

Prohibited Personnel Practices Part 1

Hi my name is Gavin Frost! I am an attorney with the U.S. Department of the Interior, Office of the Solicitor, and I am located in the headquarters office in Washington, D.C. The presentation that I'm providing today relates to prohibited personnel practices, and merit system principles. Specifically, I've entitled this presentation *Primer on Prohibited Personnel Practices: Avoiding Pitfalls, and Preventing Problems*.

The merit system principles and the prohibited personnel practices, appear as part of the Civil Service Reform Act, which was enacted in 1978. The Civil Service Reform Act provided the most comprehensive reform of federal workforce since passage of the Pendleton Act in 1883. And specifically for our purposes today, the Civil Service Reform Act codifies the merit system principles, and subjects individual employees who commit prohibited personnel practices to disciplinary action. The portions of the Civil Service Reform act that I will be focusing on today are found at 5 USC 2301, and 2302. 5 USC 2301 relates to, and identifies, the merit system principles; the guiding principles in the federal workplace. The language found at 5 USC 2302 identifies, in specificity, the prohibited personnel practices which must be avoided in the federal workplace by those who have the authority to take personnel actions.

A general overview of 5 USC 2301 that is the portion of the Civil Service Reform Act that relates to the merit system principles. There is much language in there of use for federal managers, and federal supervisors, but specifically the merit system principles include the following 9 provisions.

First, the federal requirement is that we recruit from qualified individuals and appropriate sources to achieve a diverse workforce and advanced personnel on the basis of ability, knowledge, skills, after fair and open competition which ensures that all individuals receive equal opportunity. The recruitment must ensure objectivity, not subjectivity.

The second merit system principle relates to the following: All employees and applicants must receive fair and equitable treatment.

Third, the merit system principles require equal pay for work of equal value.

Fourth, all employees must maintain high standards of integrity, conduct, and concern for public interest.

Fifth, the federal work force must be used efficiently and effectively.

Sixth, employees must be retained on the basis of adequacy of their performance.

Seventh, employees must be provided effective, useful education and training.

Eighth, employees must be protected against arbitrary action; they must be protected against personal favoritism; they must be protected against coercion for partisan, political purposes; and employees must be prohibited from using the position to interfere with elections.

And finally, employees must be protected against reprisal for whistleblowing.

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There are a number of perspectives on merit system principles, the nine principles that I've just identified. Some of which you may find in the Merit Systems Protection Board Report issued in January of 2013; entitled, *Managing Public Employees in the Public Interest*. One perspective voiced by individuals, and memorialized in that Merit System Protection Report, relates to the following: success in eliminating unnecessary functions and positions, and effectively addressing poor performance, is particularly important for federal agencies to demonstrate to Congress, the President, and the American people that they have done as much as possible, with as few resources as possible. These are the areas where federal employees perceive the greatest need for improvement. And there are other perspectives that you may find in Merit Systems Protection Board Studies, and I recommend that you access the Merit Systems Protection Board Website to review some of those studies.

One of the more recent studies, would it relate to the consequences of real or perceived favoritism? The Favoritism Report referenced by the Merit System Protection Board includes language that relates to the following: Employees perceptions of favoritism within the work environment can undermine employee morale, productivity, teamwork, recruitment, and retention, and increase conflict. Given these negative consequences of actual or perceived favoritism, agencies would be well served by ensuring that all supervisors act in accord with merit system principles and that all employees are confident in this practice.

So we've spoken briefly about the 2301 merit system principles, the "good," if you will, let's now turn our attention to 5 USC 2302 B which relates to the prohibited personnel practices, the "bad," the types of actions that may not be taken in the federal workplace. In order to have a prohibited personnel practice, we must have motive, intent, and purpose to engage in wrongdoing. Specifically, a prohibited personnel practice means any action described by subsection B of 5 USC 2302. A prohibited personnel practice requires a personnel action and it must be taken for a prohibited purpose. Personnel actions lie at the heart of PPP's, and provide the statutory foundation relevant to unlawful conduct. Any employee who was the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to that authority, engage in a prohibited personnel practice. Now there are 13 different forms of prohibited personnel practices. We have 9 merit system principles, and 13 different prohibited personnel practices.

So let's turn our attention now to the personnel actions that are related, and underlie, become the heart of, and foundation for, a prohibited personnel practice. Any personnel action that relates to an appointment, or a promotion, could be involved, or the subject of a prohibited personnel practice. Any chapter 75 action, a disciplinary action or corrective action, could become a prohibited personnel practice, or provide for a prohibited personnel practice in the workplace. Because a prohibited personnel practice, or a PPP, is a personnel action which is taken for a prohibited purpose, it is of critical importance for us to understand what personnel actions are relevant to prohibited personnel practices.

First, the personnel actions identified at 5 USC 2302 A2A would include appointments and promotions. If an individual is appointed or promoted and the appointment or the promotion is motivated by a prohibited personnel practice, that is in violation of the law. In addition, other personnel actions such as chapter 75 actions, disciplinary actions/corrective actions fall into the category of personnel actions for

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the purposes of PPP's. And incidentally, a widely held impression is that the government employee cannot be fired, regardless of an unacceptable conduct, or work performance. Although congress believes that this is not true, enough bad examples are available to give it credibility. While it is technically possible to fire unsatisfactory employees, appeals processes have become so lengthy and complicated, that managers often avoid taking such disciplinary actions. The disciplinary action however, still becomes a personnel action for the purposes of a prohibited personnel practice if, as I said, the disciplinary action is motivated by improper methods, or is prohibited by 2302 B 1 through 13. In addition, personnel actions that falls within the categories for prohibited personnel practice would include: a detail, a transfer, a reassignment, a restoration, a reinstatement, a reemployment, or a personnel performance evaluation under 5 USC 4301 and following.

So again we talked about personnel actions to include: appointments, promotions, personnel disciplinary actions or corrective actions, details, transfers, reassignments, restorations, reinstatements, reemployments, performance evaluations. There are more personnel actions than those. Any decision concerning pay, benefits, or awards; or concerning education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other actions described in federal law, that becomes a personnel action for the purposes of prohibited personnel practices. Any decision to order psychiatric testing or examination would fall into the category of a personnel action for the purposes of prohibited personnel practices. And finally, any other significant change in duties, responsibilities, or working condition, qualifies as a personnel action for the purposes of PPP's. Now, those personnel actions simply establish the basis for a prohibited personnel practice. Obviously, all those actions that I just mentioned are legitimate in many contexts, but if they are motivated improperly, and we'll discuss the improper motivations, then those personnel actions would satisfy the definition of a prohibited personnel practice. Remember, that an individual must have power, and the authority to take, direct others to take, recommend, or approve any personnel action in order to subject the individual to disciplinary action before committing a prohibited personnel practice. There are a number of personnel actions, but under the right circumstances, the failure to take a personnel action that would otherwise be taken can constitute a prohibited personnel practice. In addition, under the right circumstances, threats to take, or not to take, a personnel action that would otherwise have been taken, or have not been taken, may constitute the commission of a PPP.

So, first then we've talked about the personnel actions. If that personnel action, as we've discussed then, is motivated by discriminatory animus, then that personnel action satisfies the definition of prohibited personnel practice. The statutory reference at 5 USC 2302 (B) 1 includes the following forms of discriminatory actions that would qualify as prohibited personnel practices. If a personnel action is taken for any reason based upon an individual's race, color, religion, sex, or national origin, as prohibited by Title 7; or on the basis of age (as prohibited by the ADEA); or on the basis of disability; or on the basis of marital status; or partisan/political affiliation, then that personnel action becomes a PPP because it is motivated by discriminatory animus. That is the language in Title 7, it would be found at 42 U.S.C 2000e-16.

As an illustration, in the case of Special Counsel v. Zimmerman; there was a coworker who referred to another employee who was an inherent of Judaism as a "resident Jew," as a "rich Jew." And there were

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a number of other negative comments related to Judaism. In addition, the coworker suggested that the employee play a lead role in the mock office satire of a crucifixion. The employee who was subjected to that discriminatory treatment complained to the supervisor, who not only condoned the mistreatment, the discriminatory mistreatment, but also participated in the constant battery of insults. The individual who was subjected to that inappropriate action contacted the Office of the Special Counsel. The Office of Special Counsel then intervened, and actually disciplined not only the coworker who had initiated this misconduct, but certainly the supervisor for having failed to stop, and for having participated in the inappropriate conduct. All of those actions were based upon the individual's faith and religion, and as a result the Office of the Special Counsel found that that was a prohibited personnel practice, and litigated that matter on behalf of the employee before the MSBP.

Another illustration would be found in cases where an individual had not been selected for a position because of his or her race. If a selection is either denied, or approved on the basis of race, then as I mentioned previously, that personnel action becomes a prohibited personnel practice. In another circumstance, if an individual is subjected to a hostile work environment and is referred to on the basis, in negative terms, is referred to on the basis of his/her gender, then those actions in the workplace could be characterized as prohibited personnel practices; because it is motivated by discriminatory animus on the basis of gender.

There is also the prohibited personnel practice that is in the form of age discrimination. If an individual has the authority to take, direct others to take, recommend, or approve any personnel action, that person shall not, with respect to such authority, discriminate for, or against, any employee, or applicant for employment on the basis of age.

There is also a prohibited personnel practice in the form of disability discrimination. Once again, any individual who has the authority to take, direct others to take, the authority to approve any personnel action, shall not, with respect to such authority, discriminate for or against, any employee, or applicant for employment on the basis of disability. And the disability is defined as a physical or mental impairment that substantially limits a major life activity. Another prong of that definition is: a record of such an impairment. And thirdly, as it being regarded as having such an impairment. That definition is construed broadly. It is designed to determine whether an individual is qualified as a person with a disability. But any of those would satisfy if that is the motivation for the personnel action; a prohibited personnel practice on the basis of discriminatory animus. For example, there are cases; a recent case decided by the EEOC established that an individual who suffered from ADHD and was subjected to negative treatment by her supervisor, had been subjected to a hostile work environment, and the supervisor had engaged in a prohibited personnel practice.

In addition, to those forms of discriminatory animus, there are the prohibited personnel practices in the form of discrimination based upon marital status, or political affiliation. So an individual who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, discriminate for or against, any employee, or applicant for employment on the basis of marital status, or political affiliation. If a supervisor, or manager, or an HR official, or anyone

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who has the authority to take such action or recommend such action engages in such discriminatory treatment, that is a prohibited personnel practice, and in violation of federal law.

The second category of prohibited personnel practices, the first one being discrimination; the second category relates to recommendations made in the course of hiring individuals, or advancing an individual for employment. So, any individual who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, solicit, or consider, any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action, unless that recommendation or statement is based on personal knowledge or records of the person furnishing it, and consists of 2 things: One, an evaluation of the work performance, ability, aptitude, or general qualifications of such individual. Or two, an evaluation of the character, loyalty, or suitability of such individuals.

So we've got the form of PPP's that are related to discriminatory actions found at 5 USC 2302 B-1, and this one that I've just discussed, is the form of PPP's through recommendations that are not related to either an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or not related to an evaluation of the character, loyalty, or suitability of such individuals.

The long and short of 5 USC 2302 B-2 is; that if you are soliciting recommendation, if you are seeking recommendations, or you are providing a recommendation for any individual, it shall not be provided on the basis of friendship, or any affiliation; unless it relates to the evaluation of the work performance, ability, aptitude, or general qualifications of such an individual, or it relates to an evaluation of the character, loyalty, or suitability of such an individual. There is no spoils system anymore. That goes back in to the 1800's. At present, an individual concerned in examining an applicant, or appointing him/her in the competitive service, may not receive, or consider a recommendation of the applicant by a Senator, or House of Representatives member, except as to the character or residence of the applicant. This PPP at 2302 B 2 is designed to preclude an agencies reliance on statements, or recommendations by outsiders, and to specifically avoid partisan, or political interference, in effecting a personnel action. The Congress anticipates and expects that supervisors and managers will conduct accurate reference checks. There is no prohibition against contacting any professional references to help make proper selections. This requires personal knowledge or records, possessed by the person supplying the information. If it does not include personal knowledge or records possessed by the individual, and it does not include information related to the individual's potential for performance in the position, and thus relating to performance, aptitude, ability, or general qualifications, then it is improper to consider that reference for the purposes of selecting an individual.

Now we talked about PPP's that are related to discriminatory animus, and related to improper references, another form, a third form of PPP arises in the context of coercing political activity. That is prohibited by 5 USC 2032 B-3; any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, coerce the political activity of any person; this includes providing any political contribution or service; nor shall you take any action against any employee, or applicant for employment as a reprisal for refusal of any person to engage in such activity. This PPP largely summarizes the HATCH Act prohibition. Senate Report

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number 95969 recognizes that at page 21. The HATCH Act, found at 5 USC 7321 through 7326, includes language that prohibits any employee from violating 5 USC 7323, or 7324, and establishes that anyone who does should be removed from his/her position. It is possible for a 30 day suspension without pay, but the burden is on the employee to show that the facts justify a less severe action, or sanction.

Again, a PPP demands a personnel action, as we've discussed, and there are cases such as Special Counsel v. Ware in which individuals have been removed after using government computers to send fundraising emails. And that particular instance occurred in 2008 when a Contract Office Technical Representative used a government computer to send fundraiser emails prior to the election in 2008. Even the solicitation of funds from subordinates may be sufficient for removal; there is no absolute threat necessary. Simply suggesting that a subordinate make contributions of a political nature may be sufficient to satisfy this PPP, and could warrant removal from public service. So 2302 B-3 prohibits individuals from coercing activity from subordinates in a political context.

The fourth PPP relates to obstructing competition among individuals competing for a job. 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, deceive, or willfully obstruct any persons with respect to such person's right to compete for employment. You may not interfere through deception or willful obstruction with an individual's right to compete for employment. And by deception, the MSPB has determined that that means to lead astray by underhandedness. Intent must be proven by the circumstances. And finally, willful obstruction may be established through improper lowering of a person's performance appraisal. And that case was the Hoban Case, decided by the Merit Systems Protection Board in 1985.

Another form of PPP relates to influencing improperly the withdrawal of an application from competition. So 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, influence any person to withdrawal from competition for any position for the purpose of improving or injuring the prospects of any other person for employment. Now unsuccessful efforts to influence the withdrawal still represent a prohibited personnel practice. It is an intent, or a purpose, or a motive to suggest that an individual withdrawal from competition for the purposes of improving or injuring the prospects of any persons for employment that establishes the PPP. An illustration of that is found in a recent Office of Special Counsel Press Release dated December 18th, 2012. In that press release, the Office of Special Counsel referenced a manager in the headquarters office of the International Boundary and Water Commission in El Paso, Texas, as threatening to report an applicant (who's also an employee) for committing fraud. This was a false accusation. But the threat was geared towards getting the individual to withdrawal his name from consideration for a position. That satisfied the prohibited personnel practice of influencing a withdrawal from competition as prohibited by 5 USC 2302 B- 5. Another illustration would exist if an individual is applying for a detail, and the supervisor prohibits the individual from pursuing the detail based upon the need to improve some other person's prospects for that detail, or to injure some other person's prospects for the position.

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If an agency advertises 2 positions for a particular job and receives an application from an employee who has fully recovered from a compensable injury, it would be inappropriate for the managing officer or the selecting official, to encourage that employee who has recovered from a compensable injury, to remove his/her name from competition.

Another form of a PPP relates to granting advantages, improperly granting advantages, because there are several advantages that are authorized by law. The PPP prohibited by 5 USC 2302 B- 6 talks in terms of granting advantages that are not authorized by law. So 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, grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition for the requirement of any position) all for the purposes of improving or injuring the prospects of any particular person for employment; this really relates to favoritism. Providing an advantage to an individual not based upon the skills, the knowledge, or the abilities required for the position, and not authorized by law, rule, or regulation, would fall into the category of prohibited personnel practice by granting an advantage. There are perceived problems with favoritism, as the Merit Systems Protection Board Recognized in a report entitled, *Prohibited Personnel Practices: Employee Perceptions*. The Merit Systems Protection Board determined that one potential explanation for why perceptions of this prohibited personnel practice, that is granting advantages or favoritism, occurred with greater frequency than the perceptions of other PPP's is that the scope of opportunities for subjective management decisions comes into play quite frequently. When a position is filled, there are a series of decisions that must be made when deciding how to recruit for a position, and whom to select. Because often, there will not be one single right course of action, differences of opinion may arise as to how the personnel action should have been done, or accomplished. This creates an opportunity for individuals who do not approve of the outcome to determine that some improper advantage was granted. So as supervisors and managers who are in the best position to determine the individuals who get selected, ensure that the process is fair, is objective, and avoids subjectivity and granting advantages to individuals so as to avoid a PPP based upon a violation of 2302 B-6.

There are preferences, and advantages provided by law, rule, or regulation, that do not constitute PPP's even though the granting of an advantage is provided. For example, veterans, through the veteran's preference, are granted an advantage by law. Re-employment priority lists authorize advantages to certain individuals. The Interagency Career Transition Assistance Program, or ICTAP, also provides for advantages and preferences. Indians may also be accorded a preference. And 5 CFR part 335 relates to promotions and internal placements. All of those preferences, or advantages, may be provided without running afoul of the prohibited personnel practice that prohibits granting advantages not authorized by law. The PPP demands, in this instance, an intentional, or purposeful taking of a personnel action, in such a ways to give a preference to a particular individual for the purposes of improving his/her prospects, or potentially injuring another individuals prospects. In recent matters decided by the Office of the Special Counsel, a GS-14 Deputy Director of the US Customs and Border Protection Hiring Center, granted an unauthorized preference, or advantage to an individual in the selection process, and was disciplined accordingly by the Merit Systems Protection Board. That case was the Special Counsel v. John

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Capell. So if you were in a position to provide an advantage, or grant an advantage that is not authorized by law, you must avoid that to avoid committing a prohibited personnel practice.