks, Director of Federal Sector Programs of the Office of Federal Operations at the EEOC, explained how to make your workplace safer. The tools are already available. You should have the infrastructure in place, but here's how to update and fine-tune your program to make it a safer space for all employees.

This may or may not come as a surprise: The top issue in workplace safety is harassment. It is the fastest growing issue in EEO complaints with over 50 percent of complaints containing a harassment component, according to Brooks.

Your agency recently submitted a self-assessment of its anti-harassment policy. There should already be rules set up for employee conduct inside and outside the workplace. Part of the self-assessment addressed areas of support for employees who experience sexual assault, domestic violence, and stalking.

To successfully implement your agency's anti-harassment policy and advance workplace safety, Brooks suggested focusing on the six core principles of a model EEO program. I found NASA's Office of Diversity and Equal Opportunity at their Langley Research Center to have a handy guide to follow.

The 6 Core Principles

1 - Ensure your agency's leadership is committed to the EEO program. Agency leaders should take a top-down approach when communicating the EEO program's goals. The agency head should then issue

an EEO and anti-harassment policy statement on an annual basis.

2 - Integrate EEO into the agency's strategic mission. The Director of EO (or DEI) should have regular access to senior management. Also, managers and employees should be directly involved in implementing your agency's Title VII and Rehabilitation Act Programs.

FREE DEIA RESOURCE!

FELTG's DEIA Resources Page provides information on upcoming DEIA training, news articles, and resources all in one location.

3 - Ensure program accountability. Managers and supervisors play a big role in this part of the process. While the agency establishes the procedures to prevent all forms of discrimination, it falls on the managers and supervisors to be the agency's eyes and ears. Additionally, the agency should ensure that reasonable accommodations and personnel policies are clearly defined.

4 - Be proactive in preventing unlawful discrimination. Agencies should conduct a self-assessment of their EEO programs on at least an annual basis. This should include a barrier analysis. Think of not only the physical barriers, but the cultural barriers that exist. For example, first generation professionals might not have the same resources available to them that others do. After the analysis is complete, act on the information, and come up with a strategic plan to eliminate those barriers identified.

5 - Find an efficient way to deal with EEO issues. Data is the foundation on which problems can be solved. If you don't have quality data, it's like flying a plane through clouds without flight instruments – eventually you'll crash. The data you'll need to collect specifically will be related to hiring, your current workforce, and EEO complaints. Additionally, complaint resolutions and alternative dispute resolutions processes should also be checked for efficiencies as well.

6 - Be responsive and legally compliant. The laws in question are Title VII and the Rehabilitation Act. Also included in legal compliance are EEOC's regulations, orders, and other written instructions. Each year, report your program's accomplishments to the EEOC. Be sure to comply with any final EEOC order for corrective action and relief. FELTG has worked with many agencies when the EEOC has ordered compliance training at the conclusion of a complaint.

For more information on how your agency can improve on its EEO program, FELTG will be hosting our EEOC Law Week from September 19-23, from 12:30-4:30 ET each day. Meanwhile, stay safe, and remember, we're all in this together. Rhoads@FELTG.com

UPCOMING FELTG WEBINARS

FELTG's webinars provide specific, timely, and useful guidance – and they do it in just 60 minutes.

Federal Labor-Management Relations: Working Together to 'Safeguard Public Interest'
June 23

What's New in Leave 2022?
July 14

Federal Supervisors Workshop: Building the Best Toolbox for Managing Today's Workforce Webinar Series Remaining sessions: July 12, August 9, August 23

Feds Gone AWOL: Understanding the Charge and Applying it Correctly
October 6

High Times and Misdemeanors: Weed and the Workplace
October 27

To find out more about FELTG's webinar offerings and to get the most up-to-date schedule, visit our Webinar Training page.