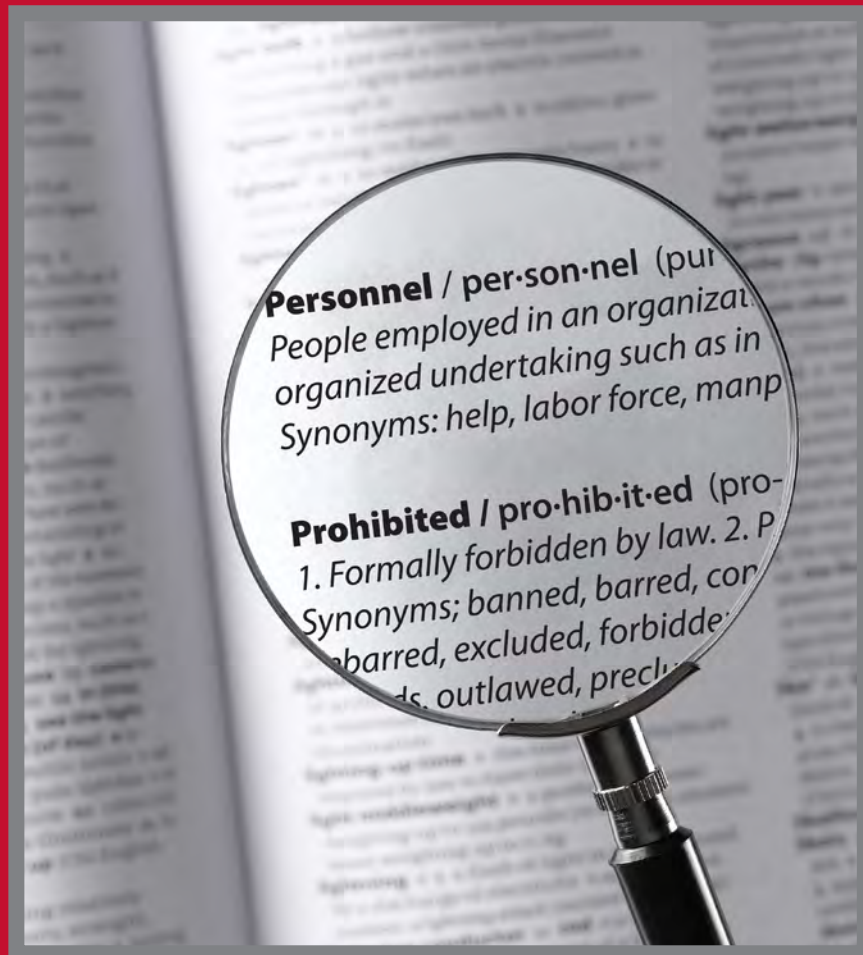


# PROHIBITED PERSONNEL PRACTICES: *Employee Perceptions*



UNITED STATES MERIT SYSTEMS PROTECTION BOARD

A Report to the President and the Congress of the United States  
by the U.S. Merit Systems Protection Board

AUGUST 2011





U.S. MERIT SYSTEMS PROTECTION BOARD  
1615 M Street, NW  
Washington, DC 20419-0001

The President  
President of the Senate  
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this U.S. Merit Systems Protection Board report, *Prohibited Personnel Practices: Employee Perceptions*. This report describes the 12 prohibited personnel practices (PPPs), what they each mean, the frequency with which Federal employees perceive that these PPPs are occurring, and the deleterious effect that such perceptions can have on the Federal workforce.

The PPPs are codified at 5 U.S.C. § 2302(b), which specifies that agency officials are not permitted to discriminate, consider improper recommendations, coerce political activity, obstruct competition or encourage a candidate to withdraw from competition, grant a preference not authorized by law, engage in nepotism, retaliate for whistleblowing or the exercise of a grievance or appeal right, knowingly violate the preference rights of a veteran, or engage in other actions that would violate a law, rule or regulation that implements the merit system principles.

Data from a recent survey conducted by the Merit Systems Protection Board indicates that perceptions of occurrences of most PPPs are at an 18-year low. However, there is room for improvement. One of the most important lessons that we identified is the extent to which employees observe how others in the workplace are treated, and how perceptions of management's improper treatment of others affects the observer. As our report explains, an employee's perception that others in the workplace have been subjected to a PPP has a negative relationship to the observer's level of engagement, even if the observer is not personally affected. Given that many employees may observe a single act, the perceived commission of any PPP can have substantial consequences for organizational effectiveness.

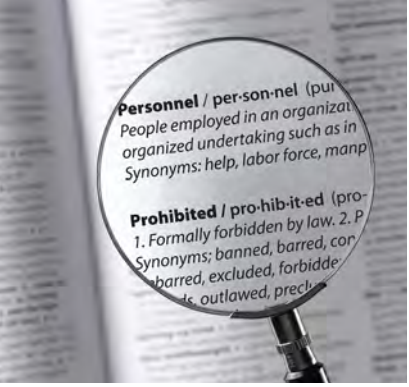
I believe you will find this report useful as you consider issues affecting the Federal Government's ability to operate efficiently and effectively in these challenging times.

Respectfully,

A handwritten signature in black ink, appearing to read "Susan", followed by a horizontal line.

Susan Tsui Grundmann  
Enclosure





# PROHIBITED PERSONNEL PRACTICES: EMPLOYEE PERCEPTIONS



A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES  
BY THE U.S. MERIT SYSTEMS PROTECTION BOARD



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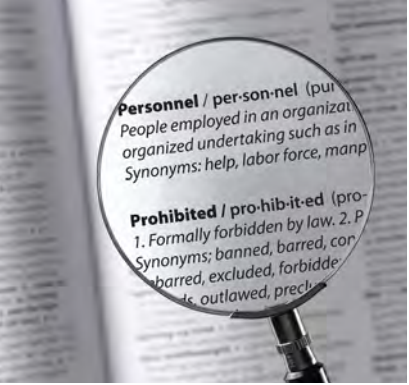
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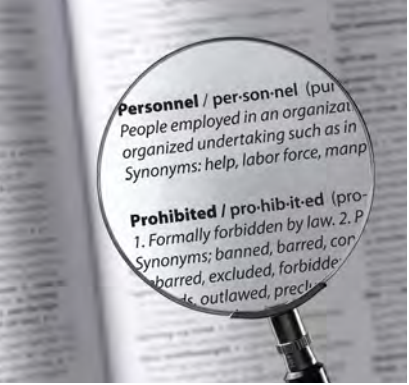




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# PROHIBITED PERSONNEL PRACTICES – 5 U.S.C. § 2302(B)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

- (1) discriminate for or against any employee or applicant for employment—
  - (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16);
  - (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);
  - (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d));
  - (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or
  - (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;
- (2) 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 such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—
  - (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
  - (B) an evaluation of the character, loyalty, or suitability of such individual;
- (3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;
- (4) deceive or willfully obstruct any person with respect to such person’s right to compete for employment;
- (5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;
- (6) 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 or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;
- (7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110 (a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110 (a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) 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 applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

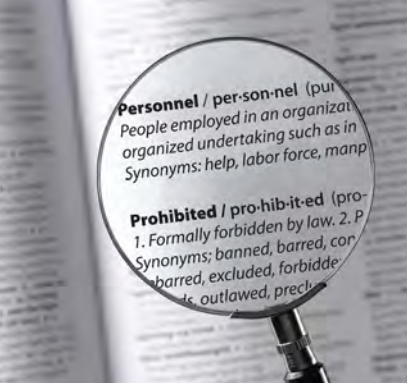
(11)

(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.



# EXECUTIVE SUMMARY

The U.S. Merit Systems Protection Board (“MSPB” or “the Board”) has a statutory responsibility to report to Congress and the President regarding “whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.”<sup>1</sup> The prohibited personnel practices (PPPs), codified at 5 U.S.C. § 2302, are a set of 12 activities that are proscribed by law. The purpose of this report is to discuss the extent to which Federal employees perceive that PPPs are occurring and to educate readers on the meaning and importance of the PPPs.<sup>2</sup>

## Findings

Overall, perceptions of occurrences of PPPs have dramatically declined since 1992. The PPPs with diminished perceptions include discrimination, coercion of political activity, obstruction of competition, influencing a withdrawal from competition, granting an improper advantage, nepotism, retaliation for whistleblowing, and retaliation for exercising an appeal or grievance right. PPPs in the Federal Government are serious, but they also appear to be increasingly uncommon.

Our 2010 Merit Principles Survey (MPS) data also show that there is a business case for avoiding PPPs. Perceptions of a PPP, whether observed or personally experienced, have a strong relationship to an employee’s level of engagement at work. Thus, while avoiding PPPs is a legal requirement, it is also a good management practice.

## Recommendations

We encourage agencies to educate their workforces, and in particular their executives, managers, supervisors, and human capital staff including equal employment opportunity advisors, about the PPPs.<sup>3</sup> These management officials should be informed about the meaning of each PPP, what constitutes a violation, and the reasons why it is in their interest to comply with 5 U.S.C. § 2302(b). This holds particularly true for new political

<sup>1</sup> 5 U.S.C. § 1204(a)(3).

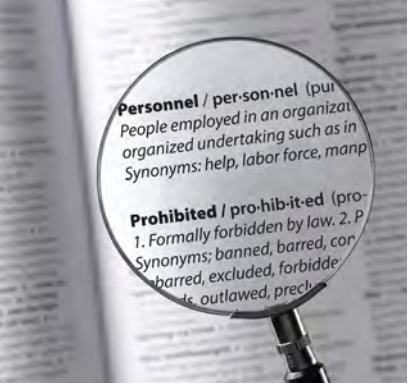
<sup>2</sup> There may be many causes for a perception that a PPP has occurred, including misunderstandings regarding what the PPPs mean and what motives were behind a personnel action. However, perceptions can serve as important indicators of the potential that a PPP has occurred.

<sup>3</sup> 5 U.S.C. § 2302(c) specifically states that “[t]he head of each agency shall be responsible for the prevention of prohibited personnel practices...”

appointees who may not be familiar with the civil service and may not have previously operated within a merit system. It would be beneficial if new officials received a standard memorandum from the head of the agency or cabinet department informing the official of the existence of the PPPs, expressing the leadership's expectations that PPPs will not occur, and giving a source for further information about the PPPs. This report could be one such source of PPP information provided to officials, but agencies may benefit from creating their own, more brief summaries. At the very least, officials should be given a copy of the PPPs from 5 U.S.C. § 2302 along with an explanation of the practical significance of the PPPs.

Where agencies discover that a PPP may have potentially occurred, agencies should, of course, promptly investigate to discover if the PPP did in fact happen. If the agency finds that the PPP happened, it should correct any improper personnel action and, if appropriate, consider taking disciplinary action to address the misconduct of the official who committed the PPP. The agency should also consider what agency practices may have permitted the PPP to occur and take action to correct those root causes.

Where there are perceptions of PPPs, but the agency concludes that PPPs have not occurred, agencies should seek to do a better job of explaining to employees the reasons behind management decisions so that employees can better understand the merit-based reasons for a particular outcome and avoid misperceptions in the future.



# INTRODUCTION

When Congress enacted the Civil Service Reform Act of 1978 (CSRA), the new law included two very important lists. One was a list of merit system principles that were to be encouraged, and the other was a list of personnel practices that were to be prohibited. This report discusses the prohibited personnel practices. The full text of the PPPs has been provided in the front of this report.

## Purpose

The primary purpose of this report is to provide Congress and the President with important information about the health of the Federal merit systems—in this case, the declining rate of perceptions that a PPP has been committed in the Federal service.

However, it is also our hope that we can use this opportunity to better educate the Federal workforce, and supervisors in particular, about the existence of the PPPs, how they can be avoided, and why avoiding the PPPs is not simply the law, but also a good management practice that can help create a more engaged workforce.

Accordingly, the first major chapter of this report provides the reader with an explanation of how each PPP has been interpreted by the Board and the courts. This section can be used as a stand-alone primer on the PPPs, but it also can help the reader to understand the chapter that follows, which provides longitudinal data derived from our merit principles surveys regarding employee perceptions of each PPP.

## PPPs and Board Authority

Because of statutory language, there are only a few ways that allegations of PPPs can be adjudicated by the Board. The first avenue involves the Office of Special Counsel (OSC).<sup>4</sup> OSC has the power to file with the Board a complaint asserting that a PPP has been committed. OSC can ask the Board to order corrective action, meaning that if OSC proves its case, the Board will undo the personnel action that constituted the PPP. OSC can also ask for disciplinary action, meaning that OSC requests that the Board order a reprimand, suspension, demotion, or removal action to discipline an individual for having

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<sup>4</sup> For more information on how to disclose a PPP to OSC, please visit OSC's website at [www.osc.gov](http://www.osc.gov).

committed a PPP. OSC can also request that the Board 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.<sup>5</sup>

The second way that a PPP may come before the Board is as an affirmative defense.<sup>6</sup> This occurs when an employee has brought an otherwise appealable action before the Board (such as his or her removal) and the employee asserts that the agency's action constituted the commission of a PPP.<sup>7</sup> If the Board finds by a preponderance of the evidence that the agency's action was the commission of a PPP the Board must overturn the agency's action.<sup>8</sup>

There is a third way that the commission of a PPP may be addressed by the Board, but because the authority is highly restricted, it has rarely been an issue. The Board may review an OPM rule or regulation on its own motion, and may declare the provision invalid, provided that the provision either: (1) *requires* an agency to commit a PPP, or (2) as implemented by an agency *requires* an employee to commit a PPP.<sup>9</sup> The statutory requirement that the rule or regulation must *require*, not merely permit, the commission of a PPP, has limited the extent to which this authority has been exercised.<sup>10</sup>

For two PPPs, the law provides individuals with another means by which they can bring that PPP to the attention of the MSPB. The first is for whistleblowers (section 2302(b)(8)), and the second is for veterans with preference (section 2302(b)(11)).

If an employee asserts that a personnel action, including an otherwise non-appealable action (such as a reprimand), is a result of whistleblower retaliation (the eighth PPP), the employee may bring an individual right of action to the Board. However, there is a series of steps that must occur for the Board to have jurisdiction over an individual right of action, as discussed in MSPB's recent report *Whistleblower Protections for Federal Employees*.

For veterans, another avenue exists to obtain redress for a violation of veterans' preference. The Veterans Employment Opportunities Act of 1998 (VEOA) empowers the Board

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<sup>5</sup> 5 U.S.C. § 1215(a)(3).

<sup>6</sup> See *Leaton v. Department of the Interior*, 65 M.S.P.R. 331, 341 (1994), *aff'd*, 64 F.3d 678, (Fed. Cir. 1995) (Table) (holding that the Board may adjudicate a claim that a PPP has occurred "when such a claim is interposed as an affirmative defense to an otherwise appealable action"). An affirmative defense occurs when an employee claims that an action should not be sustained because: (1) there was a harmful error in the agency's procedures for taking the action; (2) the decision was based on a PPP; or (3) the decision was otherwise not in accordance with the law. 5 U.S.C. § 7701(c)(2). While an agency has the burden to prove that its action is supported by a preponderance of the evidence, the appellant asserting an affirmative defense bears the burden to prove the affirmative defense by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2).

<sup>7</sup> A comprehensive list of appealable actions may be found at 5 C.F.R. § 1201.3.

<sup>8</sup> 5 U.S.C. § 7701(c)(2). *But see* 5 U.S.C. § 1221(e)(2) (stating that in a case involving retaliation for whistleblowing, the Board shall not order corrective action if the agency shows by clear and convincing evidence that the agency would have taken the same action in the absence of the whistleblowing).

<sup>9</sup> The Special Counsel or "any interested person" may petition the Board to conduct such a review. *See* 5 U.S.C. § 1204(f)(1).

<sup>10</sup> 5 U.S.C. § 1204(f)(2).



to adjudicate, under certain conditions, claims that there has been a violation of an “individual’s rights under any statute or regulation relating to veterans’ preference.”<sup>11</sup> Thus, if a veteran with preference alleges that an agency has violated veterans’ preference, the VEOA can provide an avenue for Board adjudication of the claim.<sup>12</sup>

The Board does not have jurisdiction to adjudicate an allegation that a PPP has occurred unless the law has specifically granted the Board the authority to adjudicate the claim under the particular circumstances, given either the nature of the offence (“requiring” the commission of a PPP) or the unique rights of the party raising the claim before the Board.<sup>13</sup> As a result, some PPPs have extensive case law to define them, while others have rarely been given the opportunity for elucidation.

## 2010 MPS Methodology

MSPB’s Office of Policy and Evaluation periodically surveys Federal employees to measure the health of the merit systems. The 2010 MPS was administered to 71,968 full-time, permanent Federal employees. We oversampled certain populations to ensure a sufficient amount of responses from some subagencies. The final results have therefore been weighted to ensure that the outcomes are representative of most of the Federal Government as a whole. Survey participation was voluntary. There was a 58 percent response rate overall.<sup>14</sup>

Our survey permitted respondents to provide responses of “Don’t Know/Not Applicable” to all of our PPP-related questions. For all of these questions, approximately 25 to 35

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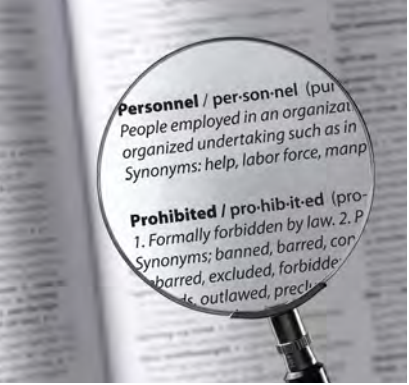
<sup>11</sup> *Dean v. Office of Personnel Management*, 115 M.S.P.R. 157, 163-64 (2010); see 5 U.S.C. § 3330a(a)(1)(A), (d).

<sup>12</sup> Issues of discrimination because of military service and reinstatement following such service may also arise under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). However a petition for appeal filed under VEOA or USERRA is adjudicated under the applicable law, not as a PPP.

<sup>13</sup> “The Board’s jurisdiction is not plenary, but is limited to those matters over which it has been granted jurisdiction by law, rule, or regulation.” *Stoyanov v. Department of the Navy*, 474 F.3d 1377, 1379 (Fed. Cir. 2007).

<sup>14</sup> The electronic version of the 2010 survey was offered to 70,675 employees, with 41,680 respondents, for a response rate of 59 percent. The paper version of the survey was mailed to 1,295 employees from the Federal Aviation Administration, with 340 respondents, for a response rate of 26 percent. In 2007, the MPS was administered to a sample of 68,789 employees and 41,577 employees responded (a 60 percent response rate). In 2005, the MPS was administered to a sample of approximately 74,000 employees and 36,926 employees responded (a 50 percent response rate). In 2000, the MPS was administered to a sample of 17,250 employees and 6,958 employees responded (a 43 percent response rate). In 1996, the MPS was administered to a sample of 18,163 employees and 9,710 responded (a 53 percent response rate). In 1992, the MPS was administered to a sample of 20,851 employees and 13,432 employees responded (a 64 percent response rate). See *Managing for Engagement—Communication, Connection, and Courage; Accomplishing Our Mission: Results of the Merit Principles Survey 2005; The Federal Workforce for the 21st Century: Results of the Merit Principles Survey 2000; The Changing Federal Workplace; Employee Perspectives; Working for America: An Update*. While there is no agreed upon rule in the scientific community regarding a threshold for an acceptable response rate, these response rates are generally considered sufficient to perform data analyses. See *The Gallup Europe Journal*, “Response Rates as Quality Criteria for Survey Data,” 2007, available at [http://www.gallup-europe.be/newsletter/articles/1207\\_18.htm](http://www.gallup-europe.be/newsletter/articles/1207_18.htm).

percent of respondents indicated that they either did not know the answer or considered the question not applicable. These responses have been removed from the data for all questions discussed in this report in order to provide a clearer picture of how an individual is affected by the perception that their agency does or does not have officials who commit various PPPs.



# WHAT ARE THE PPPs?

Before discussing the details of how relatively rare perceptions of PPPs are, it may be helpful to know the content of the PPPs, and what the text of the statute actually means. This chapter provides a brief discussion of each PPP, and how the PPPs have been interpreted by the Board and Federal courts in case law. It is extremely important for readers to understand that this report is not an official decision of the U.S. Merit Systems Protection Board, and should not be considered an advisory opinion or cited as a source of law. Where this chapter cites actual cases, individuals should refer to the text of those decisions for legal guidance. Where this chapter provides hypothetical examples, those hypotheticals should not be used as legal guidance or interpreted as the position of the Board with respect to the adjudication of allegations that a PPP has been committed.

There are two important concepts to understand when looking at PPPs. The first is a “personnel action” and the second is the group of people who are in a position to commit a PPP. Understanding these terms is important because the statute specifies both the personnel actions, and the individuals’ roles in those actions, that can qualify for 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 other significant change in duties, responsibilities, or working conditions.<sup>15</sup> Under the right circumstances, a failure to take a personnel action that would have otherwise been taken can constitute the commission of a PPP.

Many Federal employees are not in a position to influence any of these personnel actions. Thus, the PPPs apply only to “[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action[.]”<sup>16</sup> For the sake of simplicity, this report will refer to such a person as “an official.” People in a number of different roles may qualify as an official; it is not necessary for the individual to be in a supervisory position. For example, human resources (HR) advisors are in a particularly strong position to make recommendations on almost any conceivable personnel action, and their actions are covered by 5 U.S.C. § 2302 when they act in this role.<sup>17</sup>

<sup>15</sup> 5 U.S.C. § 2302(a)(2)(A).

<sup>16</sup> 5 U.S.C. § 2302(b).

<sup>17</sup> See *Special Counsel v. Lee*, 114 M.S.P.R. 57, ¶ 21 (2010), *rev'd in part*, 413 F. App'x 298 (Fed. Cir. 2011); *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 578 (1993).

What makes the PPPs special and distinct from the rest of title 5 is that the PPPs are not just about personnel actions. They are primarily about the *motive* behind the personnel actions.<sup>18</sup> As the Senate report for the CSRA put it, “[a] prohibited personnel practice is a personnel action which is taken for a prohibited *purpose*.”<sup>19</sup>

Thus, most of the PPPs have two elements: (1) the action of the official, and (2) the official’s mental state.<sup>20</sup> The act is the exterior event that others can perceive and often document; e.g., “here is the SF-50 produced when the agency hired John Doe.” The mental state is harder to prove. Why was John Doe selected? Was it because a selecting official discriminated against a different candidate for being over 40 years old?<sup>21</sup> Was it because John Doe was the nephew of the selecting official?<sup>22</sup> Was it because the selecting official deliberately skipped over a qualified preference-eligible veteran who was located above John Doe on the referral list without following the proper pass-over procedures?<sup>23</sup> What was the *motive* of the official who made the personnel action happen? This is enormously important, because as explained below, for most (but not all) of the PPPs, why the personnel action happened is crucial.

This motive is one of the elements that distinguishes the PPPs from the merit system principles. The merit system principles (a copy of which can be found at Appendix A) are a series of good government principles with which Federal personnel activities are expected to comport. However, the merit system principles are outcome oriented. For example, it is an MSP that “[t]he Federal work force should be used efficiently and effectively.”<sup>24</sup> It is possible for individuals to perceive that their agency’s personnel practices are inconsistent with this principle, without the individuals perceiving that any official is acting for a prohibited motive. Having policies that are inefficient and ineffective is obviously bad, but it is not necessarily illegal. For this reason, our questions related to the PPPs should not be interpreted as reflecting upon the extent to which the merit system principles are being followed. A separate report discussing employee perceptions regarding the extent to which agencies comply with the merit system principles is forthcoming.

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<sup>18</sup> See *Humberson v. U.S. Attorney’s Office for District of Columbia*, 236 F.Supp.2d 28, 32 (Dist. D.C. 2003), *aff’d* 2003 WL 21768064 (D.C. Cir. 2003) (holding that the purpose of the PPPs is to “forbid employers from imposing” personnel actions “out of particular illicit motivations”).

<sup>19</sup> S. Rep. 95-969, 20 (1978 U.S.C.C.A.N. 2723, 2742) (emphasis added).

<sup>20</sup> See *Carducci v. Regan*, 714 F.2d 171, 175 n. 3 (D.C. Cir. 1983) (noting that a “prohibited personnel practice is not established unless the basis or motivation for the action is one of those listed in § 2302(b)). As we discuss in the next chapter, some PPPs are more explicit than others as to the importance of the official’s motives when taking a personnel action. The 12<sup>th</sup> PPP, to “take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles[.]” is the only PPP for which there is a decision specifically stating that motive can be irrelevant to the commission of that PPP. See *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 579 (1993).

<sup>21</sup> 5 U.S.C. § 2302(b)(1)(A).

<sup>22</sup> 5 U.S.C. § 2302(b)(7).

<sup>23</sup> 5 U.S.C. § 2302(b)(11)(A).

<sup>24</sup> 5 U.S.C. § 2301(b)(5).

The PPPs are presented below, with our comments, in the order in which they appear in the statute at 5 U.S.C. § 2302(b).

## Discrimination—5 U.S.C. § 2302(b)(1)

Any employee who has 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—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation[.]

There are various laws that specifically prohibit discrimination, and this PPP simply states that violating particular laws with respect to personnel decisions is prohibited. Thus, while discrimination complaints are typically either pursued through the Equal Employment Opportunity process, or raised as an affirmative defense in an otherwise appealable action, discrimination is also a PPP.

For example, in *Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 281 (1988), the Board held that the PPP of discrimination occurred when a supervisor “participated in [the conduct] and failed to restrain” his subordinate from openly referring to a Jewish co-worker with highly derogatory comments related to his religion. The official’s act of participation and failure to restrain the other offender “rendered [the victim’s] conditions of employment offensive, hostile, and intimidating on account of his religion, in violation of 42 U.S.C. §§ 2000e-16[.]”<sup>25</sup> Because a significant change in working conditions is a personnel action, and 42 U.S.C. §§ 2000e-16 is addressed by section 2302(b)(1)(A), this conduct constituted the commission of the PPP of discrimination. For the commission of this PPP (as well as another PPP) the Board debarred the supervisor from Federal service for a period of five years—the maximum period allowed under the law.<sup>26</sup>

<sup>25</sup> *Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 279 (1988).

<sup>26</sup> Two years of debarment were for the discrimination, with an additional 3 years of debarment for retaliation against an employee for exercising a grievance or appeal right related to the discrimination. *Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 281, 294 (1988); see also 5 U.S.C. § 1215(a)(3).

## Considering Recommendations—5 U.S.C. § 2302(b)(2)

Any employee who has 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 such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

- (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
- (B) an evaluation of the character, loyalty, or suitability of such individual[.]

The second PPP prohibits an official from considering recommendations regarding personnel actions unless the person providing the recommendation has personal knowledge or possesses records that form the basis for the recommendation.<sup>27</sup> One potential example of this PPP in action would be if a hiring official (Supervisor X) considered a recommendation from a fellow supervisor (Supervisor Y) to select a particular candidate, but Supervisor Y knew the candidate solely from meeting the candidate at a fund-raising party held by “the Committee to Re-elect Senator John Doe” and had no actual knowledge of the candidate’s abilities related to the available position.

The history of this PPP goes back to the spoils system of the 19<sup>th</sup> century. When the civil service was created by the Pendleton Act of 1883, one provision was that hiring officials were barred from considering any recommendation for selection if it came from a member of Congress, other than as it pertained to the individual’s character or residence.<sup>28</sup> This prohibition is currently codified at 5 U.S.C. § 3303.<sup>29</sup>

However, while the prohibition on Congressional recommendations was the inspiration for the second PPP, found at 5 U.S.C. § 2302(b)(2), this PPP is different in several important respects from the rule for Congress at 5 U.S.C. § 3303.<sup>30</sup> Unlike section 3303, section 2302(b)(2) does not specify that the recommendation must come from a member of Congress for the PPP to apply. Executive branch officials must also avoid making such recommendations. The PPP also, unlike the Congressional rule, makes an exception for recommendations “based on personal knowledge or personal records, where it consists of an evaluation of work performance, ability, aptitude, character, loyalty, or suitability.”<sup>31</sup>

<sup>27</sup> 5 U.S.C. § 2302(b)(2).

<sup>28</sup> Pendleton Act of 1883, § 10.

<sup>29</sup> See 89 S. Rep. 1380 at 59 (1966) (codifying section 10 of the Pendleton Act at 5 U.S.C. § 3303).

<sup>30</sup> The second PPP “restates and expands” 5 U.S.C. § 3303. S. Rep. 95-969, 20 (1978 U.S.C.C.A.N. 2723, 2742).

<sup>31</sup> S. Rep. 95-969, 20 (1978 U.S.C.C.A.N. 2723, 2742).

This exception is important, because it enables people to provide accurate references to assist hiring officials to make high-quality, merit-based selections.<sup>32</sup> The Board has held that “the sparse legislative history of the statutory provision indicates that the [second PPP] was intended to prevent the use of improper influence to obtain a position or promotion.”<sup>33</sup>

## Coercing Political Activity—5 U.S.C. § 2302(b)(3)

Any employee who has 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 (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity[.]

The third PPP prohibits an official from coercing anyone’s political activity or retaliating for someone’s refusal to engage in a political activity.<sup>34</sup> The coercion does not have to be extreme to qualify for this PPP, and the employee need not be a supervisor. For example, in *Special Counsel v. Ware*, 114 M.S.P.R. 128 (2010), a Contract Officer Technical Representative was removed who used her Government computer to send fundraiser e-mails to 14 or more individuals, three of whom were not Federal employees, but who she nevertheless exercised some control over because of her influence over a contract. In its decision to remove the employee, the Board noted its holding in an earlier case, that “[t]he proscriptions of the Hatch Act fall equally on clerks and managers alike.”<sup>35</sup> (The conduct in *Ware* was addressed solely under the Hatch Act, and was not prosecuted as a violation of section 2302(b)(3)).

In another case, *Special Counsel v. Acconcia*, 107 M.S.P.R. 60, ¶ 2 (2007), the Board explained that “the coercion of political contributions, is one of ‘the most pernicious of the activities made unlawful by the Hatch Act’” and that a single occasion of soliciting funds from a subordinate for a political campaign warranted removal, even though the supervisor did not specifically attach any threats of consequences for nonparticipation to the solicitation.<sup>36</sup>

<sup>32</sup> For more information on the use of reference checking to determine a candidate’s potential for success if hired, please see our 2005 report *Reference Checking in Federal Hiring: Making the Call*, available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

<sup>33</sup> *Roane v. Department of Health and Human Services*, 8 M.S.P.R. 339, 343 (1981). See also *Wenzel v. Department of Interior*, 33 M.S.P.R. 344, 351 (1987) (holding that “[t]he legislative history of this provision indicates that it was designed to preclude an agency’s reliance on statements or recommendations by outsiders and to specifically avoid partisan or political interference in effecting a personnel action.”)

<sup>34</sup> 5 U.S.C. § 2302(b)(3).

<sup>35</sup> *Special Counsel v. Ware*, 114 M.S.P.R. 128, ¶ 35 (2010) (citing *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 203 (1988)).

<sup>36</sup> *Id.* at ¶¶ 2, 5, 10. But see *Special Counsel v. Mark*, 114 M.S.P.R. 516, ¶¶ 2, 13 (2010) (holding that a 120-day suspension, not removal, was appropriate for an employee who sent a single e-mail soliciting campaign contributions and did not solicit subordinates or other individuals subject to his control or authority).

This PPP’s prohibition against using coercion deliberately “summarizes the Hatch Act prohibitions.”<sup>37</sup> The Hatch Act is a law that was created to ensure that Federal employees act impartially and “are not used to build a powerful, invincible, and perhaps corrupt political machine.”<sup>38</sup> Because the conduct that constitutes the commission of this PPP is also conduct that violates the Hatch Act, this is perhaps the most powerful of all the PPPs. If a Federal employee violates the Hatch Act, the default is that the employee must be removed. Removal will occur unless the “Board finds by unanimous vote that the violation does not warrant removal, [in which case] a penalty of not less than 30 days suspension without pay shall be imposed by direction of the Board.”<sup>39</sup>

## Obstructing Competition—5 U.S.C. § 2302(b)(4)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority... deceive or willfully obstruct any person with respect to such person’s right to compete for employment[.]

The fourth PPP prohibits an official from using *deception* or otherwise *willfully* acting to obstruct someone’s right to compete for employment.<sup>40</sup> As with most of the PPPs, motive matters here. The Board has held that in common usage, the word ‘willful’ is considered synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional.’<sup>41</sup> Similarly, the American Heritage Dictionary defines deceive as “to mislead by deliberate misrepresentation or lies[.]”<sup>42</sup> The Board has held that the absence of a credible explanation for a misrepresentation can constitute circumstantial evidence of an individual’s intent to deceive.<sup>43</sup> Thus, once again, the intent of the official may be the difference between a PPP occurring or not.

<sup>37</sup> S. Rep. 95-969, 21 (1978 U.S.C.C.A.N. 2723, 2743). The Hatch Act is codified at 5 U.S.C. §§ 7321-26.

<sup>38</sup> *U. S. Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973) (discussing Congress’s intent when enacting the Hatch Act in 1939).

<sup>39</sup> 5 U.S.C. § 7326. When determining the appropriate penalty, the Board considers: (1) the nature of the offense and the extent of the employee’s participation; (2) the employee’s motive and intent; (3) whether the employee had received advice of counsel regarding the activity at issue; (4) whether the employee ceased the activities; (5) the employee’s past employment record; and (6) the political coloring of the employee’s activities. *Special Counsel v. Mark*, 114 M.S.P.R. 516, ¶ 8 (2010).

<sup>40</sup> 5 U.S.C. § 2302(b)(4).

<sup>41</sup> *Weed v. Social Security Administration*, 107 M.S.P.R. 142, ¶ 7(2007) (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

<sup>42</sup> American Heritage Dictionary, Houghton Mifflin, available at <http://education.yahoo.com/reference/dictionary>.

<sup>43</sup> *Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 6 (2010).



One example of this prohibited conduct can be found in the case of *Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984). In *Hoban*, the administrative law judge held that the evidence “led to the conclusion that respondent downgraded [his employee’s performance appraisal] to inhibit his chances to compete for promotion to a detective’s position.”<sup>44</sup>

## Influencing a Withdrawal From Competition—5 U.S.C. § 2302(b)(5)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority... influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment[.]

The fifth PPP focuses on attempts to influence an individual to withdraw from competition.<sup>45</sup> “Actual withdrawal of an applicant is not required to establish a violation [of this PPP]; an attempt to influence withdrawal is sufficient.”<sup>46</sup> “[T]he statute requires a two-part showing: (1) that an employee influenced or attempted to influence a person to withdraw from competition and (2) that the influence was exerted to improve or injure the employment prospects of another.”<sup>47</sup> Therefore, for this particular PPP to occur a specific motive must be present—the intent to affect the employment prospects of another.<sup>48</sup>

An example of this PPP can be found in *Special Counsel v. Brown*, 61 M.S.P.R. 559, 565 (1994). In *Brown*, there were two vacant public affairs specialist positions. One applicant was a qualified priority referral under the displaced employee program—which meant that under a rule in place at the time the agency could not select other candidates without first selecting him.<sup>49</sup> However, despite this rule, the agency selected two other candidates without even interviewing the priority candidate. When management was told that they could not select their candidates without first selecting the priority candidate, or getting permission from OPM for his nonselection, the agency interviewed the priority candidate, but then told him that they would prefer not to hire him and that they could

<sup>44</sup> *Special Counsel v. Hoban*, 24 M.S.P.R. 154, 160 (1984). The penalty in this particular case was a reduction in grade to a non-supervisory position.

<sup>45</sup> 5 U.S.C. § 2302(b)(5).

<sup>46</sup> *Special Counsel v. Brown*, 61 M.S.P.R. 559, 563-64 (1994).

<sup>47</sup> *Id.*

<sup>48</sup> As the Senate report for the CSRA noted, the fourth and fifth PPPs are very similar. S. Rep. 95-969, 21 (1978 U.S.C.C.A.N. 2723, 2743).

<sup>49</sup> See 5 C.F.R. § 330.305(b)(1987) (“OPM or agencies with delegated examining authority will neither certify from a register of eligibles nor authorize appointment outside the register in the absence of eligibles to fill any position expected to last more than 1 year for which a displaced employee is eligible and available for priority referral.”)

ask him to waive his displaced employee priority. The displaced employee did not waive his priority, but the agency proceeded to appoint the other candidates and not the displaced employee.<sup>50</sup> The Board held that the supervisor's actions in suggesting to the candidate that he withdraw from consideration was a violation of 5 U.S.C. § 2302(b)(5), even though management's attempt to persuade the candidate was unsuccessful.<sup>51</sup>

## Granting an Advantage—5 U.S.C. § 2302(b)(6)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such 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 or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment[.]

The sixth PPP prohibits an official from providing any advantage to a candidate, unless there is a law, rule, or regulation that authorizes the advantage.<sup>52</sup> However, as discussed previously, most of the PPPs explicitly target improper *motives*. In order for an action to qualify for the sixth PPP, the official must be acting “for the purpose of improving or injuring the prospects of any particular person for employment[.]”<sup>53</sup> As the Board has explained, “[i]t is not the [personnel] action itself that violates the law, but, instead, the intent behind the action.”<sup>54</sup> “It is possible to violate section 2302(b)(6) using hiring authority and recruitment vehicles that would be acceptable under other circumstances” if the purpose is to grant an advantage.<sup>55</sup>

Providing an unauthorized advantage includes “defining the scope or manner of competition or the requirements for any position” with this improper motive. As mentioned earlier, human resources staff are in a particularly good position to be aware of the commission of prohibited personnel practices, because personnel actions that involve hiring, firing,

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<sup>50</sup> OPM then ordered the supervisors involved to appoint the displaced employee, and when the “respondents deliberately failed to take timely corrective action after OPM” gave the instruction, the delay was held to be an additional PPP under what is now 5 U.S.C. § 2302(b)(12)—a failure to take action where the inaction violates a law, rule or regulation concerning a merit principle. See *Special Counsel v. Brown*, 61 M.S.P.R. 559, 576-68 (1994).

<sup>51</sup> Because the supervisor in question had since retired, the Board's penalty was to impose a fine on the supervisor. See *Special Counsel v. Brown*, 61 M.S.P.R. 559, 574 (1994).

<sup>52</sup> 5 U.S.C. § 2302(b)(6). There are several preferences or advantages provided by law or regulation, such as veterans' preference, reemployment priority lists, the Interagency Career Transition Assistance Program (ICTAP), and the Department of Defense Priority Placement Program.

<sup>53</sup> 5 U.S.C. § 2302(b)(6).

<sup>54</sup> *Special Counsel v. Lee*, 114 M.S.P.R. 57, ¶ 21 (2010) (citing *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 570 (1993)), *rev'd in part*, 413 F. App'x 298 (Fed. Cir. 2011).

<sup>55</sup> *Id.*, ¶ 5.

promoting, and financially rewarding employees tend to involve advice given by an HR specialist, and often require a request for personnel action (SF-52 or RPA), which is typically signed by an HR staffer who must “certify that the information entered on [the] form is accurate and that the proposed action is in compliance with statutory and regulatory requirements.”<sup>56</sup> The notification of personnel action (SF-50 or NPA) that documents the personnel action is also usually signed by an HR employee.

The issue of the role of HR employees in a section 2302(b)(6) PPP has come before the Board more than once.<sup>57</sup> The most recent case, *Special Counsel v. Lee*, is particularly illuminating, and is a strong warning to HR staff to be wary if there are obvious signs of a PPP.

The case of *Special Counsel v. Lee* involved two HR specialists, Mr. Lee and Ms. Beatrez. There was also a supervisor who apparently wanted to promote a particular person. This supervisor was a Coast Guard officer, not a civilian, and she later claimed that she was confused about how the civilian personnel system worked.<sup>58</sup> She requested and received two certificates of eligible candidates for a GS-11 position; one was from the delegated examining unit (DEU) and the other was under the local merit promotion plan (MPP). Her preferred candidate only applied for the MPP vacancy, and he was not referred.<sup>59</sup>

The record indicates that the Coast Guard officer’s human resources advisor, Lee, asked the staffing specialist to reopen the DEU announcement because the desired candidate had only applied under MPP, and Lee (mistakenly) believed the candidate could be hired under DEU if only the candidate had applied for that announcement.<sup>60</sup>

When the candidate was found unqualified for the second DEU announcement, Lee advised the supervisor that in order to be able to consider the specific candidate she sought, his “recommendation” was to cancel the certificates and issue a new one, for a GS-09 with promotion potential to the GS-11.<sup>61</sup> By this point, a new staffing specialist had been assigned to the action—Beatrez. Beatrez canceled the earlier referral lists and issued yet another announcement for the position, this time as a GS-09 with promotion potential to the GS-11 with the area of consideration limited to the local commuting area.<sup>62</sup>

While it was the supervisor who wanted to promote the particular person, Lee recommended to the supervisor how to accomplish this. The Board held that 5 U.S.C. § 2302(b)(6)

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<sup>56</sup> Request for Personnel Action (SF-52) Part C.

<sup>57</sup> See *Special Counsel v. Lee*, 114 M.S.P.R. 57 (2010), *rev’d in part*, 413 F. App’x 298 (Fed. Cir. 2011); *Special Counsel v. Byrd*, 59 M.S.P.R. 561 (1993); *Special Counsel v. Ross*, 34 M.S.P.R. 197 (1987).

<sup>58</sup> *Special Counsel v. Lee*, 114 M.S.P.R. 57, ¶23 (2010), *rev’d in part*, 413 F. App’x 298 (Fed. Cir. 2011).

<sup>59</sup> *Id.*, ¶ 9.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*, ¶11.

<sup>62</sup> *Id.*

includes “conduct that aids and abets another who is violating the statute.”<sup>63</sup> Lee thus ran afoul of section 2302(b)(6) because there was “a pattern of cooperation” between Lee and the supervisor who sought to promote a particular individual.<sup>64</sup>

In contrast, Beatrez was less involved with the personnel action. She had no role in the first two announcements being issued, but canceled the second announcement and issued the third vacancy announcement. The administrative law judge (ALJ) that conducted the hearing for this case determined that OSC had failed to prove by preponderant evidence that Beatrez had the required intent to commit a PPP. On petition for review, the Board held that the ALJ erred and there was preponderant evidence of Beatrez’s intent to aid in the commission of a PPP, thereby making her liable as well. Upon reviewing the Board’s decision, the Federal Circuit held that there was insufficient evidence for the Board to overrule the ALJ with respect to Beatrez’s intent, given the deference that is normally given to the credibility determinations of a hearing judge and the fact that the third announcement could have appeared proper to Beatrez, if viewed in isolation from the events that preceded Beatrez’s involvement. Because an improper motive was not found by the court, the action against Beatrez was reversed.<sup>65</sup>

In addition to demonstrating how 5 U.S.C. § 2302(b)(6) may be violated, the case involving Lee also conveys an important message about committing a PPP, even if the agency supports the employee’s actions. High ranking HR officials testified on behalf of Lee and Beatrez at the hearing. One stated that Lee and Beatrez had simply done what others in the agency had done “frequently” and another claimed that the charges had hit all of them “out of left field” and that they did not know the agency was committing a PPP.<sup>66</sup> While this was relevant to the penalty, it did not negate the fact that a PPP occurred, and Lee knowingly helped it to occur. In contrast, Beatrez was held to lack the requisite intent, and therefore was not liable for the acts of others.

Similarly, in *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 577 (1993), two HR officials were found to have committed a violation of section 2302(b)(6) in a situation where their superiors knew what the officials were doing and were perceived as viewing the PPP as a solution to a problem. One important lesson from all of this for any official is that a supervisor or even a high-ranking manager may be unable to protect an official if the official violates the law and commits a PPP, or *intentionally* helps someone else to commit a PPP.

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<sup>63</sup> *Id.*, ¶32.

<sup>64</sup> *Id.*, ¶25.

<sup>65</sup> See *Beatrez v. Merit Systems Protection Board*, 413 F. App’x 298 (Fed. Cir. 2011) (NP). The Board will defer to the credibility determinations of an administrative judge when they are based, explicitly or implicitly, upon the observation of the demeanor of witnesses testifying at a hearing because the administrative judge is in the best position to observe the demeanor of the witnesses and determine which witnesses were testifying credibly. *Haebe v. Department of Justice*, 288 F.3d 1288, 1299-1301 (Fed. Cir. 2002).

<sup>66</sup> *Special Counsel v. Lee*, 114 M.S.P.R. 57, ¶44 (2010) *rev’d in part*, 413 F. App’x 298 (Fed. Cir. 2011). The official specifically referred to it as the agency’s conduct, rather than that of either individual, perhaps in the hopes of passing the responsibility on to the agency.

## Nepotism—5 U.S.C. § 2302(b)(7)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority... appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110 (a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110 (a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official[.]

The seventh PPP prohibits an official from acting to appoint, employ, promote, or advance a relative, or to advocate such an act.<sup>67</sup> “Relative” is specifically defined in the law, which can help eliminate confusion about where to draw the line. A “relative” means “an individual who is related to the public official as father, mother, son, 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, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.”<sup>68</sup> One example of nepotism can be found in *Welch v. Department of Agriculture*, 37 M.S.P.R. 18 (1988), where a manager directed a subordinate supervisor to “prepare a written justification for the temporary appointment of” the manager’s son.

However, for nepotism to occur, there must be the act of advocacy. For example, in *Wallace v. Department of Commerce*, 106 M.S.P.R. 23, ¶ 2 (2007), Wallace was a high-ranking official who became aware that her sister was interested in a position that fell under Wallace’s authority. Wallace notified senior management that her sister was interested in applying for the vacancy and that “she was recusing herself from any input or involvement in the hiring process for the position and further sought... guidance on how to ensure that a fair and impartial selection could occur.” Wallace’s sister was ultimately selected for the position, but the Board held that the PPP of nepotism did not occur because the agency “failed to establish that Wallace’s mere presence in the chain of command” at the time of the selection constituted a violation of the nepotism statute.<sup>69</sup> In other words, the necessary advocacy or act to further the sister’s employment was missing from this case.

In addition to the act of advocacy, nepotism requires the involvement of a *relative*. Personal favoritism, in which an official may seek the advancement of someone who is not the best choice merely because the person is a friend or is otherwise well-liked by the official can be a problem, and is counter to the merit system principles.<sup>70</sup> However, unlike the

<sup>67</sup> 5 U.S.C. § 2302(b)(7).

<sup>68</sup> 5 U.S.C. § 3110(a)(3).

<sup>69</sup> *Wallace v. Department of Commerce*, 106 M.S.P.R. 23, ¶ 11 (2007).

<sup>70</sup> 5 U.S.C. § 2301(b)(8)(A) specifically states that employees should be protected against personal favoritism.

merit system principle that condemns personal favoritism, the seventh PPP is limited to relatives as defined in the law.<sup>71</sup> (Personal favoritism, and how it differs from rewarding competence, is the subject of a planned future report.)

## Whistleblower Retaliation—5 U.S.C. § 2302(b)(8)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority... take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety[.]

The eighth PPP prohibits an official from taking or failing to take, or threatening to take or fail to take a personnel action because of an individual's whistleblowing activity. A failure to take an action is also covered by this PPP. However, determining who is considered a protected whistleblower under the law is complicated. To be protected against an act of whistleblower retaliation, a Federal employee must:

1. Disclose conduct that meets a specific category of wrongdoing set forth in the law.
2. Make the disclosure to the "right" type of party. Depending on the nature of the disclosure, the employee may be limited regarding to whom the report can be made.
3. Make a report that is either: (a) outside of the employee's course of duties; or (b) communicated outside of normal channels.

<sup>71</sup> 5 U.S.C. §§ 2302(b)(7), 3110(a)(3).

4. Make the report to someone other than the wrongdoer.
5. Have a reasonable belief of wrongdoing. The employee does not have to be *correct*, but the belief must be *reasonable* to a disinterested observer.
6. Suffer a personnel action, the agency's failure to take a personnel action, or the threat to take or not take a personnel action. An intangible effect, such as having co-workers no longer be as friendly towards the employee is not a personnel action. Certain other types of actions—particularly the revocation of a security clearance—are also not personnel actions, even though the loss of a security clearance could lead to the loss of Federal employment.
7. Seek redress through the proper channels. Unless the personnel action is one for which MSPB has a separate jurisdictional authority, the employee must seek redress through the Office of the Special Counsel (OSC). Failure to present OSC with a detailed complaint and to wait for OSC to conclude its investigation (or wait 120 days if the investigation is not concluded), will prevent MSPB from obtaining jurisdiction to hear the claim.

However, even if a whistleblower establishes all of the above, the law states that the relief sought by the individual will not be ordered if the agency can establish by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing.<sup>72</sup>

We strongly urge readers not to generalize from a single whistleblowing case because the outcome in a whistleblowing case can rest upon any one of the factors listed above. Any allegation of retaliation for whistleblowing must be assessed on the specific facts of that case. However, two examples of recent cases where an agency was found to have committed whistleblowing retaliation are offered below.

In *Chambers v. Department of the Interior*, 116 M.S.P.R. 17 (2011), the appellant was the Chief of Police for the National Park Service, a sub-agency of the Department of the Interior. In a 2003 interview, Chambers told the *Washington Post* that traffic accidents had increased along the Baltimore-Washington Parkway because there were only two officers on patrol, when four officers were needed. Her agency fired her in 2004 for making public remarks regarding security on the Parkway, as well as other charges.<sup>73</sup>

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<sup>72</sup> 5 U.S.C. § 1221(e)(2). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than preponderance of the evidence. 5 C.F.R. § 1209.4 (d).

<sup>73</sup> *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶¶ 2-4 (2011).

Chambers filed a timely appeal of her removal with the Board, and after extensive litigation, the Federal Circuit held that when Chambers informed the media that traffic accidents had increased on the Parkway as a result of staffing shortages, the discussion qualified as a protected disclosure of a substantial and specific danger to public safety. Chamber's disclosure qualified because: (1) the disclosure was specific about the source of the problem (only 2 officers instead of the recommended 4 were patrolling); (2) a specific consequence of the shortage was described (accidents); (3) motor vehicle accidents are a significant and serious danger to public safety; and (4) it was not a vague or speculative outcome—accidents had already happened as a result of the shortage.<sup>74</sup>

The question then became, was she removed “because of” her protected disclosure, or would she still have been removed in the absence of her protected disclosure? The Board concluded that “the agency failed to establish by clear and convincing evidence that it would have taken any action against the appellant in the absence of her protected disclosures.” The agency was therefore required to reinstate Chambers with back pay, including interest.<sup>75</sup>

Similarly, in *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197 (2011), a physician disclosed patient medical records to various members of Congress as well as others, outside of the Government, in order to draw attention to what he perceived as poor medical treatment for veterans. The agency removed the appellant for his “unauthorized release and disclosure of private and protected information.” Parikh filed a timely appeal, and the Board held that because Parikh's perceptions of poor medical treatment were reasonable, it was not necessary that he prove that his perceptions were correct. Additionally, Parikh's disclosures to some individuals in their capacities as members of congressional committees on veterans' affairs fell within a narrow exception within the Privacy Act and thus the disclosures were not prohibited by law. However, the Board found that the appellant did violate the Privacy Act when he disclosed patient information to others outside the Government, and that those disclosures could not be protected by the Whistleblower Protection Act because the disclosures were prohibited by law.<sup>76</sup>

The question then became whether the agency would have removed the appellant for his unprotected disclosures in the absence of his protected disclosures. In other words, if he had released the information to the outsiders, but not to Congress, would he have still been removed? The Board held that while some of the evidence suggested that the agency would still have taken the removal action because the agency took seriously the need to keep patient records confidential, the evidence did not rise to the level of clear and convincing. As a result, the agency's personnel action could not be affirmed and the agency was ordered to reinstate the appellant with back pay and interest.<sup>77</sup>

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<sup>74</sup> *Chambers v. Department of Interior*, 602 F.3d 1370, 1379 (Fed. Cir. 2010).

<sup>75</sup> *Id.*, ¶ 74.

<sup>76</sup> *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197 (2011).

<sup>77</sup> *Id.*, ¶¶ 37-40.



For descriptions of more cases involving allegations of whistleblower retaliation, please see our recent report, *Whistleblower Protections for Federal Employees*, available at [www.mspb.gov](http://www.mspb.gov). The Board also publishes its decisions on its website and offers a search tool to help individuals locate potentially pertinent cases. Because whistleblowing cases depend so heavily on the particular circumstances of the case, individuals are encouraged to read the full text of any case they find of particular interest.

## Other Retaliation—5 U.S.C. § 2302(b)(9)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority... take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

- (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
- (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);
- (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
- (D) for refusing to obey an order that would require the individual to violate a law[.]

Originally, this PPP contained only part (A) applying to appeals and grievances. The other provisions were added by the Whistleblower Protection Act of 1989.<sup>78</sup> The CSRA Senate report discussing the ninth PPP noted that “*the prohibited action is the reprisal itself; the mere fact that an employee, who is otherwise incompetent or guilty of misconduct, exercises an appeal right, does not automatically protect the employee against appropriate disciplinary action.*”<sup>79</sup> Thus, once again, the reason why the agency official has engaged in the personnel action is the key question.

One example of the commission of this PPP can be found in *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5 (2008). In *Marshall*, the appellant claimed that the agency removed her because she had filed EEO complaints against the agency. The removal action before the Board was the fourth disciplinary action that the agency had taken against this employee (who was the union president) in less than 1 year, and all three of the earlier actions had been overturned, two on the basis of reprisal for protected activities. For the action before the Board, the deciding official gave “ambiguous testimony concerning the nature of the appellant’s offense” which led the Board to conclude that “the harsh penalty of removal” took place because of the appellant’s prior, protected activities—a violation of 5 U.S.C. § 2302(b)(9).<sup>80</sup>

<sup>78</sup> P.L. 101-12, § 4, 103 Stat. 16, 32.

<sup>79</sup> S. Rep. 95-969, 22 (1978 U.S.C.C.A.N. 2723, 2744).

<sup>80</sup> *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶¶ 23-25 (2008).

However, the penalty involved need not be so harsh for the PPP to be committed. In *Matter of Frazier*, 1 M.S.P.R. 163 (1979), a supervisor “suggested to [his employee] that he could expect to encounter less difficulty in his work if he dropped his union and EEO responsibilities” and “offered to drop [a] proposed letter of reprimand... in return for” the employee resigning from his collateral duties as an EEO counselor.<sup>81</sup> A week after the employee resigned from those duties, the proposed letter of reprimand was rescinded. The Board held that the supervisor’s conduct was because of the appellant’s protected activities and constituted the commission of a PPP.<sup>82</sup>

## Other Discrimination—5 U.S.C. § 2302(b)(10)

Any employee who has 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 conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States[.]

The Board has held that the legislative history of 5 U.S.C. § 2302(b)(10) and the “judicial interpretation of that provision” indicate that this PPP was “intended to apply to off-duty non-job related conduct.”<sup>83</sup> However, off-duty conduct may be a source of discipline if there is a “nexus” to the efficiency of the service.<sup>84</sup>

In *Special Counsel v. Lynn*, 29 M.S.P.R. 666, 668-69 (1986), the Office of Special Counsel filed a complaint for disciplinary action, requesting that the Board discipline two supervisors for removing a temporary employee from his position because of a letter the employee wrote to the editor of a local newspaper. In the letter to the editor, the employee criticized certain personnel practices followed by the Forest Service. According to OSC, the letter did not adversely affect the performance of the employee in question, or other employees, and therefore the removal constituted a prohibited personnel practice in “violation of 5 U.S.C. § 2302(b)(10), which prohibits discrimination based on conduct which does not adversely affect performance.” Ultimately, this case was dismissed at the request of the

<sup>81</sup> *Matter of Frazier*, 1 M.S.P.R. 163, 174-75, 196 (1979). (At the time of this case, only section (b)(9)(A) was in the statute, sections (B)-(D) were added later in the Whistleblower Protection Act.)

<sup>82</sup> Unlike section 2302(b)(8), the statute does not permit an individual right of action for a section (b)(9) violation. In *Frazier*, OSC filed a complaint with the Board, while in *Marshall*, there was an otherwise appealable action.

<sup>83</sup> *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 585 (1991).

<sup>84</sup> See *Allred v. Department of Health and Human Services*, 23 M.S.P.R. 478, 479 (1984); *Vilt v. U.S. Marshals Service, Dept. of Justice*, 16 M.S.P.R. 192, 197 (1983); *Gordon v. Government Printing Office*, 9 M.S.P.R. 354, 356 (1982).

Special Counsel—before the Board could rule if a PPP occurred—because the agency addressed the misconduct and disciplined the supervisors for their conduct. Because “the merit system principles were preserved” by the agency’s actions, any action by the Board would have been duplicative.<sup>85</sup>

Other private conduct is likewise protected if it does not affect the performance of the employee or others in the workplace. For example, both the Office of Special Counsel and Office of Personnel Management have interpreted section 2302(b)(10) as prohibiting discrimination based upon sexual orientation.<sup>86</sup>

## Veterans’ Preference—5 U.S.C. § 2302(b)(11)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority...

(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans’ preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans’ preference requirement[.]

The 11<sup>th</sup> PPP emphasizes the Government’s commitment to protecting the right that certain veterans have to a preference in competitive examinations and reductions in force.<sup>87</sup> Veterans’ preference is provided to honorably discharged veterans who are disabled as a result of their service or who served on active duty in the Armed Forces during specified time periods or in particular military campaigns.<sup>88</sup>

This PPP was added to section 2302(b) by the Veterans Employment Opportunities Act of 1998 (VEOA).<sup>89</sup> That statute also created a separate authority under which the Board is authorized to act for the protection of veterans’ rights. Under 5 U.S.C. 3330a, a preference

<sup>85</sup> *Special Counsel v. Lynn*, 29 M.S.P.R. 666, 668 (1986). As discussed later, a case such as this could also implicate 5 U.S.C. § 2302(b)(12) because of constitutional provisions involving free speech.

<sup>86</sup> See <http://www.opm.gov/er/address2/Guide04.asp>; <http://www.osc.gov/ppppolicies1.htm>. See also *Norton v. Macy*, 417 F.2d 1161, 1167-68 (D.C. Cir. 1969) (holding that the Government could not remove an employee for homosexual conduct because it had failed to demonstrate how his conduct harmed the efficiency of the service). *But see Brown v. Department of the Navy*, 229 F.3d 1356 (Fed. Cir. 2000) (holding that an off-duty affair with a marine’s wife interfered with the efficiency of the service because the employee was the program manager of the Morale, Welfare, and Recreation Department on the base).

<sup>87</sup> 5 U.S.C. §§ 3309, 3319, 3501, 3502. For more information on when preference is given and how it is applied, see U.S. Office of Personnel Management, *VetGuide*, available at [www.opm.gov](http://www.opm.gov).

<sup>88</sup> Under certain circumstances, a spouse, widow/widower, or mother of a veteran may qualify to receive the preference. 5 U.S.C. § 2108(3), see U.S. Office of Personnel Management, *VetGuide*, available at [www.opm.gov](http://www.opm.gov).

<sup>89</sup> Veterans Employment Opportunities Act of 1998, P.L. 105-339 § 6.

eligible who alleges that a Federal agency has violated his rights under any statute or regulation relating to veterans' preference may file an appeal with the Board, provided that he has satisfied the statutory requirements for first filing a complaint with the Secretary of Labor and allowing the Secretary at least 60 days to attempt to resolve the complaint. This is known as a VEOA appeal, named after the authorizing statute.<sup>90</sup>

VEOA appeals have two notable advantages for veterans over the use of 5 U.S.C. § 2302(b) (11). First, individuals may file a petition for appeal with the Board under VEOA without the necessity for action by the Office of Special Counsel. Secondly, VEOA does not require that the violation of a veteran's rights be made knowingly. The statute even has different provisions for an award as a result of "willful" violations as opposed to violations that are not "willful."<sup>91</sup>

For example, in *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 245, ¶¶ 20, 31 (2010), the agency admitted that it did not comply with veterans' preference provisions after it erroneously concluded that it did not have to comply with title 5 competitive service veterans' preference requirements for a particular position. While the Board held that this error constituted a violation of the appellant's veterans' preference rights requiring a reconstruction of the selection process, the case was not raised as a PPP, and thus the violation did not have to be done knowingly for redress to be awarded.

In contrast, the PPP requires an otherwise appealable action or the intervention of the Office of Special Counsel. The text of 5 U.S.C. § 2302(b)(11) also states that the violation must be done "knowingly."<sup>92</sup> The Board has not yet been presented with a case in which it was necessary to reach the question of whether or not a violation of veterans' rights was done knowingly under 5 U.S.C. § 2302(b)(11). The absence of such cases is likely a result of the more broad VEOA appeal option.

However, the fact that a violation of section 2302(b)(11) has not yet been brought to the Board by the Office of Special Counsel for adjudication does not take away from its importance. A victim whose rights have been violated may obtain redress through a VEOA appeal. However, that alone does not address the question of what is to be done with an official who was responsible for the violation if the violation occurred knowingly. The goal of the PPPs is not only to correct violations, but to protect the merit systems by preventing them from occurring in the first place. Section 2302(b)(11) grants the Board its

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<sup>90</sup> 5 C.F.R. § 1208.2.

<sup>91</sup> 5 U.S.C. § 3330c(a).

<sup>92</sup> The Senate report that accompanied the VEOA statute briefly described a few of the PPPs already codified and explained that "[p]ersons found by the MSPB to have knowingly committed such practices may be removed or suspended from Federal employment, or fined. Section 5 of the Committee bill would amend 5 U.S.C. § 2302 to add violations of veterans' preference laws to the listing of prohibited personnel practices. Thus, persons who knowingly fail to comply with veterans' preference requirements could be disciplined in accordance with standards applicable to prohibited personnel practices." S. Rep. No. 105-340 at 17 (1998) (internal citations omitted).

authority to determine the fate of a knowing violator of a veteran’s preference rights. The mere presence of this threat is an important tool for the Office of Special Counsel when it negotiates with agencies and individuals that it suspects may have knowingly violated a veteran’s rights. It may also be helpful to agencies that seek to educate their workforces on the need to comply with veterans’ preference.

## Violating Rules That Implement a Merit System Principle—5

### U.S.C. § 2302(b)(12)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority...take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

Unlike many of the other PPPs, there is no mention of motive in the plain text of the statute for this PPP. In *Special Counsel v. Byrd*, the Board held that the commission of this PPP does not require an improper motive. “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 5 U.S.C. § 2302(b)(12).<sup>93</sup> “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 violated implements or directly concerns a merit system principle.”<sup>94</sup>

In the Senate report to accompany the CSRA, an example was provided of conduct that could qualify as the 12<sup>th</sup> PPP. If a supervisor were to “take action against an employee or applicant, without having proper regard for the individual’s privacy or constitutional rights,” such an action would be the commission of the 12<sup>th</sup> PPP.<sup>95</sup>

The commission of this PPP can overlap with any of the other PPPs because the PPPs as a whole tend to mirror the merit system principles, and this PPP covers violations of laws, rules, and regulations implementing merit system principles. Thus, it would be difficult to violate a different PPP without violating an MSP, which in turn violates the 12<sup>th</sup> PPP if there is a law, rule, or regulation involved. It is hard to picture a situation in which a personnel action could occur without touching upon some law, rule, or regulation involving the merit principles.

<sup>93</sup> *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 579 (1993). The PPP currently codified at 5 U.S.C. § 2302(b)(12) was numbered (b)(11) at the time of this case.

<sup>94</sup> *Id.* An excerpt of the merit system principles is in Appendix A.

<sup>95</sup> S. Rep. 95-969, 23 (1978 U.S.C.C.A.N. 2723, 2745); see also H.R. Conf. Rep. 95-1717, 131 (1978 U.S.C.C.A.N. 2860, 2865) (containing almost exactly the same language).

For example, in *Special Counsel v. Lynn*, discussed earlier in conjunction with 5 U.S.C. § 2302(b)(10), the Office of Special Counsel filed a complaint for disciplinary action, requesting that the Board discipline two supervisors for allegedly infringing upon an employee's First Amendment rights in violation of 5 U.S.C. § 2302(b)(12) as well as (b) (10).<sup>96</sup> The supervisors allegedly removed a temporary employee from his position because of a letter the employee wrote to the editor of a local newspaper.<sup>97</sup> As mentioned earlier, this case was never fully adjudicated because the employing agency sought and received permission from the Office of Special Counsel for the agency to implement discipline, rendering any Board involvement duplicative. However, it is an example of a case in which the Office of Special Counsel determined that a violation of 5 U.S.C. § 2302(b)(12) might have occurred.<sup>98</sup>

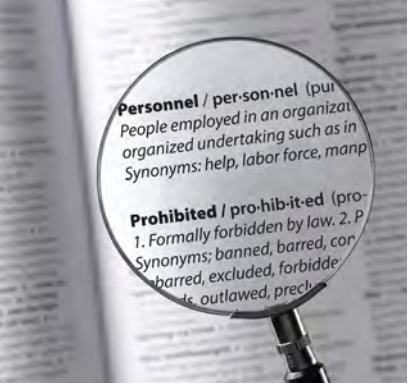
It is also an example of the important role that agencies, the Office of Special Counsel, and the Board all play in preventing and addressing potential PPPs. The Office of Special Counsel performed its duty by investigating the situation and bringing the case before the Board once it concluded that a PPP likely occurred. However, the agency also took responsibility for its employees and, after obtaining consent from the Office of Special Counsel, addressed the situation without the necessity for the Board to reach its own determination. This is important, because when the agency takes the disciplinary action, it sends a message to its workforce that the agency does not tolerate within its own culture the commission of PPPs. The Board's authority to adjudicate allegations of PPPs is important for the protection of the merit systems, but the goal is for agencies to create a culture that supports the merit systems and proscribes conduct that can constitute the commission of a PPP in order to reduce the potential that a PPP will occur.

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<sup>96</sup> The PPP currently codified at 5 U.S.C. § 2302(b)(12) was numbered (b)(11) at the time of this case.

<sup>97</sup> A public employee's first amendment rights can be a complicated legal issue. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (holding that the Government "has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations"); *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that a supervisor was "not required to tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships"); *Kohl v. U.S. Postal Service*, 115 F. App'x 49, 52 (Fed. Cir. 2004) (NP) (holding that the "First Amendment does not require an agency to tolerate letters that disrupt a government workplace and intimidate other employees").

<sup>98</sup> However, a constitutional right does not need to be implicated for the 12th PPP to apply. For example, in *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 581 (1993), the Board held that this PPP was committed when employees violated hiring rules contained in the Code of Federal Regulations.



# PPP PERCEPTIONS AND TRENDS

This chapter provides information collected through various administrations of the Merit Principles Survey about the frequency with which Federal employees perceive that they have been personally affected by the commission of a PPP.<sup>99</sup> When examining this data it is important to recognize that the survey respondents did not have the benefit of receiving a primer on the PPPs, such as was provided in the preceding chapter of this report. Thus, the responses we received to our survey questions were subject to the respondents' own interpretations with respect to certain terms, such as what constitutes nepotism or what veterans' preference means. The extent to which respondents are educated about such matters likely varies greatly, but we do not have data indicating how accurately these terms were understood. However, as will be discussed further in our next chapter, perceptions that PPP has occurred matters. It is not enough just to avoid the commission of PPPs, an effective civil service also requires avoiding the appearance that PPPs are occurring.

Furthermore, because we recognize how valuable our survey respondents' time is and how complex some PPPs are, and because there is so much for the MSPB to study regarding how the Government can promote a healthier civil service, we have not asked questions about every PPP on every MPS survey. However, for at least some elements of eight of the PPPs, we can track general perceptions over time.<sup>100</sup>

When looking at this data, it is important to bear in mind that the exact wording of the questions and the response options that were provided to survey respondents were not the same in all administrations of the MPS, and that this can account for some differences in the reports of perceptions that we received. In the 2010 MPS, we altered the wording of several questions from that used in prior administrations of the survey in order to make the questions more closely reflect the language used in 5 U.S.C. § 2302(b).

Another consideration when comparing data is that opportunities to perceive that a PPP occurred may vary over time. Because a personnel action, or the lack of a personnel action, is a necessary element in the commission of a PPP, opportunities to perceive a PPP will vary based upon the extent to which personnel actions are occurring or being withheld. For example, our survey asked if an official had tried to influence someone to withdraw from competition for a position for the purpose of helping or injuring someone else's chances. If

<sup>99</sup> The Merit Principles Surveys do not all address the same topics, and when a topic is revisited, the question may or may not be phrased in the exact same way as in a prior administration of the survey.

<sup>100</sup> Longitudinal data in this report are from the Board's 2008 report *The Federal Government: A Model Employer or a Work In Progress?*, available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

a work unit had 10 competitions in the preceding 2 years, there would be 10 opportunities for the respondent to perceive that this PPP did or did not happen. But, if the work unit had only one competition, there would be only one-tenth as many opportunities to form this perception.

For these reasons, we strongly caution readers against broad generalizations based on data from any single survey administration, and recommend instead an examination of trends over time.

Overall, perceptions of PPPs occurring are relatively rare. In 2010, for 10 of the 12 PPPs, we asked respondents one question per PPP, but for the discrimination PPP, we asked a separate question for 8 different protected classes, creating a total of 18 possible PPPs for respondents to report upon.<sup>101</sup> Only 8 percent of respondents reported that they were personally affected by even one PPP, and only 1.3 percent of all respondents reported being affected by more than three PPPs.<sup>102</sup> However, even though perceptions of PPPs occurring have declined over the past 18 years, and were almost uniformly less common in 2010 compared to earlier years, we still encourage agencies to make every attempt to further reduce occurrences—and perceptions of occurrences—of PPPs. As will be discussed in the next chapter, these perceptions have consequences. Thus, while progress has clearly been made, there is still more that can be done.

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<sup>101</sup> The 12th PPP pertains to “any law, rule, or regulation implementing, or directly concerning, the merit system principles” and therefore could not be presented as a single survey question in a manner that would provide intelligible results. However, we did ask respondents questions pertaining to several merit system principles, which will be the focus of an upcoming study.

<sup>102</sup> For the calculations discussed in this paragraph, each form of discrimination against a protected class constitutes a different PPP. Thus, a report of discrimination based on age, race, and sex would be considered three separate PPPs for purposes of this data.



## Perceptions of Most PPPs Are Declining

Of those PPPs for which we have longitudinal data, almost all were perceived less frequently in 2010 than in previous administrations of the MPS. These declining perceptions include several forms of discrimination, coercion of political activity, obstruction of competition, influencing a withdrawal from competition, granting an improper advantage, nepotism, retaliation for whistleblowing, and retaliation for exercising an appeal or grievance right.

When comparing survey data, it is important to recognize that the workforce in 2010 looks different from the workforce of 1992. In 1992, the average age of the Federal workforce was 43 years; by 2010 it was 47 years. In 1992, 27 percent of the workforce identified themselves as belonging to a minority group; by 2010, this had increased to 34 percent. In 1992, 55 percent of the workforce had a high school education or less; by 2010, 45 percent of the workforce had a high school education or less. In 1992, 49 percent of the workforce was in professional or administrative positions; by 2010 this had increased to 63 percent. All of these factors have the potential to influence employees' perceptions.

### Discrimination

As can be seen in Table 1, overall perceptions of most forms of discrimination have been increasingly less common over the past decade or more. Discrimination based upon race/national origin, sex, age, religion, disability, marital status, and political affiliation have all declined compared to 1992, and none of these categories had a rate of perception above 5 percent in 2010. Additional data show that in 2010, overall, only 5.2 percent of respondents reported perceiving that they had experienced one or more acts of discrimination (as defined in 5 U.S.C. § 2302(b)(1)) in the preceding two years.<sup>103</sup>

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<sup>103</sup> For more information on declining perceptions of discrimination in the Federal workplace, see our recent report, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

**Table 1:** Percentage of respondents who reported experiencing the particular form of discrimination within the preceding two years

Discrimination	1992	1996	2000	2005	2007	2010
Race/national origin-based	13.4%	14.5%	11.7%	7.1%	4.7%	5.0%
Sex-based	12.2%	13.1%	10.4%	7.0%	4.3%	3.9%
Age-based	9.8%	10.8%	10.7%	8.7%	5.3%	4.8%
Disability-based	2.8%	2.2%	2.5%	2.3%	2.2%	2.7%
Religion-based	1.7%	1.6%	1.5%	1.1%	1.4%	1.2%
Marital status-based	3.0%	2.6%	2.0%	1.4%	1.5%	1.7%
Political affiliation-based	1.6%	2.5%	1.3%	1.4%	1.4%	1.1%

*\*In previous administrations of the MPS, race/national-origin based discrimination was asked as a single question. In the 2010 MPS, race and national origin were two separate questions. The data from those two questions in 2010 have been combined in this table for the purpose of allowing comparisons to the prior MPS data.*

As the table above shows, perceptions of disability-based discrimination increased slightly between 2007 and 2010. Not surprisingly, our data indicate that the severity of the disability had a strong relationship to employees’ perceptions that discrimination had occurred. Of those respondents who reported that they had an impairment that affected one or more major life activities, 26 percent perceived discrimination, while of those who reported an impairment that did not affect a major life activity, only eight percent perceived discrimination. The nature of the impairment (sensory, neurological, physical movement, psychological, developmental or learning, or chronic health condition) did not have a notable relationship to perceptions of disability-based discrimination. (After categorizing respondents with a disability by the nature of their disability, the range was from 11.3 to 19.6 percent perceiving this discrimination.)

Minor fluctuations due to the margin of error on surveys, or differences in how the question was phrased in different years, are potential explanations for the increased reporting of perceptions of disability-based discrimination. Another possible explanation for the increase may be the aging of the workforce. While 8.4 percent of respondents under age 40 reported that they had a disability, 14.7 percent of respondents aged 40 or more reported a disability. The average age of the Federal workforce has increased since 1992, and as the workforce ages, the percentage of the workforce that has some form of disability is likely to increase, creating more opportunities for perceptions of discrimination on that basis to occur.

Agencies should do all that they can to prevent any form of discrimination, particularly disability-based discrimination, which in 2010 showed the greatest increase in perceptions. Agencies should be careful to ensure that they have measures in place to provide reasonable accommodations where required by law, and also that they provide accommodations under other circumstances where such assistance may not be mandated by statute or regulation but can help the workforce to function as effectively and efficiently as possible.<sup>104</sup>

The slight increase in perceptions of discrimination based on marital status is harder to explain, and therefore may be more difficult for agencies to address. It may be that married employees are more sensitive to work/life balance issues than they were in 2005 and 2007, or it may be that unmarried employees more often perceive pressure to “cover” for employees who are unavailable due to personal commitments. While the increase in perceptions of this PPP is very slight, and the perception rate remains low, there has been a trend towards greater perceptions of this PPP since 2005. We again caution against reading too much into small differences in results between administrations of the MPS, but if this trend continues in the future, further examination may be needed—particularly if its growth becomes more pronounced.

## Coercing Political Activity

As can be seen in Table 2, perceptions that an individual has experienced coercion related to political activity are consistently rare, and were less common among survey respondents in 2010 than in 2007. Because these perceptions are so rare, a small increase or decrease in the number of respondents with this perception can cause the survey data to show that perceptions within the Government have doubled (1992-1996), or been cut by more than half (2007-2010). However, these fluctuations should not be given too much emphasis. Rather, the key message is that perceptions of coercion are consistently rare but present, and should be taken seriously given the importance of this PPP.<sup>105</sup>

**Table 2:** Perceptions Regarding Political Coercion

	1992	1996	2000	2005	2007	2010
Percentage of respondents who reported a perception that they experienced coercion related to political activity in the preceding 2 years.	0.5%	1.0%	0.6%	*	1.9%	0.7%

\* This question did not appear on the 2005 MPS.

<sup>104</sup> See 5 U.S.C. § 2301(b)(5) (stating that the “Federal work force should be used efficiently and effectively”).

<sup>105</sup> As noted in the previous chapter, most behavior that would qualify for this PPP would also constitute a violation of the Hatch Act, which means that removal would be mandatory unless the entire Board agreed that a lesser penalty would be appropriate. 5 U.S.C. § 7326.

## Obstructing Competition

As can be seen in Table 3, perceptions of interference with the right to compete have steadily dropped since 1996, and in 2010 such interference was perceived by less than 5 percent of survey respondents. In previous administrations of the MPS, our survey asked whether the respondent had been *discouraged* from competing for a vacancy, while the 2010 MPS phrased the question to reflect the PPP more closely by asking if an official *obstructed* the right to compete because the statute uses the term “obstruct.”<sup>106</sup> The difference in phrasing may account for the fact that the percentage of respondents perceiving this behavior dropped by more than half between 2007 and 2010—the most dramatic fluctuation that perceptions of this PPP have experienced since 1992. However, regardless of how the question was phrased, there was a steady decline in this perception after 1996.

**Table 3:** Perceptions Regarding Obstruction of Competition

	1992	1996	2000	2005	2007	2010
Percentage of respondents who reported a perception that they were discouraged from competing or encountered an obstruction to competing for employment in the preceding 2 years.	15.7%	17.6%	13.6%	12.3%	10.6%	4.8%

## Influencing a Withdrawal From Competition

As Table 4 demonstrates, perceptions that a respondent was influenced to withdraw from competition have also steadily decreased since 1996. Such perceptions occurred in 2010 less than half as often as they did in 1992 and 1996.

**Table 4:** Perceptions of Influence to Withdraw From Competition

	1992	1996	2000	2005	2007	2010
Percentage of respondents who reported a perception that they were influenced to withdraw from competition in the preceding 2 years.	4.8%	4.8%	4.2%	3.3%	3.0%	2.2%

<sup>106</sup> The question on the 2005 MPS asked: “In the past 2 years, do you feel you have been deliberately misled by an agency official about your right to compete for a job or promotion?” In 2007, the question was: “In the past 2 years, have you been discouraged from competing for a job or promotion by an agency official?” On the 2010 MPS, we asked if the individual had been personally affected by a management official who “obstructed someone’s right to compete for employment.”

## Granting an Advantage

As shown in Table 5, perceptions that a management official has granted an unauthorized advantage to an individual in a recruitment action have also dropped dramatically, from a quarter of respondents in 1996 to 7 percent in 2010. Questions asked about this perception are another example of where differences in how the question was phrased in 2010 may account for some of the difference in the survey results.<sup>107</sup> However, regardless of the precise words used, there was a steady decline in this perception in 2000, 2005, and 2007. As with most of the other PPPs, perceptions of this PPP appear to be on a downward trend. However, with 6.9 percent of respondents perceiving this PPP, it was perceived more often than any other PPP.

One potential explanation for why perceptions of this PPP occurred with greater frequency than perceptions of other PPPs is the scope of opportunities for subjective management decisions to come into play. When a position is being 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 a single right course of action, differences of opinion may arise as to how the personnel action should have been done. This creates an opportunity for individuals who do not approve of the outcome to assume that an improper advantage was granted. Furthermore, because this PPP includes non-selection as a personnel action, a single selection action can have an effect on many employees, increasing the likelihood that an employee in the sample perceived that this PPP directly affected him or her.<sup>108</sup>

**Table 5:** Perceptions of Granting an Advantage

	1992	1996	2000	2005	2007	2010
Percentage of respondents who reported a perception that an improper or unfair advantage was given by a management official in a competition for a job or promotion.	19.1%	25.3%	22.1%	18.6%	14.5%	6.9%

<sup>107</sup> For example, the question on the 2007 MPS asked: “In the past 2 years, have you been denied a job or promotion because one of the selecting or recommending officials gave an unfair advantage to another person?” However, on the 2010 MPS we asked a more focused question, asking if the individual had been personally affected by a management official who had “tried to define the scope or manner of a recruitment action, or the qualifications required, for the purpose of improving the chances of a particular person.”

<sup>108</sup> As discussed in our recent report *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, available at [www.mspb.gov/studies](http://www.mspb.gov/studies), perceptions of personal favoritism are a problem in the workplace. MSPB is currently conducting a study to explore in greater depth the problem of personal favoritism in the civil service.

## Nepotism

As can be seen in Table 6, perceptions of nepotism have also declined steadily since 1996. What is noteworthy about the 2010 responses is that, in order to more closely mirror the statute, the question in 2010 was broader than it had been in previous survey administrations. While the 2005 and 2007 surveys asked if a job had gone to a relative of the official, the 2010 question asked if an official had *advocated* for a relative, without restricting the result to successful placement of the relative. Despite this change in the question to reflect the PPP more closely, perceptions of nepotism declined.<sup>109</sup>

**Table 6:** Perceptions of Nepotism

	1992	1996	2000	2005	2007	2010
Percentage of respondents who reported a perception of nepotism	4.2%	4.7%	3.5%	3.2%	3.0%	1.7%

## Whistleblower Retaliation

Perceptions of this particular PPP have generally declined, but showed a slight increase in 2007 before dropping once more in 2010. As can be seen in Table 7, the percentage of respondents who perceived such retaliation in 2010 was less than half of the comparable percentage in 1992. A number of factors may be responsible for this result, including the fact that in 2010, a smaller percentage of respondents reported observing wrongdoing compared to 1992 (11.1 versus 17.7 percent).<sup>110</sup> Furthermore, in 2010, fewer respondents who made a report of wrongdoing believed that they had been identified as the source of the report compared to 1992 (42.5 percent versus 53.1 percent). This would leave fewer respondents in a position to interpret a management action as retaliation for whistleblowing activities. However, overall, perceptions of whistleblower retaliation have dropped much more sharply than opportunities for retaliation, indicating a perception that agency officials are less likely to retaliate now than they were in 1992. This is not to say that instances of retaliation against whistleblowers (or any other PPP) are any less serious than they used to be, only that perceptions of it occurring are less prevalent.<sup>111</sup>

<sup>109</sup> One possible explanation for some of the decline in nepotism perceptions is that in 2010 we also asked a question regarding management officials advocating for personal friends. Providing a distinction between relatives and friends may have resulted in respondents recognizing that the category of “relatives” was narrow.

<sup>110</sup> Other than the data presented in Table 7, all questions about whistleblowing in 1992 precisely match the questions used in 2010. This was done in order to ensure that comparisons could be more easily made between those two years. For more on our comparisons of whistleblowing data from 1992 and 2010, please see our upcoming report, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*.

<sup>111</sup> MSPB is currently conducting a study to explore employee perceptions related to whistleblowing in greater depth, including how agencies react to disclosures of wrongdoing and what can be done to encourage more employees to come forward with important information about a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

**Table 7:** Perceptions of Whistleblower Retaliation

	1992	1996	2000	2005	2007	2010
Percentage of respondents who reported a perception of reprisal for whistleblowing activity.	8.3%	7.3%	7.1%	5.0%	5.5%	3.2%

## Other Retaliation

As was the case with perceptions of whistleblower retaliation, perceptions of retaliation for exercising a grievance or appeal right increased slightly in 2007, but by 2010 had declined to less than half of the 1992 rate of perception, as shown in Table 8. As noted earlier in this report, section 2302(b)(9)(A) prohibits a personnel action from being taken where the reason for the action is because the employee exercised any appeal, complaint, or grievance right. Our survey question did not include “complaint” rights.

**Table 8:** Perceptions of Grievance or Appeal Retaliation

	1992	1996	2000	2005	2007	2010
Percentage of respondents who reported a perception of reprisal for exercising a grievance or appeal right.	11.3%	12.2%	8.6%	6.1%	8.4%	3.9%

## Perceptions Low for PPPs With No Longitudinal Data

Historically, we have not gathered data for the following PPPs:

- Soliciting or considering improper employment recommendations;
- Discriminating in favor or against someone in a personnel action on the basis of off-duty conduct which was entirely unrelated to the job;
- Knowingly violating a lawful form of veterans’ preference; and
- Violating any law, rule, or regulation implementing, or directly concerning, the merit system principles.

The reason we have not asked about these PPPs as consistently as the other PPPs is because these practices are particularly challenging for respondents to identify. An individual who is not selected may not know if there were improper employment recommendations involved with that outcome; off-duty conduct is a broad category and the individual may not agree with management as to whether the conduct was related to the job; it is difficult in many situations to discern if someone else *knowingly* violated veteran’s preference because the

respondent would have to be acquainted with how well the official knew the rules; and there are so many laws, rules, and regulations concerning the merit principles that it would be wholly unrealistic to expect a typical Federal employee to know them all—particularly in an environment where many people have little or no knowledge of precisely what the merit principles are.<sup>112</sup>

Despite these challenges, for the 2010 MPS, we attempted to capture perceptions related to soliciting or considering improper employment recommendations; discriminating in favor or against someone in a personnel action on the basis of off-duty conduct which was entirely unrelated to the job; and knowingly violating a lawful form of veteran’s preference or veteran’s protection laws.<sup>113</sup> The results were as follows:

- 3.7 percent of respondents perceived that they were personally affected by a management official considering improper employment recommendations.
- 2.0 percent of respondents perceived that they were personally affected by discrimination in favor or against someone in a personnel action on the basis of off-duty conduct which was entirely unrelated to the job. (We also asked respondents specifically about discrimination based on sexual orientation and 1.1 percent reported that they felt that they had been personally affected by this.)
- 1.4 percent of respondents perceived that they were personally affected by a management official knowingly violating a lawful form of veterans’ preference or veterans’ protection laws.<sup>114</sup>

While we do not have historical data to which we might compare these results, perceptions of these PPPs appear to be in the “middle of the pack,” meaning they are perceived more frequently than some PPPs, but less frequently than others. It is likely (but cannot be proven) that if perceptions regarding these PPPs had also been recorded over the last 18 years, that they would show the same downward trend as the others, given that perceptions of all PPPs have declined when compared to the data from 1992.

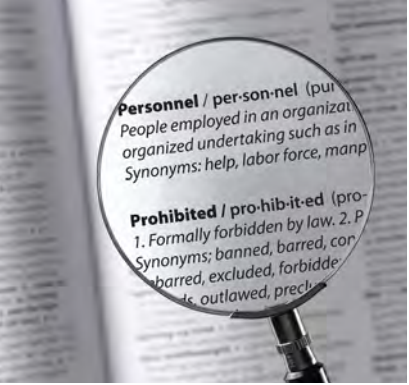
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<sup>112</sup> MSPB recently engaged in an effort to provide greater education about the merit system principles, including highlighting a “merit system principle of the month” on our website. See [www.mspb.gov](http://www.mspb.gov).

<sup>113</sup> The 2010 MPS also asked a series of questions to capture perceptions related to the merit principles, which will be the subject of a future study.

<sup>114</sup> In FY 2009, MSPB received a combined total of 1,072 cases, compared to 533 cases in FY 2008, under two related veterans’ rights laws, the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA). See Merit Systems Protection Board, *Fiscal Year 2009 Annual Report* at 1 available at [www.mspb.gov](http://www.mspb.gov). While we do not have survey data for prior years to conduct a comparison, it is possible that perceptions that preference rights are being denied have experienced a similar increase.





# BYSTANDERS AND THE BUSINESS CASE

Perceptions that a prohibited personnel practice occurred are relatively rare, but, when a personnel action occurs under circumstances that cause the perception of a PPP, the impact is not limited to the individuals who are personally affected. Others in the work unit see what happens, and they judge it. For this reason, we asked respondents to the 2010 MPS not only if they had been personally affected by a PPP, but also if they had perceived a PPP in their work unit without being personally affected. The results are presented in Table 9, below. For every PPP, more people reported perceiving it without being personally affected than reported that they were personally affected by it.

**Table 9:** Perceptions of PPPs in the Work Unit <sup>115</sup>

In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...			
	I was personally affected by this ↓		
	This has occurred in my work unit, but I was not personally affected by this ↓		
	This has NOT occurred in my work unit ↓		
...discriminated in favor or against someone in a personnel action based upon race	86.3%	9.1%	4.6%
...discriminated in favor or against someone in a personnel action based upon age	88.5%	6.8%	4.8%
...discriminated in favor or against someone in a personnel action based upon religion	96.7%	2.1%	1.2%
...discriminated in favor or against someone in a personnel action based upon sex	88.3%	7.8%	3.9%
...discriminated in favor or against someone in a personnel action based upon national origin	94.5%	3.4%	2.1%
...discriminated in favor or against someone in a personnel action based upon disabling condition	92.9%	4.5%	2.7%

<sup>115</sup> As explained previously, our survey permitted respondents to provide responses of “Don’t Know/Not Applicable” to all of our PPP-related questions. For all of these questions, approximately 25 to 35 percent of respondents indicated that they either did not know the answer or considered the question not applicable. These responses are not included in this data.

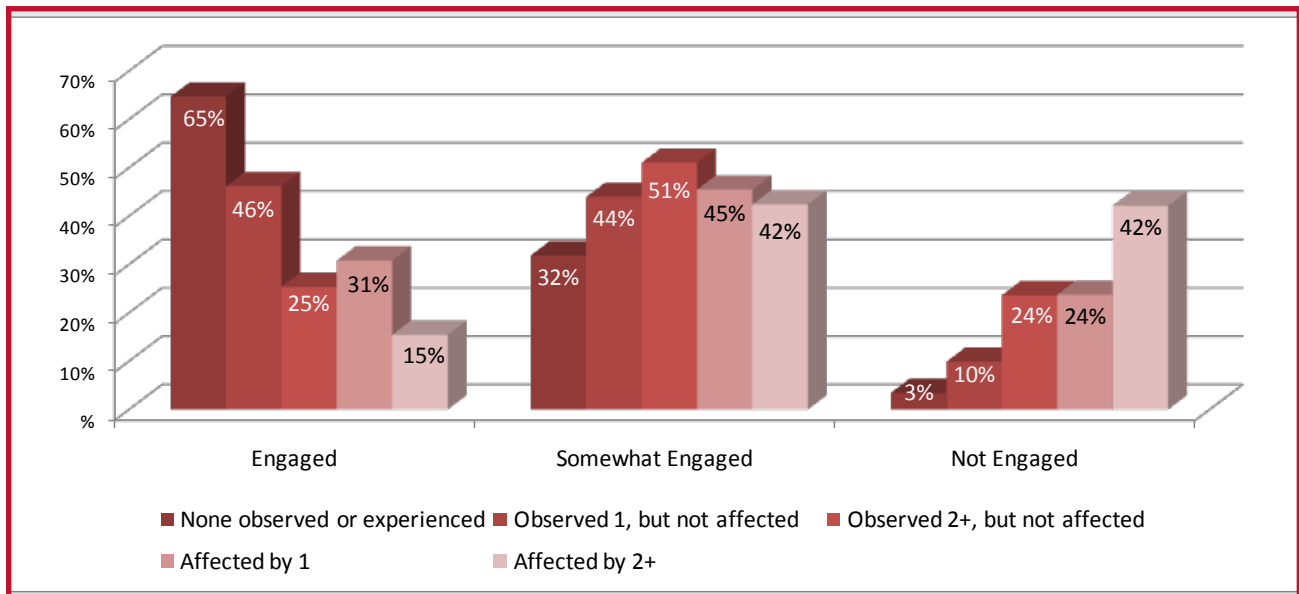
**Table 9 Continued:** Perceptions of PPPs in the Work Unit

<b>In the past 2 years, an agency official (e.g., supervisor, manager, senior leader, etc.) in my work unit has...</b>			
			I was personally affected by this ↓
This has occurred in my work unit, but I was not personally affected by this ↓			
This has NOT occurred in my work unit ↓			
...discriminated in favor or against someone in a personnel action based upon marital status	95.8%	2.5%	1.7%
...discriminated in favor or against someone in a personnel action based upon political affiliation	96.8%	2.1%	1.1%
... solicited or considered improper employment recommendations	86.8%	9.5%	3.7%
...tried to pressure someone to support or oppose a particular candidate or party for elected office	97.7%	1.7%	0.7%
...obstructed someone's right to compete for employment	86.4%	8.8%	4.8%
...tried to influence someone to withdraw from competition for a position for the purpose of helping or injuring someone else's chances	93.0%	4.9%	2.2%
...tried to define the scope or manner of a recruitment action, or the qualifications required, for the purpose of improving the chances of a particular person	78.0%	15.1%	6.9%
...advocated for the appointment, employment, promotion, or advancement of a relative	87.8%	10.5%	1.7%
...took or threatened to take a personnel action against an employee because the employee disclosed a violation of law, rules, or regulations or reported fraud, waste, or abuse	91.9%	5.0%	3.2%
... took or threatened to take a personnel action against an employee because the employee filed an appeal or grievance	88.9%	7.2%	3.9%
...discriminated in favor or against someone in a personnel action on the basis of off-duty conduct which was entirely unrelated to the job	92.4%	5.6%	2.0%
...knowingly violated a lawful form of veteran's preference or veteran's protection laws	95.5%	3.1%	1.4%

The commission of a PPP is a violation of the law no matter how many or how few people realize that it happened, so why does it matter if others in the work unit perceive a PPP? Perceptions that a PPP has occurred in the work unit appear to have a relationship with the extent to which an employee reports being engaged and motivated. As can be seen in Figure 1, below, the more PPPs that a respondent indicated that he or she had experienced or observed, the less engaged the respondent was.<sup>116</sup> Engagement is important because, as we demonstrated in our 2008 report, *The Power of Federal Employee Engagement*, engaged employees produce better results for their agencies.<sup>117</sup>

What is particularly noteworthy in our 2010 MPS data is the difference in engagement levels between those respondents who reported that they had observed two PPPs without being personally affected, and those who reported being personally affected just once. While 31 percent of employees who believed that they had experienced one PPP were engaged, only 25 percent of those who believed that they had observed two PPPs (without being personally affected by any PPPs) were engaged. In other words, *seeing* two PPPs may be worse for engagement than *experiencing* one. Many employees may observe a single act. Therefore, acts that are perceived as the commission of a PPP against just one employee can have a relationship to the engagement of an entire office.

**Figure 1:** Experience or Observation of PPPs and Scores on the MSPB Employee Engagement Index



<sup>116</sup> These engagement scores are based on MSPB’s employee engagement scale, which consists of 16 questions about the employee’s attitude on a variety of issues. A list of the questions is in Appendix B. For more information on the reliability and validity of the engagement scale, see *The Power of Federal Employee Engagement*, Appendix A, available at [www.mpsb.gov/studies](http://www.mpsb.gov/studies).

<sup>117</sup> *The Power of Federal Employee Engagement*, available at [www.mpsb.gov/studies](http://www.mpsb.gov/studies).

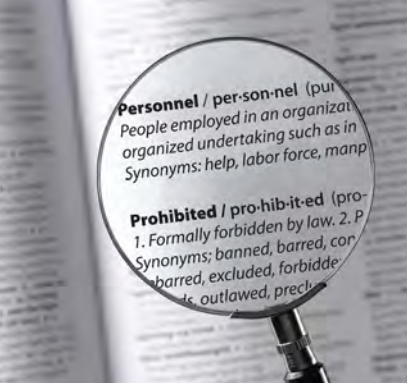
The more PPPs that an employee sees or experiences, the greater the tendency that the employee will not agree with the following statements related to engagement and motivation:<sup>118</sup>

- Overall, I am satisfied with my supervisor;
- Overall, I am satisfied with managers above my immediate supervisor;
- Recognition and rewards are based on performance in my work unit;
- I am given a real opportunity to improve my skills in my organization;
- I am treated with respect at work;
- My opinions count at work;
- A spirit of cooperation and teamwork exists in my work unit;
- I have the opportunity to perform well at challenging work;
- At my job, I am inspired to do my best work;
- The harder I try, the more I am able to achieve my work goals and objectives;
- The better I perform on the job, the more I feel appreciated; and
- I feel highly motivated in my work.

Thus, while PPPs are to be avoided because the commission of a PPP violates the law, and can cause the offender to be subjected to an adverse action up to and including removal from the Federal service, there is also a business case for avoiding the perception of PPPs throughout a work unit. Work units that avoid these perceptions have a more engaged and motivated workforce, factors that are key contributors to an effective and efficient civil service.

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<sup>118</sup> Several of the items in this list come from the engagement scale, while others come from MSPB's research regarding motivation in the Federal workforce, which is not precisely the same thing. An MSPB report on motivation in the Federal workforce is planned for next year.



# CONCLUSION

Perceptions of occurrences of most PPPs are at the lowest point in 18 years. For the PPPs where we do not have longitudinal data for comparison, only a small percentage of respondents reported perceptions that they were personally affected by the commission of those PPPs. However, while perceptions of most PPPs are relatively rare, reducing PPPs—and perceptions of PPPs—remains important.

As discussed earlier in this report, personnel actions that involve subjective decisions are particularly vulnerable to perceptions of a PPP. Take for instance the areas of recruitment and selection. Managers must make a number of determinations based on their own judgment when hiring, such as the grade level at which to fill the position, the area of consideration for the recruitment action, the competencies necessary to best perform the job duties, and the assessment tools that will be used to measure applicant ability. People can hold very different opinions on how any one of these determinations should be made. Therefore, the potential is high for the final outcome to be different from what some individuals might believe it should have been. The more an employee has at stake in the outcome, the harder it may be for that employee to consider dispassionately the possible reasons for management’s decisions.

Because of these factors, perceptions that a PPP has occurred may never be fully eradicated. However, agencies can take steps to reduce them. Agencies should make an effort to ensure that decisions are based on the best information available and are grounded in merit-based reasons. Being as transparent as is practical about the process, both in advance and following the decision, can help dispel suspicions that improper motives played a role in the decision-making process. Awareness that this transparency will occur may also dissuade officials from knowingly attempting to take an improper action. Sunlight is the merit systems’ best ally.

We encourage agencies to educate their workforces, and in particular their executives, managers, supervisors, and human capital staff including equal employment opportunity advisors, about the PPPs.<sup>119</sup> These management officials should be well-informed about the meaning of each PPP, what constitutes a violation, and the reasons why it is in their interest to comply with 5 U.S.C. § 2302(b), including fostering a more engaged and motivated workforce. This recommendation is particularly important for new political appointees

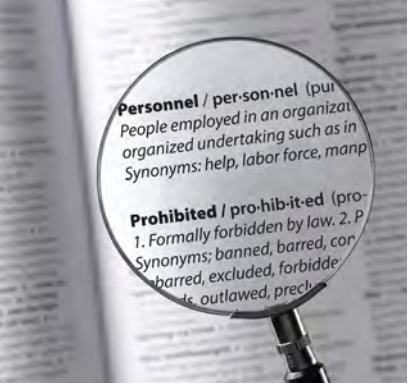
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<sup>119</sup> 5 U.S.C. § 2302(c) specifically states that “[t]he head of each agency shall be responsible for the prevention of prohibited personnel practices...”

and other new officials who may not be familiar with the Federal civil service and may not have previously operated within a merit system. It would be beneficial if new officials were given a standard memorandum from the head of the agency or cabinet department drawing the official's attention to the existence of the PPPs, the leadership's expectations that PPPs will not occur, and a source for further information about the PPPs (such as what each PPP means, how to avoid committing a PPP, and how to prevent erroneous perceptions).<sup>120</sup> Other officials could benefit from a regular reminder. This MSPB report could be one source provided to officials, but agencies may benefit from creating their own, more brief summaries as well, given the realities of asking a new employee to read a report of this length. At the very least, officials should be given a copy of the PPPs from 5 U.S.C. § 2302.

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<sup>120</sup> For example, on March 10, 2008, the Attorney General issued a memorandum for all Department of Justice political appointees instructing them to review a short fact sheet about the PPPs that included some examples of conduct that could constitute a violation of 5 U.S.C. § 2302. The appointees were instructed to provide an acknowledgement that they had read the fact sheet and understood its content. *See* <http://www.justice.gov/ag/readingroom/ag-031008.pdf>.



# APPENDIX A: MERIT SYSTEM PRINCIPLES – 5 U.S.C. § 2301(B)

Federal personnel management should be implemented consistent with the following merit system principles:

- (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.
- (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
- (3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.
- (4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
- (5) The Federal work force should be used efficiently and effectively.
- (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
- (7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.
- (8) Employees should be—
  - (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

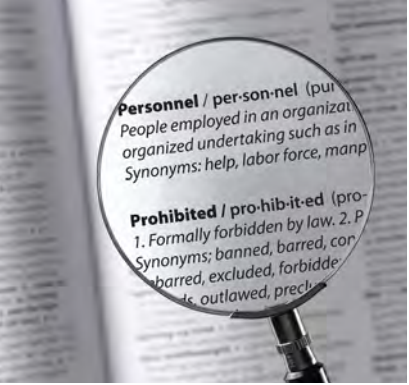
(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.





# APPENDIX B: MSPB'S ENGAGEMENT SCALE QUESTIONS

The engagement scale measures levels of agreement with the following 16 items:

*Pride in one's work or workplace*

1. My agency is successful at accomplishing its mission.
2. My work unit produces high-quality products and services.
3. The work I do is meaningful to me.
4. I would recommend my agency as a place to work.

*Satisfaction with leadership*

5. Overall, I am satisfied with my supervisor.
6. Overall, I am satisfied with managers above my immediate supervisor.

*Opportunity to perform well at work*

7. I know what is expected of me on the job.
8. My job makes good use of my skills and abilities.
9. I have the resources to do my job well.
10. I have sufficient opportunities (such as challenging assignments or projects) to earn a high performance rating.

*Satisfaction with the recognition received*

11. Recognition and rewards are based on performance in my work unit.
12. I am satisfied with the recognition and rewards I receive for my work.

*Prospect for future personal and professional growth*

13. I am given a real opportunity to improve my skill in my organization.

*Positive work environment with some focus on teamwork.*

14. I am treated with respect at work.
15. My opinions count at work.
16. A spirit of cooperation and teamwork exists in my work unit.



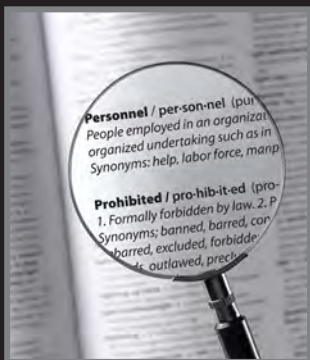


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# PROHIBITED PERSONNEL PRACTICES: *Employee Perceptions*

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