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

FELTG Newsletter Vol. XIV, Issue 8 August 17, 2022

What Do Dating, Diarrhea, Due Process Have in Common?

They are all topics the MSPB has recently looked at. (Pardon the alliteration.) Did you know:

- If an Administrative Judge is in a romantic relationship with an appellant's co-worker, that's a conflict of interest, especially if there's evidence the co-worker really doesn't like the appellant.
- If someone drives a GOV home one mile to clean up and change clothes after an unfortunate bout of diarrhea, that's not Misuse of a GOV.
- Not giving an appellant an oral reply isn't always a due process violation.

We've got a lot more lessons from the new MSPB, which we'll be discussing during one of FELTG's most popular programs, MSPB Law Week, September 12-16 – and during our August 31 case law update.

We have more than just MSPB news this month. The newsletter discusses whether you can discipline a union rep who is on official time, non-EEO harassment, disability misconceptions, and more.

Take care,

Deborah J. Hopkins, FELTG President

UPCOMING FELTG VIRTUAL TRAINING

The FELTG Virtual Training Institute provides live, interactive, instructor-led sessions on the most challenging and complex areas of Federal employment law, all accessible from where you work, whether at home, in the office or somewhere else.

Here are some of our upcoming virtual training sessions we'll be doing over the next several weeks. For the full schedule of virtual offerings, visit the **FELTG Virtual Training Institute**.

SPECIAL EVENT!

Federal Workplace 2022: Accountability, Challenges & Trends
August 29 – September 1

UnCivil Servant: Holding Employees Accountable for Performance and Conduct
September 7-8

MSPB Law Week
September 12-16

Setting the Bar: Advancing Diversity, Equity, Inclusion and Accessibility for FY 2023
September 28

EEOC Law Week
September 19-23

FLRA Law Week
September 19-23

Absence, Leave Abuse & Medical Issues Week
September 26-30

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.

The Good News: 100% Official Time Does Not Excuse Misconduct!
By Ann Boehm

This administration is decidedly pro-union. The FLRA has two Democrats and one Republican on the Authority. There may be a perception that unions are untouchable in this environment, but that is just plain wrong. A recent decision from the newly constituted FLRA is illustrative. *Bremerton Metal Trades Council*, 73 FLRA 90 (2022).

The agency investigated a union representative, who was on 100% official time, for bullying and verbal abuse. The investigation showed she engaged in the misconduct over several years. The agency suspended her for ten days. The union grieved the suspension, leading to an arbitration hearing to determine whether the agency had jurisdiction to discipline the grievant.

The union "claimed that because the grievant's schedule consisted of 100% official time, *any* Agency-imposed discipline would constitute an unfair labor practice" (emphasis added).

That is a bold argument. Even on 100% official time, the union representative is receiving a salary from the Federal government. Insulating individuals on 100% official time from any agency-imposed discipline would seemingly allow those officials to operate without accountability.

According to the arbitrator, the union rep "'engaged in "confrontational and bullying" behavior on a "regular basis'" which degraded "'the morale of those working around her'" and created an "uncomfortable working environment.'" Her behavior caused a chief steward to experience three panic attacks in one month, the last one sending him to an emergency room.

According to signed statements obtained by the agency, the grievant described her colleagues with words like "'r**ard,' 'stupid,' 'slow,' 'f**king p**sy,' 'f**king idiot,' and 'god d**n r**ard.'" As Dana Carvey's Church Lady might say, "Well isn't that special?"

Holy cow! A ten-day suspension seems light given her misconduct, but as aforementioned the union argued the agency could not discipline her at all because such discipline would interfere with internal union affairs.

The agency argued that the parties' collective bargaining agreement enabled the agency to ensure the union office remained safe and usable, which justified the discipline of this union representative. *Id.* The arbitrator agreed with the agency, concluding the agreement "allowed the agency to discipline any employees who used the Union 'office in a way not intended' or who made the office's 'occupancy untenable.'"

The arbitrator noted an agency may discipline employees for conduct that is "'flagrant or otherwise outside the bounds of protected activity.'" Unsurprisingly, the arbitrator concluded the repeated and intentional bullying, with the goal of inflicting emotional distress, was for the grievant's own benefit and not provoked. Therefore, it was flagrant and outside the bounds of protected activity.

The union filed exceptions with the FLRA, arguing the flagrant misconduct finding exceeded the arbitrator's authority. The FLRA disagreed and denied the union's exception.

The union also argued the Arbitrator's award was contrary to the Federal Service Labor-Management Relations Statute. Again, the FLRA disagreed and denied the union's exception.

The agency won. Justice prevailed! Even in a pro-union administration, unions and their reps can and should be held accountable. That's Good News! Boehm@FELTG.com

This Isn't Harassment: Supervision, Not Hostile Work Environment
By Deborah J. Hopkins

One of the topics we've been discussing in recent FELTG classes is "other harassment," that is, harassment that's not based on protected EEO categories. And one of the most common questions we're asked is this: At what point a supervisor crosses the line from effectively supervising employees to creating a hostile work environment?

Hostile work environment harassment is a term of art in the EEO world, and requires a complainant to prove three things:

1. They were subjected to unwelcome conduct,
2. The conduct was based on their protected EEO category, and
3. The conduct was so severe or pervasive that it altered the terms, conditions, and privileges of employment.

The below supervisory actions, if exercised in a reasonable manner, are NOT harassment:

- Assigning work
- Setting deadlines
- Creating a work or telework schedule
- Assessing performance or providing feedback
- Managing work groups
- Setting a dress code
- Disagreement on management style or decisions

The list is not exhaustive. The statute that gives supervisors this authority is 5 USC 301-302, which says the head of an executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business … and to delegate to subordinate officials the authority vested in him … by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency.

Harassment is easy to allege, but not easy to prove. Let's look at a couple of recent cases.

Case 1

The employee alleged harassment and reprisal when his supervisor avoided him or walked away from him on multiple occasions, and he claimed that his supervisor often responded to his questions by stating he did not know the answer and failed to provide him adequate guidance. He also claimed his chain of command treated him in a "hostile manner" when his supervisor "yelled" at him that he needed to fix something, and when his supervisor "grabbed [his] arm to pull [him] into a room" and "yelled" at him about reporting improper patient care. In addition, he claimed that the chief of staff "yelled at him, accused him of 'making up our service data,' and told him to 'shut up' during a meeting.

The MSPB, which had jurisdiction over this case because it was an IRA appeal, said that while these actions were indicative of an "unpleasant and unsupportive work environment," they did not violate the law. *Skarada v. VA*, 2022 MSPB 17 (Jun. 22, 2022).

Case 2

In a recent case before the EEOC, a complainant alleged multiple incidents of harassment based on race, color, sex, age, and reprisal. Among the incidents she identified:

- She received a Letter of Warning (we at FELTG recommend you NEVER issue these)

- She was told that the Letter of Warning was serious and could lead to future disciplinary actions
- Her access to work-related databases was revoked
- A supervisor went through her desk to look for documents
- A supervisor broke a souvenir that was on her desk
- She did not receive assistance from upper-level management after she informed them her supervisor was targeting her
- She was eventually removed

In response to the allegations of harassment the agency provided legitimate reasons for its actions, including that the complainant had engaged in **198 specifications of misconduct**, including violations of the Privacy Act and Rules of Conduct of Maintenance of Personnel Records, as well as "unauthorized use of non-public information, intentional failure to observe any written regulation or order prescribed by competent authority, and violating the Rules of Behavior." Also, the complainant did not respond to any of the charged misconduct.

EEOC said, "The image which emerges from considering the totality of the record is that there were conflicts and tensions in the workplace that left Complainant feeling aggrieved. However, the statutes under the Commission's jurisdiction do not protect an employee against all adverse treatment … Discrimination statutes prohibit only harassing behavior that is directed at an employee because of their protected bases. Here, the preponderance of the evidence does not establish that any of the disputed actions were motivated in any way by discriminatory." *Kandi M. v. SSS*, EEOC Appeal No. 2021002424 (Apr. 18, 2022)

Want to know more about Other Harassment? Join FELTG for the Federal Workplace 2022 virtual event the last week of August for a session on that very topic. Hopkins@FELTG.com

Is This the New MSPB's First Problematic Decision?
By William Wiley

In the humble opinion of this old Board observer, President Biden's recent appointees to be members of the US Merit Systems Protection Board have done a very good job with the content of the rulings they have handed down since beginning to work this spring. Most practitioners were glad to see *anything* coming out of MSPB HQ after a five-year drought of decisions. It has been a pleasant surprise to see the direction the legal analyses have taken is well-based and consistent with common sense, upholding much and modifying where necessary.

Save for one. Here's the fact pattern in *Chiovitti v. Air Force*, MSPB No. PH-0752-21-0212-I-1 (July 12, 2022)(NP):

1. The employee was removed based on a charge of Conduct Unbecoming.

2. In the decision notice implementing the removal, the Deciding Official (DO) told the employee that he could challenge the removal decision by either filing a) a grievance under the negotiated grievance procedure or b) an appeal with MSPB, but not both.

3. The employee chose to file a grievance in lieu of a Board appeal.

4. The agency denied the grievance on unspecified "procedural grounds" i.e., not on the merits of the charged misconduct.

5. The union, on behalf of the employee, invoked arbitration.

6. The grievance was pending before the arbitrator for nearly a year. After discussions between the agency and union representatives, the union agreed to

withdraw the grievance. In exchange, the agency agreed not to contest MSPB's jurisdiction over the termination.

- While not clear from the opinion, it appears that during the processing of the grievance, the agency was arguing that the matter could not be arbitrated because the employee is a probationer. Perhaps this was the "procedural grounds" on which the agency denied the grievance?
- 5 USC 7121(c)(4) specifically excludes from arbitration any grievance concerning an "examination," and the probationary period has long been held to be part of the "examination" process for federal employment.
- To add a bit of confusion to all of this, two weeks *after* the union's withdrawal of the grievance, the agency representative became aware of an unusual agency-specific procedural agreement that established that the employee was *not* a probationer, i.e., that he had completed probation/examination and that the merits of the removal indeed could be arbitrated.

7. On appeal to MSPB, the administrative judge dismissed the appeal as filed too late. After all, the termination had taken place over a year previously and the employee's choice of the grievance procedure precluded a later choice of the MSPB appeal process.

8. On petition for review, the employee argued that good cause existed for excusing the late filing because the DO had provided incorrect information when he told the employee he could file either a grievance or an MSPB appeal.

In deciding the PFR, the new Board members remanded the case to the administrative judge. The issue for the AJ to decide on remand is whether the DO provided "incorrect information" in the decision notice regarding whether the appellant had a right to file a grievance concerning the termination.

OK, wait just a minute.

The employee was in a bargaining unit. Bargaining unit employees have the right to file a grievance. The employee chose to file a grievance. So where is the possibility that the DO provided the employee "incorrect information"?

Well, as they say on the true-crime podcasts, it's complicated:

- The Board's decision speaks of a "decision notice." Although not addressed specifically, with a decision notice, there most probably would have been a "proposal notice." Those two steps in removing an employee come to us from 5 USC Chapter 75, Subchapter II on adverse action procedures. As the agency appears to have used adverse action procedures to remove the employee, it must have considered him to meet the definition of an "employee" who is entitled to have those due process procedures used: "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment," 5 USC 7511(a)(1). In other words, not probationary, because in general agencies do not use proposals and decisions to fire probationers.
- Then, when the employee filed a grievance to contest the removal, the agency dismissed his grievance on "procedural grounds." Unfortunately, the Board's decision does not specify what those grounds are. Could be that the employee filed his grievance beyond the time limit for initiating a grievance. That's a common procedural failure that would make the grievance nonarbitrable. Or, it could have been that by this stage, the agency was

arguing that the employee's grievance was nongrievable because he is a probationer. Failure of a probationary period is excluded by law from any statutory grievance procedure.

- Did the agency initially believe the employee to be a non-probationer at the time of removal? That would explain the apparent use of adverse action procedures. And then, did the agency deny the subsequent grievance because it changed its mind and decided to argue that the employee was a probationer not entitled to grieve his removal? We can't tell from the decision whether that is the case. However, if correct, that would explain why the union was willing to withdraw the employee's grievance from arbitration and the agency agreed not to contest the employee's substitute option to appeal to MSPB.

Unusual situation. Complicated. Position changes. Mutual misunderstandings. All are within the confluence of federal labor laws and federal removal/termination laws. We can get past all of that. But where does MSPB see that the agency might have violated the employee's rights by giving him "incorrect information" relative to how the removal could be challenged? He was a bargaining unit employee. The DO was correct to tell him he could file a grievance because bargaining unit employees can file grievances. Could it be that the Board is trying to say that if the employee was a probationer, the DO should not have told him he could file a grievance because a probationer cannot grieve a termination?

If so, that is an untenable dangerous position in which to put the agency, and unfair to both the union and the employee. **It is not up to the agency to decide unilaterally whether a bargaining unit employee is a probationer!**

Unions and management sometimes disagree on whether a matter is grievable or arbitrable. A union/management relationship is based on the principle that either side may have an opinion different from the other. Happens all the time. The mechanism for resolving those disagreements is the negotiated grievance procedure. In fact, the very first topic that the federal workplace labor law says must be covered by a grievance procedure is that "any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability." 5 USC. 7121(a)(1). If the DO believed the employee to be a probationer and, therefore, had NOT told the employee he may be able to file a grievance, he would have been potentially depriving the employee and his union of the option of challenging management's probationary determination through the negotiated grievance procedure.

The law is clear. The merits of the termination of a probationary employee may not be challenged by grieving the matter to arbitration. However, there are several situations in which a union might choose to file a grievance relative to the removal of a probationer, e.g.:

- The statutory definition of "grievance" includes "any claimed violation … of any law." 5 USC 7103(A)(9). If management were to fire an employee during probation because the employee engaged in union activity, that would be an unfair labor practice and a violation of federal law (5 USC 7116(a)). Therefore, a union or employee could file a grievance relative to the termination of a probationary employee if the claim was that the agency had committed an unfair labor practice.
- Perhaps the employee wants to grieve that the circumstances that led to his removal were in reprisal for his whistleblowing. That's another law violation.
- Does the negotiated grievance procedure cover claims of

> race/sex/age/etc. discrimination? If so, the terminated probationer might want to pursue a grievance based on one or more of those protected categories.

If this employee was a probationer, the DO had no obligation to inform him of any redress rights at all -- MSPB, grievance, or otherwise. At least, not according to government-wide regulations or statute. However, the DO chose to do so anyway. In the alternative, if the employee was beyond probation and thereby entitled to have the DO explain his redress rights to him, it did so when it told the employee he could file either a grievance or an MSPB appeal, but not both.

In either situation, the fact that the employee through his union filed a grievance that was withdrawn prior to arbitration does not lead to the conclusion that the DO made a mistake in the information he provided. The fact that the agency and union came to believe later during the pendency of the grievance that the employee's removal may be nongrievable, or that in fact the employee is beyond probation and entitled to a full merits appeal to the Board, does not change the election that the employee made.

Did the agency provide misinformation to the employee when it told him he could file a grievance relative to his removal? No, that information is correct regardless of whether the employee was still serving as a probationer or had completed his probation. The notification that an agency provides that an employee may have the right to file a grievance in no way implies that the grievance will be reviewed on the merits by an arbitrator. Agencies and unions are entitled to disagree as to whether a particular matter is grievable or arbitrable, and to resolve that disagreement through arbitration. The Board's decision is misplaced in that it remands the case to the AJ for a determination that is unable to be made.

Several years ago, FELTG developed a standardized rights notice that agencies can use to notify employees of the various redress procedures available to them should the agency impose an adverse action. The FELTG rights notice (copy given to all who attend FELTG's *MSPB Law Week* seminar) refers the employee to the negotiated grievance procedure with the admonition that the employee should seek advice from a union representative prior to selecting that option. We continue to believe that is the better practice, certainly better than management deciding for the employee and union whether a particular aspect of a disciplinary action can be submitted to arbitration on the merits. Wiley@FELTG.com

Sometimes Things Just Aren't as They Seem
By Dan Gephart

If you're a Federal supervisor and you see your name in the *Washington Post*, chances are it's not going to be a positive experience. And that was certainly the case for the high-ranking senior government official whose demeanor and leadership were questioned by anonymous staff members in a story last month.

That this personnel investigation was dragged onto a public website that generates 70 million unique views each month doesn't look good for anyone involved. I will not weigh in on any of the specific details of this story, nor make any judgments. But I will share three important lessons we can take away from the article.

1. A disability may appear to be something else. Before you rush to judgment on an employee's behavior, be aware that some disabilities exhibit themselves in ways you wouldn't expect.

More than 37 million Americans, a whopping 11.9 percent of the population, had some form of diabetes in 2019, according to the American Diabetes Association. That's a lot of people. When blood glucose levels become too high or too low, a diabetic individual's mental status can become impaired. It could lead to slurred speech and moodiness that mimic intoxicated behavior. It may seem obvious to you that an employee is drunk, but that may not be the case.

When an employee shows up to work looking disheveled, acting irritably, and appearing sleep-deprived, you may think she was out on a bender. She could have anxiety, post-traumatic stress disorder, or may be undergoing a mental health crisis.

Are you supposed to somehow figure this out on the fly? No. Are you supposed to ask the employee if he has a disability? Heck no! The law prohibits your agency from asking questions likely to elicit information about a disability at this stage. General questions such as, "Are you feeling okay?" are usually appropriate, as is telling the employee: "Hey, did you know we have a Reasonable Accommodation Coordinator? I'll email you her contact information just in case you'd like to talk to her."

If the employee is indeed drunk, remember that you can and should discipline the employee – even if the employee has a disability such as alcoholism.

2. You should hold all employees accountable, even if they may have a disability. Let's say an employee arrives late for a couple of times in one week. Could a change in medication or a hidden disability be the cause? It's possible. But that doesn't mean you ignore what's happening. Yes, you can point the employee to the RA Coordinator. Then document the incidents using your 75-cent tool (prices may change due to inflation). If the misconduct or poor performance continues, take the appropriate action.

3. Reasonable accommodations are not a one-and-done thing. What if the employee had previously informed you of his disability and had already received an accommodation? And now, out of the blue, the performance or conduct worsens.

This is a good reminder that reasonable accommodations are not lifetime appointments. It's good practice to reassess the accommodation if an employee appears unable to perform the essential functions of their job. Medications change (as do their side effects), and conditions improve, worsen, or simply change over time. Most reasonable accommodations are no- or low-tech. But if you're providing a high-tech accommodation, you need to ensure it's compliant with current and changing

technology needs and be aware if there's a new alternative product that would be effective.

The pandemic changed us all. If your employees are returning to the physical workplace after more than two-plus years, now may be the time to re-evaluate the effectiveness of their reasonable accommodations. It's one of those rare things you can do that is a true win-win for everyone. Gephart@FELTG.com

[Editor's note: Join Attorney Katherine Atkinson for the session Revisiting Existing Reasonable Accommodations, one of the 11 sessions that make up FELTG's Annual Federal Workplace 2022: Accountability, Challenges & Trends August 29 – September 1.]

UPCOMING FELTG WEBINARS

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

Reasonable Accommodation in the Federal Workplace
Final session: August 18

Federal Supervisors Workshop: Building the Best Toolbox for Managing Today's Workforce Webinar Series
Final session: August 23

The Why, When, and How of Whistleblower Reprisal Under the New MSPB
September 8

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

The Latest in Religious Harassment and Discrimination Cases
October 12

High Times and Misdemeanors: Weed and the Workplace
October 27

Visit our Webinar Training page.

Who Wrote that Rule? Notification is 2nd Element of Discipline
By Michael Rhoads

Here at FELTG, we teach that there are five Elements of Discipline when a supervisor needs to prove an employee committed a misconduct. The second element deals with what you as a supervisor/ER/LR/HR Specialist can do to pro-actively notify your employees of the rules. For the sake of argument, we'll say that the rule we've established is legal and enforceable by agency standards. Let's say your agency has established a rule where no one is allowed to keep open food or beverages on their desk overnight, or a rule that employees must remove food from the break room fridge before the close of business on Fridays.

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

There are a few ways to notify employees of a new rule. First, take a moment to introduce the rule at your next group meeting. If there is a common area in your office, post any new rules or agency regulations in a prominent spot. If your agency has a SharePoint site, or an agency policies page on your website, you can post the rule there as well – and direct employees there to view the rules.

The direct route is usually the quickest and most efficient. If you know the culprit who is leaving out open food or beverages, or violating the fridge policy, then addressing it with that individual is a much better practice than calling a team meeting with everyone, when only one person is violating the policy.

Face-to-face communication has been greatly reduced since March 2020. You can accomplish the direct approach over your favorite web-based software (e.g., MS Teams, Zoom, etc.), or by simply using a

phone of your choice to call the person directly.

Let's say the violation of these rules has become a pastime at your agency, and the supervisors have not been enforcing the rules. If you don't enforce the rule, you lose the rule, so in order to re-establish the rule the agency must re-establish notice (send an email or mention it in a team meeting, for example).

FREE DEIA RESOURCE!

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

And last, but certainly not least, there is a strong case for common sense. Shouldn't everyone know that if food is left out on a desk, opened, for too long, it may cause alarm to your fellow employees? Not to mention any smaller critters that may be lurking about.

To find out the other four Elements of Discipline, join FELTG President, Deb Hopkins on September 7-8 from 12:30 – 4:00 PM ET each day for our flagship course, UnCivil Servant: Holding Employees Accountable for Performance and Conduct.

Stay safe, eat in good health, and remember, we're all in this together. Rhoads@feltg.com

Ask FELTG Tackles Two Questions About Reasonable Accommodation

Q: An employee claims to have a family member with an underlying medical condition that makes him susceptible to severe COVID. May the agency ask for medical documentation about the family member's condition, if that's why the employee is seeking telework as a reasonable accommodation?

A: If the employee does not have a disability, then any step toward granting telework, including requesting medical documentation, is not part of the reasonable accommodation process because only qualified employees (or applicants) with disabilities are entitled to RA. *See Key-Scott v. USPS*, EEOC Appeal No. 0120100193 (2012).

You'll need to check your agency's policy for guidance about what is required to allow telework flexibilities for employees who live with individuals with underlying health conditions.

Q: If the agency grants telework as a provisional accommodation and it's clear the accommodation is not working, how does the agency change the accommodation if the medical documentation states that telework is the recommended accommodation?

A: If the medical documentation recommends telework, the agency is not bound to provide telework if there is another affective accommodation that allows the employee to perform their job within their medical restrictions. If an accommodation is not working, then it is not an effective reasonable accommodation.

In a case where medical documentation recommends telework, at the outset the agency should request additional medical information related to the functional limitations the employee has, so that the agency can determine if an accommodation other than telework is appropriate.

The information presented here is for informational purposes only and not for the purpose of providing legal advice. Contacting FELTG in any way/format does not create the existence of an attorney-client relationship. If you need legal advice, you should contact an attorney.

Whether you need to jump start your DEIA efforts, or if you're ready to take them to the next level, join FELTG on Sept. 28 from 1-4:30 pm ET or **Setting the Bar: Advancing Diversity, Equity, Inclusion, and Accessibility in FY 23.**