




Prohibited Personnel Practices: Employee Perceptions

A brief overview of a study conducted by the
U.S. Merit Systems Protection Board
Office of Policy and Evaluation




Hello, and welcome to a brief presentation on our report, *Prohibited Personnel Practices: Employee Perceptions*. The purpose of this presentation is to provide a little information about the Prohibited Personnel Practices (PPPs), how they work, and why they are important. We encourage you to read the report in its entirety for a more in-depth picture of this important issue. In particular, our report provides an extremely valuable level of description of each PPP as well as data on the trends in PPPs over time.



What are the PPPs?

The Prohibited Personnel Practices (PPPs) are a set of 12 prohibitions set in statute.

5 U.S.C. § 2302(b)



When the Civil Service Reform Act of 1978 was enacted, Congress included a list of prohibitions. There were 11 at the time, but a 12th PPP was added by the Veterans' Employment Opportunity Act of 1998 (VEOA), creating a total of 12 PPPs.

One important thing to remember about the PPPs is that they are, for the most part, about improper motives.

As the Board has repeatedly expressed in its decisions, for most PPPs, it is not the action itself that violates the law, but, instead, the intent behind the action.

Even for the few situations where motive is not specifically in the PPP, the motive of the official may be an aggravating or mitigating factor in any penalty.




What are the elements of a PPP?

- To commit a PPP, an official must have the “authority to take, direct others to take, recommend, or approve” a personnel action.
- Even if the official does not personally have an improper motive, it is a PPP to engage in “conduct that aids and abets another who is violating the statute.”




As explained in section 2302 of title 5, for a PPP to occur, an individual must have the “authority to take, direct others to take, recommend, or approve” a personnel action. As explained in the case of *Special Counsel v. Lee*, if an individual knowingly engages in a “pattern of cooperation” in order to aid and abet someone else who is trying to commit a PPP, then this accomplice is also liable for his or her assistance.




What are the elements of a PPP?

- There must be a personnel action—or attempted personnel action. Under the right circumstances, trying to avoid taking a personnel action that would have otherwise been taken can also constitute the commission of a PPP.




The definition of a personnel action with respect to the PPPs is very broad. A personnel action means an appointment, promotion, disciplinary action, detail, transfer, reassignment, reinstatement, restoration, reemployment, or performance evaluation. It also can include any other decision concerning pay, benefits, awards, training, psychiatric testing, or any significant change in duties, responsibilities, or working conditions.

Under the right circumstances, a failure to take a personnel action or an attempt to avoid taking a personnel action that would have otherwise been taken can constitute the commission of a PPP.



What are the prohibited purposes?

1. Discrimination
2. Improper recommendations
3. Coercing political activity
4. Obstructing competition
5. Trying to convince someone to withdraw from competition to advantage of someone else
6. Defining the scope of competition, manner of competition, or requirements of a position for the purpose of providing an unauthorized advantage



So, what are the prohibited personnel practices? The PPPs specify that agency officials are not permitted to discriminate, consider improper recommendations, coerce political activity, obstruct competition, or encourage a candidate to withdraw from competition in order to provide an advantage to someone else. Officials cannot deliberately shape the competition for a position for the purpose of giving an advantage to someone, or to deliberately disadvantage a potential candidate.

Remember that motive is often important. Defining the scope of competition to bring in a pool of well qualified candidates is not only permitted, it is encouraged. It is when there is an improper purpose behind the decision that this sixth PPP may occur.



What are the prohibited purposes?


7. Nepotism
8. Retaliation for whistleblowing activities
9. Retaliation for cooperating with an investigation, testifying, exercising an appeal/complaint/grievance right, or refusal to violate the law
10. Discrimination based on a non-merit factor
11. Knowingly violating a veteran's preference rights




It is also a PPP to deliberately engage in nepotism, which is the hiring of a relative. It is a PPP to retaliate against an employee for blowing the whistle, exercising an appeal right, helping someone else to exercise an appeal right, or to punish a person for refusing to follow an order that would require the person to break the law.

It is a PPP to discriminate based on conduct that does not affect an individual's performance or that of others in the workplace. For this reason, most off-duty activities cannot be the basis for a personnel action. However, if the off duty conduct affects the efficiency of the service, such as a law enforcement officer breaking the law, then an agency is permitted to act on the conduct.

It is also a PPP to knowingly violate a veteran's preference requirement.



What are the prohibited purposes?




12. Violating a law, rule, or regulation that implements a merit principle

The elements of this PPP are:

- (1) A personnel action was taken;
- (2) The taking of this action violated a civil service law, rule or regulation; and
- (3) The law, rule or regulation that was violated implements or directly concerns a merit system principle.

We encourage you to look at the report for a more in-depth description of each PPP.



The last PPP is rather broad, because most personnel laws, rules, or regulations implement a merit principle.

The 12th PPP is one PPP where the Board has expressly held that motive is not in the text of the PPP. According to the Board in *Special Counsel v. Byrd*, “The statute simply does not contain that requirement, and the plain words of the statute show that only three elements must be proved by the preponderance of the evidence in order to find a violation” of (b)(12).

“These elements are: (1) a personnel action was taken; (2) the taking of this action violated a civil service law, rule or regulation; and (3) the law, rule or regulation [that was] violated implements or directly concerns a merit system principle.”

However, motive does still come into play with respect to the penalty for this PPP. In *Byrd*, the Board held that it is a mitigating factor if an employee is unaware of the illegality of his or her actions, but it also held that a subject matter expert in personnel is responsible for knowing the personnel rules.

Thus, this 12th PPP appears to stand for the concept that it is a very bad idea to be careless about the laws, rules, and regulations that were designed to ensure a merit-based civil service.



What happens if MSPB finds there has been a PPP?

- In a corrective action case, the MSPB will order the agency to undo the personnel action and restore the individual to the situation they had prior to the action.
- In a disciplinary action case, the MSPB may order a reprimand, suspension, demotion, or removal action. MSPB can also debar an individual from Federal employment for a period of up to 5 years and/or assess a civil fine of up to \$1,000.

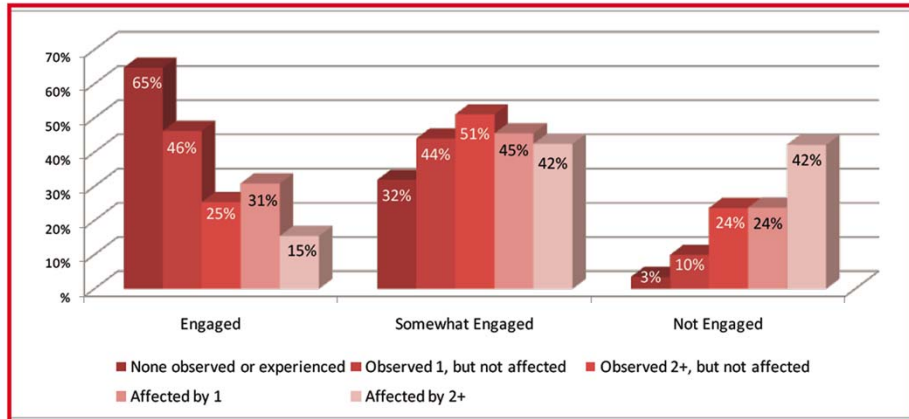


There are three kinds of PPP cases. For all PPPs, there are the cases where an employee can come to MSPB with an otherwise appealable action and assert that the action was the result of a PPP and therefore should be undone. There are also disciplinary action cases, which means that the Office of Special Counsel (OSC) asks MSPB to discipline an official for committing a PPP. OSC is an independent agency charged with investigating and prosecuting PPPs.

For whistleblowing—the 8th PPP – there is also an individual right of action, which means that by following a certain process, an individual can seek corrective action for a personnel action that is not otherwise appealable to MSPB.

Agency officials need to understand that for disciplinary actions brought in response to a PPP, OSC brings the charge, while MSPB decides if the case was proven by preponderant evidence and if OSC's recommended penalty is appropriate. On appeal, the Federal Circuit can review MSPB's decision. But, the employing agency is not a party in a disciplinary action case and has no authority in the matter. In other words, no matter how high-ranking a manager may be, he or she can't shield an offender.

Why do PPPs matter?



The PPPs were enacted because the conduct that they address is contrary to a merit-based civil service. These rules exist to prevent the creation of a corrupt spoils system and to prevent fraud, waste, and abuse.

In addition to the fact that committing a PPP violates the law, compromises the merit system, and can cost you your job, the commission of a PPP damages a work unit's ability to function efficiently and effectively.

For example, as can be seen on this chart, observing PPPs damages employee engagement. Even if an individual is not personally harmed by the PPP, watching it happen can make the employee far less engaged.

There is a good reason why these personnel practices are prohibited!



How can I learn more?

- The report that explains the PPPs in greater depth is available at www.mspb.gov/studies.
- If your agency would like an in-person presentation with the opportunity to ask questions, please contact studies@mspb.gov. Presentations may be possible via teleconference or in the Washington, D.C. area at no cost.



Thank you for watching our brief overview.

If you would like to learn more about the PPPs, please read our report *Prohibited Personnel Practices: Employee Perceptions*. Our website also contains two additional reports that focus on the PPP of retaliation for whistleblowing activities.

If your agency would like an in-person presentation on whistleblowing or the other prohibited personnel practices, with the opportunity to ask questions, please contact us. Presentations may be possible at no cost to your agency via teleconference or in person within the D.C. area.