



**Tips and Tidbits
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Question: What are Merit System Principles? Prohibited Personnel Practices? How do they apply to the applicant referral/job selection process? What are the ramifications of violating these prohibited practices?

Following the assassination of President James A. Garfield by a disgruntled job seeker, Congress passed the Pendleton Act in January of 1883. The Pendleton Act provided that Federal Government jobs be awarded on the basis of merit and Government employees be selected through competitive exams. The Act also made it unlawful to fire or demote an employee for political reasons who was covered by the law. Further, requiring employees to give political service or contributions was forbid.

These changes gave impetus to the Federal employment system as we know it today; however, it was not until a century later that the Merit System Principles were firmly established in law by the Civil Service Reform Act of 1978.

Merit system principles provide the code of conduct that should be followed when taking personnel actions – they are the “do’s”. On the other hand, prohibited personnel practices are those practices that should be avoided when taking personnel actions – they are the “don’ts”.

What are the prohibited personnel practices?

Twelve prohibited personnel practices, including reprisal for whistleblowing, are defined by law in Section 2302(b) of Title 5 of the United States Code (USC). In most cases, a personnel action such as an appointment, promotion, reassignment, or suspension, is involved in order for a prohibited personnel practice to occur. Generally stated Section 2302(b) provides that a Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may not engage in any of the prohibited practices. [Please see Enclosure 1 for the entire list].

In addition to outright discrimination, the prohibited personnel practices that relate to the merit-based Federal hiring process include:

- Soliciting or considering 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 an evaluation of the work performance, ability, aptitude, or general qualifications of such

individual; or, an evaluation of the character, loyalty, or suitability of such individual (5USC, Section 2302(b)(2));

- Obstructing any person with respect to such person's right to compete for employment (5USC, Section 2302(b)(4));
- Influencing any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment (5USC, Section 2302(b)(5));
- Granting unauthorized preference to any employee or applicant for employment for the purpose of improving or injuring the prospects of any particular person for employment (5USC, Section 2303(b)(6));
- Appointing, employing, promoting, advancing, or advocating for appointment, employment, promotion, or advancement to any individual who is a relative (5USC, Section 2302(b)(7)), and,
- Knowingly taking, recommending, or approving, or failing to take, recommend, or approve any personnel action if the taking/not taking of such action would violate a veteran's preference requirement (5USC, Section 2302(b)(11)).

Many actions and behaviors, intentional or not, could contravene these prohibitions. Examples include, but certainly are not limited to, management specification of skills during the referral process to target an intended employee as opposed to selecting skills pertinent to the duties of the position and ultimately the mission of the organization; requesting cancellation of vacancy announcements when "sought after" individuals were not on the initial referral list even when that list contained ample, qualified candidates; unduly narrowing or broadening the scope or manner of competition for the sake of reaching a "name request" when the narrowing or broadening of the area of consideration is not necessarily to supply a sufficient number of qualified candidates; rewriting a position description to tailor the duties around the skills/qualifications of an intended employee/applicant; or, a supervisory official or employee personally executing the steps necessary for their own upgrade, award, etc. There are many, many other examples.

Violation of the merit principles, which essentially translates to engaging in a prohibited personnel practice, applies to all/any public official(s). A public official is defined as an officer, a member of the uniformed service, an employee and any other individual, in whom is vested the authority by law, rule, or regulation, or to whom the authority has been delegated, to appoint, employ, promote or advance individuals, or to recommend

individuals for appointment, employment, promotion, or advancement in connection with employment in an agency. This includes selecting officials, Directors, Commanders, panelists, subject matter experts requested to assist in the evaluation process, and Human Resource (HR) professionals alike.

What are the consequences of violating the prohibited personnel practices?

An infraction of a prohibited personnel practice could result in disciplinary action as engaging in these behaviors is a violation of the law. Recently, the Merit Systems Protection Board (MSPB) ordered the suspension of two Coast Guard Human Resource (HR) Specialists* for violating 5 U.S.C. 2302(b)(6) by granting preference/ advantage to an applicant for the purpose of improving that applicant's prospects of obtaining a promotion to a supervisory position. In this case the specialists cancelled a series of vacancy announcements and re-advertised the position three times in an attempt to ensure Management's name request would make the list and receive consideration for the position. One specialist received a 45 day suspension, the other a 10 day suspension.

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 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.

In another case, a NASA HR employee, Patricia Biondolillo, pled guilty in Federal Court to using her official position to secure and advance her husband's employment at the Langley Research Center. The Specialist used non-public information concerning a job opening to introduce her husband's resume to the selecting official; failed to disclose her relationship to the prospective employer; and, pressured university officials to expedite her husband's admission and therefore, employment at Langley. The HR employee was directed to remove herself from the employment process; however, she continued to be involved, specifically regarding the issue of the pay grade. Her sentencing will take place 23 Sep 10. She faces a maximum penalty of one year in prison and a \$100,000 fine. She was in violation of 5 U.S.C. 2302 (b)(7) which reads:

*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** of such employee if such position is in the agency in which such employee is serving as a public official or over which such employee exercises jurisdiction or control as such an official.*

In yet another case***, the Board held that Byrd, a selecting official, and Rubinstein, a Personnelist, committed prohibited personnel practices in violation of 5 U.S.C.2203(b)(6) and (b)(11) by giving an applicant for employment an unauthorized preference when they hired her through the use of the agency's temporary limited appointment (TLA), and for

violating laws, rules, and regulations implementing or directly concerning merit system principles in connection with this hiring.

The Board concluded that the respondent's actions in utilizing the TLA authority had no other purpose *than to limit the scope of the competition in order to improve the applicant's chances for employment*. The Board also concluded that the respondent's use of the TLA was inappropriate because there was no administrative need for temporary employment for the permanent position the applicant filled. The Board also found that this same hiring action created the appearance of giving preferential treatment in violation of 5 CFR 735.201a(b). Taking into account that Byrd had retired after the complaint was filed, the Board fined him \$1,000 and ordered Rubinstein suspended for 60 days.

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, violate any law, rule, or regulation which implements or directly concerns the merit principles –

As illustrated through the last case, infractions are **not** limited to HR professionals. Even though these practitioners are responsible for knowing and guarding the sanctity of the merit principles, management and selecting officials, Commanders, and Directors are also held to the standard and are subject to be appropriately disciplined for infractions as well. Undue persuasion/coercion of HR Specialists to reannounce positions when sufficient candidates have been referred, refusals to make selections when “sought after” applicants are not on that list even when a sufficient number of candidates has been garnered – these are behaviors shed an unfavorable light on the manager engaging in such activity and could be the antecedent of a prohibited personnel practice.

Where is the line drawn between good customer service [on the part of HR staff] and a prohibited personnel practice?

The line is drawn at the point where the recruitment process becomes focused on an individual instead of the general applicant pool; when recruitment requirements are modified to accommodate a specific candidate; and/or, when legitimate candidates are discounted because “the candidate” is not found qualified or reachable. Sometimes the answer is “no”.

When does a name request become a prohibited personnel practice?

When skills and experience requirements are designed based on the specific experience/skills of the name request; when management fails to seriously consider referred candidates when the name request was not referred or within reach; and/or, when repeated recruitment is conducted and/or processes modified to enable the specific name request to be referred and/or reachable.

For additional training on the merit systems principles and prohibited personnel practices, log on to the website below. Contact your servicing HR Specialist or the undersigned with your questions.

http://www.chra.army.mil/webcourses/Intro_Merit_Sys/index.html

*Special Counsel, Petitioner, v. Richard F. Lee, Diane L. Beatrez

** Relative is defined as father, mother, son, daughter, 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.

***Special Counsel v. Byrd and Rubinstein, 59M.S.P.R.

BLANCHE D. ROBINSON

Human Resources Officer

Fort Benning CPAC

Phone: 545-1203 (Coml.); 835-1203 (DSN)

E-Mail: Blanche.drobinson@us.army.mil

Prohibited Personnel Practices

Discriminate for or against any employee or applicant for employment

Solicit or consider any recommendations or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action except if material is solely a required evaluation of the person's work performance, ability, aptitude or general qualifications or of character, loyalty, and suitability.

Coerce the political activity of any person (including the providing of any contributions or service), or take any action against any employee or applicant for employment as reprisal for refusal to engage in such political activity.

Deceive or willfully obstruct any person with respect to such person's right to compete for employment.

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.

Grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment for the purpose of improving or injuring the prospects of any particular person for employment.

Appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative if the person is in the agency in which the official serves or over which he/she exercises jurisdiction or control.

Take or fail to take, or threaten to take or fail to take personnel action with respect to any employee or applicant for employment for disclosure of information about violation of law or rules, gross mismanagement, waste of funds, and abuse of 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 performance of other.

Take or fail to take any other personnel action if the taking or failure to take such action violates any law, rule or regulation implementing or directly concerning the merit system principles.