Federal Employment Law Training Group

Teaching the Law of the Federal Workplace

FELTG Newsletter Vol. XI, Issue 4 April 10, 2019

Don't Make All Your Supervisors Do Push-ups

Have you ever read an EEOC decision where the remedy includes remedial training for the offending persons? Or, have you ever been required to attend training as a result of a finding of discrimination, even though you weren't the responsible management official? (Like the military; everyone does push-ups if just one person screws up.) At FELTG we do plenty of remedial classroom training, and we always enjoy it, because we think everyone can use a refresher of the law as it pertains to discrimination in the federal workplace.

You may not know that in addition to the standard "everyone goes to training" after a discrimination finding against an agency, FELTG also has another option: Remedial Instruction. Our instructors come to you – or you can come to us – and will have a one-on-one conversation with the person who needs the training. Or, if you prefer, we can do a video training discussion, with no travel required. No matter the method of the one-on-one, we have found this approach to be extremely effective, because the conversation is frank and honest and can be focused on the specific topics needed for the person who is getting the training. Let us know if you'd like more information on this unique approach.

In the meantime, it's on to the April 2019 Newsletter for more insight and discussion on employment law topics you might want to know more about.

Read and enjoy,

Deb

Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING SESSIONS

Advanced Employee Relations
April 30 – May 2
Washington, DC

Workplace Investigations Week
May 13 – May 17
Denver, CO

Developing & Defending Discipline: Holding Federal Employees Accountable
May 14 – May 16
Denver, CO

MSPB Law Week
June 3 – June 7
Dallas, TX

Developing & Defending Discipline: Holding Federal Employees Accountable
June 25 – June 27
Washington, DC

The Civil Civil Servant: Protections, Performance and Conduct
July 10
Washington, DC

Emerging Issues Week: The Federal Workplace's Most Challenging Situations
July 15-19
Washington, DC

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Losing Charges Can Sink Your Case – Unless You Work at the VA
By Deborah Hopkins

One of the long-standing principles we teach during MSPB Law Week (next offered in Dallas, TX, June 2-6) deals with how important it is to be mindful of the words used in disciplinary charges. Historically, if all of an agency's charges are sustained, then the MSPB grants deference to the agency's penalty selection unless the penalty is outside the bounds of reasonableness. *See, e.g., Payne v. USPS*, 72 MSPR 646 (1996). But if the agency loses even one charge, the agency loses the presumption of penalty deference and the MSPB has more room to step in and mitigate the penalty. *See LaChance v. Devall*, 178 F.3d 1246 (Fed. Cir. 1999).

One of the tendencies we warn agencies against is what my colleague Bill Wiley calls "spanking the employee," otherwise known as piling on charges. You might have an employee who has done a bunch of bad things, but the danger in piling on charges is that if you lose even one, you could lose your penalty. (Hint: One way to avoid this is to include in the decision letter a statement that says any one of the charges, standing alone, would be enough to warrant the selected penalty. *See LaChance, above*.) So, it's important to be mindful of the charges and to choose your best two or three, rather than to charge 10 or 20 things and risk losing a few.

Unless you're covered by the new VA law, that is.

Under the *Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017* (38 USC § 714), the MSPB does not have the authority to mitigate the VA's penalty, as long as the agency can show the employee might have engaged in the misconduct. That's right, *might have*. Under this law, the VA must only show substantial evidence (not preponderance like all the other agencies must show) that the employee engaged in misconduct in order to have a charge upheld. The regulatory definition for substantial evidence in federal personnel actions is "evidence a reasonable person *might* accept [not *would* accept] to support a conclusion even though others may disagree. [Emphasis added.] 5 CFR 1201.56(c)(1); 5 CFR 1201.4(p).

So if you work for the VA and you lose charges, you don't have to worry. As long as even one charge stands, your penalty stands. To drive that point home, the U.S. Court of Appeals for the Federal Circuit just issued a non-precedential decision in what we believe is its very first decision under the new VA law, *Hairston v. VA*, No. 2018-2053 (Fed. Cir. Mar. 8, 2019).

In this case the appellant, a housekeeping aid, was removed for two acts of misconduct:

- Charge 1: Conduct unbecoming of a federal employee (kissing a nurse without her permission)
- Charge 2: Failure to follow instructions (for visiting a ward he was ordered to stay away from)

The MSPB AJ sustained Charge 1, but did not find substantial evidence on Charge 2. Normally, this is where an agency's penalty determination would be scrutinized – but because the agency is the VA, the AJ did not have the authority to mitigate the penalty, so he upheld the removal. See 38 USC § 714(d)(2)(A)-(B).

The appellant in this case did not file a petition for review to the MSPB (probably because they lack a quorum and he didn't want to wait at least three years to get a decision back). After a month, the administrative judge's initial decision became the final decision, and then the appellant filed a petition for review with the

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Federal Circuit, which has jurisdiction under 28 USC § 1295(a)(9). (Did you even know that an appellant can skip the PFR process and go right to the Federal Circuit? It's been happening more lately since the MSPB is currently non-functioning at the PFR level.)

The scope of review in an appeal from the Board is limited by statute and the Federal Circuit must affirm the Board's decision unless they find it to be:

> "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); *see Kahn v. Dep't of Justice*, 618 F.3d 1306, 1312 (Fed. Cir. 2010).
>
> Under the substantial evidence standard, this court reverses the Board's decision only "if it is not supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1298 (Fed. Cir. 2002) (quoting *Brewer v. U.S. Postal Serv.*, 647 F.2d 1093, 1096 (Ct. Cl. 1981)).

The decision is unremarkable in the Federal Circuit upheld the MSPB's decision and affirmed the removal, as it does over 90% of the time. But it's noteworthy because it's the first decision under the VA's new law, and it tells us that our read of the law on penalty mitigation is absolutely what we thought it was. Whether you agree or disagree with the application of the law, you can fire an employee at the VA if he *might have* broken a rule – and the Federal Circuit can't step in.

If you're not covered under this VA law, though, you'll want to be extra careful when drafting charges. Join me for a webinar on this very topic July 11 called Words Matter: Drafting Defensible Charges in Misconduct Cases. Hopkins@FELTG.com.

Upcoming FELTG Webinars

The Reassignment Riddle: How, When and Why to Use This Management Tool
Ann Boehm
April 11, 2019

Substance Abuse Disorders and the Federal Workplace
Shana Palmieri
Mollie Slater
April 18, 2019

Successfully Managing Federal Employees with Mental Health Disabilities
Shana Palmieri
May 2, 2019

What to Do and What Not to Do in the EEO Process
Dwight Lewis
May 16, 2019

Within Grade Increases: From Eligibility to Denial to Appeals
Barbara Haga
May 30, 2019

Understanding and Working with Your Agency's OIG
Jim Protin
June 6

50 Shades of Reprisal: Whistleblower, EEO, Union & Veteran Reprisal
Deborah Hopkins
June 13, 2019

Significant Cases and Developments at the FLRA
Joe Schimansky
July 18, 2019

Employee Sexual Misconduct: Discipline Early to Make Your Agency a Safer Place
Deborah Hopkins
June 27, 2019

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When Per Se Violations Meet Eggshell Plaintiffs
By Meghan Droste

Happy spring, everyone! As the weather turns nicer, at least in theory, my spring teaching schedule is picking up. I just finished teaching part of FELTG's Absence, Leave Abuse & Medical Issues Week here in DC. The last day of the course focuses on medical documentation, including the confidentiality requirements and what happens when agencies fail to follow them.

The discussion of per se violations — when agencies are found liable for violations regardless of intent or excuse — and the resulting damages, is invariably an interesting one.

One thing I always remind my students is that although the damages awards are generally low in those cases, usually in the range of $1,000 to $2,500, there is a chance that they could be much higher depending on the circumstances.

The Commission's relatively recent decision in *Sanora S. v. Department of Health & Human Services*, EEOC App. No. 0120171305 (Dec. 21, 2018), is an example of how per se violations can result in significant harm. In the underlying complaint, discussed in *Zenia M. v. Department of Health & Human Services*, EEOC App. No. 0120121845 (Dec. 18, 2015), the complainant alleged, in part, that the agency retaliated against her when an EEO Complaints Manager provided documents from her two pending EEO complaints to the Chief Executive Officer as part of an investigation into whether the complainant had violated the Privacy Act and HIPPA.

(Side note: If any of you work at the Commission, I implore you to use the same pseudonym for all the decisions regarding the same complainant. It will spare everyone a lot of confusion.)

The complainant also alleged retaliation when the agency accused her of violating the chain of command when she sent emails regarding her allegations of harassment and discrimination. The agency issued a Final Agency Decision (FAD) finding no discrimination or retaliation in any of the complainant's allegations. In the *Zenia M.* decision, the Commission reversed with regard to the two allegations described above, finding them to be per se retaliatory, but affirmed the FAD with respect to the other allegations, and ordered the agency to conduct a supplemental investigation into the harm the complainant suffered as a result of the per se retaliation.

In its supplemental investigation and FAD, the agency awarded the complainant $1,500 in non-pecuniary compensatory damages and $50 in pecuniary damages. The complainant appealed, arguing that she was entitled to a higher award of non-pecuniary damages because of the significant harm she suffered as a result of the agency's actions. As described in the *Sanora S.* decision, the complainant suffered from PTSD, anxiety disorder and major depressive disorder. In the supplemental investigation, she presented medical documentation, her own testimony, and statements from her sisters detailing the impact of the agency's actions on her, including increased stress, and fear of further retaliation including losing her job. Her sisters' statements described the complainant's panic attacks, nightmares, and episodes of bed wetting.

The agency argued that these were all symptoms of pre-existing conditions and, as a result, could not be attributed to the per se retaliation.

In its decision, the Commission relied on the eggshell plaintiff theory, or "the principle that 'a tortfeasor takes its victims as it finds them'" to find that the agency's award of

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$1,500 was insufficient. Under this principle, an agency is only liable for the additional harm or aggravation of a pre-existing condition that its actions cause; this also means that it cannot escape liability by simply pointing to a pre-existing condition. After reviewing the significant harm outlined in the complainant's evidence, the Commission increased the damages award to $20,000 — more than 13 times the amount in the agency's FAD.

These decisions are an excellent illustration of the pitfalls of per se retaliation, and significant harm that can result. Be sure to also keep in mind that the eggshell plaintiff theory applies in other types of cases, so you should not discount potential liability based only on the employee's prior health concerns. Droste@FELTG.com

The Good News: Federal Law Enforcement Officers are Keeping Us Safe
By Ann Boehm

I spent the majority of my 26-year federal career working for law enforcement agencies. I once had a relative ask me, "Ann, why do you like to work with bad a--es?" (Law enforcement officers typically chuckle when I tell them that story.) I will tell you why. Going to work every day is much easier when you support people who run into gun fire instead of away from it. Too often, we forget about the value and valor of those who protect us on a daily basis.

I was inspired to write this month's *Good News* on federal law enforcement officers after I read a *Washington Post* article about law enforcement efforts at the oft-maligned Department of Veterans Affairs (DVA). Yep, the DVA has law enforcement — apparently 4,700 sworn officers — as do many agencies other than the ones with the letters we typically recognized (you know, ATF, DEA, FBI, ICE, USMS). DVA law enforcement officers in Long Beach, Calif., are teaming with local law enforcement and social workers to help veterans on the brink. In response to emergency calls, an officer and social worker will respond to critical situations involving veterans. Instead of just arresting the troubled veteran, the officers try to get him or her the help needed to address the demons driving the behavior. They are having success, and the program may serve as a model to be implemented elsewhere.

Federal law enforcement officers do many things. A quick search of law enforcement jobs in USAJOBS revealed that the Bureau of Indian Affairs, Department of Labor, Environmental Protection Agency, IRS, Small Business Administration, and State Department are all hiring law enforcement officers right now. Who knew?

And these jobs are not easy. Anyone watch *Narcos*? It scares me to watch it, but real-life DEA special agents really worked in that world. I heard their stories. They talked casually about their work in Colombia. I once met with a DEA agent who had the newspaper front page of the shot-up Pablo Escobar behind his desk – let me tell you, it was gory – because he was there when DEA agents took Escobar down! Crazy stuff! And this kind of fearless crime fighting is happening every day, whether the American people know it or not.

It's worth noting that many federal law enforcement officers were among those "essential" workers during the 35-day shutdown who worked as hard as they always do yet did not get paid. I personally believe that appearances on the national news by Tom O'Connor, President of the FBI Agents Association, helped end the shutdown. Congress and the public don't like to hear that criminal investigations are being compromised and hard-working agents cannot pay for medical treatment for

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their families. The report summarizing these things is compelling.

Of course, law enforcement officers are also human beings, and sometimes they engage in misconduct. Those who manage law enforcement officers may not realize that federal personnel law expects law enforcement officers to be held to a higher standard than the rank and file government employees when it comes to misconduct penalties. Also, great criminal investigators do not always know how to conduct a useful administrative misconduct investigation.

We at FELTG value our federal law enforcement friends, and we want to help them all be the best they can be. We offer a training course specifically for law enforcement personnel. Reach out to us if you'd like us to come to your agency. We want the good folks who protect us to work in an environment free of toxic co-workers. When it comes to public safety and people's lives, there is no room for problem employees.

The Good News is that we have wonderful and dedicated law enforcement personnel in many, many federal agencies who are taking care of the American public. Thank you and stay safe! Boehm@FELTG.com

Fear the Mumps, Not the PIPs
By Dan Gephart

Guess who made a long visit to my alma mater this year?

The Mumps. No, the obscure 1970s kitschy New York punk-pop band known for its outrageous live shows didn't re-form for Temple University's Spring Fling. I'm talking about the contagious, inflammation-spreading, gland-swelling, deafness-causing, we-already-had-it-eradicated mumps. And not just one or two mumps. There were more than 115 cases of the easily prevented virus on campus.

The anti-vaccination movement is as strong as ever. Meanwhile, the Flat Earth Society, which boasts thousands of dues-paying members, and climate change denial groups are just two of many thriving communities that take pride in turning their back on science, history, and, sometimes, facts.

Those of us who toil in and around the federal employment world know that we are not immune to overlooking the simple truth.

Reasonable Accommodation in the Federal Workplace

Register now for our five-part webinar series on **reasonable accommodation:**

1. **Reasonable Accommodation: The Law, the Challenges & Solutions** (July 18)
2. **Reasonable Accommodation: A Focus on Qualified Individuals, Essential Functions, Undue Hardship** (July 25)
3. **Telework as Reasonable Accommodation: When to Say "Yes" and When to Say "No"** (August 1)
4. **Hear it from a Judge: The Reasonable Accommodation Mistakes Agencies Make** (August 8)
5. **Understanding Religious Accommodations: How They're Different from Disability Accommodation** (August 15)

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After all, that's the only explanation for why there are still federal supervisors who would rather ignore poor performance than put an employee on a performance improvement plan, or as we now call it a FELTG – the demonstration period (DP).

Folks, this ain't rocket science. This ain't even whatever science makes those volcanoes erupt baking soda at junior high school science fairs.

The DP – or PIP, if you still call it that, or the ODAP, OP, or DO – is not even an adverse action that would render an employee aggrieved. It's just a *preliminary step* to taking a personnel action. *Lopez v. Agriculture*, EEOC No. 01A04897 (2000), *Jackson v. CIA*, EEOC No. 059311779 (1994).

For this article, we're focusing on this preliminary step that too many supervisors fear. Let's assume that your agency has established critical elements under an OPM-approved plan, and that you have communicated those critical elements to the employee. And now, the employee is failing to meet those on one or more of those elements. Do NOT ignore the poor performance. Just follow these three steps:

Step one: Notify the employee. In a letter or email, identify the critical element, or elements, at issue, and explain to the employee that his performance is at the unacceptable level. Reiterate, based on the performance plan, what exactly warrants a rating of unacceptable. Go ahead and attach that employee performance plan.

Inform the employee that you are putting him on a performance improvement plan (or, again, whatever your agency calls this "opportunity" period), and that if he fails to raise his level of performance during the DP, you will initiate the steps that will lead to his removal. Identify specifically when the DP begins and ends. Clearly define for the employee what you will consider the "minimum retention level."

Step two: Conduct the DP – and limit it to 30 days. There is no reason for a DP to go longer than 30 days. The MSPB has consistently affirmed that a 30-day DP satisfies an agency's obligation to provide an employee with a reasonable opportunity to demonstrate acceptable performance. *Lee v. EPA*, 2010 MSPB 240; *Towne v. Air Force*, 2013 MSPB 81. In previous rulings, the Board has found that a DP as short as 17 days is OK. *Bare v. DHHS*, 30 MSPR 684 (1986). But don't get too aggressive. Three days is not enough time, according to the Board. *Hailey v. Agriculture*, 26 MSPR 114 (1985).

And remember those Executive Orders President Trump issued last year? Well one of them requires agencies to limit the performance demonstration period "generally" to no more than 30 days.

As for conducting the DP, FELTG suggests you:

- Meet weekly with the employee.
- Give oral constructive criticism relative to the week's work and the week's assignments.
- Follow up with an email to the employee that day or the next. Restate the criticism, make assignments for the next week, and send a copy of the email to your advisor.

Step three: Make your decision. Has the employee met that "minimum retention level" that you defined in your notification letter? If so, issue a performance warning letter. In that letter, inform the employee that you will still take steps to initiate a removal if the employee's performance dips back to unacceptable within a year of the first day of the DP.

If the employee fails the DP, then you have three options. You can reassign the employee, offer last rites, or proposal the removal. There is a time, place, and reason for all three of these options, and you can find out more from FELTG President

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Deborah Hopkins and Bill Wiley, FELTG Professor Emeritus when FELTG hosts MPSB Law Week in Dallas from June 3-7.

But for now, I need to leave. I have a doctor's appointment, and those leeches aren't going to attach themselves. Gephart@FELTG.com

Case and Program Consultation

Sometimes, you need an outside perspective. Whether it's been a while since you've taken a misconduct action, you have a tricky performance case with a high-ranking employee, you need help negotiating your next union contract, or there's a challenging EEO complaint pending, it can be beneficial to get assistance from someone who's handled these types of legal challenges before. That's where FELTG comes in.

We're not just a training company. We have a team of specialists with decades of experience who can help you tackle the trickiest federal workplace legal challenges. Take a look at some of the projects we've been working with agencies on recently:

- Drafting and reviewing disciplinary documents
- Preparing for litigation before the MSPB and EEOC
- Editing agency policy on performance and conduct expectations and procedures
- Drafting performance plans and writing standards
- Preparing negotiators for bargaining with unions
- Developing administrative investigation plans
- Defending against nonmeritorious harassment complaints

If you think we can help, you can reach us at info@feltg.com or 844-283-3584.

Tips from the Other Side: April 2019
By Meghan Droste

This month's tip regarding discovery comes from both my experience as an employee-side attorney and also from my previous life when I occasionally represented federal agencies. As anyone who has had to engage in discovery can tell you, interrogatories are served in nearly every case and can take up a large amount of time to respond to. I know from both sides of the table that trying to ensure your client/witness is on top of drafting the responses, the inevitable follow-up emails and calls when they are not, and the reviewing and editing for comprehension can be incredibly time-consuming. Although I have never done it — more on why not in just a bit — I can somewhat understand the appeal of cutting out the middle man (and all of the related work) and just drafting the responses yourself. No follow ups, no explanations for why they really do have to respond, no editing needed; it's all taken care of on time and done correctly.

Sounds great, right? Well…. no, sorry. You really shouldn't respond to the interrogatories yourself, no matter how many headaches it might save you.

Why shouldn't an attorney/non-attorney representative draft the responses to interrogatories?

For starters, you are not the witness/ complainant/responsible or responding management official (and if you are a witness or responsible management official you should speak with someone about having the case reassigned because you may run into some serious issues of privilege if you participated directly in the issues in the complaint).

As the representative, you do not have any direct, personal knowledge of the allegations or what occurred. Just as you cannot testify in a deposition or hearing about your understanding of the facts, you

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should not testify to them in the interrogatory responses. You need to ask the people who know about the events what happened, and they should be the ones drafting the responses.

When I was on the agency side of cases, I would identify everyone who might have relevant knowledge and then send each person the requests that applied to them. That might mean nearly all of them, or it might be just one or two, whatever was appropriate for each person. If more than one witness had knowledge responsive to a request, I would include all of their responses, clearly indicating what information was from each witness. I strongly encourage you to do the same.

If my advice isn't enough to convince you, consider the case law on this issue. The Federal Rules of Civil Procedure, which are not binding but do provide guidance, contemplate an attorney signing discovery responses only as to the objections, and not to the substantive responses. See Fed. R. Civ. P. 33(b)(5) ("The person who makes the answers [to the interrogatories] must sign them, and the attorney who objects must sign any objections."); see also *Sorrell v. District of Columbia*, 252 F.R.D. 37, 43 (D.D.C. 2008) (holding a paralegal signing discovery responses to be improper because he would be attesting to the veracity of the answers and also making objections).

As one court has noted, the requirements under Rule 33(b)(5) are "critical because interrogatories serve not only as a discovery device but as a means of producing admissible evidence." See *Walls v. Paulson*, 250 F.R.D. 48, 52 (D.D.C. 2008).

Your responses as a representative are not evidence; but the responses of the people with personal knowledge are. I know it may seem like a lot more work, but in the end it will be better for the agency, and it's just the right thing to do. Droste@FELTG.com

More Cases Based on Failure to Meet a Condition of Employment

By Barbara Haga

Last month, I began a series of columns regarding failures to meet conditions of employment. There are a wide variety of cases out there on these types of conduct actions with a lot of authority for agencies to hold employees to these requirements. This month, we are focusing on licenses and qualifications.

No 'Faculties'

Sometimes I learn something new working on these columns. This time it is a new use of the word "faculties." In the context of this case, it means a license or authorization from a church authority. Unfortunately for this Chaplain (Catholic priest), GS-0060-12, the one person with authority to give him faculties declined to do so.

Chaplain Ezeh was serving as a priest at Joint Base Anacostia Bolling in the Washington, DC, area and had been there for two years. The Archbishop of the Military Services is the sole endorser of Roman Catholic priests serving the Archdiocese of the Military Services, and by a letter dated December 14, 2011, the Archbishop informed the appellant that he had decided to terminate his faculties effective January 15, 2012. The case did not include any reasons why the faculties were terminated nor was there any response from Chaplain recounted; however, it was stipulated in the initial decision that without these faculties Chaplain Ezeh could not say mass or administer sacraments. The AJ and the Board sustained the removal

Ezeh v. Navy, 114 FMSR 13 (NP) (Sept. 30, 2013).

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Disbarred

De Maio was a GS-13 Estate Tax Attorney for the IRS. He was removed because he failed to meet a condition of employment. He was disbarred as a result of some reported unethical behavior which occurred during some private legal work. The Maryland Court of Appeals referred the complaint to a judge of the circuit court for hearing. DeMaio did not appear for the hearing. The circuit court judge concluded that De Maio had violated the Rules of Professional Conduct as charged. The Attorney Grievance Commission filed a recommendation for sanction, in which it urged the appellant's disbarment. DeMaio filed a response to the recommendation. On February 17, 2004, by unanimous decision, the Maryland Court of Appeals adopted the recommendation and disbarred the appellant.

DeMaio did not notify the IRS. Instead they learned of the matter about a week later from a member of the private bar and referred the matter for internal investigation by the Treasury Inspector General for Tax Administration. The disbarment was confirmed, and the agency proposed his removal in December 2004. Initially, he argued during his oral reply that the charge of failing to maintain membership in a state bar could not be sustained because he was also admitted to practice before the U.S. District Court for the District of Columbia and was a member of the bar of the District of Columbia. He finally acknowledged, however, that his District of Columbia bar membership had been suspended based on his disbarment in Maryland. The agency subsequently confirmed that he was suspended from practicing by the District of Columbia Court of Appeals pending resolution of the issue of reciprocal discipline. The AJ sustained the removal and the Board declined to review it by decision dated January 4, 2006.

De Maio v. Treasury, PH-0752-05-0394-I-1 (August 18, 2005).

Loss of License to Practice Psychology

Cerwonka is an interesting variation in the line of condition of employment cases because it 1) is a very recent Federal Circuit decision, 2) involves a Title 38 issue, and 3) deals with a situation where there was an appeal of the license revocation ongoing when the removal was effected.

The decision in Cerwonka's employment case was rendered by the Federal Circuit after the initial decision became final. Cerwonka's license was revoked by the State of Louisiana in February 2017 because of "clear ethical violations" and repeatedly failing to follow the rules and regulations binding upon him as a psychologist. The decision does not provide any details about the underlying misconduct except that the misconduct arose in conjunction with his private practice. The proposed removal letter noted that 38 USC.7402(f) provides that a person may not be employed as a psychologist with the VHA if his license has been terminated for cause - which had occurred. The VA removed him on April 1, 2017.

In July 2017, Cerwonka's appeal of the decision to revoke his license was decided and a Louisiana district court judge reinstated his license, pending further proceedings. The issuing office appealed the decision to the Louisiana First Circuit Court of Appeal. In an April 2018 decision, that court vacated the lower court's decision and remanded the matter for further proceedings. At the time of the Federal Circuit's decision, proceedings on the merits of the license revocation remained pending.

What did the Federal Circuit decide? They sustained the removal, finding that the Title

FELTG in Portland

Attention supervisors in the Pacific Northwest: Don't miss **Managing Federal Employee Accountability**, which will be held July 22-26 in Portland, Oregon.

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38 statutory provision took precedence over any Title 5 efficiency of the service arguments. The court noted that 38 USC.7402(f) prohibits the VA from employing any psychologist who had a license terminated for cause, without permitting any additional considerations or affording any discretion. The decision stated that the VA had interpreted this to mean that the immediate removal of an employee who had a license terminated for cause was required and quoted the VA handbook which stated "[a]n employee who fails to meet or who fails to present evidence of meeting the statutory, e.g., 38 U.S.C. § 7402, or regulatory requirements for appointment *will be separated."*

Cerwonka v. VA, U.S. CAFC, 2018-1398 (Feb. 13, 2019).

Tune in next month for further discussion of conditions of employment tied to medical qualifications. Haga@FELTG.com

Hey, Deciding Officials: What Exactly Does* Ex Parte *Mean?
By Deborah Hopkins

In federal sector employment law, we often use terms of art that carry very specific meaning. These terms may vary from a typical dictionary definition, or even from a black-letter law definition. Examples include *discipline, due process, notice, response, representative, supervisor*, and even *employee*.

A term of art that I want to highlight today is *ex parte*. This is a Latin term used in legal proceedings meaning "from one party." The Legal Dictionary definition goes a little deeper: "An *ex parte* judicial proceeding is conducted for the benefit of only one party. *Ex parte* may also describe contact with a person represented by an attorney, outside the presence of the attorney."

That's fine, but still not entirely helpful for the purposes of agency discipline and performance actions in the federal government. It needs some context. But before the context, let's do a quick review of the required steps to taking a disciplinary or performance action:

1. The Proposing Official (PO) gives the employee a proposal notice which includes the reasons for the proposed discipline (charges; *Douglas* factors) or performance removal (incidents of unacceptable performance during the PIP), and any relevant supporting documentation.
2. The employee responds orally and/or in writing to the Deciding Official (DO), based on the information given in the proposal notice and any other information the employee thinks is relevant. The employee has the right to be represented in this response.
3. The Deciding Official makes a decision based ONLY on what is contained in the proposal packet and what was contained in the employee's response.

These are the due process steps required by law, for any Title 5 or Title 42 career employee who has satisfied the probationary period. So, where exactly does this *ex parte* concept fit in? Well, there are two primary types of *ex parte* violations that might arise:

- An ***ex parte act*** occurs when an adjudicator considers evidence not available to one or more of the parties.
- An ***ex parte discussion*** is one held by an adjudicator without allowing all of the parties to the controversy to be present.

The DO is a management official in the agency and as such makes decisions for the agency, she is also acting as the judge, because she is weighing the evidence to determine what penalty to dole out.

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The employee legally is entitled to know all the reasons the PO relied upon, at the time he issues the proposal notice. So an *ex parte* violation occurs when, after the proposal is issued, the DO becomes aware of new information about the employee or the case, and the employee (and the representative, if he has one) is not made aware of the new information.

Let's apply this scenario to the two types of *ex parte* violations above:

- *Ex parte act:* A coworker of Ed Employee, whose removal has been proposed, sends an email to the DO, informing her that the Ed has been sending inappropriate text messages to her for months, even though she's asked him to stop. The coworker attaches a PDF with copies of the purported text messages.
- E*x parte discussion:* The deputy director of the division sets up a meeting to talk with the DO about the risks of keeping Ed around, when there are unsubstantiated but potentially serious allegations of harassment against him. Ed is never told about this discussion.

Now you can see where the term *ex parte* comes in – only one side (the DO) gets the information, either intentionally or unintentionally, and Ed Employee does not have a chance to respond to it, because that new information was not in the proposal notice.

If such a violation occurs and the employee finds out about it, then it's an automatic loser of a case for the agency – even if there is video evidence of the employee committing the charged act of misconduct, 15 sworn statements from credible witnesses, and a confession from the employee himself. It's a procedural due process violation and that employee cannot be removed or otherwise disciplined.

One of the foundational *ex parte* cases involved a DOD employee who claimed credit for time not worked on six different days, and was removed for submitting false claims. After the proposal was issued, the Commanding Officer engaged in surveillance of the employee and provided this information, along with additional documents, to the DO – and the employee was not given any of this information. Due process violation, and we're done; employee gets his job back. *Sullivan v. Navy,* 720 F.2d 1266 (Fed. Cir. 1983).

Additional cases show that *ex parte* information, whether it is relied upon or not, automatically violates due process. *See Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011); *Buchanan v. USPS*, DA-0752-12-0008-I-1 (2013); *Kelly v. Agriculture,* 225 Fed. Appx. 880 (Fed. Cir. 2007); *Gray v. Department of Defense*, 116 MSPR 461 (June 17, 2011). Be careful when doing legal research, though, because you will find cases where agencies got lucky and successfully argued that the new information was not considered, or did not influence the DO. *See, e.g., Blank v. Army,* 247 F.3d 1225 (Fed. Cir. 2001) (After receiving the employee's response to the proposed termination, the DO conducted a further inquiry into the matter but there was no due process violation because the interviews only clarified and confirmed what was already in the record.).

You don't want to hope to get lucky in one of these cases, though. Fortunately there's a simple fix for an *ex parte* conundrum, and it will save your case. The DO can simply notify the employee of the new information and give the employee an opportunity to respond to it, before the DO makes a final decision. *See Ward, above*.

It may bump your timeline back a few days to allow the extra response time, but that's waaaaaay better than losing a case on a due process violation and having to start from scratch. Hopkins@FELTG.com

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