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

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Misconceptions About Security Clearance Revocations Abound

A few weeks ago, Ann Boehm wrote an article about the benefits of employee reassignment – in certain situations, anyway. A fairly new MSPB NP decision dealt with an appellant who was removed for failing to maintain a security clearance, and claimed the agency should have been collaterally estopped from removing her. Part of the appellant's argument was the agency should have considered a reassignment. Was she right? Nope.

MSPB indicated that "there is no policy, statute, or regulation requiring the reassignment of an agency employee who has failed to maintain a security clearance."

The topic of security clearance revocation can be confusing, and wouldn't you know – we've got you covered. On August 24 we're presenting the two-hour virtual training All Clear? When Employee Security Clearances are Revoked or Suspended. You should definitely check it out.

This month's newsletter discusses a SCOTUS case that alters religious accommodation, effective charging, why letters of counseling continue to plague agencies, 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 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**.

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Charges and Penalties Under the new MSPB
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The Race Ahead: Breaking the Cycle of Racial Bias by Rewiring the American Mind
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Successful Hiring: Effective Techniques for Interviewing and Reference Checking
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Bad Detective: The Mistakes That Hamper Agency Investigations
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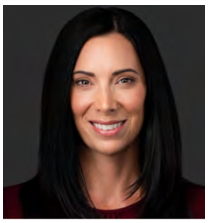
A Big Change for Undue Hardship in Religious Accommodation … or Not?
By Deborah J. Hopkins



On June 29, the Supreme Court upended decades of precedent in its unanimous decision *Groff v. DeJoy*, No. 22–174 (Jun. 29, 2023).

Under Title VII, employers are required to accommodate the sincerely held religious beliefs or practices of employees unless doing so would cause an "undue hardship" on the employer. For years, the definition of "undue hardship" for religious accommodation has been "anything more than a *de minimis* burden," which is a much lower threshold than proving undue hardship for the purposes of disability accommodation – and, quite recently, pregnancy accommodation.

The new SCOTUS case looked at a USPS mail carrier, Gerald Groff, who requested to be excused from work on Sundays because his religious beliefs required that day to "be devoted to worship and rest." The agency required Sunday work because of a new partnership with Amazon.

The agency said granting Groff Sundays off would be more than a *de minimis* burden on his coworkers' schedules. Also, it would require the USPS to pay overtime, which would be an undue hardship on the agency. After being disciplined for refusing to work on Sundays as ordered, Groff resigned. He filed a failure-to-accommodate religious accommodation claim against USPS.

From the SCOTUS syllabus:

> Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." §2000e(j). Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business…
>
> Title VII requires that an employer "reasonably accommodate" an employee's practice of religion, not merely that it assesses the reasonableness of a particular possible accommodation or accommodations. Faced with an accommodation request like Groff's, an employer must do more that conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options would also be necessary. (citation omitted). Having clarified the Title VII undue-hardship standard, the Court leaves the context-specific application of that clarified standard in this case to the lower courts….

While this seems like a major change to the "undue hardship" analysis, there's a school of thought that indicates this might not actually change much for Federal agencies.

I asked FELTG Instructor Bob Woods, who will present How are Religious Accommodation Requests Different from Disability Accommodation Requests? on August 17, what he thought about *Groff*. Here's what Bob said:

> [W]hile *Groff* is clearly an important decision, I don't think it will have a significant impact on Federal agencies. I don't have a crystal ball, but I say this based upon the nature of the types of accommodations typically requested in such cases and the EEOC's existing guidance (in both 29 CFR 1605.2 and EEOC Guidance, Section 12: Religious Accommodation) and their Federal sector caselaw. While the Supreme Court has now clarified its decision in *Hardison v. TWA,* it also noted that the EEOC already minimized the impact of the term "more than a *de minimis* cost" in its guidance and decisions. Although the *Groff* decision does not limit the EEOC to its current guidance, I believe that they already hold Federal

agencies to standards that comport with the plain language of the law.

I also note, as does the Court, that the Postal Service went to fairly substantial lengths to accommodate Mr. Groff. The 3rd Circuit found exempting Groff for Sunday work would result in an undue hardship that would clearly be more than a *de minimis* cost. The Supreme Court has vacated and remanded for "further proceedings consistent with this decision." Given the asserted impact on the Postal Service discussed in these decisions, it's possible that the 3rd Circuit may still find an undue hardship.

Agencies would certainly be well advised to review (or create) Religious Accommodation procedures and policies and confer with counsel to review existing/pending complaints of failure(s) to provide religious accommodations to ensure they are not relying upon the concept of *de minimis* costs. Agencies should also be on the lookout for updated EEOC guidance. As always, we'll keep you posted on any relevant information that results from this important SCOTUS decision. Hopkins@FELTG.com.

NEW FELTG CLASS ALERT!

Join us July 26 for No Need for Fear: A Guide to Navigating EEO Challenges for Supervisors and Advisors – a two-hour virtual training that lays the groundwork to understand EEO law and defenses, but also shares time-tested wisdom on how to recover and rebuild workplace morale during the process and after the EEO claim has been resolved.

Productivity and engagement increase when supervisors have a firm grasp on EEO matters. Attend and learn how:

- Identify the theories of discrimination.
- Recognize the pitfalls that lead to discrimination complaints.
- Restore the relationship with employees who filed the claim.

The Good News: Fed Circuit Offers Reminder to Charge Carefully
By Ann Boehm

An agency lost a removal case before the Federal Circuit this month. In *Williams v. Federal Bureau of Prisons*, an arbitrator sustained the employee's removal, but the Federal Circuit vacated and remanded the arbitrator's decision because the arbitrator failed to properly analyze the *Douglas* factors. *Williams*, Case No. 2022-1575 (Fed. Cir. July 6, 2023).

If you just read that quick summary of *Williams*, the decision seems to be pro-employee and bad news for agencies. But here's the thing: The decision is completely consistent with years of MSPB and Federal Circuit precedent. And the lesson agencies should learn from it is – charge carefully, or have your penalty at the mercy of arbitrators, administrative judges, the MSPB, and the Federal Circuit.

To make sure our good friends of FELTG don't face a similar situation, let's review what happened in *Williams*.

Ms. Williams started work as correctional officer at the Federal Correctional Complex in Beaumont, Texas (FCC-Beaumont) on March 4, 2018. Before that, in January 2016, she met Alex Hayes. They were engaged in July 2018, and had a child together in September 2018.

So, what's the big deal here? Turns out Mr. Hayes had been in Bureau of Prisons (BOP) custody in his past – from June 2005 to July 2013 – and on supervised release until July 15, 2018. He even spent some time at FCC-Beaumont. The problem for Ms. Williams was the BOP Standards of Employee Conduct prohibit employees from becoming involved with inmates or former inmates, and if they do engage in such improper conduct,

they must report it in writing to the BOP. Former inmate, as defined by BOP, means less than one year has elapsed since release from BOP custody or supervised release. Mr. Hayes fit into this category until July 2019.

BOP was ahead of Ms. Williams in knowing about Mr. Hayes's former inmate status. In May 2019, they placed her on administrative reassignment, and Internal Affairs investigated her improper contact with a former inmate and failure to report the contact. Ms. Williams knew Mr. Hayes had been incarcerated but did not know about his BOP past until she heard rumors. She questioned Mr. Hayes. On June 3, 2019, she learned he had been in Federal custody. She reported this to BOP the next day.

ASK FELTG

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

[Quick aside here. It just seems to me if you are engaged and have a child with someone, some of your conversations might get into, "Hey, where have you lived in the past?" "Ever been in Beaumont before?" "Any chance you have ever been in Federal prison — for 8 years or so?"]

The Internal Affairs investigation, which ended in July 2019, found Williams had engaged in improper conduct with a former inmate and failed to timely report the contact. On Feb. 5, 2020, the BOP issued a notice of proposed removal based on two charges: (1) improper contact with a former inmate; and (2) failure to timely report. The final decision removing Ms. Williams was issued on April 22, 2021.

Ms. Williams challenged her removal before an arbitrator. The arbitrator sustained the charge on improper contact but did not sustain the charge on failure to report. In not sustaining the failure to report charge, the arbitrator explained that Ms. Williams immediately reported the contact as soon as she found out about Mr. Hayes's past.

I'm sure you astute FELTG readers know, as the Federal Circuit reminded us in *Williams*, "when an arbitrator sustains fewer than all the agency's charges, the arbitrator 'may mitigate to the maximum reasonable penalty' for the sustained charges unless the agency has indicated it desires a lesser penalty be imposed on fewer charges. *Williams* at 4 (citing *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999)). The BOP had not indicated it desired a penalty less than removal if only one charge was sustained, so the arbitrator should have independently analyzed the *Douglas* factors to determine a reasonable penalty for the one sustained charge. [Learn more on this subject. Purchase a recording of FELTG's 60-minute training The Role of the Douglas Factors in Arbitration.]

The arbitrator did not do this, even though he indicated it would be just and fair to change the removal to a long suspension. He also failed to independently analyze the *Douglas* factors and deferred to the deciding official's *Douglas* analysis. Because the arbitrator misunderstood and misapplied the law, the court vacated the removal and remanded for the arbitrator to independently analyze the relevant *Douglas* factors to determine the maximum reasonable penalty. What can agencies take away from this case?

- Charge properly. Remember that you must prove a charge by preponderance of the evidence, or 51 percent.
- If you think there is a chance any of your charges may fail, the *Douglas* factor penalty analysis should mention an alternative penalty in that situation.
- Remember that arbitrators often have very little experience with the Federal disciplinary process. Advocates should do their part to educate them.

Williams is not a new case that is averse to agencies. It is simply a good reminder of how things work in discipline. And that's Good News! Boehm@FELTG.com

First-time Caller, Long-time Loss of Confidence and Trust
By Dan Gephart

Sometimes, a Federal employee's misconduct is so far beyond the pale that it's impossible to ever again trust that employee. That was certainly the case for a certain IRS contact representative/Howard Stern devotee. Sorry, I meant to say *former* IRS contact representative. (I don't know the status of the ex-employee's Stern fandom).

The employee arrived at work and called the Howard Stern radio show on his personal cellphone. He was put on hold. When the employee's 8 am shift started, he began handling incoming phone calls from taxpayers on his work phone.

Two hours later, the Stern show took him off hold. The employee didn't realize this and continued his conversation with a taxpayer, which was now being broadcast live. He unknowingly shared the taxpayers' personally identifiable information, including her phone number and the amount of back taxes she owed, to thousands of Sirius XM listeners.

Howard Stern shouted the employee's name to get his attention. The employee then put the taxpayer on hold to talk to Howard Stern, where he "gleefully" identified himself as a Federal employee.

It's no surprise that the agency removed the employee, nor that the MSPB upheld that removal earlier this year, citing the effect of the employee's misconduct on his supervisors' confidence, while questioning his potential for rehabilitation. *Forsyth v. Treasury*, NY-0752-16-0246-I-1 (Mar. 15, 2023)(NP). Regarding the latter, the employee was directed to make a post-incident call to the Howard Stern show to ask them to not rebroadcast the telephone exchange, which the employee did, while also requesting a tour of the show's broadcast studio.

A few months back, Ann Boehm extolled the value of Douglas Factor Five in her monthly Good News column. Douglas Factor 5 is consideration of "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."

FEMA similarly lost confidence in a Senior Executive Service employee who misused her position to help a friend gain employment at FEMA. The SESer also provided her friend with personally identifiable information of FEMA employees. *Clark v. Department of Homeland Security,* DC-0752-13-0661-I-1 (Feb. 21, 2023)(NP).

The employee, who worked in the agency's Chief Component Human Capital Office, pointed to a positive evaluation she received after the incident to argue that her supervisor had not lost confidence in her. The Board held, however, that "the penalty judgment belongs to the agency, not to an appellant's supervisor … in the absence of an agency's failure to consider the relevant Douglas factors adequately, a supervisor's opinions are insufficient to overcome the agency's judgment concerning the appropriateness of the agency-imposed penalty."

How much confidence would you have in an employee who "golfed during official duty hours on at least 205 days for which he claimed no annual leave on his official timesheets." In *Sheiman v. Department of Treasury*, MSPB No. SF-0752-15-0372-I-2, at 15 (May 24, 2022) (NP), the Board agreed removal was the right penalty, stating 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."

The MSPB decisions in this article have been issued within the last couple of years. For

guidance on increasing the chances that your removals match the Board's view on penalty assessment, register for Charges and Penalties Under the New MSPB on August 1. This half-day session is part of FELTG's weeklong Federal Workplace 2023: Accountability, Challenges, and Trends event. Gephart@FELTG.com

Reason #37,129 NOT to Issue a Letter of Warning: EEO Complaint Edition
By Deborah J. Hopkins

It may be one of the most written-about topics in this newsletter, but we keep writing because we keep seeing cases where employees challenge letters of warning, caution, counseling, and the like, and agencies get tied up in litigation for years as a result.

Look at *Shad R. v. USPS*, EEOC Appeal No. 2022004404 (May 11, 2023). The complainant in this case was a sales/service/distribution associate at a postal facility. The agency issued him two letters of warning (LOW):

1. On Feb. 23, 2021, the LOW charged the complainant with "Hazmat Question/Work Performance/Failure to Follow Instructions." The supervisor said that the complainant "did not ask the Hazmat Question at all, did not give customer his full attention, did not apologize to the customer for making her wait, did not suggest extra services, and did not offer any additional items for the customer. Complainant was also not wearing his uniform, but rather was wearing an apron."

2. On March 6, 2021, the LOW charged "Conduct/Failure to Follow Instructions." The LOW specified that, the complainant failed to remove his personal items from the retail window and workroom floor, despite an order to do so.

According to the record, the February LOW was rescinded, and the March LOW was grieved and proceeded to arbitration, with the outcome of the arbitration unknown. The complainant filed an EEO complaint over the two LOWs, alleging that the agency discriminated against him and subjected him to a hostile work environment on the bases of:

- Race (Latino),
- National origin (Hispanic),
- Sexual orientation (gay),
- Religion (Satanism),
- Disability (HIV, anxiety, and depression), and
- Reprisal for prior protected EEO activity.

The supervisor (S1) who issued the LOWs "explained that the February LOW resulted from her personal observations of Complainant's interaction with a customer. S1 also explained that she issued the March LOW because Complainant had multiple personal items in the workplace, including an inappropriate picture of a woman, and he did not remove them." In his defense, the complainant asserted, among other things, "the March LOW was improper because, as a gay man, he does not objectify women."

The EEOC affirmed the Final Agency Decision which found no discrimination or harassment. In other words, the agency had a legitimate, non-discriminatory reason for warning the employee. That said, had the warnings been issued orally or via email and NOT put on letterhead, most likely the complainant would not have felt aggrieved for the purposes of filing a union grievance or an EEO complaint. Something about non-disciplinary actions being out on letterhead escalates things to a level where an employee wants to challenge, rather than heed the warning. We'll discuss this plus a lot more on July 26 during the two-hour virtual training No Need for Fear: A Guide to Navigating EEO Challenges for Supervisors and Advisors. Hopkins@FELTG.com

How Preference Eligibility Can 'Upset' a Simple Termination Case
By Barbara Haga

While the purposes of a trial period and a probationary period are much the same, the rights for excepted service employees who are subject to an adverse action are different than those for competitive service employees. In fact, it wasn't until 1990 that non-preference eligible excepted service employees had appeal rights to the MSPB at all.

Under the original *Civil Service Reform Act*, excepted employees who were not preference eligibles did not have MSPB appeal rights. The Supreme Court addressed the issue in *United States v. Fausto*, 484 U.S. 439 (S. Ct. 1988), affirming the MSPB's determination that non-preference eligibles were not included in the groups of employees eligible to appeal adverse personnel actions to the Board. The *Civil Service Due Process Amendments Act of 1990*, Pub. L. No. 101-376, granted those rights to the non-preference excepted employees about two years later.

Preference in hiring applies to permanent and temporary positions in the competitive and excepted services of the executive branch. When we address the broad category of who is a preference eligible, we typically picture those who served in uniform in the military, and certainly the vast majority of individuals who have preference obtained in that way.

However, it is important to remember that there are other categories of preference that extend from a military member's service.

This is called derived preference and includes the spouse of a disabled veteran who is unemployed, the widow or widower of a deceased veteran, or the parent of a disabled or deceased veteran. As the Board wrote in *Redus v. USPS*, 88 M.S.P.R. 193 (2001):

> The Veterans' Preference Act should be construed, whenever possible, in favor of the veteran, especially when the right to defend against charges of wrongdoing is involved. *See Flanagan v. Young,* 228 F.2d 466, 472 (D.C. Cir. 1955). Therefore, we find that the plain language of the statute indicates that Congress intended to confer preference eligible status on spouses of disabled veterans who are unable to support their families through employment with the government because they suffer from service-connected disabilities.

Numerous conditions must be met to qualify for use of such preference. An OPM guide describes requirements for each category. It is not completely up to date since it still addresses preference for "mothers," even though preference is currently extended to both mothers and fathers.

The language regarding spousal eligibility in 5 USC 2108(3)(E) states that preference eligible includes "the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia."

The "spouse" section of the OPM guide gives examples of when disqualification may be presumed. These occur when the veteran is unemployed and 1) is rated by appropriate military or Department of Veterans Affairs authorities to be 100 percent disabled and/or unemployable; 2) has retired, been separated, or resigned from a civil service position on the basis of a disability that is service-connected in origin; or 3) has attempted to obtain a civil service position or other position along the lines of his or her usual occupation and has failed to qualify because of a service-connected disability.

The guide applies to hiring, so why would readers of this column be concerned about that? Here's why: If the individuals exercising this preference are excepted employees, it will give them due process and appeal rights *a year earlier* than they would otherwise have them.

Never saw this coming!

The *Redus* case is a perfect example of how this issue can completely upset an otherwise simple termination case. Redus was a Postal Service employee. Her coverage as an employee entitled her to due process and was based on her status as a preference eligible. The information here is applicable with other excepted service cases.

Redus was terminated in June 1998 after more than a year of service as a Distribution Clerk. The charges were failure to report for duty as instructed and AWOL. She was not given a proposed notice and opportunity to reply, nor was she given MSPB appeal rights. Regardless, Ms. Redus found her way to the Board.

Her husband was 100 percent disabled. The Postal Service was not aware of this. She did not use spousal preference to obtain employment. She produced documentation of his disability *after* her termination. The VA documentation she supplied was dated Jan. 20, 1998, and said:

> "This will certify that Leon Redus is a beneficiary of the Department of Veterans Affairs; that said beneficiary has been rated incompetent by the Department of Veterans Affairs in accordance with the laws and regulations governing said Department and that the appointment of a guardian of his estate is a condition precedent to the payment of monies due said beneficiary by the Department."

Redus was persistent in advancing her case. She lost at the initial level because the AJ ruled that while her husband was disabled, there was no evidence that he had failed to qualify for any appointment. The AJ's decision was upheld by the Board. Redus continued her challenge to the Federal Circuit. The Board asked the Federal Circuit to let them review the decision. The Court agreed, which led to the decision cited above.

The Board changed its mind regarding what was necessary to meet the last portion of the definition in 5 USC 2108(3)(E). It found the information Redus showed that her husband would not have qualified for any Federal position was sufficient to give her preference. Because of that, she was entitled to due process. The agency stated that it did not give notice because it did not know that she was a preference eligible. That was immaterial. The Board overturned the action and waived the untimely filing, since she was not given notice of her appeal rights.

In *Cowan v. Interior,* DE-0752-10-0066-I-1 (MSPB 2010), something similar happened. Cowan claimed preference when she was hired. She produced documentation that her husband had been rated as 70 percent disabled by the VA, had been granted a disability annuity by SSA, and had resigned from his civil service position due to his diabetes.

In spite of this, Interior violated her due process rights, and they were reversed. Haga@FELTG.com