

DELRS | 2024
Forging the DoD Workforce of the Future

Prohibited Personnel Practices
 Ashley Tease
 U.S. Office of Special Counsel
 Deputy Chief, Diversity, Outreach & Training

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OFFICE OF SPECIAL COUNSEL (OSC)
5 U.S.C. §§ 1211-19; 5 C.F.R. Part 1800

OSC is 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**

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POP QUIZ

QUESTION: *Who can commit a Prohibited Personnel Practice?*

- A. Anyone with personnel action authority
- B. Supervisors
- C. Political appointees
- D. B & C
- E. All the above

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PROHIBITED PERSONNEL PRACTICES

There are 14 Prohibited Personnel Practices under 4 Categories

1. **Discrimination**
 - Based on race, 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)
2. **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)

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PROHIBITED PERSONNEL PRACTICES

There are 14 Prohibited Personnel Practices under 4 Categories

3. **Retaliation**
 - For Protected Disclosures
 - 5 U.S.C. § 2302(b)(8)
 - For Protected Activity
 - 5 U.S.C. § 2302(b)(9)
4. **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
 - 5 U.S.C. § 2302(b)(13)
 - Unauthorized access to medical records
 - 5 U.S.C. § 2302(b)(14)

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DISCRIMINATION

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DISCRIMINATION



5 U.S.C. § 2302(b)(10) 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



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DISCRIMINATION (cont.)



5 U.S.C. § 2302(b)(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 punish employees for conduct if it can be linked to efficiency of the service by demonstrating:
 - The circumstances are so egregious as to raise a rebuttable presumption;
 - The conduct adversely affects the agency's trust and confidence in the employee's job performance;
 - The conduct adversely affects the employee's or coworkers' job performance; OR
 - The conduct adversely affects the agency's mission.



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HIRING OFFENSES



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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*

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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 a person's right to compete for a job
 - Generally, non-selection is not considered willful obstruction if the candidate is given the opportunity to apply and to compete for the position

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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 must have happened to help or hurt another person's employment prospects. However, the applicant does not actually have to withdraw from competition for the action to be a violation

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GRANTING AN UNAUTHORIZED PREFERENCE

5 U.S.C. § 2302(b)(6)



- 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
 - See 5 U.S.C. § 3110


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NEPOTISM

5 U.S.C. § 2302(b)(7)



- 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


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VIOLATING VETERANS' PREFERENCE

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

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WHICH PPP HAS JESSICA COMMITTED?

Scenario:

- Jessica creates a job listing for an entry-level data analyst position at her agency
- Michael applies for the job, and although he is the most qualified candidate for the job, Jessica does not want to hire him, because she is hoping to hire Sheila
- To prevent Michael from getting the job, she removes the listing and re-announces it, but now requires experience in fundraising to bolster Sheila's application, which was ranked slightly lower than Michael's.
- Fundraising experience has never been required for this position
- Michael is not selected for the position in favor of Sheila because he does not have fundraising experience

Which PPP has Jessica Committed?

- A. Soliciting or considering employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics [5 U.S.C. § 2302(b)(2)]
- B. Granting an unauthorized preference or advantage to improve or injure the prospects of any particular person for employment [5 U.S.C. § 2302(b)(6)]
- C. Influencing withdrawal from competition to improve or injure employment prospects of another [5 U.S.C. § 2302(b)(5)]
- D. Nepotism [5 U.S.C. § 2302(b)(7)]



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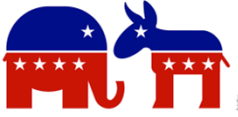
POTPOURRI




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COERCING POLITICAL ACTIVITY

5 U.S.C. § 2302(B)(3)




- An agency official shall not coerce the political activity of any person (including the providing of any political contribution or service) or take 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




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CATCH-ALL PPP
 5 U.S.C. § 2302(b)(12)

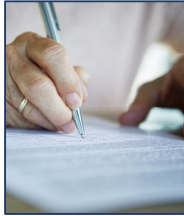


- An agency official shall not take or fail to take a personnel action in violation of a law, rule, or regulation that implements or directly concerns a merit system principle
 - Intent is **not required** for some violations


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ANTI-GAG ORDER PROVISION
 5 U.S.C. § 2302(b)(13)




- This provision 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


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PROHIBITED USE OF MEDICAL RECORDS
 5 U.S.C. § 2302(B)(14)



- An agency official shall not access 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.

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RETALIATION

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PROVING RETALIATION
5 U.S.C. § 2302(b)(6) and (b)(9)(A)(i), (B), (C), and (D)

- The following elements must be met:
 - Reasonable belief that employee made a protected disclosure or employee engaged in protected activity
 - Personnel action taken, not taken, or threatened
 - Actual or constructive knowledge of protected disclosure or activity; and
 - Contributing factor (disclosure or activity was a contributing factor in the personnel action)
 - Sufficient timing between the disclosure or activity and the personnel action at issue; or
 - Circumstantial evidence

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PROVING RETALIATION
ELEMENT 1: PROTECTED DISCLOSURES

- Includes:
 - Violation of any law, rule, or regulation
 - No *de minimis* exception
 - Gross mismanagement
 - Substantial risk of significant impact on mission
 - Gross waste of funds
 - More than debatable expenditure
 - Abuse of authority
 - No *de minimis* exception
 - Substantial and specific danger to public health or safety
 - Imminent and reasonably foreseeable harm, cannot be speculative
 - Censorship related to scientific research or analysis (scientific integrity)

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PROVING RETALIATION

ELEMENT 1: PROTECTED DISCLOSURES (cont.)

- 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

5 U.S.C. § 2302(b)(8)



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PROVING RETALIATION

ELEMENT 1: DISCLOSURES NOT COVERED




- 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



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IS IT A PROTECTED DISCLOSURE?

1. Elise raises concerns about her agency not addressing asbestos containing materials and violating OSHA regulations during a meeting with her supervisor. Elise does not follow-up with a written complaint. **Is it a protected disclosure?**
2. Mark informs the front office that its new strategic plan is not cost effective. **Is it a protected disclosure?**
3. Sam discloses that his supervisor Bill lacks the licensure required by Federal and agency regulations to supervise their lab. Sam disclosed this information after Bill denied him a promotion. **Is it a protected disclosure?**



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HAS KIM ENGAGED IN PROTECTED ACTIVITY?

Scenario:

- Kim, an IT Specialist at a large federal agency, reports directly to Jack
- Kim learns that Jack's niece is working for the agency
- Because Jack oversees the IT department, Kim believes that Jack advocated for his niece's appointment
- Kim files a complaint with the Office of Inspector General at her agency
- The OIG contacts HR and learns that the finance department hired Jack's niece
- Additionally, Jack's niece does not perform any IT functions

Has Kim engaged in Protected Activity?

A. Yes, Kim engaged in protected activity
 B. No, Kim did not have a reasonable belief that Jack engaged in wrongdoing

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PROVING RETALIATION

ELEMENT 1: PROTECTED ACTIVITY

- Protected Activity
 - 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 any component responsible for internal investigation or review
 - Refusal to obey an order that would require violation of law, rule, or regulation

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

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PROVING RETALIATION

ELEMENT 2: PERSONNEL ACTION

- Official Definition found at 5 U.S.C. § 2302(a)(2)(A)
 - Unofficial definition – anything that would require an SF-52; significant change in duties; decision concerning pay, awards, or benefits
- Personnel Action Must be Taken, Not Taken, or Threatened
 - Failure requires a showing that an official declined or refused to take a personnel action (e.g., Non-selection)
 - Threatened means objective, concrete indication that an action is impending (e.g., Performance Improvement Plan/Demonstration Period)
- Not everything is a Personnel Action
 - Hostile Work Environment – a personnel action if it results in a significant change in working conditions
 - Appraisals – annual rating is a personnel action, but a midterm rating is not
 - Bad paper – a Letter of Reprimand is a personnel action; a verbal/written counseling is generally not
- Was the Action Voluntary?
 - Generally, arises in the context of a resignation or retirement, which OSC typically will not have authority to consider

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


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PROVING RETALIATION
ELEMENTS 3 & 4: KNOWLEDGE/CONTRIBUTING FACTOR

- Knowledge and Timing:
 - Knowledge and timing can be sufficient to establish the contributing factor element of a prima facie case of retaliation under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (B), (C), and (D)
 - Must demonstrate actual or constructive knowledge (official had reason to know) of the protected disclosure or activity
 - More than a two-year gap between whistleblowing and personnel action is too long to demonstrate contributing factor

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




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PROVING RETALIATION
ELEMENT 4: CIRCUMSTANTIAL EVIDENCE

- Statements of animus: "failure to follow the chain of command"
- Disproportionate response
- Whistleblowing directed at the official who took the action
- Poor explanation for action – stated reason appears to be pretext for retaliatory animus
- Change in attitude – employee had no history of performance problems or misconduct, no intervening positives

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




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CAN DEAN ESTABLISH ALL FOUR ELEMENTS OF A RETALIATION CLAIM?

Scenario:

- Dean is a GS-12 Program Specialist detailed to work at the American consulate in Rome, Italy for three years. In April 2022, the agency announced an internal GS-13/14 Program Specialist position.
- Catherine, Dean's first-line supervisor and the selecting official for the internal position offered Dean and another employee, Sean, assistance with their resumes and application package. Dean and Sean accepted her offer. Catherine did not offer aid to the six other applicants.
- On June 15, 2022, Catherine announced that she had selected Sean for the position. Disappointed, Dean emailed the Chief Human Capital Officer on June 27 and raised concerns about Catherine providing an unfair advantage to Sean during the hiring process. He did not disclose that Catherine had also assisted him. The CHCO asked Dean if she could discuss the matter with Catherine and disclose his name. Dean agreed. The CHCO contacted Catherine and Catherine's second line-supervisor about the matter on July 12.
- In January 2023, Catherine informed Dean that she was not pleased with his performance and had decided to curtail his detail by a year.

Can Dean establish all four elements of a retaliation claim?




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AGENCY DEFENSE

CLEAR AND CONVINCING EVIDENCE

- 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*

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



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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



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PPP REMEDIES – CORRECTIVE ACTION (cont.)

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



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