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

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Winding Down 2022

FELTG Readers,

It's been quite a year. While the pandemic is still lingering, we've at least started to see what the new "normal" life looks like. We've connected with you a lot on virtual training (it's nice to have moved past all the 2020 tech issues, isn't it?), but have also been able to see many of you again in person this year – a highlight for sure. We've gotten your email questions, read your LinkedIn comments, your Zoom chats, your class feedback – and we appreciate it all.

I hope as the year winds down that you find time to relax, celebrate the holidays if that's your thing, travel if you want to, stay home if that sounds better, take a few days off work – or go into the office when it's quiet, which I know some of you like to do.

Thanks for a fantastic year, and we can't wait to see you in 2023. But we're not done just yet – check out the inside of this newsletter for information on remaining 2022 events.

In the final newsletter this year, we discuss due process, the FLRA, workplace antisemitism, strategic planning, 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 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**.

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

EEOC Law Week
March 13-17

Nondiscriminatory Hiring in the Federal Workplace: Advancing Diversity, Equity, Inclusion and Accessibility
April 5

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.

Due Process Lessons From Three New MSPB Cases
By Deborah J. Hopkins

As we continue MSPB Law Week, I thought I'd share a few of the new Board's decisions on appellant allegations of due process violations. From my read, the Board seems to be closely following four decades of precedent in its decisions.

Lesson 1: A refusal to extend the response period is not a due process violation.

In proposed removals and other appealable actions, appellants are entitled to a statutory minimum of 7 calendar days to respond to the deciding official (DO) under 5 U.S.C. § 7513(b)(1). In a recent case, the agency's notice of proposed removal gave the appellant a full 14 days to submit any written or oral responses to the DO. The appellant requested an extension on this 14-day timeline, which the agency denied.

Nevertheless, the appellant sent a written response that the DO received after the 14-day window. According to the case, the DO had already decided that the removal action was warranted, yet she still considered the appellant's late-filed response. However, it did not change her decision. At that point, because the 14 days has passed, she was under no obligation to consider the appellant's response. However, having done so, she effectively negated his due process argument. *Jones v. VA*, CH-0752-15-0286-I-1 (Jul. 21, 2022)(NP).

Lesson 2: Providing fewer than 7 days to respond is not automatically a due process violation.

In this case, the agency proposed a 14-day suspension based on two charges and provided the appellant with 7 days to respond. A few days later, the agency amended the proposal notice to add a third charge and gave the appellant an additional 4 days to respond. Although the 4-day response period was fewer than the 7 days required by statute, "it was not unreasonably short." Moreover, the DO considered the supplemental written response the appellant provided the day after the 4-day deadline. Because the appellant received notice of the action against her, an explanation of the reasons for the action, and an opportunity to present her response, there was no due process violation.

Another interesting takeaway from this case: The agency did not schedule an oral reply, and the appellant raised a harmful error affirmative defense. The Board held that appellant did not show the lack of scheduling an oral reply constituted harmful procedural error because the appellant was still provided the opportunity to present her side of the case in writing.

For those astute readers wondering how a 14-day suspension ended up before the Board in the first place, the agency split the suspension into two portions to fit around the employee's 90-day detail to another office and, due to administrative error, the two periods of suspension combined for a total of 15 calendar days, thus constituting an appealable action. *Cargile v. Army*, CH-0752-14-0056-I-2, CH-752S-13-2680-I-2 (Oct. 3, 2022)(NP).

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

Lesson 3: Credibility matters in allegations of due process violations.

In this case, the appellant claimed her due process rights were violated on the day she received the notice of proposed removal. On that day, the DO spoke to the appellant's former coworker and indicated that the agency had terminated the appellant. The appellant claimed the alleged conversation demonstrated that "her subsequent

response to the proposed removal was meaningless, rather than meaningful."

The agency disputed the nature of the conversation and due process claim. According to a sworn statement, the DO spoke with three individuals on the day the appellant received the proposed removal. The DO spoke to a Human Resources point of contact, the appellant's former Engineering Division Chief, and a former subordinate of the DO who was also friends with the appellant. The DO indicated he spoke to HR about the disciplinary process and the DO's specific responsibilities, "including those related to the appellant's due process rights."

A conflict arose in descriptions of the other two conversations:

- "According to that former Engineering Division Chief, he specifically remembered asking if the appellant was fired, and the deciding official responding in the negative, instead indicating that the appellant was being given the opportunity to present her case."
- "According to that former subordinate of the deciding official and friend of the appellant, the deciding official called him, indicating that the appellant had been terminated earlier that day."

After weighing the AJ's credibility determinations, the Board agreed with the AJ that the DO's version of events was more credible. It denied the appellant's due process claim. *Conde v. DHS*, DC-0752-15-1059-I-1 (Nov. 10, 2022)(NP).
Hopkins@FELTG.com

KEEPING UP WITH THE MSPB

FELTG keeps you updated on all of the latest MSPB decisions with our quarterly virtual training Back on Board: Keeping Up With the New MSPB. Register now for the next session on Feb. 14 from 1-3 pm ET.

3 Reasons Why Member Grundmann is Optimistic About FLRA's Future
By Dan Gephart

As she nears completion of the first six months of her tenure as a Federal Labor Relations Authority member, Susan Tsui Grundmann is very optimistic about the agency. We caught up with Member Grundmann a couple of times over the past several weeks, and she was eager to discuss the issues that have her enthused about the FLRA's direction.

1. Formalization of a relationship with FLRA's internal union.
2. Re-establishment of the Collaboration and Alternative Dispute Resolution Office (CADRO).
3. FLRA's return to the top 10 of the Best Small Agencies to Work list.

The FLRA union
"We meet on a regular basis," Grundmann said about the agency and its union. "We have to lead by example. The people on the ground have great ideas. Look to the people who do the work as well as those who do it through other people. Give everyone a voice at the table."

The agency and the union are working closely on returning employees to the physical workplace. They agreed to a return after 14 straight days with a reduction in transmission rates recorded in all regions followed by a 30-day notice provision. During our conversation with FLRA Chairman Ernest DuBester back in April, the hope was for a mid-May return. Months later, the virus still has different plans.

CADRO
Speaking of Chair DuBester, one of his first acts was to reinstate CADRO, which once again is led by Michael Wolf.

"CADRO is back," Grundmann said. "They have an astonishing resolution rate of nearly 100 percent in negotiability appeals. Now when you file a ULP, you have an opportunity to go to CADRO."

During the 18-month period since CADRO was restored in 2021, it has fully resolved 35 negotiability petitions containing 414 language disputes, according to Wolf. A 36th case was partially resolved.

As of Oct. 31, CADRO has handled 127 ULP cases. So far, per Wolf, only three cases required a hearing and 11 were resolved on motions for summary judgment. The rest of the 113 cases were fully resolved through the settlement conference process. That's a success rate just under 90 percent.

A best place to work

In 2020, the agency ranked 23rd among small-size agencies with a score of 64.6. The scores are calculated based on three questions in the Federal Employee Viewpoint Survey (FEVS):

- I recommend my organization as a good place to work.
- Considering everything, how satisfied are you with your job?
- Considering everything, how satisfied are you with your organization?

In 2021, that score jumped to 78.4, vaulting the agency into 7th place in the list just behind the Farm Credit Administration. Why the sudden jump?

"Our employees have always had a strong sense of purpose towards the agency mission, which is to protect rights and facilitate stable relationships among Federal agencies, labor organizations, and employees while advancing an effective and efficient government through the administration of the Federal Service Labor-Management Relations Statute," Grundmann said. "Because we didn't have a General Counsel for several years, ULP complaints couldn't be issued and regional employees couldn't do a significant part of their jobs. I think the President's appointment of Charlotte Dye as Acting General Counsel, which enabled this important work to start up again, likely had a positive effect on employees' morale.

"Additionally, as an agency, we recommitted to our mission by redeveloping a robust training and education program and restoring CADRO. We also demonstrated to our employees that we will engage with them by once again recognizing their exclusive representative and re-establishing our own labor-management forum."

Grundmann thinks it's important not just for FLRA employees, but for all Federal employees, that FLRA is viewed as a good place to work.

"If we are in the business of addressing issues between agencies, its unions, and its employees, we should be viewed by our own employees as embodying the core principles that the employee viewpoint survey measures: employee engagement and satisfaction," she said.

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FELTG Flagship Classes

Mark your calendars now. FELTG's flagship courses – the weeklong MSPB Law Week, EEOC Law Week, and FLRA Law Week, and the two-day UnCivil Servant return in early 2023. Visit the FELTG Virtual Training Institute webpage for more information.

UnCivil Servant: Holding Employees Accountable for Performance and Conduct – Feb. 8-9.

EEOC Law Week – March 13-17

MSPB Law Week – March 27-31

FLRA Law Week – May 1-5

No Need to Cringe: Make Strategic Planning Your Friend
By Scott Boehm

Every office is required to develop a strategic plan. Yet, when most people hear the words "strategic planning," they tend to cringe. I felt the same way in 2005 when our staff conducted its first strategic planning process. I didn't fully appreciate it at the time, but the process reaped rewards beyond any of our expectations. And it wasn't difficult at all. If I had to do it over again, I would immediately hire someone to teach strategic planning to me and my staff.

A strategic plan is a metric-driven assessment of how your office executes its mission, with emphasis on how much more efficient and effective it could be in two to five years. And it is nothing to fear.

One misconception about strategic plans is that they must be lengthy. Quite the opposite. Our strategic plan was *seven* pages long. Another misconception is that they are a silly bureaucratic exercise. Not so. They are an important learning process for an office. Executing a strategic plan enhanced the knowledge of every staff member who engaged in the process. Everyone finally understood how our office contributed to the agency's overall mission.

Here is how it works. There are five components to a strategic plan:

- Mission and vision statements
- Strategic goals
- Strategies to accomplish every goal
- A plan of actions and milestones (POA&M)
- Metrics to measure progress toward each strategic goal

Mission and vision statements are key to successful strategic planning, but before those can be drafted, an organization MUST conduct a mandate analysis. Why? To ensure you understand all the missions assigned to your office by statute or directive.

The second time we performed strategic planning, we discovered our Office of Inspector General (OIG) Audit section was responsible for financial statement audits. But they had only conducted *performance* audits for the prior decade. Ouch! Mandates are important. Think about it for a second. A decade went by and nobody looked at the books. The mandate was there. The previous OIGs failed to catch it.

Once you understand the mandates, mission and vision statements come easily. Also, strategic goals and the strategies to get there will become self-evident. And the transition from planning to execution begins with the nuts and bolts of the strategic plan: the important POA&M and performance measures (metrics). The POA&M assigns an office (or person) of primary responsibility; deliverables (these could be documents, tools, policies, etc.); milestones and estimated completion dates for each deliverable; and the all-important performance measures.

Most organizations work on the first three strategic planning components and pay little attention to who is responsible for deliverables and their milestones (POA&M). They also have a problem defining success because they don't have well-defined and agreed-upon metrics.

Here at FELTG, we want to help you in your strategic planning processes to ensure it is a meaningful exercise and not just a bureaucratic drill.

Our strategic planning process will:

- Identify your immediate mandates and requirements
- Enable you to hire a workforce with diverse skill sets
- Train, develop, and reward that workforce to decrease staff attrition

while also decreasing cycle time for your office's products.

Your return-on-investment for our training will be significant. Let us know if we can help! Info@FELTG.com

[**Editor's note:** Bring Scott Boehm to your agency to teach your staff on strategic planning, annual planning, and much more. Contact Training Director Dan Gephart at Gephart@FELTG.com for more info.]

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
March 7, April 4, May 2, June 2, July 11
August 8, August 22

Dealing with Medical Issues in Misconduct Cases
April 6

Make Your Best Case: Effectively Preparing Performance Narratives
May 4

The New MSPB and Whistleblower Reprisal
May 23

Do You Really Know How to Use the Douglas Factors?
June 1

Your Agency's DEIA Strategy Should Address Workplace Antisemitism

By Dan Gephart

Five years ago, it was young men carrying torches and shouting "Jews will not replace us" on the eve of the violent Unite the Right rally in Charlottesville. Four years ago, it was a 46-year-old man killing 11 and wounding six at the Tree of Life synagogue in Pittsburgh. More recently, celebrities, athletes, and news networks have thrust antisemitic tropes and conspiracy theories into the public consciousness.

Antisemitism has been increasing steadily since 2016. Last year, the Anti-Defamation League recorded the most antisemitic incidents since it started tracking the data 40 years ago. It's widely expected that 2022 numbers will be much higher.

It should come as no surprise that these hateful stereotypes have found their way into the workplace. Yet, the results of a recent survey by the company Resume Builder were still outright shocking and should make the message clear to anyone involved in their agency's DIEA efforts: You must address "antisemitism and cultural competency on Jews and Jewish issues" as part of your workplace DEIA strategy.

Last month, Resume Builder surveyed 1,131 hiring managers and recruiters in the U.S. The results were alarming, to say the least.

- 26 percent of hiring managers say they are less likely to move forward with Jewish applicants. The top reason is the belief that Jews have too much power and control.
- 26 percent make assumptions about whether a candidate is Jewish based on their appearance.
- 23 percent say they want fewer Jews in their industry.
- 17 percent say leadership has told them not to hire Jews.
- 33 percent say antisemitism is common in their workplace, and 29

percent say antisemitism is acceptable in their company.
- 9 percent say they have a less favorable view of Jews than they did five years ago.

Last year, the EEOC commissioners unanimously approved a resolution condemning violence, harassment, and acts of bias against Jewish individuals.

Earlier this year, EEOC Commissioners Keith Sonderling and Andrea Lucas spoke during a webinar addressing the rise of antisemitism in work and education settings.

"Too often, incidents of antisemitism in the workplace go ignored, but we cannot dismiss them," Lucas said. "These insidious acts can contribute to a culture of hate that may give rise to physical violence later."

The ADL's Stand Up Against Antisemitism noted the many ways that bias and discrimination against Jews can manifest in the workplace:
- Microaggressions around Jewish culture or the way people look, such as one employee telling their Jewish coworker "Oh, you don't look Jewish."
- Tensions and hostility around geopolitical issues. For example, Jewish coworkers being held accountable, demonized, and harassed during conflagrations in the Middle East, or Jewish employees being seen as indistinguishable from Israel.
- Pervasive stereotypes about Jews that go unchecked, such as "Jews have too much power."
- Denial of advancement opportunities
- Inequitable out-of-office policies and holiday observances
- Philosemitic remarks intended to be complimentary. For example, "give this task to David since Jews are good negotiators."

Agency leaders need to set an example, unlike these leaders:
- The Philadelphia City Commerce Director who called the story of Schindler's List mere moneymaking "propaganda."
- The Salt Lake City CEO who sent an email to other Utah-based tech leaders claiming the COVID-19 vaccine is part of a plot by "the Jews" to exterminate people.
- The Google Global Diversity lead, who resigned after a blog post he wrote surfaced: "If I were a Jew I would be concerned about my insatiable appetite for war and killing in defense of myself."

And then there was the supervisor in *Lashawna C. v. Dep't of Labor*, EEOC Appeal No. 0720160020 (Feb. 10, 2017), who during an e-mail conversation about work hours and schedules, told a Jewish employee he (speaking about himself) had been working like "a Hebrew slave." This supervisor's actions proved costly to the agency, which was found liable for the harassment due to a lack of evidence that it exercised reasonable care to prevent and correct the harassment.

It's not just leaders, though. All employees play a role in preventing and addressing these behaviors, Commissioner Sonderling said in the aforementioned webinar.

If you lead agency DEIA efforts take note: A workplace is not inclusive if any type of bias goes unchecked. As the ADL wrote: "This results in psychological harm, unhealthy interpersonal interactions, inequitable workplace policies and procedures, diminished employee productivity, and lack of accountability across the organization." Gephart@FELTG.com

[**Editor's note:** Keep up to date with DEIA articles and training opportunities via FELTG's DEIA Guidance and Resources.]

Concerned About Employee Mental Wellness? Here are Some Solutions
By Shana Palmieri, LCSW

The ongoing impact of the pandemic is clear: There are drastic increases in the rates of anxiety and depression and a growing need for access to behavioral health treatment. Prevalence rates of anxiety and depression rose 50 percent and 44 percent, respectively, according to an article in Translational Behavioral Medicine.

This rate was six times higher than in the pre-pandemic year of 2019. The most significant impact was found for those aged 18 to 29, with rates of anxiety and depression jumping to 65 percent and 61 percent, respectively. Also, rates of stress are increasing for Americans. The American Psychological Association reports the top sources of stress include rising prices and inflation (87 percent), supply chain issues (81 percent), and global uncertainty (81 percent). Stress about money is the highest it has been since 2015.

[**Editor's note:** Shana will present the 60-minute webinar Grappling with Employee Stress in the Workplace: Improving Performance and Morale in Your Agency on March 23. Register now.]

In alignment with the increasing rates of stress and mental health symptoms, there is a critical workforce shortage in healthcare. The country is on track to be short 31,109 psychiatrists within a few years, per an *AAMCNews* blog post. The clinical workforce shortage was well-documented throughout the pandemic, and we continue to see healthcare staff leave the field altogether.

The average hospital turnover rate is now 25.9 percent – an increase of 6.5 percent, according to the 2022 NSI National Healthcare Retention & RN Staffing Report.

The American Psychological Association found that a third of individuals reporting mental health symptoms during the pandemic who did not receive treatment believed having treatment would have been helpful. Forty-five percent of these individuals reported access to care (including location, provider availability and timing) prevented them from accessing treatment. Twenty-seven percent of individuals reported the thought of reaching out and trying to find help was too overwhelming.

The impact of rising rates of mental health symptoms and increasing reports of significant stress levels has a critical impact on employers in terms of absenteeism, productivity, and office morale. Creating a workplace environment that promotes mental wellness and eliminates barriers to accessing behavioral health treatment provides great benefit to the employees *and* the employer.

Even given the significant challenges, there are a variety of solutions employers can integrate into the workplace as solutions.

Access to care
Finding a behavioral health provider through an employer's health plan can be tedious and very challenging. Individuals are often left with a list of psychiatrists and therapists and start calling and leaving messages trying to find someone to at a minimum to return their call and hopefully with a call back and open availability. For an individual already suffering and feeling overwhelmed, trying to navigate this process can be extremely frustrating.

Employers can help in one of two ways:

- They can provide better resources directly to their employees to help them find a provider.
- They can contract with a telehealth company in an agreement with specific access to care expectations to ensure their employees can receive timely access to behavioral health treatment.

Contracting with a national telehealth provider that offers access to outpatient therapists and psychiatrists can greatly improve the ease and length of time for employees seeking providers. Platforms, such as Ginger, Lyra Health, and Spring Health, charge insurance premiums plus a per member fee. Array Behavioral Health does not have per-member fees.

Employers can also provide resources directly to their employees. For example, employees can schedule an appointment on the Array Behavioral Health website, find providers through Psychology Today, or access options to book online appointments through Zocdoc.

Stress and mental wellness
Employers seeking an overall approach to improving mental wellness and reducing employee stress levels can consider a variety of resources and programs.

Employers may want to offer employees a mindfulness-based stress reduction program (MSBR). MSBR is an eight-week evidence-based progress secular mindfulness-based training to reduce symptoms of stress, anxiety, depression, and pain. There are also a collection of digital tools available to offer employees such as Calm for Business and Headspace for Work.

Improving access is one critical aspect for employers to address the overall mental wellness of their workforce. It is also important to maintain a commitment to employee wellness through the workplace culture and environment. Employers' dedication to employee wellness will lead to a more productive, healthy, and happy workforce.

Important note: In instances of a psychiatric crisis, including suicidal thoughts or thoughts to harm others, there is the 988 mental health crisis line and 911 to access more immediate and emergency assistance.
Info@FELTG.com

The Good News:
A Letter to Santa 2022
By Ann Boehm

Dear Santa:

I hope you and Mrs. Claus are doing well. Has inflation hit the North Pole? Kind of crazy how it's hit everyone this year!

Is the staff recovering from the pandemic? Any mass resignations or "quiet quitting" by the elves? I'm sure you've always had a great work-life balance up there, but I know it must be tough to do that given your hard and fast deadline every year!

My Christmas list this year is pretty short and in no particular order (although the last one may be the one, I want most!). I think I've been very good, so I hope I get my Christmas wishes!

1. Better recognition by agencies of bad supervisors.

Santa, we here at FELTG teach a lot of classes intended to help supervisors understand how to handle problem employees. I think sometimes agencies forget that there are bad supervisors, and those bad supervisors can even create problem employees. It would be great if agencies could take a close look at their managers and supervisors to see if they are in the good column or bad column.

Signs to look for: excessive turnover in the workplace, frequent grievances or EEO complaints, and generally unhappy staff. If those signs are present, the problem may be the supervisor and not the employees.

2. Better employee understanding of what a hostile work environment really is.

Santa, too many employees think that being unhappy at work equates to a hostile work environment. That's just not true. Harassment is very real, sadly, but the EEOC cannot get to the legitimate cases quickly because it has to deal with lots of non-meritorious hostile work environment cases that bog down the whole system.

So how can you help, Santa? Employees need to know that a hostile work environment is unwelcome verbal or physical conduct; based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age (40 and over), disability, or genetic information; that is so severe or pervasive to alter the terms and conditions of employment.

3. Better collective bargaining negotiating by agencies to avoid agreeing to collective bargaining agreement (CBA) language that gives the union more rights than the labor statute requires.

Santa, in 1978, Congress passed the very detailed *Federal Service Labor-Management Relations Statute*. Bargaining unit employees and their unions have lots of rights through the statutory language. It always makes me a bit sad when I see a provision in a CBA that gives the union and employees more rights than the statute requires. For example, requiring agency investigators to tell bargaining unit employees about their *Weingarten* rights is not a statutory requirement, but the requirement is in far too many bargaining agreements.

4. Better efforts by unions and agencies to sincerely work together and put the public interest above their individual interests.

Santa, sometimes unions and agencies act like toddlers in playroom: They each hold tight to their "toys" and refuse to share. Good preschool teachers help little kids understand the value of sharing. You are pretty good with the whole "toy" thing. Maybe you can help unions and agencies figure out that it's better to put individual interests aside and work toward a common ground that results in the best service to the public.

5. More in-person training.

Santa, virtual training is working well, but in-person training is my favorite. As we continue to emerge from the crazy COVID world, I hope that we get back to more in-person training. I asked for this last year, and we did have more in-person training this year than in 2020 and 2021. Employees seem to be enjoying the interactions that in-person training provides.

6. A pony.

Santa, I'm not getting any younger. I'm going to keep asking …

Merry Christmas! Happy Holidays! Happy New Year! Ann. Boehm@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 this month. 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.

Clean Record Agreements: You Can Use Them Now, But Should You?
By Barbara Haga

With issuance of OPM's final regulations covering Parts 315, 432, and 752 on Nov. 10, 2022 (87 FR 67765), the prohibition on clean record agreements will end. Effective Dec. 12, you are free to hide the dirty laundry to your heart's content. With this new regulation, you can agree to remove the information and let the employee – who, by the way, was so bad you were going through the time, paper, and process to fire or demote him or her – walk out the door with a record that says he or she was fine. You *can* do it, but to me the important question is: *Should* you do it?

Under the microscope

Some may think the Trump EO 13839 prohibition on these agreements came out of the blue. That is not the case. The MSPB has been talking about issues related to these agreements for years. The Federal Circuit has said some not very favorable things about them for 25 years. In *Pagan v. VA,* 170 F.3d 1368, (Fed. Cir. 1999), the Fed Circuit repeated what they said earlier:

> Settlement agreements may serve a useful purpose in terminating disputes without the necessity for further administrative or judicial proceedings. The incorporation into such agreements of a "clean record" requirement has proven to be a source of problems -- problems that necessitate the very administrative or judicial proceedings sought to be avoided. As a result, this court has expressed its concern with agency settlement agreements that allow an unsatisfactory employee to resign in exchange for a personnel record clear of all charges and adverse actions. *See Thomas v. Department of Housing & Urban Dev.,* 124 F.3d 1439, 1442 (Fed. Cir. 1997) ("It may well be that it is virtually impossible for agencies to ensure that settlement agreements such as this. . .can be performed to the letter … Perhaps as a matter of sound governmental administration such agency agreements should be prohibited."). Indeed, such agreements invite trouble. The employee expects, perhaps unrealistically, that with a "clean record" potential employers will be unable to find out about adverse actions taken by the former employer. The former employer, when asked, must either outright lie, or attempt some artful evasion which, because other employers now recognize what these agencies do, in fact fools no one.

The decision went on to say:

> Although reasonable settlement of employment disputes is commendable, when the agency is required to give no information or an agreed-upon "neutral" reference, "the practice of one government agency palming off an unacceptable employee on another government agency by withholding material evidence concerning the employee's conduct hardly serves the public interest." *Holmes v. Department of Veterans Affairs,* 58 F.3d 628, 634 (Fed. Cir. 1995).

Even OPM wasn't telling agencies they should do it. In response to those who opposed lifting the ban, OPM stated they weren't saying agencies should do it, just that they were not prohibited from doing it.

> We are simply rescinding a rigid regulation that, upon reflection and further consideration, we deem impracticable, unrealistic, and unhelpful because it absolutely prohibits agencies from altering or removing information about performance or misconduct as a condition to resolve or settle a complaint or challenge to a personnel action, even where doing so furthers the best interests of an effective and efficient Government

> and the interests, voluntarily expressed, of both parties to personnel litigation. OPM's rescission does not take a position on whether any particular case should be settled, and does not prohibit settlements, which through lessening a penalty or permitting resignation, may in certain circumstances lessen the risk of outright reversal with its high costs without benefit, or may otherwise adversely affect governmental interests.

Practical effect

I deliver training sessions on conducting effective interviews and reference checks. The course includes a segment on asking applicants direct and pointed questions about their experience and another segment aimed at helping managers ask the same types of questions of past employers. As a reference, I use the September 2005 MSPB report *Reference Checking in Federal Hiring: Making the Call*. The report focuses on hiring issues stemming from managers not fully or effectively checking out applicants.

[**Editor's note:** Contact Dan Gephart at Gephart@FELTG.com to bring Barbara and this course to your agency.]

Interestingly, that report contains a discussion of the problem of getting good information on candidates who have clean record agreements. That report cites the same information from the Federal Circuit that I included earlier in this article. The Board wrote that in spite of the problems with such agreements, they continue (and likely will begin again in a few days).

Where does that leave the supervisor who is trying to do a good job and fully vet a potential applicant? Sometimes they run into a brick wall.

The former supervisor will not answer questions about an individual's performance and/or conduct on the job. Two things can happen then – 1) the hiring supervisor elects not to hire this applicant because they could not verify the information in the resume, or 2) the hiring supervisor decides to take the risk and hires without verification. The hiring manager may regret that decision.

In *Pagan*, the USPS hiring supervisor declined to hire. The former supervisor at the VA, Mr. Lopez, took an interesting approach to responding to the USPS questionnaire. In answering the question about whether the employee would be rehired, Lopez added as asterisk and wrote, "Due to circumstances beyond my control no coment [sic] can be made at this time." "Another question asked Lopez to rate Pagan's attendance, work performance, behavior, and attitude using an excellent to unsatisfactory scale. Lopez crossed out the whole scale without rating Pagan in any of the above categories." When the Postal Service told Pagan there were no more jobs available, he filed a petition for enforcement with the Board.

The Federal Circuit found fault with the supervisor. The question about rehiring obviously presented a problem for the supervisor and there was nothing in the agreement that specified what kind of reference would be given. Lopez could have responded "yes", which he knew not to be true, or he could have answered "no", which was an honest response. His option would certainly lead a potential employer to believe there was an issue with Pagan.

Crossing out the entire rating scale might look like a better choice. The Federal Circuit didn't think so. "Although the agency did not promise to provide a favorable reference, or even any reference at all, it was required to act, in matters relating to Pagan, as if he had a "clean record." The act of crossing out the portion of the USPS questionnaire asking that Pagan be ranked according to his attendance, work performance, behavior, and attitude, and then returning the form in that condition would have strongly suggested to any recipient of the form that Pagan did not have a "clean record" with the DVA." Haga@FELTG.com