



## Office of the Attorney General

Washington, D.C.

March 10, 2008

MEMORANDUM FOR DEPARTMENT OF JUSTICE ~~POLITICAL~~ APPOINTEES

FROM: THE ATTORNEY GENERAL

SUBJECT: Merit System Principles and Prohibited Personnel Practices

The framework for Federal human resources is built on integrity and merit. It is important for all of us to understand and follow the Merit System Principles in dealing with career employees. Our actions and decisions should be within the bounds set by the Merit System Principles and the Prohibited Personnel Practices, which are set forth in the attached briefing materials.

Beginning last summer, all new political appointees (Presidential Appointees with Senate Confirmation, Noncareer Senior Executive Service, and Schedule C appointees) have been briefed on Merit System Principles and Prohibited Personnel Practices as part of the orientation process. I am committed to ensuring that all serving political appointees are provided the same information. Therefore, please review the attached briefing materials and provide acknowledgement of your review and understanding of these hiring precepts to the Justice Management Division (JMD) no later than March 28, 2008. Please email your acknowledgements to: [DOJ.Hiring-Training@usdoj.gov](mailto:DOJ.Hiring-Training@usdoj.gov).

Our obligation to adhere to the highest standards of ethical and professional behavior will be enhanced by continued reinforcement of our human resource responsibilities.

Thank you.

Attachments

# MERIT SYSTEM PRINCIPLES

## Fact Sheet

**What is the Merit System Protection Board (MSPB)?** MSPB is directed by law to conduct special studies of the civil service and other Federal merit systems to determine whether these statutory mandates are being met, and to report to the Congress and the President on whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

**Where are the Merit System Principles found in regulation?** 5 USC§ 2301(b):

(A) This section shall apply to--

- (1) an Executive agency; and
- (2) the Government Printing Office.

(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 workforce 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 workforce should be used efficiently and effectively.
- (6) Employees should be retained on the basis of 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.

(C) In administering the provisions of this chapter--

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives; which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

## PROHIBITED PERSONNEL PRACTICES

### *Fact Sheet -- Examples*

#### What are "Prohibited Personnel Practices?"

Twelve prohibited personnel practices, including reprisal for whistleblowing, are defined by law at § 2302(b) of title 5 of the United States Code (U.S.C.). A personnel action (such as an appointment, promotion, reassignment, or suspension) may need to be involved for a prohibited personnel practice to occur. Generally stated, § 2302(b) provides that a Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may not:

(1) discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

- ***EXAMPLE: SUPERVISOR JOE REFUSES TO PROMOTE EMPLOYEE JANE BECAUSE JANE IS A REGISTERED REPUBLICAN.***

(2) solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;

- ***EXAMPLE: SELECTING OFFICIAL JOE HIRES APPLICANT JACK BASED ON SENATOR SMITH'S RECOMMENDATION THAT JACK BE HIRED BECAUSE JACK IS A CONSTITUENT.***

(3) coerce the political activity of any person;

- ***EXAMPLE: SUPERVISOR JANE TAKES AWAY SIGNIFICANT JOB DUTIES OF EMPLOYEE JACK BECAUSE JACK WON'T MAKE A CONTRIBUTION TO JANE'S FAVORITE CANDIDATE.***

(4) deceive or willfully obstruct anyone from competing for employment;

- ***EXAMPLE: SUPERVISOR JOE, LOCATED IN HEADQUARTERS, ORDERS THAT NO VACANCY ANNOUNCEMENTS BE POSTED IN THE FIELD OFFICE WHERE EMPLOYEE JACK WORKS BECAUSE HE DOESN'T WANT JACK TO GET A NEW JOB.***

(5) influence anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;

- ***EXAMPLE: SUPERVISOR JANE, IN AN EFFORT TO HIRE EMPLOYEE JOE, TELLS EMPLOYEE JACK — A QUALIFIED EMPLOYEE — THAT HE SHOULDN'T APPLY FOR A POSITION BECAUSE HE ISN'T QUALIFIED AND WON'T BE SELECTED.***

(6) give an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant;

- ***EXAMPLE: SUPERVISOR JANE SPECIFIES THAT SPANISH-SPEAKING SKILLS ARE NECESSARY FOR A VACANT POSITION, IN ORDER TO SELECT EMPLOYEE JACK, WHO SPEAKS FLUENT SPANISH. THE POSITION, HOWEVER, DOESN'T REQUIRE SPANISH-SPEAKING SKILLS.***

(7) engage in nepotism (i.e., hire, promote, or advocate the hiring or promotion of relatives);

- ***EXAMPLE: SECOND-LEVEL SUPERVISOR JANE ASKS FIRST-LEVEL SUPERVISOR JOE TO HIRE HER SON.***

(8) engage in reprisal for whistleblowing – i.e., take, fail to take, or threaten to take or fail to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety (if such disclosure is not barred by law and 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 – if so restricted by law or Executive Order, the disclosure is only protected if made to the Special Counsel, the Inspector General, or comparable agency official);

(9) take, fail to take, or threaten to take or fail to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;

(10) discriminate based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant, or others;

(11) take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and

(12) take or fail to take a personnel action, if taking or failing to take action would violate any law, rule or regulation implementing or directly concerning merit system principles at 5 U.S.C. § 2301.

- ***EXAMPLE: MANAGER JANE DECIDES NOT TO HIRE APPLICANT JOE BECAUSE HE IS A MEMBER OF AN ORGANIZATION THAT OFTEN TAKES POSITIONS THAT MANAGER JANE BELIEVES ARE CONTRARY TO THE POSITIONS TAKEN BY THE CURRENT ADMINISTRATION.***

No selection based on such a factor appears to violate merit principles, which, among other things, state that:

1. 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, with proper regard to their privacy and constitutional rights.

**Who can be protected by the Office of Special Counsel (OSC) from prohibited personnel practices?**

**General.** OSC has jurisdiction over prohibited personnel practices committed against most employees or applicants for employment in Executive Branch agencies and the Government Printing Office.

**Limited Jurisdiction; whistleblower protection.** OSC has jurisdiction over allegations of whistleblower retaliation for employees of - the government corporations listed at 31 U.S.C. § 9101; the Transportation Security Administration (TSA).

**Limited Jurisdiction; U.S. Postal Service (USPS) nepotism allegations.** Under a Memorandum of Understanding (MOU) between OSC and USPS, OSC refers alleged violations of the anti-nepotism statute (5 U.S.C. § 3110) to USPS for investigation. Once USPS completes its investigation, it reports its findings and any proposed action to OSC.

**Who is not protected by OSC from prohibited personnel practices?**

OSC has no jurisdiction over prohibited personnel practices committed against employees of -

- the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President;
- the General Accounting Office;
- the Federal Bureau of Investigation;
- the U.S. Postal Service (except for nepotism allegations; see above); and
- the Postal Rate Commission.

(The process for protecting FBI whistleblowers is contained at 28 CFR part 27.)

**Are Federal employees required to cooperate with OSC investigations?**

Title 5 of the U.S. Code authorizes the OSC to issue subpoenas for documents or the attendance and testimony of witnesses. During an investigation, the OSC may require employees and others to testify under oath, sign written statements, or respond formally to written questions.

Federal employees are also required to provide to the OSC any information, testimony, documents, and material, the disclosure of which is not otherwise prohibited by law or regulation, in investigations of matters under civil service law, rule, or regulation. The same rule requires Federal agencies to make employees available to testify, on official time, and to provide pertinent records to the OSC.

Ref: 5 U.S.C. § 1212(b); Civil Service Rule 5.4

**What legal responsibilities do Federal agencies have to prevent prohibited personnel practices?**

Section 2302(c) of title 5 requires Federal agency heads, and officials with delegated authority for any aspect of personnel management, to: prevent prohibited personnel practices, including reprisal for whistleblowing; comply with and enforce civil service laws, rules, and regulations; and ensure (in consultation with the OSC) that Federal employees are informed of their rights and remedies.