Prohibited Personnel Practices Part 2

A seventh prohibited personnel practice relates to nepotism. If you are an individual who was the authority to take, direct others to take, recommend, or approve any personnel action, you may not, with respect to that authority, appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to any civilian position, any individual who is a relative; and that is defined in section 3110(a)(3) of title 5. If that employee is being appointed, or promoted, or advanced, in such a position that the agency, or the employee is serving as a public official (as defined in section 3110(a)(2) of title 5) or over which the employee exercises jurisdiction or control as such an official. So in your position, as an individual with the authority to take, direct others to take, recommend, or approve any personnel action, you may not, appoint, employ, promote, advance, or advocate for appointment, or for promotion, or advancement, any individual to a position over which you have authority.

The mere presence in the chain of command however, is not sufficient to violate a 5 USC 2302 (b)(7) which relates to nepotism. Now a relative means any individual who is related to the public official as a father, a mother, a son, a daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-son, step-daughter, step-brother, step-sister , or half-sister, or half-brother. Any of those individuals represent relatives, and if you are in the position to advance, as we discussed, or promote, any of those personnel actions, if you do so, you have engaged in nepotism which is prohibited by 5 USC 2302 (b)(7). And the public official that we've discussed includes any individual in whom is vested the authority by law, rule, or regulation, or to whom the authority has been delegated to appoint, employ, promote, or advance individuals, or to recommend those individuals for such appointment, employment, promotion, or advancement. All of that would constitute nepotism, and is prohibited by 5 USC 2302 (b)(7).

An illustration of that would exist if, even for example, if a selecting official agrees to hire another selecting official's relative in return for the other selecting official hiring the first individual supervisor's relative. So for example, Jane agrees to hire John's sister, and John in turn agrees to return the favor by hiring Jane's brother-in-law. And as a matter of fact, such instances did recently occur in the Department of Justice. The Office of the Inspector General issued a report regarding the investigation of improper hiring practices in the justice management division in July of 2012. That federal organization recently uncovered multiple violations to the prohibition against nepotism when selecting officials attempted to skirt the rules by hiring the relatives of other managers in exchange for those managers hiring their relatives.

The eighth form of a prohibited personnel practice relates to retaliation for whistleblowing. If you have the authority to take, direct others to take, recommend, or approve any personnel action, you may not, with respect to that action, take or fail, or threaten to take, or threaten to fail to take any personnel action with respect to any employee or applicant for employment because of a disclosure of information by the employee or applicant which the employee or applicant reasonably believes evidences; one, a violation of law, rule, or regulation; two, gross mismanagement; three, a gross waste of funds; four, an abuse of authority; or five, a substantial and specific danger to public health and safety, if the disclosure is not specifically prohibited by law. So let's go back. If you are in a position to take, direct others to

take, recommend, or approve a personnel action, you may not take, or fail to take, you may not threaten to take, you may not threaten to fail to take any of those personnel actions. If in the process of taking the personnel action it is because of a disclosure of information that is reasonably believed to evidence a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. Now remember, those types of disclosures may not be specifically prohibited by law. If the disclosures are specifically prohibited by law, then the agency may take action. If the information is not specifically required by executive order to be kept secret, as well. So if an individual is free to disclose the information; right, is not prohibited by law, is not prohibited by executive order from disclosing information, and the individual does disclose the information that evidences a reasonable belief of violation of a law, rule, or regulation, or gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, that that disclosure cannot motivate your action. In addition, if an individual makes such a disclosure to the Special Counsel, the Office of the Special Counsel, or to the Inspector General's Office, you may not retaliate for that form of whistleblowing disclosure.

Gross mismanagement, for the purposes of the Whistleblower Protection Act, is defined as decisions which are not merely debatable. Gross mismanagement does not mean action, or inaction which constitutes simple negligence, or wrongdoing. Instead, gross mismanagement means a management action, or inaction, which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. So for example, if an individual discloses what he/she believes to be gross mismanagement, and that disclosure evidences a reasonable belief that there is a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission, that would qualify as a whistleblowing disclosure; and that disclosure could not motivate the agency to take a personnel action (and we have discussed those in detail) regarding the individual who has made the disclosure.

A gross waste of funds constitutes a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the federal government. So, if an individual makes a disclosure which he/she reasonably believes evidences an expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government, that individual has made a whistleblowing disclosure, and cannot be the basis for a personnel action; otherwise, it is prohibited personnel practice. The abuse of authority requires an arbitrary or capricious exercise of power by a federal official, or employee that adversely affects the rights of any person, or that results in personal gain, or advantage to himself, or preferred other persons. In this case if an individual discloses what he/she reasonably believes to evidence an arbitrary or capricious exercise of such power, that individual has engaged in whistleblower protected activities.

The disclosure related to "specifically prohibited by law" is within the scope and being interpreted by the Supreme Court presently in MacLean v. The Department of Homeland Security to determine what exactly does constitute "specifically prohibited by law." And in that case, he references to disclosures made by Mr. MacLean who had evidenced what he believed to be whistleblowing disclosures that the Department of Homeland Security believed to be "specifically prohibited by law," because the Department of Homeland Security believed that Mr. MacLean was not authorized to make the disclosures. This related to the use of airline air marshals in the air. That the Department of Homeland

Security believed that that disclosure could not be disclosed and it was specifically prohibited by law; and the Supreme Court will be deciding that in the near future. The reasonable belief that I discussed, with regard to a whistleblowing disclosure is established if a disinterested observer with knowledge of the essential facts, known to, and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrong doing. If an individual reasonably believes that he/she is disclosing information that evidence actions of government wrongdoing, that individual has established a reasonable belief of a whistleblowing disclosure and cannot be punished for that disclosure.

The legal requirements then; to summarize in a whistleblowing disclosure type action where we are dealing with 2302 (b)(a), requires the following: disclosure of information, a reasonable belief (and that is determined on a case specific basis), it requires a personnel action (either a decision to take or fail to take, or a threat to take, or fail to take). It requires a contributing factor; so the agency must be motivated by the disclosure to take a personnel action, and there must be a connection between the personnel action, and the disclosure of information. The contributing factors typically established by a knowledge timing test; that is the agency has knowledge of the disclosure (which is characterized as a whistleblowing disclosure), and takes a personnel action within a reasonable period of time after learning of the disclosure. In other words, an agency becomes frustrated with an individual who has disclosed information and attempts to take a personnel action as a result of that disclosure. If an individual establishes that there is a contributing factor between the personnel action, and the knowledge of the disclosure of information, the agency must then prove by clear and convincing evidence that the agency, absent that protected disclosure, would not have taken that personnel action after having not learned of the disclosure of information. Let me revise that a little bit, if an agency has taken a personnel action within a reasonable period of time after having learned of a disclosure of information. That satisfies the contributing factor analysis, and the knowledge timing test. And then to avoid be characterized as having engaged in a prohibited personnel practice, the agency would have to show by clear and convincing evidence that the agency would have taken the personnel action in the absence of that disclosure.

An illustration of that occurs recently in the context of an individual named Kenneth Delano, who works for the Department of the Army. In August of 2013, he was a police officer and he disclosed to the IG, (the inspector general for the Department of the Army), that two officers had improperly received law enforcement availability pay. The employee officer had informed management that he had contacted the inspector general's office and had filed a complaint. As a result, there was a loss of pay of approximately $25,000 for the two individuals who had improperly received law enforcement availability pay. In July of 2014 the agency proposed to remove that police officer who had made the whistleblowing disclosure. They based that removal action on lack of candor and discourtesy to a fellow officer. The Office of the Special Counsel stepped in and stopped that personnel action from occurring, because the Office of the Special Counsel believed that the personnel action, (in that case, the proposal to remove, and the subsequent removal) was all geared, or based on the whistleblowing protected disclosures made by the police officer to the inspector general's office that had been investigated, and had validity. In that case, the Office of the Special Counsel may turn its attention to the proposing, or the deciding officials as having engaged in prohibited personnel practices.

Another example of a whistleblowing disclosure that motivated the agency to take action appears in the case of Chambers v. the Department of the Interior. In that matter, the agency police chief told media that traffic accidents in the area under her control had increased due to staffing shortages, and shortly after learning of the report, the supervisor was removed from her position on the basis of several charges including making public remarks relevant to security. The Federal Circuit Court of Appeals ultimately determined that the agency police officer had made whistleblowing disclosures, and that those whistleblowing disclosures, or at least one of those whistleblowing disclosures, had motivated the agency to take a personnel action; in that case removal. And the Federal circuit Court of Appeals did not allow, it disallowed that action from occurring.

A ninth form of a prohibited personnel practice relates to retaliation in any other forms. So if you have the authority to take, direct others to take, or if you have the authority to influence any of those actions, you may not, with respect to any of that authority, take or fail to take, or threaten to take, or fail to take, any personnel action against that employee because of the exercise of any appeal (ex: MSPB appeal), or any complaint (ex: EEO complaint), or a grievance right granted by any law, rule, or regulation. You may also not retaliate against an individual for testifying, or otherwise lawfully assisting any individual in the exercise of any right referred to in 2302 (b)(9). You may also not take any action for cooperating with, or disclosing information to the inspector general of any agency, or the office of the Special Counsel. And you may not take action against any individual for refusing to obey an order that would otherwise require the individual to violate the law. This is at 2302 (b)(9) which is distinct from the other forms of discriminatory animus that I referenced in 2302 (b)(1). So any of these forms of retaliation, again for exercising rights to file an appeal, file a complaint, file a grievance, testify on behalf of an individual, cooperating with or disclosing information to the Office of the Inspector General, or the Office of the Special Counsel, or for refusing to obey an order that would require the individual to violate a law. If you have motive, or intent, or purpose to punish an individual for having exercised those rights, that would qualify as a prohibited personnel practice in violation of 2302 (b)(9).

As an illustration, for example, of the 2302 (b)(9) prohibited personnel practice; if an employee were to file an EEO complaint related to the denial of a promotion, or related to the existence of a hostile work environment, and a supervisor goes to the employee and explains that pursuing that complaint would not serve the employee's best interest, and the supervisor further states that the pending EEO matter destroys workplace harmony and creates strife, and suggests that the individual withdrawal the EEO complaint, he doesn't promote the individual who has filed the EEO complaint; that may be a retaliatory action, and thus a prohibited personnel action, or prohibited personnel practice in violation of 2302 (b)(9).

Other forms of discrimination would also satisfy the definition of prohibited personnel practice. So for example, any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to that authority, discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or the applicant for, or the performance of others; except that nothing in the paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of

an employee or applicant for any crime under the laws of any State, the District of Columbia, or the United States; this is at 2302 (b)(10).

This form of discrimination really relates to a prohibited personnel practice that is motivated for reasons unrelated to performance in the workplace. Let me give you an example of that, in April of 2010, an individual; a civilian army quality assurance specialist had communicated to management her intent to change her name from male to female, and she began to dress and present as a women. The agency inappropriately restricted her use of the restroom; they failed to use her proper name and pronouns, and subjected her and her workplace conversations to increased review and scrutiny. The Office of the Special Counsel investigated that matter, and it very recently issued a press release in which they determined that there had been a violation of 2302 (b)(10). And that was because the individuals who were involved in allowing this female to use the female's bathroom, or disallowing that, had not used her proper name or her pronouns, and had subjected her workplace conversations to increased review and scrutiny, had done so for reasons that were retaliatory, and that were not related to the quality assurance specialists ability to perform her duties in the workplace. Because that retaliation, or discrimination was unrelated to her ability to perform her duties, the Office of the Special Counsel determined that that had been a violation of 5 USC 2302 (b)(10); and had instructed the Department of the Army to cease and desist that practice.

In the context of a 2302 (b)(10) violation, the Office of the Special Counsel need not prove that a personnel action was taken, or not taken to establish a 2302 (b)(10) claim. Instead, the Office of the Special Counsel must simply show that the alleged harassment is related to the authority to take, recommend, or approve a personnel action. Thus, any action that constitutes an abuse of the supervisor/subordinate relationship may be sufficient to prove a 2302 (b)(10) claim.

Another illustration of the 2302 (b)(10) violation would appear in the sense that if an employee, let's say a member of a local alternative lifestyle group working as a GS-11 geologist, sent to the newspaper an editorial which criticized the agency's personnel practice; but that letter does not adversely affect the performance of the employee who has received appointment only 4 months ago. If the supervisor terminates the employee for having sent the letter during a probationary period, and bases the decision on the employees irresponsible comments to the press, that would be a prohibited personnel practice in violation of 5 USC 2302 (b)(10), and could subject that supervisor to disciplinary action.

We have so far discussed 10 different ways in which an individual, a supervisor, with the authority to take, direct others to take, recommend, or approve any personnel action, may engage in prohibited personnel practices. There are 3 remaining forms of prohibited personnel practice. The first of those 3 remaining forms relates to violation of veteran's preference. This is found at 5 USC 2302 (b)(11). Any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to that authority, knowingly take, recommend, or approve any personnel action if the taking of that action would violate a veteran's preference requirement. Or you may not knowingly fail to take, recommend, or approve any action if the failure to take such action would violate a veteran's preference requirement. Recognize that individuals who believe that they have been subjected to a veteran's preference violation may also contact the Department of Labor and pursue

claims or remedies on their own without regard to prohibited personnel practices as referenced at 2302 (b)(11). But as supervisors and managers you must be aware that if you have taken an action which is in violation of a veteran's preference requirement, that would constitute a prohibited personnel practice, and could subject you to disciplinary action if you have engaged in that PPP.

The next form, the 12th form, of the PPP's relates to violating rules that implement merit system principles. So once again, if you are an employee who has the authority to take, direct others to take, recommend, or approve any personnel action, you shall not, with respect to that authority, take or fail to take any other personnel action if the taking, or the failing to take of that personnel action violates any law, rule, or regulation implementing, or directly concerning the merit system principles which we discussed previously, and which are contained in section 2301 of the Title 5. A violation occurs if an agency official takes an action against an employee or applicant without having proper regard for the individual's privacy, or constitutional rights. But if you recall those merit system principles listed at 2301, the 9 merit system principles. And if an individual is in the process of pursuing his/her employment, consistent with the merit system principles and if a supervisor takes action against the individual in violation of those merit system principles, that becomes a prohibited personnel practice in violation of 2302 (b)(12).

There is an open question before the MSPB that relates to analyzing a prohibited personnel practice under 5 USC 2302 (b)(12). As to whether a first amendment to the constitution represents a law, rule, or regulation implementing, or directly concerning the merit system principles; and that case is found presently before the MSPB at Special Counsel ex rel. Vincent Cefalu v. Department of Justice. The long and short of that is if an individual has engaged in first amendment activities, it may be well advised as a supervisor or a manager to think seriously about whether the exercise of the first amendment right is something that the agency wants to take action against. Because if there is a personnel action that is taken as a result of conduct that may be protected by the first amendment, that could potentially run afoul of the prohibited personnel practices in violation of 5 USC 2302 (b)(12).

The last prohibited personnel practice relates to implementing or enforcing non-disclosure policies, forms, or agreements which do not contain a qualifying statement. There is language that must be included in non-disclosure policies, forms, or agreements and if that language is not included, as established by 5 USC 2302 (b)(13), that becomes a prohibited personnel practice. The language that must be included in such non-disclosure policies, forms, or agreements is as follows; these provisions are consistent with, and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statue, or executive order relating to (1) classified information, (2) communications to congress, (3) reporting to an inspector general of a violation of any law, rule, or regulation, or mismanagement; a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling executive orders, and statutory provisions are incorporated into this agreement, and are controlling. That language must be included in non-disclosure policies, forms, or agreements otherwise that failure to include such language represents a prohibited personnel practice in violation of 5 USC 2302 (b)(13). So we have spoken thus far about 13 different areas, 13 different forms of prohibited personnel practices.

Before we close, let's talk about the sanctions and remedies associated with violating 5 USC 2302 (b)(1) through (b)(13). The Office of the Special Counsel is authorized to investigate any allegation of a prohibited personnel practice. The Office of the Special Counsel however, normally avoids duplicating

EEO procedures. So if you recall when we discussed the language at 5 USC 2302 (b)(1), related to discriminatory animus; The Office of the Special Counsel routinely avoids investigating those forms of prohibited personnel practices. But as you've noted more recently with regard to the employee who was the male to female Department of Army individual, that may be covered by title 7 as a result of its prohibition against sex, and The Office of the Special Counsel did investigate that. The long and short of that is that The Office of the Special Counsel has a broad authority to investigate any allegations of PPP's and they may do so, although as I said, they normally avoid duplicating the EEO procedures.

Absent any allegation, even without an allegation from an individual, The Office of the Special Counsel may investigate to determine whether reasonable grounds exist to believe that a prohibited personnel practice has occurred. The Office of the Special Counsel may seek corrective action from the Merit Systems Protection Board. In addition, The Office of the Special Counsel may petition the Merit Systems Protection Board for a stay of any personnel action. So if the agency, much like in the Delano case, if the agency has taken an action, proposed and taken an action, The Office of the Special Counsel may petition the MSPB to stay that personnel action until such time as The Office of the Special Counsel has fully investigated whether there is, or is not a prohibited personnel practice. An individual, for example, who has been subjected to whistleblower retaliation, may through an individual right of action, may file a prohibited personnel practice claim and pursue that through 2302 (b)(8). So in other words, an individual right of action, or a stay request from an employee, a former employee, or an applicant for employment may with respect to the PPP contact The Office of the Special Counsel and then thereafter either have The Office of the Special Counsel pursue the matter, or they may pursue that individually through the Merit Systems Protection Board.

Disciplinary actions; The Office of the Special Counsel may file a complaint with the Merit Systems Protection Board for disciplinary action against a supervisor, or manager who has engaged in a prohibited personnel practice. The MSPB may impose disciplinary action against an individual violating the language of 2302 (b)(1) through (b)(13). And those disciplinary actions may consist of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, may include a suspension, or a reprimand. The Merit Systems Protection Board may also assess a civil penalty not to exceed $1,000, or any combination of those. So if the Office of the Special Counsel determines that there has been a prohibited personnel practice, and that a supervisor or manager has intentionally, and with purpose, and motive engaged in such prohibited activities, they may request that the MSPB impose sanctions; and those sanctions may include removal, reduction in grade, debarment from Federal service not to exceed 5 years, a suspension, a reprimand, a penalty, a civil penalty of $1,000, or any combination of those 3.

Well there you have it! We've discussed 13 different forms of prohibited personnel practices and the types on sanctions and remedies that may be available to the Office of the Special Counsel, to an individual, and to the Merit Systems Protection Board to address prohibited personnel practices. Thank you.