



Safeguarding the Merit System: A Guide to Preventing Prohibited Personnel Practices

U.S. Office of Special Counsel
Erica Calys
Attorney

Office of Special Counsel (OSC)

5 U.S.C. §§ 1211-19; 5 C.F.R. Part 1800



Authorized to:

- ☐ Investigate prohibited personnel practices and other activities prohibited by civil service law, rule, or regulation
 - ☐ Seek corrective action for employees
 - ☐ Seek disciplinary action against officials
- ☐ Provide safe channel for whistleblower disclosures
- ☐ Advise and enforce the Hatch Act provisions on political activity by federal, state, and local government employees
- ☐ Protect reemployment rights of military veterans and reservists under USERRA

What are the Merit System Principles?

- A. Standards governing the management of the executive branch workforce
- B. Principles that enforce the laws that make it illegal to discriminate
- C. Principles that oversee the federal personnel system

Making Disclosures of Wrongdoing to OSC


OSC's Disclosure Unit reviews 6 types of disclosures of alleged government wrongdoing:

1. Violation of a law, rule, or regulation;
2. Gross mismanagement;
3. A gross waste of funds;
4. An abuse of authority;
5. A substantial and specific danger to public health or safety; and/or
6. Censorship related to research, analysis, or technical information.

Note: The whistleblower's identity may remain confidential throughout OSC's disclosure review process

OSC's Process for Resolving Disclosures of Government Wrongdoing


If OSC determines a substantial likelihood of wrongdoing has occurred, then the agency is required investigate and report its findings to OSC



After the investigation, OSC reviews the agency's findings and the whistleblower is afforded an opportunity to comment on the report



OSC sends the following to the President and Congress:
(1) Agency report; (2) Whistleblower's comments; and
(3) OSC's analysis of whether the report is reasonable.



Information transmitted to the President is made public on OSC's website

OSC's Process for Investigating PPP Complaints

- ❖ **Form available at www.osc.gov**
- ❖ Jurisdiction over most **Executive Branch employees, applicants, and former employees** who are not in the Intelligence Community
- ❖ **Conduct neutral investigations** seeking to uphold the merit system of federal employment
- ❖ OSC reviews and requests **information from the complainant**
- ❖ OSC can **request documents from the agency and interview agency employees**
- ❖ If the inquiry reveals a PPP has occurred, **OSC seeks corrective action** for the complainant
- ❖ In certain circumstances, **OSC may seek discipline** against the responsible management official
- ❖ If it appears that there is no evidence to support the allegations, **OSC closes the file without further action**

Prohibited Personnel Practices



DISCRIMINATION

- Based on race, color, color, sex, etc., but note, marital status and political affiliation. 5 U.S.C. § 2302(b)(1)
- Based on conduct that does not adversely affect job performance. 5 U.S.C. § 2302(b)(10)

HIRING OFFENSES

- Considering improper (political) job references. 5 U.S.C. § 2302(b)(2)
- Obstructing the right to compete. 5 U.S.C. § 2302(b)(4)
- Influencing withdrawal from competition. 5 U.S.C. § 2302(b)(5)
- Unauthorized preferences and advantages. 5 U.S.C. § 2302(b)(6)
- Nepotism. 5 U.S.C. § 2302(b)(7)
- Knowingly violating veterans' preference. 5 U.S.C. § 2302(b)(11)

RETALIATION

- For Protected Disclosures 5 U.S.C. § 2302(b)(8)
- For Protected Activity 5 U.S.C. § 2302(b)(9)

POTPOURRI

- Coercing Political Activity. 5 U.S.C. § 2302(b)(3)
- Violation of law, rule, or regulation concerning MSPs. 5 U.S.C. § 2302(b)(12)
- Non-Disclosure Agreements/Gag Orders. 5 U.S.C. § 2302(b)(13)
- Unauthorized Access to Medical Records. 5 U.S.C. § 2302(b)(14)

DISCRIMINATION

Discrimination

5 U.S.C. § 2302(b)(1) bars discrimination based on:

- race, color, nationality, religion, sex (including pregnancy and gender identity), handicapping condition (or disability), age, *marital status*, or *political affiliation*
- **Marital Status:** must be some indication that the adverse action is related to employee's status
- **Political Affiliation:** based on affiliation with a party or candidate, not a political issue



5 U.S.C. § 2302(10) bars discrimination based on:

“conduct that does not adversely affect the performance of the employee or applicant, or the performance of others,” including sexual orientation and gender identity

Agencies may take action if:

1. The circumstances are so egregious as to raise a rebuttable presumption;
2. The conduct adversely affects the agency's trust and confidence in the employee's job performance;
3. The conduct adversely affects the employee's or coworkers' job performance; OR
4. The conduct adversely affects the agency's mission.

HIRING OFFENSES

Hiring Offenses



Considering Improper Job References

5 U.S.C. § 2302(b)(2)

An agency official shall not request or consider a recommendation based on political connections or influence.

- This PPP prohibits requesting or considering recommendations about an employee or applicant unless the recommendation is based on personal knowledge of the employee or records of the person providing it.
- Put another way, this means that a recommendation to hire or promote someone in the federal workplace must be ignored unless the person making the recommendation has actual knowledge of the person's abilities as they would apply to the position in question.



Hiring Offenses



Obstructing Competition

5 U.S.C. § 2302(b)(4)

An agency official shall not intentionally deceive or obstruct anyone from competing for employment.

- This PPP prohibits an agency official from willfully obstructing an individual's right to compete for a job.
- Generally, non-selection is not considered willful obstruction as long as the candidate is given the opportunity to apply and to compete for the position.



Hiring Offenses



Influencing Withdrawal from Competition

5 U.S.C. § 2302(b)(5)

An agency official shall not influence anyone to withdraw from competition to improve or injure the employment prospects of any person.

- This PPP means that an agency official cannot try to persuade an applicant to withdraw his or her name from consideration for a job.
- For a violation to occur, this influence or persuasion has to have happened to help or hurt another person's employment prospects. However, the applicant does not actually have to withdraw from competition in order for the action to be a violation.



Hiring Offenses



Granting an Unauthorized Preference

5 U.S.C. § 2302(b)(6)

An agency official shall not give an unauthorized advantage to improve or injure the employment prospects of any person.

- This PPP, which can be complex, prohibits agency officials from providing a wrongful advantage to an applicant to help that applicant's, or to hurt another person's, chance of obtaining the job.
- A violation requires proof that an official: (1) granted an **unauthorized advantage**; and (2) **intentionally and purposefully manipulated** the hiring process.



Hiring Offenses



Nepotism

5 U.S.C. § 2302(b)(7)

An official cannot appoint, employ, promote, advance, or advocate for a relative.

- "Relative" is defined by law 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. 5 U.S.C. § 3110



Hiring Offenses



Violating Veterans' Preferences

5 U.S.C. § 2302(b)(11)

An agency official shall not take or fail to take, recommend, or approve a personnel action if the official knows that doing so would violate a veterans' preference requirement.

- This PPP ensures that veterans' preference for federal government jobs are honored.
- OSC is not authorized to seek corrective action for such violations—DOL/VETS—but may seek disciplinary action against a subject official.



Did Janet grant Cal an unauthorized preference?

Janet is the hiring official for a Pilot position. The announcement for the position states that the incumbent must possess a FAA issued pilot's license. However, the position does not actually require the incumbent to fly a plane. Cal applies for the position, but he does not have a FAA issued pilot's license. He has a drone certificate that limits him to flying drones for the agency. Janet likes Cal. She knows that he is a hard worker and relies on the fact that Cal will not ever have to fly a plane in the position. Janet selects Cal for the position.

- A. No, because Human Resources referred Cal to the hiring official.
- B. Yes, because Janet knew and liked Cal before she selected him for the position.
- C. Yes, because Janet hired Cal despite him not meeting the minimum qualifications for the position.
- D. No, because the position does not actually require Cal to fly a plane.

POTPOURRI



Coercing Political Activity

5 U.S.C. § 2302(b)(3) prohibits an official from:

Coercing the political activity of any person (including the providing of any political contribution or service), or taking any action against an employee or applicant in retaliation for their refusal to engage in such political activity

- Historically common, now rare
 - Most likely cases handled by OSC's Hatch Act Unit
- *Special Counsel v. Acconcia*, 107 M.S.P.R. 60, ¶ 5 (2007)
 - A single act of soliciting funds from a subordinate for a political campaign warranted removal, even though supervisor did not attach any threats for failing to make the contributions



Catch-All PPP

5 U.S.C. § 2302(b)(12) prohibits:

- Taking or failing to take a personnel action in violation of a law, rule, or regulation that implements or directly concerns a merit system principle.
- Intent is *not required* for some violations.



non-disclosure agreement

Whistleblower Protection Enhancement Act (WPEA) of 2012

5 U.S.C. § 2302(b)(13) requires:

- A statement clarifying that agency restrictions on disclosures are superseded by statutory whistleblower rights in any nondisclosure agreements, policies, or forms
- Implementing or enforcing a nondisclosure agreement that fails to provide this required notification of whistleblower rights is prohibited
- Existing nondisclosure agreements become enforceable when notice of superseding statutory rights is posted



Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017

5 U.S.C. § 2302(b)(14) prohibits:

Accessing the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in the other 13 prohibited personnel practices

Is Jack's Instruction Lawful?

Walter contacts a representative in Employee and Labor Relations (ELR) after discovering that his subordinate misused her position and obligated the agency to a contract without prior supervisory approval. Jack, Walter's first-line supervisor, learns about Walter's communications with ELR. Jack sends an email reminder to his employees that they must engage the chain of command should an issue or concern arise. Jack explains that utilizing the chain of command will allow him to address any concerns within the unit.

- A. Yes, Walter did not engage in whistleblowing.
- B. No, Jack cannot implement policies that restrict the ability of his employees to engage in whistleblowing.
- C. Yes, employees should allow their chain of command to assist with resolving their concerns.
- D. Yes, section 2302(b)(13) does not apply to email communications.

RETALIATION

Alleging Retaliation

Supervisors may not take, fail to take, or threaten to take or withhold a personnel action for:

- Protected disclosures – statutory categories listed on slide 24
- Protected activity – statutory activities listed on slide 28



Prima Facie Case of Reprisal

Preponderance of Evidence

The following elements must be met:

1. Reasonable belief that employee made a **protected disclosure** or employee engaged in **protected activity**
2. **Personnel action** taken, not taken, or threatened
3. *Actual* or *constructive knowledge* of protected disclosure or activity; and
4. **Contributing factor** (disclosure or activity was a contributing factor in the personnel action)
 1. Sufficient *timing* between the disclosure or activity and the personnel action at issue; OR
 2. Circumstantial evidence

Protected Whistleblower Disclosures

5 U.S.C. § 2302(b)(8)

In general, employees must have a “reasonable belief” that they are disclosing information in one or more of the following categories and, unless prohibited by statute or classified, employees may make disclosures to anyone.

Categories:

- Violation of any law, rule, or regulation
- Gross mismanagement: substantial risk of significant impact on mission
- Gross waste of funds: more than debatable expenditure
- Abuse of authority
- Substantial & specific danger to public health or safety
- Censorship related to scientific research or analysis (scientific integrity)

Protected Whistleblower Disclosures

5 U.S.C. § 2302(b)(8)

- Generally protected when made to *any person, including Congress*
- *Need not be accurate* to be protected, employee must only *reasonably believe* that it is true
- *Must be reasonably specific* but no requirement to cite a law, rule, or regulation
- Policy disagreements are generally not protected
- Whistleblower's *personal motivation does not negate* reasonable belief
- *No requirement* to go through chain of command
- Still *protected if employer mistakenly believes* employee is a whistleblower, e.g., "perceived whistleblower"
- Protected if *disclosure made prior to the date* on which the individual was appointed or applied for appointment to a position

Disclosures Not Covered

5 U.S.C. § 2302(b)(8)

Any disclosure that would normally be protected under the statute is *not protected* (unless made to OSC, IG, or other authorized agency component), where the disclosure is:

- Prohibited by law OR
- Required by Executive Order to be kept secret for national security or foreign affairs

Is the Disclosure Protected?

- A. Amelia went to lunch with her coworkers during work hours. She noticed that her boss, Jason, was drinking heavily at this lunch to the point where his speech was slurred, and he could not walk straight. Amelia then saw Jason drive back to work. Amelia informed her second-line supervisor of Jason's behavior upon returning from lunch.
- B. Juan discloses to a coworker that management engaged in gross mismanagement when it placed a project on hold. Juan also informs his coworker of his belief that the program could save the agency millions of dollars. Juan contends that management's decision prevents the agency from fulfilling its stated mission.
- C. During a meeting with her supervisor, Eloise shares that she has some concerns about an agency policy not being consistent with OSHA regulations. She does not follow up with a written complaint.

Protected Activity

5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), (D)

Includes:

- Exercise of appeal, complaint, or grievance rights
- Testimony or other assistance to person exercising such rights
- Cooperation with or disclosures to Special Counsel, Inspector General, or component responsible for internal investigation or review
- Refusal to obey an order that would require violation of law, rule, or regulation

Personnel Action

5 U.S.C. § 2302(b)(8) and (b)(9)(A)(i), (B), (C), (D)

A Personnel Action Must be Taken, Not Taken, or Threatened:

- **Taken:** anything that would require an SF-52; significant change in duties; decision concerning pay, awards, or benefits (5 U.S.C. §2302(a)(2)(A))
- **Failure:** requires a showing that an official declined or refused to take a personnel action. (Non-selection)
- **Threatened:** objective, concrete indication that an action is impending (Performance Improvement Plan/Demonstration Period)

Causation

5 U.S.C. § 2302(b)(8) and (b)(9)(A)(i), (B), (C), (D)

Standard: Contributing Factor *(Intent is Not Required)*

- The Knowledge-Timing Test
 - Knowledge
 - Timing: Up to 18 months
- Circumstantial Evidence
 - Statements of animus
 - Disproportionate response
 - Whistleblowing directed at official who took action
 - Poor explanation for action – stated reason appears to be pretext for retaliatory animus
 - Change in attitude

Agency Defense

5 U.S.C. § 2302(b)(8) and (b)(9)(A)(i), (B), (C), (D)

Agency must show *by clear and convincing evidence* that it would have taken same action absent protected disclosure or activity

Factors:

- *Strength of evidence* in support of personnel action
- Existence and strength of *motive to retaliate*
- Treatment of *similar employees* who did not engage in protected whistleblowing

Whitmore v. Dep't of Labor



PPP Remedies: Corrective Action

Status Quo Ante

- Placing individual in the position they would have been in had no wrongdoing occurred (e.g., rescind job suspension, restore job)

Monetary Damages

- Compensatory (including interest, reasonable expert fees, costs)
- Reasonable and foreseeable consequential damages (e.g., back pay, employee benefits, medical costs, travel expenses, attorney's fees)

Systemic Relief

- PPP training
- Facility or agency wide policy changes



PPP Remedies: Disciplinary Action

Adverse Action

- Reprimand, suspension, reduction in grade, or removal
- Mandatory proposed discipline for violations of 5 U.S.C. § 2302(b)(8), 2302(b)(9), or (b)(14)

Debarment

- Debarment from federal employment (up to 5 years)

Civil Penalties

- Employee can be fined up to \$1,000

QUESTIONS

Case Review Division:	(202) 804-7000 (800) 872-9855 info@osc.gov
Disclosure Unit:	(202) 804-7000 (800) 872-9855 info@osc.gov
Hatch Act Unit:	(202) 804-7002 (800) 85-hatch hatchact@osc.gov
Website:	www.osc.gov [complaint forms/e-file]
Speaker Requests & Certification Program:	(202) 804-7163 certification@osc.gov
Erica Calys (Presenter):	ecalys@osc.gov