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

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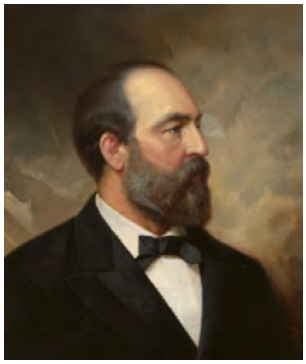


Politics Have Been Ugly for Generations

Did you know the modern, merit-based civil service system is the direct result of a Presidential assassination? In 1881, President James Garfield was assassinated by an individual who thought he deserved a job in the Federal government, but was denied a position. Federal employment at that time was a "spoils system," which meant that the political party in power gave public offices to its supporters, so most Federal jobs were not based on merit.

As a result of the assassination (and, as the story goes, in President Garfield's memory) President Chester Arthur signed into law the *Pendleton Civil Service Reform Act* on January 16, 1883, which among other things created the Civil Service Commission (the MSPB's predecessor) and made it illegal to fire Federal employees because of their political activity. At least something good came out of a very hard time in our country's history – and hopefully some good comes out of these challenging political times we're enduring now.

In this month's newsletter, we discuss *Douglas* factors 2 and 5, workplace intoxication and its impact on workers' compensation claims, EEO reprisal challenges, accommodating stroke victims, and more.

Take care,

Deb

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 the 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**.

Reasonable Accommodation: Meeting Post-pandemic Challenges in Your Agency
November 17

MSPB Law Week
December 5-9

Drawing the Line: Union Representation or Misconduct
January 19

Calling All Counselors: Initial 32-Hour Plus EEO Refresher Training
January 23-26

Get it Right the First Time: Accepting, Dismissing, and Framing EEO Claims
February 22-23

Workplace Investigations Week
February 27 - March 3

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.

A New Aggravating Job Type Under Douglas Factor 2
By Deborah J. Hopkins

A brand-new precedential MSPB decision has led me to ask FELTG readers: What charge would you draft, and what penalty would you assess, in this case? Here are some facts:

The appellant, a GS-9 Supervisory HR specialist, made several comments and engaged in conduct toward two subordinates over an 18-month period which made them uncomfortable, including:

- Calling them "sexy" or "beautiful"
- Commenting on what a subordinate was wearing, including "you look nice," and you "should wear dresses more often because [she] has nice legs."
- Leering
- Staring at a subordinate's rear end
- Continuing to make comments even after the subordinates told him he had crossed a line
- Making advances and "hitting on" them

In addition to the above, the appellant spent hours in his office, with the door closed, "with a particular female subordinate employee, reportedly engaging in conversations that were personal in nature, and that he, as a supervisor, should have recognized that his actions could be construed as favoritism and were disrupting his office." This caused a disruption because the appellant "was often unavailable to assist other [employees]."

A few of the aggravating factors identified in the case:

- One subordinate employee would hide out of sight in a co-worker's office when the appellant was around
- The appellant's supervisor spoke to him "numerous times" about his inappropriate behavior
- A 13-day suspension a few years previously for sending pornographic emails using his government-issued computer to another female subordinate employee
- Disruption in the workplace

And mitigating factors:

- His length of service and "good performance"
- The appellant's claims that he was suffering from stress and tension in the workplace due to his relationship with his supervisor
- The appellant's claims that he was suffering from depression

The agency removed the appellant for conduct unbecoming a supervisor, with two specifications -- one for his unwelcome conduct toward his subordinates including calling them "beautiful" and "sexy" and the other for his closed-door conduct in his office with the subordinate.

Despite upholding both specifications and thereby affirming the charge, the AJ found removal too severe and mitigated the penalty to a 14-day suspension and demotion, primarily because the conduct did not include "more serious charges such as sexual harassment, making sexual advances, or inappropriate conduct" towards female subordinates.

On PFR, the Board disagreed with the AJ's characterization of the misconduct and held the AJ "erred in limiting the specification to two instances of the appellant calling female subordinates 'beautiful,' and in doing so, trivialized the severity of his behavior."

The appellant's misconduct actually spanned several months and went well beyond two instances.

MPSB Law Week is Back

Register yourself and your team now for MSPB Law Week, held virtually Dec. 5-9.

In its review, the Board looked at *Douglas* factor 2, job level and type, holding in line with MSPB precedent that "because supervisors occupy positions of trust and responsibility within an agency, the agency has a right to expect a higher standard of conduct from them." *Edwards v. U.S. Postal Service*, 116 M.S.P.R. 173, ¶ 14 (2010). But then it continued:

> Furthermore, while the appellant's misconduct would be serious in any context, **when considered in the context of the appellant's position as a Supervisory Human Resources Specialist, we find his misconduct to be exceptionally serious**. The importance of a healthy and effective human resources department for an agency cannot be overstated … Human resources employees, such as the appellant, play crucial roles in maintaining the quality of public service, because it is the responsibility of the human resources component of an agency "to retain Governmentwide approaches, authorities, entitlements, and requirements" in areas including "[a]ccountability for adherence to merit system principles" and "[e]mployee protection from prohibited personnel practices." [bold added]

The Board held that the appellant's conduct was "antithetical" to his responsibilities as a Supervisory Human Resources Specialist and "strikes at the very core of his job duties to assist in protecting the merit systems principles and prevent prohibited personnel practices." Therefore, removal was within the bounds of reasonableness. *Thomas, IV v. Army*, 2022 MSPB 35 (Oct. 20, 2022).

The big takeaway from this case is that in addition to supervisors, LEOs, and SESers, HR employees may also be held to a higher standard under Douglas factor 2.

We discuss this case and others in detail during MSPB Law Week, December 5-9. Hopkins@FELTG.com

The Good News: Douglas Factor 5 is Your Chance to Tell the Story

By Ann Boehm

Anyone who has taken my training or read my articles knows how much I like the *Douglas* factors, established by the Merit Systems Protection Board (MSPB or Board) way back in 1981: *Douglas v. VA*, 5 MSPB 313 (1981). The *Douglas* factors serve as a logical tool that enables proposing and deciding officials to figure out a defensible, reasonable penalty for an employee who engages in misconduct.

For proposing officials and deciding officials, it is necessary to understand the importance of *Douglas* Factor number 5: "the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties." *Douglas*, 5 MSPB at 332. It is your chance to tell the story!

I acknowledge that it is well-settled in Board law that the most important *Douglas* Factor is number 1. MSPB cases repeatedly state, "[i]n selecting a reasonable penalty, the Board must consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated." But what is often overlooked is the significant weight the Board gives to *Douglas* Factor 5.

Cases from the long-awaited newly-quorumed (yep, I know that is not a real word) MSPB substantiate the importance of *Douglas* Factor 5. In *Sheiman v. Department of the Treasury*, the Board agreed that the employee's continued use of sick leave to play golf justified removal, highlighting that it was "clear from the deciding official's testimony that his loss of trust and

confidence in the appellant played a major role in his decision," and "[t]he deciding official's loss of trust is an aggravating factor." MSPB No. SF-0752-15-0372-I-2, at 15 (May 24, 2022) (NP).

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

Similarly, in *Purifoy v. DVA*, the Board found removal for AWOL to be reasonable, noting "[t]he deciding official's loss of confidence in the appellant and his concern that the appellant's misconduct conveyed a negative message to other employees are also aggravating factors." MSPB No. CH-0752-14-0185-M-1, at 8 (May 16, 2022) (NP). Specifically, "the deciding official testified that he did not think that the appellant 'was going to come back and be a good employee' and, according to the Douglas factors worksheet, which the deciding official considered in imposing the appellant's removal, his supervisors 'lost all confidence in his ability to perform his assigned duties' because he was not present to perform them." *Id.*

(Can we pause for a moment to appreciate that last sentence? The supervisors lost confidence in his ability to perform his duties because he was not there – he was AWOL. Hahaha. Makes sense to me.)

Supervisor confidence can also benefit an employee. In my experience, I have seen instances where an employee really messed up with some major misconduct, but the supervisor's continued confidence in the employee resulted in a penalty less than removal.

And that is ultimately my point about *Douglas* Factor 5. Supervisors know their employees. They know the impact misconduct has on their office and their mission. They are the only ones who know that. The Board understands this.

Tell your story. The Board will listen. And that's Good News! Boehm@FELTG.com

No Debate Necessary: Accommodating Employees Who Had Strokes
By Dan Gephart

As I write this, I'm getting set to watch my Philadelphia Eagles take on the Washington Commanders. I am usually a wreck watching my Birds, and the last few weeks have been more anxiety-filled than ever. I have a feeling tonight's game, even if it's a loss, will be less stressful. The reason? I won't be forced to watch dozens of political ads during the game.

Regardless of where you are on the political spectrum or how you feel about last week's results, I think we can all agree on saying good riddance to these dark, poorly produced, truth-averse, fear-mongering commercials. This past election season took awfulness and ugliness to a new level.

As losing candidates and parties continue their post-mortems this week, I'd like to conduct one, too. But I don't want to discuss issues, votes, winning, or losing. Let's talk about reasonable accommodation.

As the Pennsylvania primaries rolled to an end, the campaign for Senatorial candidate John Fetterman announced that he had suffered a stroke. Fetterman still won the Democratic primary, then stayed off the campaign trail for weeks as he recovered.

A major party candidate for the Senate recovering from a stroke seemed like an anomaly. It's not. Former Illinois Senator Mark Kirk suffered a severe stroke and still campaigned for reelection in 2016, although he eventually lost to Tammy Duckworth. Two current Senators – Ben Ray Lujan of New Mexico and Chris Van Hollen of Maryland – have suffered strokes since they've been in office. More than 795,000 people in the United States have a stroke each year, according to the CDC.

Fetterman's campaign announced he had auditory processing difficulties, a common occurrence after a stroke. Fetterman's first big foray back in public, other than a few small rallies, was a televised high-stakes debate with his opponent Mehmet Oz. Fetterman had requested and received an accommodation of closed captioning.

Despite the accommodation, Fetterman stumbled over some words, struggled to find others, and spoke haltingly. Critics and opponents called his debate performance "painful to watch," "disastrous," and "cringe-worthy."

As Federal HR and EEO practitioners and supervisors, what can we learn from all of this?

1. **A communication disorder is not a reflection on an individual's brain capacity or his/her/their ability to do a specific job.** This should be obvious to everyone, but it isn't always. For years, people have assumed that someone who struggles communicating -- whether it's a speech impediment or aphasia -- lacks intelligence. Research has consistently shown that is not always the case.

2. **Accommodations are highly individualized.** Just because another employee who had a stroke received a certain reasonable accommodation doesn't mean that accommodation will be successful for someone else who suffered a stroke. There are a wide variety of stroke-related limitations. And people experience these limitations in different ways. The Job Accommodation Network suggests asking the following questions during the interactive process:

    - What limitations is the employee experiencing?
    - How do these limitations affect the employee and the employee's job performance?
    - What specific job tasks are problematic as a result of these limitations?
    - What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?
    - Once accommodations are in place, would it be useful to meet with the employee to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
    - Do supervisory personnel and employees need training?

3. **Not every reasonable accommodation will be effective.** Closed captioning is a potentially effective accommodation for someone who processes visual information better than auditory information, such as Fetterman. "But during a debate," Disability Policy Expert Adam Fishbein wrote in an opinion piece for the *Philadelphia Inquirer*, "where multiple people were speaking rapid-fire, it would be difficult for Fetterman to integrate what he needed to read in order to process what was being said." Fishbein and his cowriter Susan Paul, a certified speech/language pathologist, said a more effective accommodation would've been to allow Fetterman extra time to digest what he read and formulate his response, not starting the clock on his response until he started talking. Work closely with the employee and communicate often about the effectiveness of the accommodation.

4. **Have patience with the employee, but don't delay accommodation.** Not only are the limitations for individuals who have had strokes highly individualized, so is the recovery time. Taking your time to find

the right accommodation doesn't mean letting the situation play out. *Jeffry R. v. USPS,* EEOC App. No. 0120180058 (EEOC 2019) offers a great example: After a city carrier had a stroke that caused partial paralysis, he requested a spinner knob on his vehicle. The agency failed to provide one for three *years*. The agency argued that the carrier was not qualified because he took too long to complete his route. However, the EEOC found the agency only gave the carrier one month to reacclimate to delivering mail and to his route – he was able to do it within four months.

For more guidance on accommodation, join Attorney at Law and FELTG Instructor Katherine Atkinson tomorrow (November 17) for Reasonable Accommodation: Meeting Post-pandemic Challenges in Your Agency. Gephart@FELTG.com

New OPM regs, new FELTG webinar!

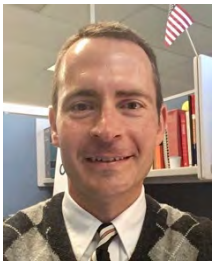
Implementing New OPM Regs on Discipline, Performance

OPM just released its final regulations implementing Executive Order 14003, and they go into effect on Dec. 12. The regs provide guidance on whether you:

- Can use clean-record agreements in settlements.
- Must notify employees that their probationary period is ending.
- Should provide assistance to employees on performance demonstration periods.
- Are required to use progressive discipline in cases of employee misconduct.

FELTG President Deb Hopkins will break it down during Implementing New OPM Regs for More Effective Disciplinary and Performance Actions on December 13 from 2:30-3:30 pm ET.

Can Agencies Drug Test Injured Workers?
By Frank Ferreri



Let's say an employee who is going about her business on the job slips and falls, resulting in an injury for which she files a claim for workers' compensation benefits. Someone at the agency thinks that it wasn't work that caused the spill but the fact that she was under the influence of drugs at the time of the injury.

The agency, wanting to get the record straight, decides the employee needs to undergo drug testing. Can the agency do such a thing and what sort of considerations apply when an agency has made the call to test for drugs?

The following breaks down what Congress, the Office of Workers' Compensation, and the Employee Compensation Appeals Board (ECAB) have had to say about drug testing for workers injured on the job.

First off, while it isn't the law it should be pointed out that Executive Order 12564, signed into effect by President Reagan in 1986, maintains that Federal employees are required to refrain from the use of illegal drugs. The EO charges agencies with establishing programs for drug testing. So, Federal employees shouldn't be using drugs in the first place, and agencies have the authority to take action against those who do.

In the specific context of workers' compensation, under 5 USC Sec. 8102(a), Congress has declared that agencies are not required to pay workers' compensation benefits for a disability or death that is proximately caused by the intoxication of the employee. Unlike Reagan's EO, it's not just illegal drugs that are a problem. That's because on the regulatory side of things, in 20 CFR 10.220, OWCP clarified by implication that the "intoxication" referred to

under the statute is "intoxication by alcohol or illegal drugs."

In 2009, OWCP released Publication CA-810, which, among many other things, spelled out that an agency defending against compensating an employee must present a record that establishes the extent to which the employee was intoxicated at the time of the injury and the particular manner in which the intoxication caused the injury.

So, while the work doesn't stop by proving that an employee was under the influence of illegal drugs or alcohol, it is a necessary first step to controverting a claim.

The 2009 publication emphasized that an agency looking to proximately link an injury to an employee's intoxication does not have "any additional authority to test employees for drug use beyond that which may exist under other statutes or regulations."

An agency claiming the employee's intoxication as a defense should, per the FECA Procedure Manual, obtain a statement from the physician and hospital where the employee was examined following the injury that describes the extent to which the employee was intoxicated and the manner in which the intoxication affected the employee's activities. As part of this, the manual directs agencies to obtain "the results of any tests made by the physician or hospital to determine the extent of intoxication."

Contours of the Law

To see how the law plays out in the real world, it's necessary to look at ECAB decisions that have weighed in on the issues of injured employees, their intoxication, and agency-employed drug testing.

Here's a look at a few cases for insight on those subjects:

***N.P. and U.S. Postal Service,* 2011 WL 4499581, No. 10-952 (ECAB July 26, 2011)**

What happened? A letter carrier alleged that she injured the left side of her head, broke her left elbow, and scraped her left knee when she fell after making a delivery.

The agency's argument. The agency controverted the claim, asserting that she was intoxicated at the time of the injury due to her consumption of narcotics and, therefore, did not sustain an injury in the performance of duty, which is a required showing for an employee to obtain benefits.

The drug testing issue. Because the carrier appeared to be intoxicated – allegedly she was slurring her speech and falling in and out of consciousness and another patient expressed concern that the carrier had been driving -- the hospital where she received treatment for her injuries administered the test, which came back positive for opiates. Further analysis revealed the presence of "an extremely high concentration of morphine and a significantly elevated level of oxycodone."

How the ECAB ruled. According to the board, the evidence, including the drug test, wasn't "clear" that the carrier was intoxicated at the time of her fall and did not establish that intoxication was the proximate cause of the accident. "The evidence establishes only the possibility that [the carrier] was intoxicated … at the time of injury."

***T.F. and U.S. Postal Service*, 2008 WL 5467738, No. 08-1256 (ECAB Nov. 12, 2008)**

What happened? A mail carrier alleged that she experienced an injury while driving for work when she hit an embankment of gravel, which caused the vehicle to hydroplane and led to a spinal injury.

The agency's argument. Drug testing came back positive for marijuana and opiates, the agency denied the carrier's claim.

The drug testing issue. The test was administered two full days after the accident,

and the report indicated that the tests were "all … unconfirmed" and noted that no chain of custody was maintained on the specimens received.

How the ECAB ruled. The agency didn't meet its burden to establish the affirmative defense of intoxication because it did not provide any discussion of why intoxication was the proximate cause of the accident. Instead, the evidence established that "at the time of her injury [the carrier] was delivering mail on her usual mail delivery route." Accordingly, the carrier sustained an injury in the performance of duty.

***In the Matter of Elaine Hegstrom and U.S. Postal Service*, 2000 WL 1285967, 51 E.C.A.B. 539 (ECAB June 5, 2000)**

What happened? A USPS employee died after sustaining a broken neck in a motor vehicle accident that occurred while he was delivering mail. Before he died, the employee was cited for driving under the influence.

The agency's argument. The agency invoked the affirmative defense of intoxication, claiming that it removed the employee from the performance of duty.

The drug testing issue. Upon arrival at the hospital after the accident, the employee's blood alcohol level was tested at nearly twice the legal intoxication limit in the state where the accident occurred.

How the ECAB ruled. Based on the blood alcohol level and a doctor's opinion, the ECAB held that the employee's intoxication removed him from the performance of duty as it was the proximate cause of his injury.

***B.B. and Department of Justice, Bureau of Prisons*, 2015 WL 5306843, No. 14-2000 (ECAB July 9, 2015)**

What happened? The widow of a Bureau of Prisons correctional officer filed a claim for survivor's benefits, alleging that the officer was "murdered [by] gunshot" on the job.

The agency's argument. In response, the agency alleged that the officer died in a hotel as the result of a gunshot wound inflicted by a fellow correctional officer in activities that were not job-related, part of which involved illegal drug use.

The drug testing issue. A toxicology report indicated that the officer had Methlenedioxypyrovalerone – better known as "bath salts" – in his system. The report also indicated the presence of Lidocaine, which is used as a "cutting" agent for drugs of abuse.

How the ECAB ruled. According to the board, "the employee's ingestion of mind-altering drugs would not be reasonably expected by the employing establishment as a travel-duty activity, and it constituted a deviation from the normal incidents of his employment such that he was removed from the performance of duty." Thus, the widow was not entitled to survivor's benefits.

The takeaway

What does it all mean?

Based on statutes, regulations, agency decisions, and guidance, agencies should get the results of drug testing in hand when faced with a claim for workers' compensation benefits, particularly if something like a doctor's concern or a coworker's observation raises the suspicion of possible drug or alcohol use on the job.

However, the legal key to asserting a defense based on an employee's substance use is that intoxication must be the proximate cause of the injury for OWCP to deny benefits to a worker. Thus, the agency must provide evidence showing that the employee's illegal drug or alcohol use removed her from the performance of duty.

It can be a tough case because, in certain circumstances, the ECAB might say that even if the employee was intoxicated, the injury would have happened anyway, and so would be compensable. info@FELTG.com

EEO Reprisal is (Unfortunately) Alive and Well
By Deborah J. Hopkins

Reprisal, or retaliation, is alleged in about half of all EEO complaints. It is the most common basis of discrimination in findings against agencies. Let's look at a few situations where the EEOC has issued findings of EEO reprisal: reassignment, discipline, and retaliatory harassment.

Reassignment
An agency is permitted to reassign an employee for any legitimate, business-based reason, such as employee performance or agency business needs. But reassigning an employee that management views as a problem because of her EEO activity is not permitted under the law.

A Federal Bureau of Prisons medical officer complained about harassment "in the form of harsh supervision, denial of adequate staff assistance, daily intimidation, differential treatment, inappropriate schedule changes, and desecration of her religious practices." According to the Commission, management reprised against the complainant when they told her she was "the problem" and "the one causing all of the drama" and that "problems always surround her." The AJ also found the complainant was subjected to reprisal when management reassigned her to a different work location. *Gwendolyn G. v. BOP*, EEOC Appeal No. 2021001396 (Oct. 18, 2021).

Disciplinary action
An agency is permitted to discipline an employee for misconduct as long as there is a nexus between the misconduct and the efficiency of the service, and provided the discipline is not motivated by that employee's protected category or activity.

A program analyst filed an EEO complaint against two supervisors alleging hostile work environment harassment on Aug. 12, 2016. On Aug. 29, the supervisor reprimanded the complainant for discourteous behavior that occurred between the complainant and her supervisor on Aug. 10. The supervisor never put the reprimand in the complainant's eOPF despite her statement she intended to do so.

The EEOC found a causal connection between the complainant's protected activity and the agency's disciplinary action because of the "close temporal proximity" between the two events. The AJ concluded, and the EEOC agreed, the reprimand was issued for the purpose of chilling the complainant's EEO activity. *Karolyn E. v. HHS*, EEOC Appeal No. 2021003151 (Oct. 19, 2021).

Retaliatory harassment
Creating a hostile work environment because a complainant engaged in protected activity also violates the EEO statutes.

A supervisory criminal investigator claimed retaliatory harassment when he was warned he "better be careful" and that if he continued to file EEO complaints "they will come after him." An agency management official also confirmed that she informed the complainant about the comments and management's attempts to legally "stop" his EEO activity. On top of that, another management official stated he believed the complainant's EEO complaints were "ridiculous." Also, agency management failed to timely approve or acknowledge the complainant's leave requests, denied his telework request, and issued him a counseling memorandum without following the agency's discipline policy. The EEOC found this conduct was motivated by the complainant's protected activity and constituted unlawful retaliatory harassment. *Terrance A. v. Treasury*, EEOC Appeal No. 2020002047 (Sept. 13, 2021), *request for reconsideration denied,* EEOC Request No. 2022000139 (Feb. 9, 2022).

Reprisal is something easily avoided if you have the proper training and awareness. We'll be teaching EEO counselors how to identify potential reprisal during our Calling All Counselors: Initial 32-Hour Plus EEO Refresher Training Jan. 23-26, 2023. Hopkins@FELTG.com

Weingarten and Performance Counseling Don't Mix
By Barbara Haga

Last month, my colleague Ann Boehm wrote a great article *The Good News: With Weingarten, The Law Is Enough*. I cheered as she discussed the various elements of the *Weingarten* right and when she suggested that agencies should not agree to anything beyond what the law requires. How is it in management's interest to add additional notice requirements? If the statute says annual notice is good enough, then, like Ann, I am all about complying with just that.

The basics
Understanding the reasoning behind the *Weingarten* right helps make it clear when it applies and when it doesn't. In *Department of Justice, Bureau of Prisons, Safford, AZ and AFGE, Local 2313*, 35 FLRA No. 56 (FLRA 1990), the Authority quoted from the legislative history of the *Civil Service Reform Act* (CSRA), where Congress adopted the same framework regarding representation for Federal employees in disciplinary situations that applied under the *National Labor Relations Act*.

> In *Weingarten* the Court noted that "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." Id. at 262-63. In such circumstances, the Court concluded that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." Id. at 263. In support of its conclusion that representation could be beneficial to the employer as well as the employee, the Court quoted from an arbitrator's award that described the representation process as contemplating "that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified."

Performance evaluation issues
When leading training sessions for various agencies, I hear some managers say they allow union representatives to participate in performance discussions and performance counseling sessions because they believe it is required. Perhaps, their agencies agreed to such a provision in contract negotiations, or it has become a past practice over time, or perhaps they are allowing the representatives even though their advisors would say it is contrary to their policies.

However, the situation the Supreme Court addressed in *Weingarten* -- a lone employee being questioned by management about events that could lead to a disciplinary action -- is quite different than discussions between a supervisor and employee about missing information in a report or whether the employee applied the wrong per diem rate in a travel reimbursement.

The FLRA's view
The question of whether *Weingarten* extended to performance conversations arose early after passage of the CSRA. The Authority issued decisions in 1981 and 1982 that clearly indicated that *Weingarten* was inapplicable to these types of situations.

In *Internal Revenue Service, Detroit, MI and National Treasury Employees Union and NTEU, Chapter 24*, 5 FLRA No. 53 (FLRA 1981), the Authority dealt with the case of an annual performance review. Mr. Goff was a GS-11 revenue officer whose work was subject to a 100 percent review by his manager. This was a normal process which had occurred in prior years. It included

preparation of a form identifying the findings of the manager and then a meeting with the employee to discuss those findings. After prior such evaluations, Goff had to make adjustments on some cases. Prior to the meeting at issue, Goff requested that a union representative be present at the meeting.

The manager denied Goff's request. As Goff expected, the manager criticized his work and gave him a "critical elements" letter, which was essentially a PIP notice.

The union filed an unfair labor practice charge. The ALJ who heard the case found no violation and the Authority adopted the ALJ's findings. The ALJ found that the performance review meeting was not an examination and that there was no reasonable basis to conclude that disciplinary action could arise from it. It was noted that the "critical elements" letter was not a disciplinary action, but instead, "… identifies serious work performance deficiencies and does advise the employee what is expected to improve performance to an acceptable level within a specified period of time, at the end of which there will be a further evaluation of the employee's performance on these identified elements."

Roughly one year later, the Authority issued its decision in *Department of the Treasury, Internal Revenue Service and National Treasury Employees Union and NTEU, Chapter 22*, 8 FLRA No. 72 (FLRA 1982). In a similar set of circumstances, Mr. Kotofsky's cases were reviewed. He had received several written counseling notices that year about deficiencies in his work. His supervisor told him a branch chief was coming in to hold a discussion with him and the supervisor about the unacceptable work results. Kotofsky asked for a representative, which was denied. Kotofsky was not asked to provide responses on any of the case reviews. In fact, neither the branch chief nor the supervisor took notes during the meeting.

The ALJ in this case found that there was no right to representation under the circumstances. The decision includes the following finding:

"The purpose of the meeting was to generally highlight these known deficiencies to the employee and tell him how to raise the level of his performance to expected standards. This was nothing more than a pure counseling session and was remedial in nature; without the requisite investigatory element it did not qualify as an 'examination of an employee . . . in connection with an investigation,' even though the employee asked to be represented by the union. The Statute does not provide a right to representation under these circumstances."

Bottom line

In the situations described in these cases, the Authority found that *Weingarten* did not apply. If union representation is being allowed in performance meetings, it isn't because *Weingarten* makes it so. So, please allow me to echo Ann's message from last month: Agencies don't need to go beyond what the law provides. And please make sure your managers know what the limits are. Haga@FELTG.com

FELTG 2023 Webinars

Here are just some of the webinars we have planned for early next year. Visit our Live Webinar Training webpage for a list of all upcoming sessions:

The New MSPB and Roller-Coaster Employees: Managing Up-and-Down Performance
March 2

Grappling with Employee Stress in the Workplace: Improve Performance and Morale in Your Agency
March 23

The Federal Supervisor's Workshop: Building the Best Toolkit for Managing Today's Workforce
Seven unique sessions. Series begins March 7