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

FELTG Newsletter | Vol. XIV, Issue 9 | September 14, 2022

If I Had a Bucket List, This Ride Would Be on It

Last month I had the pleasure of taking a bicycle trip through several national parks and forests in the U.S. and Canada, including Glacier National Park. As part of the itinerary, I rode from West Glacier up the Going to the Sun Road, which is consistently rated one of the top road bike rides in the country. The climb wasn't easy but the payoff at Logan Pass was worth it – and the downhill was a dream! (The bear sightings weren't too shabby either.)

I hope you were able to get a break over the summer, as well. Now, it's the final push to the end of the fiscal year, and time to start planning for FY 2023. At FELTG we are always here to help, so if there are any training areas you need us to cover or if you have ideas for future sessions you'd like us to consider, send an email to info@feltg.com, and we'll be happy to take a look.

In this month's newsletter, we discuss AWOL employees, disability harassment, the importance of jurisdiction, medical confidentiality, and much 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**.

EEOC Law Week
September 19-23

FLRA Law Week
September 19-23

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

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

Conducting Effective Harassment Investigations
October 4-6

EEO Counselor and Investigator Refresher Training
October 12-13

Back on Board: Keeping Up with the New MSPB
October 20

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.

Employees Can Be AWOL Even if at Work or Working Elsewhere
By Dan Gephart

Only six percent of American workers who have been teleworking since the pandemic began want to return to the physical workplace, according to a recent poll.

You know that there are more than a handful of people at your agency who feel the same way. What if one of those employees just never came back to the physical workplace and just kept working from home. What would you do?

Let me spell it out for you.

A-W-O-L.

But they're still working, you say. Yes, but are they working in the location where they were told to report? No? Well then it looks like you have a clear-cut case of Absence Without Leave.

As FELTG President Deb Hopkins pointed out during the recent training session *What You Think You Know About AWOL is Probably Wrong*, there are foundational MSPB cases going back to the 1980s on AWOL. The newly quorumed MSPB has already decided AWOL cases. And there are so many AWOL cases in between that you should have little problem finding one with a similar fact pattern to yours. As Deb said during the training, "a lot of employees have gone AWOL over the last 40 years."

Are you still hesitant to charge AWOL for an employee who works remotely despite orders to return to the physical workspace? Well, the MSPB has ruled that an employee doesn't even need to be "absent from the work site to be found AWOL." *Buchanan v. Dep't. of Energy,* 247 F.3d 1333 (2001).

There are several examples of this, including the employee successfully charged with AWOL for conducting personal business while on duty (*Mitchell v. DoD*, 22 MSPR 271 (1984)) and the employee removed via AWOL for sleeping on the job. *Golden v. USPS*, 60 MSPR 268, 273 (1994).

And then you have Mr. Lewis. The Bureau of Engraving and Printing employee, still seemingly dismayed by a change of shifts two years previously, refused to obey his supervisor's order. He was told that he only should return to work only if he was "willing and able to report for duty."

Lewis took his supervisor's directive to mean that he was on "approved leave," and could take his time to determine if he wanted to continue working. The agency disagreed with his assessment and charged him with AWOL. The MSPB agreed with the agency. *Lewis v. Bureau of Engraving and Printing*, 29 MSPR 447 (1985).

If you missed Deb's recent session, join us for Feds Gone AWOL: Understanding the Charge and Applying it Correctly, which will be held on October 6 from 1-2 pm ET, and get yourself up to speed on this important charge. Gephart@FELTG.com

Absence, Leave Abuse & Medical Issues Week

Whether you're an HR professional, employee relations practitioner, EEO specialist, RA coordinator, supervisor, or agency counsel, you have undoubtedly faced a leave-related challenge. Join us September 26-30 for Absence, Leave Abuse & Medical Issues Week and leave with the critical foundation you need to address the most current, complex, and relevant topics, including disciplining employees for leave abuse, medical documentation, FMLA, leave and reasonable accommodation, and more.

EEOC Case Illustrates the Ugliness of Harassment Based on Disability
By Deborah J. Hopkins

Members of the FELTG Nation are likely familiar with EEO cases where agencies fail to accommodate a complainant's disability, but there's another ugly side of disability discrimination that sometimes arises – hostile work environment harassment based on the complainant's disability. We saw this in a fairly recent EEOC case, *Damon Q. v. DOD*, EEOC Appeal No. 2020003388 (Aug. 9, 2021).

Imagine you have a visible physical disability, and a high-level supervisor mimics your disability and the way you do your job in front of a room full of your co-workers. This exact thing – and more – happened to a supply technician at DLA, a left-hand amputee who, among other things, alleged:

- During a safety re-enactment meeting in front of the workgroup, the Director mimicked the complainant's physical disability by "put[ting] his arm up with his elbow bent" and demonstrating the way the complainant performed the task, which humiliated and embarrassed him.

- After the meeting, the complainant approached the Director to talk to him about his conduct during the meeting, and the Director responded in an intimidating manner.

- While walking away from the Director because of his intimidating response and mannerisms, the Director walked behind Complainant talking aggressively about his physical disability.

- A few weeks later the complainant received an email from the safety representative stating that the complainant chose not to come to the regularly scheduled meeting because he did not want to participate in management meetings. This was a misrepresentation of his request to not be required to interact with the Director who had mimicked his disability.

FREE DEIA RESOURCE!

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

EEOC looked at the facts of this case and disagreed with the AJ, who granted summary judgment for the agency. Interestingly, though, the Commission said the material facts were not in dispute and summary judgment was appropriate – for the complainant. The Commission found the agency created a hostile work environment because the unwelcome conduct based on the complainant's disability was sufficiently severe or pervasive:

> "…[W]e note that in evaluating whether the conduct is severe or pervasive enough to create a hostile work environment, the harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. (citation omitted). In this case, we note that Complainant attested that he felt threatened, embarrassed, and humiliated by the Director's impersonation of him with his impairment during the safety reenactment. Complainant maintained, moreover, that the Director was also aggressive towards him after he complained to the Director that the mimicking of his disability was offensive towards him. We note that employees observed that Complainant and the Director engaged in a "heated" conversation after the reenactment, and a Material Handler attested that he observed the Director getting closer

> and closer to Complainant to the point of Complainant putting his arm up between the two of them. As noted above, the Director did not dispute that he demonstrated the crate inspection as if he had no left hand to show that Complainant was not properly performing the task…
>
> According to Complainant, he was so humiliated by the Director's mimicking of his disability in criticizing his performance in front of employees that he communicated to the Deputy Director, among others, that he no longer wished to attend meetings wherein the Director would be present. Rather than immediately addressing Complainant's request and concerns of a hostile work environment, the Agency generated CAC meeting minutes noting that Complainant did not want to attend the meeting because he did not want to meet with management. Complainant further received emails wherein he was accused of having a conflict with management. Complainant believed that the meeting minutes and the emails cast him in a negative light, as he only wanted to be away from the Director and did not have a conflict with management as a whole. Upon review, we determine that a reasonable person in Complainant's circumstances would find that management's actions were severe enough to create a hostile work environment based on disability… (*Damon Q.*, above, p. 8-9).

The EEOC found the agency liable because the actions were committed by a director and the agency did not take prompt, effective corrective action. When handling disability cases, be careful not to stop at reasonable accommodation, but also be aware that harassment isn't part of the equation. We'll discuss in more detail during the virtual event EEOC Law Week, September 19-23. Hopkins@FELTG.com

The New Board Affirms Several Established Discipline Principles
By William Wiley

Best practices in our business are worth restating on occasion, particularly when we get new adjudicators at MSPB. From an otherwise unremarkable recent Board final order, we are refreshingly reminded of the following principles related to federal employee discipline.

FACTS: During a discussion with an agency manager, the employee walked toward the management official, snatched a leave request form out of his hand, and then pushed the official's hand down "in an aggressive manner."

QUESTION: Can an agency fire an employee who does something this minor?

ANSWER: Yes, IF the agency knows what it is doing, *see Stevens v. Navy*, DC-0752-21-0412-I-1, August 5, 2022 (NP).

REAFFIRMED DISCIPLINE PRINCIPLES:

1. **A generic unlabeled charge is often better than a more specific labeled charge.** If you have attended FELTG's famous *MSPB Law Week* seminar, you know that an unlabeled charge of misconduct has no separate elements of proof; the agency need prove only the underlying misconduct. In comparison, a labeled charge requires that the agency prove both the underlying misconduct AND the elements of the definition of the specific charge. Here, the agency used the generic unlabeled charge of "unacceptable conduct." Therefore, it needed to prove only the "FACTS" laid out above. On appeal, the appellant argued that the agency

failed to prove that an "assault" or "threat" occurred. Because the agency avoided using the specific labels of "Assault" or "Making a Threat," it had no obligation to prove the elements that define those specifically labeled charges. Therefore, the appellant's argument failed, and the Board sustained the charge.

2. **Misconduct that occurred many months earlier can be disciplined without the charge being dismissed as stale.** In this appeal, the appellant appeared to argue the equitable defense of laches. In that argument, an individual asserts that discipline cannot be administered because the misconduct occurred too far in the past prior to the initiation of discipline. Laches bars an adverse action when an unreasonable delay in bringing the action has prejudiced the party against whom the action is taken. The elements of a laches defense require proof of BOTH an unreasonable delay AND prejudice, e.g., there is no automatic bar to taking an action just because it occurred far in the past. The one-year delay in this case was found not to be neither unreasonable nor prejudicial. In fact, MSPB has previously found that a delay of three or four years did not warrant reversal of the discipline ultimately administered. Therefore, the laches defense failed.

ASK FELTG

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

3. **It is safest if the deciding official (DO) does not discuss the proposed discipline with others prior to making a decision.** Since the cooling of the Earth, we at FELTG have counseled that the agency is in the most defensible position if the DO considers only the materials in the proposal notice and the employee's response when deciding what discipline is warranted. If the DO considers facts outside of these two documents, there is a chance the employee's due process rights will be violated. Constitutional due process requires the agency tell the employee what facts the DO will be relying on so the employee can mount a defense to the proposed action. In this case, the DO did not follow our advice and discussed the pending discipline with others before making a decision regarding the proposal. However, because much of that discussion simply confirmed facts already in the proposal, there was no violation of due process. Separately, even though arguably the DO learned about facts not in the proposal, he testified that he did not rely on those facts. Based on a credibility determination, the judge held that the DO's testimony was true and concluded that the appellant's arguments were unpersuasive. The agency won this point on appeal. However, if the DO had not engaged in these ex parte discussions, the judge would not have had to assess credibility and the Board would not have had to review the undisclosed material to determine whether they contained new facts or simply confirmed existing facts in the proposal notice.

4. **A removal after a suspension will almost always be found to be a reasonable penalty.** Progressive discipline is not a requirement prior to firing an employee for misconduct. However, if the agency has previously disciplined the employee, removal for a subsequent act of misconduct will almost always be found to be a reasonable penalty *even if the later misconduct is relatively minor*. This is particularly true if the second act of misconduct is a suspension (as it was here) and

> similar to the first misconduct (thereby establishing a pattern of misconduct). Always remember, it is not up to the Board to decide what the proper penalty should be. Rather, it is the Board's responsibility to determine whether the DO properly weighed the relevant Douglas Factors and whether the removal penalty "clearly exceeded the bounds of reasonableness."

You have three ways to learn basic principles like these: work in the business 10 to 15 years (learning from your mistakes as you go), read 43 years of Board decisions (plus the related decisions of the Federal Circuit Court of Appeals), or attend our FELTG seminars. When deciding which of these to undertake, keep one very important distinction in mind: At FELTG, you get free coffee. Wiley@FELTG.com

Back on Board: Keeping Up with the New MSPB

After a five-year absence of a quorum, the MSPB is keeping itself busy chipping away at the thousands of Petitions for Review in the backlog. How can you keep up with the Board's pace?

FELTG's quarterly review of MSPB decisions is how.

Join FELTG President Deb Hopkins for Back on Board: Keeping Up with the New MSPB on October 20 at 1 pm ET, where she will lead a discussion of the newest and most critical decisions coming out of the MSPB and what those decisions mean for you and your agency.

There has never been a situation like this before, nor a time when training has been more important. The FELTG team is reading every single new case and can't wait to share the takeaways with you.

Plus, Ms. Hopkins will also take your questions during this two-hour virtual training event.

Effective Performance Plans are Key to Supervising Teleworkers
By Barbara Haga

I recently led a virtual training session on creating effective performance narratives as part of FELTG's *Federal Workplace 2022: Accountability, Challenges & Trends* event, where I discussed several issues related to performance plans and narratives. I started with a quick discussion about plans for teleworkers. I thought it might be beneficial to explore that topic further here.

A request I have heard more than once in the past few months is a need for help with performance plans for teleworkers. This one usually leaves me scratching my head. How were managers holding people accountable for work results since 2020 if we are talking about creating plans for those workers in 2022?

Effective performance management and successful telework arrangements go hand in hand. That has been the requirement for more than ten years. Section 6502(b)(1) of the *Telework Enhancement Act of 2010* stated that agencies policies on telework had to "… ensure that telework does not diminish employee performance or agency operations."

There would have to be some way to assess performance results, which should have come through individual performance requirements.

OPM's updated telework guidance is published in the 2021 Guide to Telework and Remote Work in the Federal Government. For our purposes, we are not going to distinguish between routine telework, situational telework, or remote workers, because for this topic, the type of telework arrangement doesn't matter.

Here is OPM's key point regarding teleworkers and performance plans:

> When implementing the telework program, managers should keep in mind that performance standards for teleworking employees must be the same as performance standards for non-teleworking employees. Also, management expectations for performance should be clearly addressed in an employee's performance plan, regardless of whether or not the employee is a teleworker. When an employee participates in telework, expectations related to accountability do not differ by virtue of the telework arrangement. (p.36)(underscoring added)

This guidance is not new. It has been this way since telework came on the scene. Does that make sense?

Same Outcomes Reached Differently

The best way I know to explain it is that the teleworker is held to the same outcomes, but how the manager gets to the point of measuring that outcome might be different. Let's use an example of an employee relations specialist preparing discipline and performance-based actions. Here is the Fully Successful standard for the critical element Technical Competence that is similar to standards I have used for staff members in the past.

> Demonstrates a thorough understanding of law, rule, and regulation that applies to the assigned functional area. Provides effective management advisory services to assigned organizations which reflect well thought-out solutions and viable alternatives. Documents are clearly written and are prepared in keeping with agency format requirements. Notices and decisions 1) incorporate up-to-date information in terms of agency policy and third-party decisions, 2) include appropriate citations to contracts, policies, etc., 3) clearly and completely cover the elements of the case, and 4) incorporate required information on employee rights in the matter. Demonstrates a basic understanding of other personnel functional areas to ensure that his/her own work is fully integrated with other functions.

It would seem to me that this standard could work in either an in-person or telework situation. Perhaps in the pre-pandemic world, notices and decisions such as these were left on my desk with the case file so I could review them before they were issued. That way I had detailed information on the clarity of the elements of the case, whether due process was observed, whether the notice incorporated the latest case decisions, etc. In a world where this work is accomplished at a different location, I could still see the letter if it was sent by e-mail to me or through an automated system. What might be new is how I could see the case file remotely, so there would have to be an alternate arrangement for me to get those, but I would be judging the work on the same things regardless of whether my employee worked on that action down the hall or miles away from the agency office.

Better Methods Across the Board

Perhaps the need to evaluate the teleworker's performance means that I recognize a new way to identify the outcomes for all employees. Determining whether effective advice was given might have been easier in a pre-pandemic world. Maybe, as the office head, I attended staff meetings with the serviced organizations, and I received regular feedback in those sessions about the quality of guidance provided. There may also have been a lot of informal interactions in the cafeteria or walking down the hall with those managers who were receiving guidance from my staff members. Things may be different now, but I still need to know whether the advice is

effective. Just looking at the letter being issued doesn't really tell me how well the manager was advised throughout the process. One solution would be to do some follow-up on a sample of actions for all staff, not just the teleworkers.

Using a neutral method of choosing which cases I am going to follow up on, I could select a certain number of lower-level disciplinary actions and some adverse and performance-based actions for each of my employees. I could design a questionnaire or, perhaps, set up a time for a phone call to interview the manager involved in the action with a set of standard questions about how well they were walked through the steps of proposing/taking action.

Ultimately, as the rater, I would have to determine if the advice was effective – whether my employee allowed the manager to decide or tried to force the manager to take a particular action, whether my employee explained the steps of how various actions might take place, and what the potential issues might be that could come out of an action in terms of grievances, complaints, and appeals, etc.

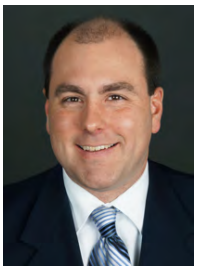
It's interesting that a lot of positions have measures about providing effective advice in their performance plans, but when I ask how that is assessed supervisors often answer: "Nobody complained." That's not enough – telework or in-person.

Next month we will look at some other related performance matters! Haga@FELTG.com

SPECIAL DEIA TRAINING EVENT

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

Confidentially Speaking: Legitimate Reason Needed to Request Medical Info
By Michael Rhoads



Think of a personal secret you've been keeping. Now imagine that, as part of an investigation, you must divulge that secret. You assume that the investigators will keep the secret confidential, only to find out that personal secret has been published for all to see online. This might sound like a plot line to a teenage drama, but revealing confidential information happens, intentionally and unintentionally, during investigations.

As part of Section 501 of the Rehabilitation Act of 1973, an employee's medical information should be treated as confidential. Agencies often find themselves on the losing side when an employee's medical information is disclosed, no matter the intent of the disclosure. A few recent EEO cases illustrate just how costly it can be when agencies improperly disclose or improperly request medical information.

Augustine V. v. U.S. Postal Serv., EEOC Appeal No. 2020001847 (Aug. 16, 2021)

The EEOC increased the amount of non-pecuniary damages from $25,000 to $70,000. The complainant, a city carrier at the United States Postal Service, had his medical information displayed publicly on the agency form used to request overtime or auxiliary assistance. The manager instructed the complainant to put his medical information on the form. Also, the complainant was not given a reasonable accommodation for his medical condition. The agency gave him a light-duty assignment, but the work he was given was completed in a few hours each day, and not over a full day's work. The complainant was forced to use sick leave to make up the balance of the day.

The agency had not complied with orders from the EEOC in a previous case, which affected the outcome of this case. In the previous case brought by the complainant in 2017, the EEOC found the agency failed to make a good faith effort to accommodate and granted him compensatory damages. The agency opined that it had accommodated the complainant sufficiently in 2017. In this subsequent case, however, the EEOC disagreed with the agency over the accommodation.

The EEOC found the agency's accommodation to be insufficient and increased the non-pecuniary damages from $25,000 to $70,000.

The EEOC wanted the agency to conduct a supplemental investigation to determine the compensatory damages, which it did not. Also, the agency failed to train and discipline the management official responsible for the disclosure of the complainant's medical information. A timelier compliance with the EEOC's orders, and especially a timelier accommodation, might have saved the agency from the increase in non-pecuniary damages.

Salvatore K. v. Dep't of Justice, EEOC Appeal No. 0120182095 (Jun. 23, 2021)

A contract company working with the US Marshals Service terminated a court security officer (CSO). The CSO is contracted to provide "security to the federal court and its judicial officers, witnesses, defendants, and attorneys." The contract company is obligated to have their CSOs "… undergo and pass an annual examination …" The complainant was diagnosed with borderline Type II diabetes in 2005.

During the annual examination in August 2013, a doctor cleared the complainant for duty as "medically qualified." A few months later, a second doctor reviewed the report and issued a medical review form to the complainant requesting ten different types of medical data from the complainant's hemoglobin measures to a complete history of his medications. The first doctor responded to the second doctor's medical review form by declaring the complainant medically fit for duty. The second doctor wasn't satisfied with that response and issued a follow-up medical review form requesting an additional eleven different types of medical data.

The complainant did not comply with one of the initial requests to test his blood sugar four times a day from his fingers since it would interfere with his ability to hold a gun. In June 2014, the complainant's district supervisor asked if he had any additional information to submit to the agency. The complainant declined to offer any further medical data. Six days later, he was terminated from his CSO position for failing to provide all documentation to determine his medical qualification.

In March 2015, the complainant filed an EEO complaint on the basis of disability, claiming the agency "subjected him to harassing, excessive, and unduly burdensome medical assessments and to requests for documentation." The AJ issued a decision without a hearing in favor of the agency. On appeal, the EEOC reversed the AJ's decision and found in favor of the complainant.

The EEOC found the agency did not prove its case for a few reasons. The complainant was able to perform his duties and was not a direct threat to himself or others. The agency relied upon too broad of a series of generalized medical requests and not an individualized assessment of the complainant or any observations of his work performance.

The EEOC also took the guidance from the American College of Occupational and Environmental Medicine (ACOEM) to task. The ACOEM's guidance violated the Rehabilitation Act by relying on generalized stereotypes rather than individualized assessments, which is required by the Rehabilitation Act.

The point of these two cases is clear: An employee's medical information is confidential. There are legitimate, business-based reasons to request medical information. However, that information should be treated more like a game of Operation than Go Fish.

To learn more about how you and your agency can properly request medical records from an employee, join FELTG for Absence, Leave Abuse & Medical Issues Week, September 26-30 from 12:30-4:30 pm ET each day.

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

UPCOMING FELTG WEBINARS

Register for instructor-led webinar sessions on the topics most important to Federal law practitioners and supervisors. Attend from where you work – agency office or home. FELTG's webinars provide specific, timely, and useful guidance – and they do it in just 60 minutes.

The Role of the Douglas Factors in Arbitration
September 29

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

Grappling with Employee Stress in the Workplace: Improve Performance and Morale at Your Agency
November 1

Avoiding Mistakes in Selection and Promotion Cases
November 15

Visit our Webinar Training page.

The Good News: Jurisdiction Matters to FLRA, MSPB, EEOC -- It Better Matter to You

By Ann Boehm

The decision-making entities in Federal employment and labor law have distinct jurisdictional limitations. Based upon some interesting recent decisions from several of these entities, they take those limitations seriously.

The Federal Labor Relations Authority (FLRA) website explains its mission as follows: "The FLRA exercises leadership under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135, to promote stable, constructive labor relations that contribute to a more effective and efficient government." They are the labor law people.

The mission of the Merit Systems Protection Board (MSPB), according to its website, is to "'Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices.'" They explain that "MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies." They are the performance, misconduct, and whistleblower protection people.

The MSPB's website also explains what they do *not* do, such as "[h]ear and decide discrimination complaints except when allegations of discrimination are raised in appeals from agency personnel actions brought before Board. That responsibility belongs to the Equal Employment Opportunity Commission (EEOC)." They are not the discrimination people.

The jurisdictional divisions of labor should be clear, but sometimes employees, unions,

and agencies file in the wrong place. The cases below demonstrate the problems with those errant filings.

Let's start with the FLRA's recent decision in *National Federation of Federal Employees, Local* 1998, 73 FLRA 111 (2022). The union filed exceptions to an arbitrator's award that upheld the removal of a grievant for unacceptable performance.

I assume you astute FELTG readers are thinking: "They can't ask the FLRA to review a performance-based removal, because that's within the MSPB 's jurisdiction." And that is correct.

The FLRA explained, "[u]nder § 7122(a) of the Statute, the Authority lacks jurisdiction to review exceptions to an award 'relating to' a matter described in § 7121(f) of the Statute" – such as removals for performance that are covered under 5 U.S.C. § 4303. *Id.* at 112. "Such matters are appropriately reviewed by the Merit Systems Protection Board." *Id.*

The FLRA lacked jurisdiction. It dismissed the case.

Another labor law entity, the Federal Service Impasses Panel (FSIP), also had to remind a union and agency that the MSPB handles the merit system. *U.S. Army Corps of Engineers, Logistics Activity Center and IFPTE, Local* 259, 2021 FISIP 019 (2022). The union and agency went to impasse over proposals discussing "Merit System Principles." The agency proposed, "The Employer recognizes merit system principles as reflected in 5 U.S.C. § 2301(b)." The Union proposed to spell out the statutory language in 5 U.S.C. § 2301(b).

Relying on jurisdiction, the FSIP ordered the parties to withdraw their proposals. The FSIP explained that the *Civil Service Reform Act* created the MSPB to enforce the Merit System Principles. Thus, the FSIP explained, "[t]he interpretation of the Merit System principles is best addressed through the numerous MSPB decisions and studies." *Id.* No need to include the merit system statutory reference in a collective bargaining agreement.

While the labor law entities were explaining what the MSPB does, the MSPB explained in *Edwards v. DOL*, 2022 MSPB 9 (2022), what it does not do. The employee claimed to be a whistleblower based upon his disclosures to supervisors about alleged race discrimination.

The MSPB said that allegations of perceived discrimination under the Civil Rights laws are not protected disclosures under the whistleblower laws. Instead, the proper forum for equal employment opportunity retaliation allegations is the Equal Employment Opportunity Commission. *Id.*

[**Editor's note:** You can get the full picture of what the EEOC and FLRA do starting Sept. 19 as FELTG begins its EEOC Law Week and FLRA Law Week virtual training events.]

What's the lesson to be learned from these cases? Pay attention to jurisdiction! It matters! It may be the easy way to win a case. And that's Good News.
Boehm@FELTG.com

GET YOUR REFRESHER TRAINING!

Hey counselors and investigators: Are you looking for a convenient and engaging way to pick up your mandatory refresher training? Are you looking or useful and up-to-date guidance where you can ask questions and get answers in real time?

Attend both days of FELTG's EEO Counselor and Investigator Refresher Training 2022 and get your 8 hours while receiving instruction on important topics, such as EEO timelines, best practices in interviewing complainants and witnesses, trends in reasonable accommodation, the very latest on sexual orientation and gender discrimination, the latest on post-COVID EEO challenges, and much more.