Preventing Nepotism in the Federal Civil Service

A REPORT TO THE PRESIDENT AND
THE CONGRESS OF THE UNITED STATES
BY THE U.S. MERIT SYSTEMS PROTECTION BOARD
JUNE 2016

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M Street, NW
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June 20, 2016

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, *Preventing Nepotism in the Federal Civil Service.* This report explains the statutory and regulatory prohibitions against nepotism and steps that agencies and employees can take to protect the service from nepotism.

Nepotism is a serious offense that can damage the effectiveness of an agency's operations and cause severe harm to the public's trust that the Government is free from corruption. Nepotism is prohibited by a criminal statute (18 U.S.C. § 208), the statute that governs the Federal civil service (5 U.S.C. § 2302(b)(7)), and the regulations for ethical conduct by Federal employees (5 C.F.R. § 2635.502). Each of these authorities applies to slightly different but often overlapping behaviors, and the agency that is empowered to address the situation, as well as the possible penalties, can vary.

Despite the differences in how these authorities operate, they tend to share a common means for avoiding the impropriety. The three main steps that an employee should undertake are: (1) consulting an ethics advisor about any potential conflict of interest; (2) disclosing the issue to a supervisor or other suitable agency official; and (3) attempting to recuse himself or herself from involvement in the matter that involves a relative or other person with whom the employee has a covered relationship. As explained in this report, there are also steps that agencies can take to reduce opportunities for nepotism to occur. Additionally, we recommend that – regardless of the outcome of the next presidential election – the new President include in his or her transition plan a strategy to educate new political appointees about the prohibited personnel practices, including nepotism, as these political appointees may not have prior experience with a merit-based civil service.

I believe that you will find this report useful as you consider issues affecting the Federal Government's ability to maintain a high-quality workforce in a merit-based civil service.

Respectfully,

Susan Tsui Grundmann

Enclosure

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TABLE OF CONTENTS

EXECUTIVE SUMMARY i

The President of the United States ii

Agencies iii

U.S. Office of Personnel Management iii

Employees iv

Applicants iv

INTRODUCTION 1

Purpose 2

Methodology 3

CHAPTER ONE: THE CRIMINAL STATUTE 5

Spouses Under the Criminal Statute 5

Children Under the Criminal Statute 7

Avoiding Violations of the Criminal Statute 8

CHAPTER TWO: NEPOTISM AS AN ADMINISTRATIVE OFFENSE 11

Examples of Nepotism Warranting an Adverse Action 14

Examples Where Nepotism Was Not Found 15

Exercising Poor Judgment 18

Deliberately Helping Someone Else Commit Nepotism 19

Avoiding Nepotism 21

CHAPTER THREE: WHAT AGENCIES CAN DO TO REDUCE THE RISK OF NEPOTISM 27

Identifying a Nepotism Problem 27

Certifications Regarding Relatives 30

Optional Form 306 (Declaration for Federal Employment) 30

Using Certifications to Ensure Appointments Are Not Influenced by Nepotism 33

Education and Guidance 36

Education and Guidance Provided by the Employing Agency 37

Education and Guidance Provided by the U.S. Office of Personnel Management 39

Fair and Open Competition 42

Holding Officials Accountable 44

CONCLUSION 47

The President of the United States....47
Agencies....47
U.S. Office of Personnel Management....48
Employees....48
Applicants....49
APPENDIX A: RELEVANT STATUTES....51
18 U.S.C. § 208....51
18 U.S.C. § 216....51
5 U.S.C. § 3110....52
5 U.S.C. § 2302(a)-(c)....52
5 U.S.C. § 2301....57
APPENDIX B: GENERAL PRINCIPLES OF ETHICAL CONDUCT FOR FEDERAL EMPLOYEES....59
APPENDIX C: THE EFFECTS OF NEPOTISM....61
APPENDIX D: DEPARTMENT OF JUSTICE SAMPLE DISCLOSURE FORMS....65

EXECUTIVE SUMMARY

In the Federal civil service, an official is not permitted to appoint, employ, promote, or advance, or advocate for appointment, employment, promotion, or advancement any individual who is a relative. Nepotism is prohibited by: (1) a criminal statute (18 U.S.C. § 208); (2) administrative statutes (5 U.S.C. §§ 2302(b)(7) and 3110); and (3) the regulations for ethical conduct by Federal employees (5 C.F.R. § 2635.502). Each of these authorities apply to slightly different but often overlapping behaviors and the agency that is empowered to address the situation can vary. For example, while the Department of Justice would be responsible for prosecuting criminal conduct under title 18, an action for violating 5 U.S.C. § 2302(b)(7) may be brought by the Office of Special Counsel (OSC) or the employing agency. Similarly, while only the criminal statute carries the possible penalty of imprisonment, the title 5 penalties include, but are not limited to, removal, suspension, demotion, and debarment from future Federal employment. Agencies are authorized to address nepotistic misconduct through their disciplinary authority to prevent damage to the efficiency of the service (5 U.S.C. §§ 7503(a) and 7513(a)).

A Government-wide survey conducted by the U.S. Merit Systems Protection Board ("MSPB" or "the Board") in 2010 shows that the extent to which employees perceive nepotism in their work units varies greatly by agency. Of the 14 agencies with at least 400 respondents, the percentage of respondents who reported they observed nepotism in hiring ranged from a low of 3.4 percent in one agency to a high of 15.9 percent in another agency. Such a difference in perceptions between agencies implies there may be things that agencies can do to reduce these perceptions. The data show that when an employee perceives nepotism, the employee also tends to be far less likely to be engaged or motivated. Thus, the ramifications of nepotism can extend well beyond the individual who has been improperly hired or rewarded and affect the larger workforce.

There is also a risk that when incidents become public, it will affect the public's trust that the Government is free from corruption. And, of course, if less qualified

individuals are appointed and advanced, the work of the Government is less likely to be performed properly.

The laws against nepotism have been on the books for decades, yet Inspectors General continue to issue reports identifying and documenting instances of employees hiring their relatives. The high ranks of some of those involved, and the extent to which human resources (HR) staff have been found complicit in assisting such actions, demonstrate that nepotism remains a problem that should be addressed. Federal employees hiring their close relatives is too fundamentally contrary to the idea of a merit-based system to be ignored. Below are some steps that the President, agencies, the U.S. Office of Personnel Management (OPM), employees, and applicants can take to reduce nepotism.

The President of the United States

As explained in this report, new political appointees whose backgrounds do not include prior public service may be unfamiliar with the rules for the civil service, including the prohibitions regarding the employment of relatives. The transition between administrations may be a particularly high-risk period as – regardless of the outcome of the election – when there is a new President there will be a large number of new appointments to positions that are political in nature and thus filled by many individuals who do not have prior experience within the civil service. When these officials arrive in their new positions, it will be important for them to conduct themselves in accordance with the law.

Under 5 U.S.C. § 2302(c), the head of an agency is responsible for the prevention of prohibited personnel practices (PPPs). While some political appointees may already know about the rules for nepotism and the other PPPs, we recommend against assuming this knowledge is present. Transition plans should include preparations to educate political appointees about the PPPs, including nepotism, and how PPPs such as nepotism can be avoided. Additionally, once a new administration is in place, there will be inevitable turnover. As new political appointees come to serve, they too may require education about the PPPs, including nepotism.

Agencies

Agency leaders and those to whom they have delegated personnel authorities are obligated to prevent nepotism. Means by which this may be achieved include:

1. Making better use of HR staff as partners to advise employees about the rules and to raise concerns if personnel actions seem suspicious.

2. Requiring additional certifications that personnel actions have not been improperly influenced when the agency deems such precautions necessary.

3. Educating executives, managers, supervisors, and employees about the rules of ethical conduct, including what it means to avoid nepotism and how they can achieve a merit-based workplace.

4. Ensuring that competitions for positions are as fair and open as is practical for the positions in question.

5. Holding employees accountable for their own conduct and for supervising the conduct of their subordinates.

U.S. Office of Personnel Management

OPM has delegated to Federal agencies much of the responsibility for hiring, including the prevention of nepotism. However, OPM should provide clear guidance to agencies on how they can accomplish this. The "Optional" Form 306 (OF-306), Declaration for Federal Employment, contains information about an applicant supplied by the applicant, including any relatives employed by the agency. One purpose of the OF-306 is to preserve the integrity of the hiring process. OPM's guidance regarding when the OF-306 is to be used is either incomplete, unclear, not followed, or has some combination of these issues. We recommend that OPM provide better guidance to agencies regarding the circumstances under which the OF-306 is required.

As explained in the report, OPM's guidance on some other matters involving nepotism is also unclear because, while purportedly still valid policy, the information

is contained in a document that was sunset more than two decades ago. We recommend that OPM consider how it can better maintain a public, well-organized reference system that provides clear guidance, including distinctions between what OPM mandates and what it merely recommends that agencies consider.

Employees

Employees who engage in nepotism may face possible criminal (18 U.S.C. § 208) or administrative sanctions (5 U.S.C. §§ 2302(b)(7)), 1215(a), 7503(a), 7513(a)). The conduct that qualifies as nepotism and the penalty for such conduct can differ between titles 18 and 5. Ultimately, an employee is responsible for his or her own actions. However, for both title 18 and title 5, an employee may greatly reduce the risk that the penalties will be applied to him or her if the employee follows three steps:

1. Consultation: If a situation could pose a conflict of interest, the employee should consult an ethics advisor. An employee should exercise good judgment by not trying to judge his or her own case.

2. Disclosure: The employee should disclose the issue to a supervisor or other appropriate agency official so that the agency can decide the proper approach. An employee's silence can damage the ability of the agency to trust the employee in the future.

3. Recusal: An employee should ask to recuse himself or herself from involvement in the personnel action. The best way not to become entangled in questionable conduct is for the employee to entirely avoid involvement in such situations whenever possible.

Applicants

Regardless of the hiring authority being used, agencies will likely ask external (and sometimes internal) applicants whether they have a relative employed by the agency. It is extremely important that applicants answer such questions candidly. The Federal Government takes the integrity of the hiring process very seriously. Merely

having a relative employed by the same agency does not automatically disqualify an applicant; but an individual can be fired for unethical conduct that occurs before or after the appointment begins. A lack of candor or outright falsehood in an application can result in the person's removal or even debarment from Federal service. Honesty is truly the best policy.

INTRODUCTION

In Federal civil service law, nepotism refers to assistance or favors that employees provide to relatives within a specific degree of closeness.[1] In this report, the word "nepotism" will be used only for situations involving relatives as defined in 5 U.S.C. § 3110 – a "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." Nepotism as defined in 5 U.S.C. § 3110 is a PPP under 5 U.S.C. § 2302(b)(7). As discussed in this report, a few forms of nepotism can qualify as criminal conduct under 18 U.S.C. § 208.[2]

There is no such thing as "minor" nepotism. It is a binary state. The person either is or is not a relative of the official.[3] The official either did or did not approve a personnel action itemized in 5 U.S.C. § 2302(a)(2)(A).[4] While the nature and extent of the nepotism is relevant to the reasonableness of a particular penalty, and whether

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[1] In contrast, the dictionary definition of the word nepotism is: "the practice among those with power or influence of favoring relatives or friends, especially by giving them jobs." *Compare* 5 U.S.C. § 3110, *with* www.oxforddictionaries.com, nepotism.

[2] *United States v. Lund*, 853 F.2d 242, 249 (4th Cir. 1988) (holding that the Civil Service Reform Act of 1978 did not alter the applicability of 18 U.S.C. § 208 to offenses in which a spouse or minor child financially benefits from the actions of a Government employee acting on the behalf of the Government).

[3] For purposes of the nepotism statute, an official "means an officer (including the President and a Member of Congress), 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[.]" 5 U.S.C. § 3110(a)(2). In contrast, the PPPs, including 5 U.S.C. § 2302(b)(7), apply to "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action[.]" 5 U.S.C. § 2302(b). Section 2302 uses the same definition for "relative" as section 3110, but section 2302 does not require that the alleged offender meet the definition of official set forth in section 3110. Unless otherwise indicated, this report uses the term "official" to refer to an employee in a position to influence the personnel action in question.

[4] Types of positions covered by the nepotism prohibition are listed in 5 U.S.C. § 2302(a)(2)(B), and include nearly all positions in the competitive, excepted, and senior executive services.

an act constitutes advocacy can be more subjective than an act of approval, nepotism laws draw sharp lines and even seemingly routine personnel actions are on the prohibited side of the line when relatives are involved.[5]

Nepotism is detrimental to a merit-based civil service. The law prohibiting the hiring of relatives was enacted to protect organizations and the public from the risk that less-qualified individuals would be given positions of responsibility merely because an official wanted to help them get a job. The nepotism law is also intended to instill confidence in the American people that their civil service is not corrupt. Federal employees today have the responsibility to: grant applications for life-saving health and financial benefits; keep our air, water, food, medicine, airplanes, and roads safe; fight fires to protect lives and property; protect our borders and prevent terrorism; provide logistical and administrative support for our military; send people and billions of dollars of technology into space; regulate the use of nuclear reactors; determine when to arrest or prosecute citizens and visitors; and perform thousands of other tasks affecting the quality of life of hundreds of millions of Americans. As a result, keeping the civil service system free of corruption so that the best possible candidates are hired, trained, promoted, and assigned complex duties is more important than ever.[6]

Purpose

Section 1204 of title 5 instructs that MSPB shall conduct studies of the civil service and, in particular, shall report to the President and Congress about the PPPs.

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[5] 5 U.S.C. § 2302(a) contains a list of activities that are considered personnel actions, including decisions about pay, benefits, awards, duties, responsibilities, and working conditions.

[6] While this report is focused on the issue of nepotism, favoritism based on personal relationships rather than qualifications or contributions to the efficiency of the service is also harmful and is contrary to the merit principles. *See* 5 U.S.C. § 2301(b)(8)(A); U.S. Merit Systems Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013), available at www.mspb.gov/studies. Actions taken to grant such preference can qualify as a different PPP. *See* 5 U.S.C. § 2302(b)(6); U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions* (2011), at 12-14, available at www.mspb.gov/studies.

Nepotism is the seventh enumerated PPP.[7] While this report seeks to inform the President and Congress about nepotism in the civil service, an additional goal is to educate supervisors, managers, executives, Inspectors General, HR employees, and other employees about nepotism so that such offenses may be avoided to the greatest extent possible and addressed where they still occur.

Methodology

This report relies primarily upon:

- Statutes and case law;
- Written and/or oral responses to MSPB questions in 2015 and 2016 submitted by the Public Service Commission (PSC) of Canada,[8] U.S. Office of Government Ethics (OGE), OSC, OPM, and Federal Chief Human Capital Officers (CHCOs) or agency-level HR Directors;[9]
- The results of the Fair and Open Competition Survey (FOCS) – a survey of approximately 10,000 HR specialists and assistants conducted in 2011; and
- The results of the Merit Principles Survey (MPS) – a survey of more than 42,000 Federal employees conducted in 2010.[10]

[7] 5 U.S.C. § 2302(b)(7).

[8] The Canadian PSC is responsible for safeguarding the integrity of staffing in the Canadian public service and ensuring the service remains non-partisan. *See* http://www.psc-cfp.gc.ca/centres/responsibilities-eng.htm. MSPB and the Canadian PSC have a long history of shared communications on issues of common interest, and we thank them for their continued cooperation.

[9] Questionnaires were sent to 24 agencies. Eighteen agencies submitted a reply, for either the agency in whole or for a part of the agency.

[10] For more on the methodology used in the FOCS, please see our 2015 report, *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs*, at 2. For more on the methodology used in the 2010 MPS and a copy of the survey questions, please see our 2012 report, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards*, at 65-67. These reports are available at www.mspb.gov/studies.

CHAPTER ONE: THE CRIMINAL STATUTE

Nepotism is addressed differently in different parts of Federal law. This chapter discusses nepotism that constitutes a crime for which imprisonment is possible. Chapter Two discusses nepotism punishable under administrative laws for harming the efficiency of the service or as a PPP.

Under 18 U.S.C. § 208, it is a crime for an employee to act "through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise," in a matter in which the employee, employee's spouse, or employee's minor child has a financial interest. When this occurs, the individual is subject to a fine of up to $50,000 and/or up to 5 years of imprisonment.[11]

Spouses Under the Criminal Statute

Section 208 has been the basis of a civil service nepotism case at least once. *United States v. Lund* is particularly illustrative, because some people may think of nepotism as the decision to hire a relative, whereas *Lund* discusses the applicability of the statute to more "minor" personnel decisions.[12]

Lund, an employee of the Defense Communications Agency, allegedly married one of his subordinate employees and then continued to supervise her without informing his agency of their relationship and the inherent conflict of interest.[13] He then participated in three intra-agency personnel decisions in which his wife had a financial interest. These decisions were: (1) granting her a within-grade pay increase (WIGI); (2) selecting her for promotion to a higher-paying position; and (3) recommending her for education funded by the Federal Government.[14]

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[11] 18 U.S.C. §§ 208(b), 216.

[12] *United States v. Lund*, 853 F.2d 242, 243 (4th Cir. 1988).

[13] *United States v. Lund*, 670 F. Supp. 654, 655 (E. Dist. Va. 1987).

[14] *Id.*

Lund argued that he could not be indicted under the criminal statute for these alleged offenses and that the provisions of the Civil Service Reform Act of 1978 (CSRA), which made nepotism a PPP punishable under title 5 administrative law, precluded the applicability of title 18 to his situation.[15] The U.S. Court of Appeals for the Fourth Circuit held that 18 U.S.C. § 208(a) "applies to a federal employee's participation, on behalf of the government, in *any* application or contract in which he has a conflict of interest," and that the personnel actions in the indictment were covered by section 208.[16] In other words, the fact that nepotism *can* be punished as a PPP does not remove nepotism involving a spouse or minor child from being covered by criminal law.

Section 216 permits imprisonment for not more than 1 year for a violation of section 208, unless the individual "willfully engage[d]" in the conduct, in which case, imprisonment may be imposed for a period of not more than 5 years.

Following *Lund*, the Office of Government Ethics issued regulations to help employees and agencies understand the personnel actions covered by section 208.[17] Ultimately, the official cannot:

1. Make determinations that individually or specially affect his own salary and benefits; or
2. Make determinations, requests, or recommendations that individually or specially relate to, or affect, the salary or benefits of any other person specified in section 208.[18]

The regulation clarifying conduct that will not pose a conflict of interest under 18 U.S.C. § 208 also clearly states that the regulation does "not permit an employee

[15] *Id.* at 244.

[16] *Id.* at 249 (emphasis in original).

[17] *See* 5 C.F.R. § 2640.203 (providing examples of acceptable and unacceptable activities). *Cf.* 18 U.S.C. § 208(b)(2) (authorizing the Director of OGE to issue regulations exempting from section 208 those activities that the Director deems too remote to affect the integrity of the services being provided).

[18] 5 C.F.R. § 2640.203(d).

to take any action in violation of any other statutory or regulatory requirement, such as the prohibition on the employment of relatives at 5 U.S.C. § 3110."[19]

Children Under the Criminal Statute

Section 208 specifically treats the interests of a minor child the same as the interests of the employee. The OGE representative that we spoke with noted that, in contrast, section 208 does not treat the interests of adult children as the interests of the employee, but that "if your own financial interests are affected by a decision regarding your adult child, you can run afoul of [18 U.S.C. §] 208." Once again, the OGE representative stressed the importance of reporting the relationship and avoiding any appearance of a conflict of interest.

A parent providing financial assistance to young adult children is common in society today.[20] Sometimes the shared financial obligations between parents and adult children are formal, such as when a parent co-signs student loans with the child,[21] but there can be less formal financial interests as well. We caution employees who may have a financial interest in the employment of their adult children – or any other relative – to recognize the seriousness of the rules involving nepotism where the finances of the child (or other relative) affect the finances of the employee.

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[19] *Id.*

[20] According to a Bank of America survey, approximately 4 out of every 10 adult millennials are receiving financial assistance from their parents. Assistance is even more common when the millennial is "just starting out." Hadley Malcolm, USATODAY, "Millennials Leaning More on Parents," Apr. 21, 2015, available at http://www.usatoday.com/story/money/personalfinance/2015/04/21/millennials-getting-help-from-parents/25812211/.

[21] Robert Farrington, "Parents: Stop Taking Out Loans For Your Child's College Education," Nov. 14, 2014, available at http://www.forbes.com/sites/robertfarrington/2014/07/14/parents-stop-taking-out-loans-for-your-childs-college-education/ (explaining that when a parent co-signs a student loan, the parent is responsible for the debt); Tamar Lewin, "Child's Education, but Parents' Crushing Loans," Nov. 11, 2012, available at http://www.nytimes.com/2012/11/12/business/some-parents-shouldering-student-loans-fall-on-tough-times.html?pagewanted=all&_r=0 (discussing the difficulties facing parents who co-sign loans).

We asked agencies if there were any particular types of positions, work environments, or hiring situations that were most vulnerable to nepotism. One agency noted, "Any position could be subject to nepotism." However, another agency, with repeated Office of the Inspector General (OIG) reports finding that nepotism occurred, replied, "In our experience, entry-level and student positions are most vulnerable to nepotism and inappropriate advocacy." We also asked agencies the extent of their agreement with a statement that "Nepotism is more likely to take place when filling entry-level positions than when filling other positions." More agencies agreed with this statement than agreed with statements that nepotism was more likely to occur for: (1) journey-man level positions; or (2) higher-graded positions. Agencies may want to give particularly close scrutiny to positions that it considers to be at greater risk of nepotism.

Avoiding Violations of the Criminal Statute

So, how can an individual avoid running afoul of section 208? The statute explains that the officer or employee should:

1. Inform his supervisor[22] of the matter;
2. Make a full disclosure of the financial interest; and
3. Obtain "in advance a written determination by [the supervisor] that the [financial] interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee[.]"[23]

We asked OGE what advice it might have for an individual whose situation could possibly be covered by section 208. The OGE representative recommended that employees remember – for personnel actions as well as other decisions – that, "your spouse's financial interest is your financial interest. What affects the finances of a spouse or minor child affects you." As such, where an employee is working on a

[22] The statute specifies that the person to be notified is the "Government official responsible for [the individual's] appointment to his or her position[.]" 18 U.S.C. § 208(b)(1).

[23] 18 U.S.C. § 208(b)(1).

personnel matter that could directly affect his or her spouse or minor child, the employee should seek guidance from his or her ethics official.

The OGE representative recommended that people remember the saying that "no man should be the judge in his own case,"[24] meaning that a person inside the situation may not have the most impartial view of the matter and may not be the best person to decide if there is a conflict. This is why contacting an impartial ethics advisor can be particularly helpful.[25] If an employee's conduct violates a criminal statute, "reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute."[26] However, regulations provide that a "good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution."[27]

In addition to being aware of the criminal prohibitions in 18 U.S.C. § 208, OGE recommended that employees familiarize themselves with the General Principles of Ethical Conduct for Federal Employees, a copy of which is included in Appendix B. It may help employees to recognize situations in which a disclosure is appropriate or the input of an ethics advisor can assist the employee to ensure that he or she has avoided any impropriety.[28]

The OGE representative also reminded us that under the ethics rules set forth at 5 C.F.R. § 2635.502:

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[24] *See In re Murchison*, 349 U.S. 133, 136 (1955) (explaining that "no man can be a judge in his own case").

[25] 5 C.F.R. § 2638.202(b) provides in part: "The head of each agency shall appoint an individual to serve as the designated agency ethics official and an individual to serve in an acting capacity in the absence of the primary designated agency ethics official (alternate agency ethics official)." These officials are responsible for a variety of tasks, including advising agency employees regarding matters that concern ethical standards. *Id.*

[26] 5 C.F.R. § 2635.107.

[27] *Id.*

[28] The ethical principles not only instruct employees to avoid violating the law, but also to avoid the appearance of such a violation. 5 C.F.R. § 2635.101(b). *See* Appendix B.

> Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship[29] is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

The importance of disclosing conflicts of interest and avoiding involvement in such actions is a constant theme throughout this report. Unlike some areas of personnel law that may be complicated, complying with 18 U.S.C. § 208 is very simple and clearly stated in the statute and regulations. If there is a conflict, an employee should disclose the conflict and take no role in the conflicted action unless the agency issues a specific waiver or exemption.[30] However, as noted in 5 C.F.R. § 2640.203(d), the provisions of 5 U.S.C. § 3110 (discussed in Chapter Two) cannot be waived.

[29] A covered relationship includes, but is not limited to, "a relative with whom the employee has a close personal relationship[.]" 5 C.F.R. § 2635.502.

[30] 18 U.S.C. § 208; 5 C.F.R. § 2635.502.

CHAPTER TWO: NEPOTISM AS AN ADMINISTRATIVE OFFENSE

While there are both criminal and civil laws pertaining to nepotism, the prohibitions under those laws differ, with the civil laws applying to a broader range of relatives and more specifically enumerated activities. Under 5 U.S.C. § 3110, an official[31] is not permitted to "appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement. . . any individual who is a relative[32] of the public official." Under 5 U.S.C. § 2302(a), additional personnel actions involving relatives are prohibited, including decisions about pay, benefits, awards, duties, responsibilities, and working conditions.

In addition to what an official cannot do, there is a restriction preventing the recipient from benefiting from his or her relative violating the nepotism statute. "An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual."[33] In other words, even if the person being hired did not commit an offense, the appointment still will not be allowed to stand if the appointment itself violated the nepotism statute.[34]

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[31] An official "means an officer (including the President and a Member of Congress), 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[.]" 5 U.S.C. § 3110(a)(2).

[32] A relative "means, with respect to a public official, 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." 5 U.S.C. § 3110(a)(3).

[33] 5 U.S.C. § 3110(b).

[34] *See Appointments - Nepotism*, Comp. Gen. No. B-204266 (Apr. 22, 1982) (1982 WL 27827), at *1 (explaining that an "[i]ndividual appointed in violation of anti-nepotism provisions of title 5, United States Code, is not entitled to retain salary received or to the payment of unpaid salary since

The procedures to remove a probationer for conditions that arose prior to appointment (such as nepotism in the selection process) differ from those to remove a person who was already a Federal employee or who has completed the probationary period.[35] Both sets of rules differ from those for removing a probationer for unsatisfactory performance or conduct after appointment.[36]

Nepotism as defined in section 3110 is one of 13 PPPs. A PPP occurs when an "employee who has [the] authority to take, direct others to take, recommend, or approve any personnel action" performs one of the 13 enumerated actions. The seventh PPP is to:

> 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

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5 U.S.C. sec. 3110 expressly prohibits the payment of pay from the treasury where an appointment violates that provision of law. However, [a] waiver [of recovery] of erroneous salary payments received [may be] granted under 5 U.S.C. sec. 5584 [when] there is no indication that the individual was at fault in the matter") (internal citations modified); *Tommy H. Grantham - Nepotism*, Comp. Gen. No. B-186453 (May 2, 1977) (1977 WL 13036), at *2 (explaining that because "the clear language of 5 U.S.C. 3110 prohibit[s] the appointment of an individual whose appointment has been advocated by a public official" and therefore "prohibit[s] such an individual from being paid money from the treasury," action could be initiated to recover more than 2 years of wages paid to the person whose appointment violated section 3110) (internal punctuation omitted); *To Mr. Richard G. Kleindienst*, Comp. Gen. No. B-163686 (Jul. 10, 1972) (1972 WL 6577), at *3 (explaining that the Congress's intent in section 3110 was that "any person found to be appointed, employed, promoted or advanced, in violation of these provisions would be required to be removed from the payroll[.]")

[35] *Compare* 5 C.F.R. § 315.805, *with* 5 U.S.C. § 7513. While the processes differ, in both sets of circumstances the individual has the right to: a notice of proposed action; an opportunity to respond; and the option to submit an appeal to MSPB. For more on determining if an individual is a probationer, *see* U.S. Merit Systems Protection Board, *Navigating the Probationary Period After Van Wersch and McCormick* (Sep. 2006), available at www.mpsb.gov/studies.

[36] *Compare* 5 C.F.R. § 315.804 (no advanced notice right for probationers when termination action is based on conduct or performance), *with* 5 C.F.R. § 315.805 (advanced notice and opportunity to respond to termination actions taken against probationers for pre-appointment reasons), *and* 5 U.S.C. § 7513 (advanced notice and opportunity to respond for adverse actions taken against employees).

> 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official[.][37]

The head of each agency is responsible for preventing PPPs, as well as compliance with – and enforcement of – the civil service laws. Additionally, "[a]ny individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation."[38] Supervisors and managers may take an adverse action, up to and including removal, to discipline an official who has committed nepotism.[39]

Additionally, because nepotism is a PPP, OSC may ask the Board to act to address an alleged violation of 5 U.S.C. § 2302(b)(7). The penalty imposed by the Board can include a removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand.[40] As explained in our report, *Prohibited Personnel Practices: Employee Perceptions*, when OSC files a complaint with MSPB regarding an alleged PPP, and MSPB finds that OSC has proven its case by preponderant evidence,[41] the employing agency has no say in the penalty that MSPB imposes.[42] An agency cannot protect an employee who commits a PPP, such as nepotism, if OSC opts to prosecute the case and the Board finds the charges supported by a preponderance of the evidence. In such cases, the Board, not the employing agency, decides the penalty.

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[37] 5 U.S.C. § 2302(b)(7).

[38] 5 U.S.C. § 2302(c).

[39] *See, e.g., Rentz v. U.S. Postal Service*, 19 M.S.P.R. 35, 37-39 (1984). The charge in *Rentz* was violating an agency policy that mirrored the language set forth at 5 U.S.C. § 3110.

[40] 5 U.S.C. § 1215(a)(3)(A)(i).

[41] A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

[42] *See* U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions* (2011), at 14, available at www.mspb.gov/studies.

Examples of Nepotism Warranting an Adverse Action

The Board has adjudicated several appeals by employees disciplined for violating the nepotism statute. These cases illustrate how seriously the Government takes allegations of nepotism and the degree to which a single instance of bad judgment can severely damage or end a career.

For example, in *Rentz v. U.S. Postal Service*, the appellant was a manager who wrote a Letter of Commendation for his wife's personnel file and evaluated his wife's potential for promotion. The Board held that it was irrelevant whether the appellant's assessment of his wife was accurate. The only question was whether he used his position to support his wife's attempts to obtain a promotion. Because he had done so, the Board held that the agency was justified in removing the appellant.[43]

In *Welch v. Department of Agriculture*, the agency reassigned and suspended a manager who directed a subordinate supervisor (who was not the selecting official) to "prepare a written justification for the temporary appointment of" the Director's son. The appellant was not in a position of authority over the selecting official, but the Board held that this "did not insulate the appellant from the provisions of" the nepotism statute. The Board found that the appellant's involvement in the process constituted nepotism and that the agency was justified in suspending the appellant for 60 days and reassigning him to a different position.[44]

In *Roberts v. U.S. Postal Service*, the appellant wrote a letter in which he urged his agency to allow his daughter to take the civil service exam, and if her grade was sufficient, advocated that she be hired to replace an existing employee prior to the expiration of that employee's probationary period. The Board held that the appellant attempted to use his public office to advocate the appointment of a relative to a civilian position in violation of 5 U.S.C. § 3110(b), describing his actions as "the very

[43] *Rentz v. U.S. Postal Service*, 19 M.S.P.R. 35, 37-39 (1984). As stated earlier, the charge in *Rentz* was violating an agency policy that mirrored the language set forth at 5 U.S.C. § 3110.

[44] *Welch v. Department of Agriculture*, 37 M.S.P.R. 18, 19-20, 22-23 (1988).

conduct that Congress was attempting to halt through the passage of 5 U.S.C. § 3110."[45]

An individual need not be a supervisor to run afoul of section 3110.[46] In a non-precedential decision, *Chapman v. U.S. Postal Service*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) upheld a Board decision that found removal appropriate for an HR specialist who hired her son for a temporary position. "Because [the] petitioner's act of nepotism bore directly on her duties as a Human Resources Specialist, it was reasonable for the Board to conclude that there was a sufficient nexus between petitioner's conduct and the efficiency of the service" to warrant her removal.[47]

Examples Where Nepotism Was Not Found

While the cases above show how easily an official can find himself or herself on the wrong side of the law, the cases below show that avoiding nepotism can be done. The key is for an official to be proactive in ensuring that he or she plays no role – no matter how minor – in personnel actions that could possibly involve his or her relatives.[48]

One of the best examples of the importance of an official recusing himself or herself from any process involving relatives can be found in *Wallace v. Department of Commerce*. Wallace was a GS-15 supervisor who became aware that her sister was interested in a vacant position that fell under Wallace's authority. Wallace notified senior

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[45] *Roberts v. U.S. Postal Service*, 12 M.S.P.R. 471, 475 (1982). Because of other findings, the Board remanded the case to the regional office to determine the appropriate penalty. *Id.* at 475-76.

[46] *See* 5 U.S.C. § 3110(a)(2) (explaining that the law applies to those with the authority to appoint an individual).

[47] *Chapman v. U.S. Postal Service*, 68 F.3d 488 (Fed. Cir. 1995) (non-precedential).

[48] Public employers outside the Federal Government tend to share this view. *See, e.g.*, http://www.maine.gov/bhr/rules_policies/policy_manual/6_3.htm, recommending that "*relatives of a candidate for appointment or promotion should not take any role whatsoever in a selection process*" because even if the selection is "technically correct, the perception of nepotism could also have a negative impact on all concerned." (Emphasis in original.)

management that her sister was interested in applying for the vacancy and informed them 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." When the time came to make a selection, a panel chose Wallace's sister and Wallace informed those involved that Wallace's supervisor would have to be the one to approve the panel's selection as Wallace had recused herself.[49]

Nevertheless, the OIG received anonymous allegations that Wallace had improperly hired her sister and conducted an investigation in which it concluded that Wallace had been improperly involved in the hiring of her sister. The agency removed Wallace for this alleged offense.[50] Because section 3110 does not permit a person to remain employed if his or her appointment was made in violation of section 3110, Wallace's sister was also removed.[51]

Wallace and her sister appealed their removals to MSPB, and the administrative judge (AJ) assigned to the case concluded that by permitting the hiring process to take place with a selection panel composed entirely of her subordinates, Wallace had violated 5 U.S.C. § 3110. Accordingly, the AJ sustained Wallace's removal and the cancellation of her sister's appointment.[52]

However, on petition for review, the Board reversed the decision and ordered both appellants reinstated. The Board held that Wallace's authority over those involved in

[49] *Wallace v. Department of Commerce*, 106 M.S.P.R. 23, ¶¶ 2-3 (2007).

[50] *Id.* at ¶¶ 4-6.

[51] *Id.* at ¶¶ 4-6, 9. *Cf. Keller v. Department of the Navy*, 69 M.S.P.R. 183, 187-88 (1996) (explaining that a removal of an individual on the basis that the appointment was the result of nepotism is a removal for pre-appointment reasons and thus the individual is entitled to notice and the opportunity to respond before such a removal occurs).

[52] *Wallace v. Department of Commerce*, 106 M.S.P.R. 23, ¶ 8 (2007).

the hiring action was not – standing alone – sufficient to constitute any of the actions prohibited by 5 U.S.C. §§ 2302(b)(7) and 3110(b).[53]

The Board noted that it previously had been the policy of the Government that a "relative of a public official may be appointed by a subordinate of the official if the official is in no way involved in the action and if the agency concerned has no regulations prohibiting such employment."[54] The Board found that the agency had no applicable regulation and therefore the Board used the Government-wide policy and focused its analysis on the question of whether Wallace was, in fact, involved in the action.[55]

The Board found persuasive the sworn statements by those closest to the hiring action that they knew of no involvement by Wallace and felt "no pressure, overt or otherwise" regarding the selection of Wallace's sister.[56] Accordingly, the Board ordered Wallace's removal canceled and her sister's appointment reinstated.[57]

Similarly, in *Alexander v. Department of the Navy*, the Board found that, because the employee played no role in the recruitment process, a charge of nepotism was not supported by the evidence. Alexander inquired as to the availability of positions for which his daughter might apply and arranged for his daughter's application to be submitted for consideration. The agency concluded that these were acts of "advocacy" that violated the nepotism statute. On appeal, the Board held that advocating for a relative means to recommend or refer a relative. The Board held that asking about the availability of a position is not the same as recommending that it be filled by a particular person. Similarly, the Board held that merely submitting an application for consideration, without any request as to what should be done with the application, did not constitute a recommendation. The Board found that there

[53] *Id.* at ¶ 10.

[54] *Id.* at ¶ 11.

[55] *Id.*

[56] *Id.* at ¶ 20.

[57] *Id.* at ¶ 23.

was no evidence that Alexander spoke in favor of, recommended, commended, or endorsed the employment of his daughter by his agency. Accordingly, the Board concluded that the appellant had not violated the nepotism statute.[58]

Exercising Poor Judgment

As explained earlier, OSC can file a complaint with MSPB, alleging that an employee committed a PPP and requesting disciplinary action against that employee. However, while *OSC's jurisdiction* is based on the commission of a PPP, for *an agency* to take an adverse action against an employee, it is not required that the employee specifically commit a PPP. What is required is that the agency prove by preponderant evidence that the efficiency of the service would be promoted by the adverse action.[59] This means the agency must prove it is more likely than not that the employee committed the charged offense and that the offense harmed the performance of his duties or some other legitimate Government interest.[60]

A violation of the nepotism statute need not be shown in order to warrant disciplinary action up to and including removal; all that is necessary is for the conduct to be harmful. As discussed in Appendix C: The Effects of Nepotism, data show that there tends to be a relationship between perceptions of nepotism and damage to organizations.

In *Reynolds v. Department of Agriculture*, the appellant was a meat inspector who inspected a company that employed his son. The agency did not charge the appellant with nepotism; rather he was charged with a failure to disclose his son's

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[58] *Alexander v. Department of the Navy*, 24 M.S.P.R. 621, 623-25 (1984).

[59] *See* 5 U.S.C. §§ 7503(a), 7513(a) (efficiency of the service requirement); 5 C.F.R. §§ 1201.3(a)(1) (the standard for an adverse action is that the action will promote the efficiency of the service); 1201.56(b)(ii) (action must be supported by preponderant evidence). *See also Schumacher v. U.S. Postal Service*, 52 M.S.P.R. 575, 579-80 (1992) (holding that an agency need not demonstrate a *specific* impact on the appellant's job performance or the efficiency of the service before taking action against him).

[60] *Lamour v. Department of Justice*, 106 M.S.P.R. 366, ¶ 11 (2007) (explaining the "efficiency of the service" requirement); 5 C.F.R. § 1201.4(q) (defining preponderance of the evidence).

employment with an entity that the appellant was responsible for inspecting.[61] The agency acknowledged that the appellant was a good performer, but claimed that the fact that the appellant did not realize that he had done something wrong caused the deciding official to believe that the appellant could find himself in another compromising position if he remained employed at the agency. The Board held that the appellant's removal was warranted for not disclosing the conflict of interest to his agency.[62]

The appellant in *Reynolds* lost his job despite being a good performer because the agency could not trust him to recognize conflicts of interest in the future.[63] Fortunately, an employee does not need to judge conflicts all alone and is not expected to do so. The employee is expected to recognize when there is enough of a risk that he or she should contact an ethics advisor and make a disclosure to a supervisor or other appropriate official.

Deliberately Helping Someone Else Commit Nepotism

Section 2302(b)(7) prohibits an employee from hiring or advocating for the hiring of his or her own relative. What about a different official who aids an employee to commit nepotism? According to OSC, such conduct may be prohibited by section 2302(b)(6).[64] It is also unethical.[65]

Section 2302(b)(6) prohibits employees from providing "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

[61] 5 U.S.C. § 2302(b)(7) applies to a "personnel action" and does not address unconnected contracting decisions. However, an agency policy specifically prohibited inspectors from having a direct or indirect financial interest that conflicted substantially, or appeared to conflict substantially, with their duties. *Reynolds v. Department of Agriculture*, 54 M.S.P.R. 111, 114 (1992).

[62] *Reynolds v. Department of Agriculture*, 54 M.S.P.R. 111, 112, 114-15 (1992).

[63] *Id.*

[64] Office of Special Counsel, Response to MSPB Questionnaire, May 29, 2015.

[65] *See* Appendix B: General Principles of Ethical Conduct for Federal Employees.

requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment." This PPP includes a prohibition against knowingly aiding another employee who is acting contrary to the laws, rules, or regulations in order to improve the employment prospects of an individual.[66]

Special Counsel v. Lee, while not a case involving nepotism, offers an illustration of how aiding an official to improperly hire or advance a preferred individual can be – for the person providing the aid – the commission of a 2302(b)(6) offense. Lee was an HR advisor who "intentionally assisted" a supervisor in the manipulation of a hiring action to give "an illegal preference" to an individual.[67] While it was the supervisor who wanted to promote the particular person, the evidence showed that Lee knew about her improper motives when he recommended to her how to accomplish her goal, thereby intentionally facilitating a violation of 2302(b)(6). The Board held that 5 U.S.C. § 2302(b)(6) includes "conduct that aids and abets another who is violating the statute." 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.[68]

Ultimately, in a case brought by OSC or an appeal of an agency adverse action, the decision as to whether any particular conduct qualifies as aiding and abetting in the commission of a PPP would rest with MSPB (and its reviewing courts). It should be noted that MSPB cannot provide an advisory opinion for a hypothetical situation and must wait for issues to be presented in a ripe case.[69] However, agencies and employees should not take lightly the position of OSC (the agency that prosecutes PPPs) that helping someone to commit nepotism may qualify as a (b)(6) violation. Additionally, as explained in the previous section, a charge of unethical conduct or conduct unbecoming a Federal employee can be the basis for an agency to impose an

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[66] *See Special Counsel v. Lee*, 114 M.S.P.R. 57 (2010), *rev'd in part sub nom. Beatrez v. Merit Systems Protection Board*, 413 F. App'x 298 (Fed. Cir. 2011).

[67] *Id.* at ¶¶ 34-35.

[68] *Id.* at ¶¶ 25, 32.

[69] *See* 5 U.S.C. §§ 1204(h); 7703(a)(1).

adverse action, up to and including removal from service, regardless of whether that conduct qualifies as a particular PPP.

The General Principles of Ethical Conduct for Federal Employees are rife with prohibitions pertinent to the question of aiding in the commission of nepotism or another PPP, including, but not limited to:

- Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities;
- Employees shall act impartially and not give preferential treatment to any private organization or individual; and
- Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards.[70]

While many offices need cooperative relationships between officials for the agency's mission to be accomplished effectively, the commission of a PPP or unethical conduct is *not* an area where an employee should cooperate.

Avoiding Nepotism

Whether the employee faces a possible issue under the criminal statute (18 U.S.C. § 208), the administrative statute for PPPs (5 U.S.C. § 2302(b)(7)), the agency's disciplinary authority to prevent damage to the efficiency of the service (5 U.S.C. §§ 7503(a), 7513(a)), or the ethics rules (5 C.F.R. § 2635.502), the means to reduce the risk of engaging in an impropriety tends to include: consulting an ethics advisor; disclosing the issue to a supervisor or other appropriate agency official; and acting to

[70] Excerpted from the General Principles of Ethical Conduct for Federal Employees (5 C.F.R. § 2635.101(b)).

recuse himself or herself from involvement in the personnel action.[71] An employee should not try to independently decide what is permissible in his or her own case.

In recent years, several OIGs reported that they found incidents of nepotism involving high-ranking officials.[72] That the OIGs could conclude that they found

[71] The clarity (or lack thereof) of notice regarding any rules that were violated in committing an offense is one of the factors the Board uses to determine if a penalty is appropriate. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981). The Board has not ruled in a case where the employee committed nepotism after obtaining advice from an ethics advisor that the conduct was permitted, and the Board cannot issue an advisory opinion. 5 U.S.C. § 1204(h). However, *Special Counsel v. Campbell*, involving a different type of prohibited activity, can illustrate the importance of obtaining advisory opinions as evidence of a good faith effort to act ethically. In *Campbell*, the employee consulted with an agency ethics advisor about whether running for political office would violate the Hatch Act (the law prohibiting employees from running for office in certain types of elections). The employee proceeded after being told that under his particular circumstances, his actions would not violate the law. However, his campaign did, in fact, violate the Hatch Act. The Board found that the employee's actions in seeking and following the advice of the ethics counsel, although not relevant to the merits of the complaint, was a factor in mitigation and ordered the lightest penalty that the law permitted to issue at that time, noting it lacked the authority to reduce the penalty beyond that level. *Special Counsel v. Campbell*, 58 M.S.P.R. 170, 174 (1993), *aff'd sub nom. Campbell v. Merit Systems Protection Board*, 27 F.3d 1560 (Fed. Cir. 1994). *Cf.* 5 C.F.R. § 2636.103(c) (an advisory opinion cannot "insulate the employee from civil or disciplinary action if his conduct violates any [ ] laws, rule, regulation or lawful management policy or directive" outside of 5 C.F.R. Part 2636).

[72] *See, e.g.*, U.S. Department of Justice, Office of the Inspector General, *Investigation of Allegations of Improper Hiring Practices at INTERPOL Washington*, Feb. 2015 (finding that an executive officer used his position to instruct his subordinate to include the executive officer's son in the 2011 INTERPOL Washington summer internship program); U.S. Department of Justice, Office of the Inspector General, *Report Regarding Investigation of Improper Hiring Practices in the Justice Management Division*, Jul. 2012 (finding that the HR Assistant Director advocated for her daughter's appointment; the Facilities and Administrative Services Staff (FASS) Director advocated for his son's appointment; the FASS Deputy Director and Assistant Director in HR Policy sought to aid each other's relatives to obtain positions; the Senior Advisor to the Deputy Assistant Attorney General for Human Resources and Administration sought employment for her son and niece; and the HR Director sought employment for his cousin and nephew); U.S. Department of Energy, Office of the Inspector General, *Alleged Nepotism and Wasteful Spending in the Office of Energy Efficiency and Renewable Energy*, DOE/IG-0888, Jun. 2013 (finding that an allegation was substantiated that a senior official sought employment for his three children); U.S. Department of Defense, Office of Inspector General, *Alleged Misconduct: Dr. Shirley A. Miles, Director, Department of Defense Education Activity* (Case No. 09L112622206), Jun. 30, 2011, at 4, 22, available at http://www.dodig.mil/fo/Foia/PDFs/MilesROIforreleaseRedacted.pdf (finding that the Principal Deputy Director and Associate Director for Education, a senior executive, "advocated for and caused the hiring of [a relative] in violation of 5 U.S.C. §§ 2302 and 3110"). *See also* David A.

nepotism involving so many different high-ranking officials in different agencies speaks to a risk that may increase as the rank of the official increases.

This may not be unique to the United States. The Canadian Public Service Commission (PSC) informed us that in those recent cases where the PSC found nepotism, it tended to occur at the Director or middle-management levels rather than the lower supervisory levels. There may be something inherent in higher-level positions that increases the risk of nepotism as the rank of the position increases.

Possible explanations for more instances of nepotism being found at the higher levels, particularly in the U.S. Government, include:

1. Political appointees lacking knowledge or understanding of the civil service rules.

2. Influence over hiring in a larger number of positions means a greater potential for a match between a position in the official's control and an official's relative being interested in that position.

3. Misunderstandings by subordinates as to what the official is asking them to do.

We asked respondents to the 2010 MPS the extent of their agreement with a statement that political senior executives in their organization respect the merit process when making hiring decisions, and then asked the same question regarding

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Montoya (Inspector General), Testimony before the U.S. House of Representatives Committee on Financial Services Subcommittee on Oversight and Investigations: "Exploring Alleged Ethical and Legal Violations at the U.S. Department of Housing and Urban Development," Feb. 4, 2015, at 5-6, available at http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmontoya-20150204.pdf (testifying that the former: (1) Chief Human Capital Officer; (2) Deputy Chief Human Capital Officer; (3) Director of Human Resources; and (4) Deputy Director of Human Resources, each committed nepotism by advocating for the hiring of their own close relatives); Department of Commerce, Office of Inspector General, *Review of Conduct by a High Ranking Official in the Hiring of a Trademark Organization Employee*, Jul. 8, 2014, at 32, 35, available at http://www.oig.doc.gov/oigpublications/13-0726_unredacted.pdf (finding that a Commissioner violated multiple regulations when she instructed her subordinates to help the boyfriend of a relative to obtain employment with the agency).

career senior executives. While only 38.7 percent agreed with the statement regarding the political executives, 47.3 percent of respondents agreed with the statement about their career executives.[73]

It may be that political appointees who lack experience under the Federal civil service need to be educated about the merit principles and prohibited personnel practices, including nepotism. The transition between presidential administrations may be a particularly high-risk period because when there is a new President, there also will be a large number of new appointments to positions that are political in nature and thus filled by many individuals who do not have prior experience within the civil service.[74] A strategy to educate these appointees about the civil service, including the PPPs, should be a part of any presidential transition plan.

The second item notes that a higher-ranking position can offer more opportunities to commit acts of nepotism than a position with authority over fewer jobs. But, if the officials who are put in such positions of power are informed of the rules and choose to behave ethically, a larger number of opportunities for nepotism need not equate to more nepotism occurring. Thus, the second item may be best addressed through a combination of education and appointing ethical people.

The last item, misunderstandings, may be a question of officials needing to be more cognizant of the importance of being clear about what they are saying and not assuming that others understood what the officials meant to say.

The higher an official is in an organization, the greater the likelihood that the official's questions or wishes may seem like, or be interpreted as, orders to a

[73] Those who work closely with the executives in question tend to have a better opinion of them. But, the gap between opinions about political and career executives respecting the merit process in hiring remains (63.2% versus 70.7% agreement) for those respondents who work closely with career or political executives.

[74] The Plum Book, a listing of positions available for appointment by the President outside of the civil service, is published after each presidential election, with the U.S. House of Representatives and the U.S. Senate alternating the responsibility for this publication. The 2012 edition contained a list of more than 8,000 jobs. *See* https://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2012/content-detail.html.

subordinate. If a senior executive says, "I hope my nephew makes the referral list," the executive may think he or she is simply expressing a hope, much like one might hope a sports team wins the game that weekend. However, to an HR specialist or selecting supervisor four levels down in the organization, that hope may sound more like a command. For instance, what does it mean if a GS-15 manager says to a GS-11 official involved in hiring for a position, "My niece is qualified for this job, right?" Does it mean that the GS-15 wants to know if the GS-15 has misread the qualifications standard, or does it mean that the GS-15 wants the position description altered or the crediting plan changed to ensure that it matches the qualifications of the niece?

We encourage officials to be sensitive to how expressing their interest in a position may be interpreted by others. For a listener who is subordinate to the speaker, there can be a world of difference between the two statements below:

1. I know someone who is interested in the internship; what instructions do we give to interested candidates so that they can apply?

2. My son is interested in the internship; how does he get this job?

The first question probably would be answered by giving the same information any interested caller would get (which is likely instructions on how to access the public USAJOBS vacancy announcement). The second question may carry an implication that the subordinate is expected to achieve this outcome.[75] The greater the difference in the level of power between the speaker and the listener, the greater the risk may be that the listener will be uncomfortable asking for clarification or feel unable to refuse what he or she heard as an instruction. This may be particularly true in cases where the listener is responsible for providing customer service to the

[75] *See Alexander v. Department of the Navy*, 24 M.S.P.R. 621, 623-25 (1984) (holding that an inquiry as to the availability of a position is not the same as recommending that it be filled by a particular person – the latter is prohibited by 5 U.S.C. § 2302(b)(7), while the former is not).

speaker, such as an HR specialist.[76] While it may be difficult for a person of lower rank to ask the official to be clearer, supervisors are responsible for setting the tone where subordinates will feel it is safe to ask for that clarification.

Officials should be extremely careful about expressing any interest in vacancies on behalf of another person. It might be best for the official to make no contact at all with anyone involved in the hiring action. However, if the official decides to make contact, the official should be very explicit at all times that he or she is only seeking publicly available information and that the inquiry is not an expression of any desire to appoint, employ, promote, advance, or advocate on the behalf of the other person. The official should not assume that someone else will understand the official's intentions. Even an official with good intentions can be disciplined for poor judgment in the exercise of those intentions.[77]

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[76] In response to the FOCS, only 74% of respondents agreed that their supervisor would support them if they refused to help a customer commit a PPP. U.S. Merit Systems Protection Board, *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs* (2015) at 34, available at www.mspb.gov/studies.

[77] *See, e.g., Shibuya v. Department of Agriculture*, 119 M.S.P.R. 537, ¶¶ 10, 12 (2013) (holding that a charge of poor judgment does not require the agency to identify any particular law, rule, or regulation being violated); *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282 (1998) (sustaining a charge of poor judgment despite the fact that the employee later changed his mind and did not follow through on the inappropriate idea), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999); *Horney v. U.S. Forest Service*, 29 M.S.P.R. 543, 547 (1985) (holding that while the appellant, a supervisor, did not intend the consequences of his actions, the agency did not err in finding that the appellant's poor judgement could not be condoned), *aff'd sub nom. Horney v. Department of Agriculture*, 809 F.2d 789 (Fed. Cir. 1986).

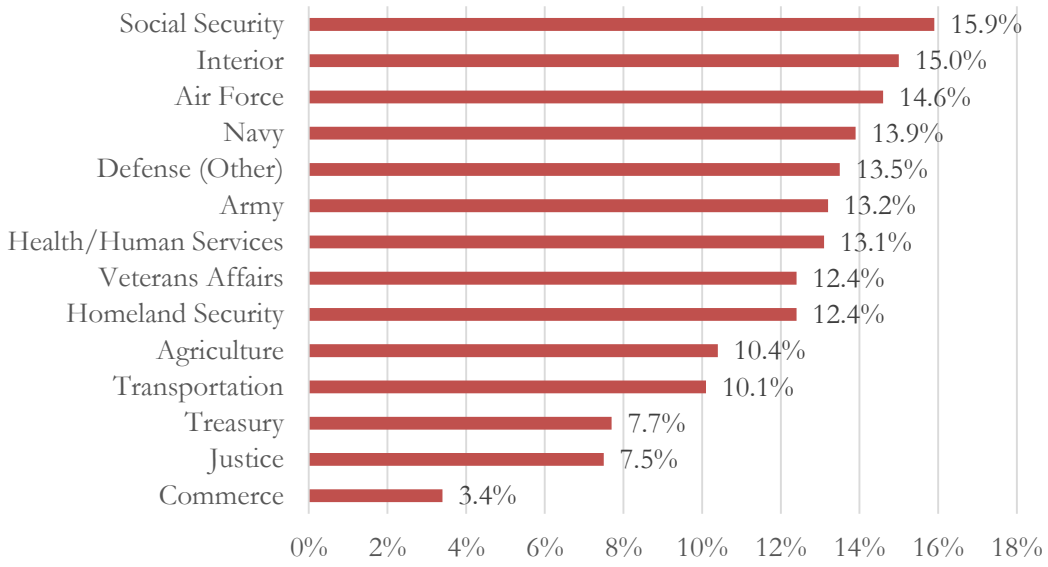
CHAPTER THREE: WHAT AGENCIES CAN DO TO REDUCE THE RISK OF NEPOTISM

This chapter discusses steps that agencies can take to reduce the potential that nepotism will occur. Some steps are more labor-intensive than others. Thus, for some options, agencies may need to assess their particular risk-levels to decide which methods are most appropriate.

Identifying a Nepotism Problem

For an agency to deal effectively with the risk of nepotism, it is helpful for an agency to know if it has an existing problem. One potential indicator of a nepotism problem is perceptions by employees that they have observed nepotism in their work units. MPS data show that the extent to which employees perceive nepotism greatly varies by agency. As shown in figure 1, of the agencies with at least 400 respondents to the 2010 MPS, perceptions that nepotism occurred ranged from a low of 3.4 percent to a high of 15.9 percent.

Figure 1: Percent of respondents who reported that an official in the work unit advocated for the appointment, employment, promotion, or advancement of a relative, by agency.



While perceptions by employees are an important warning sign that nepotism may be occurring, MPS data is not the only way that agencies can identify the possibility of a

nepotism problem. Signs that a greater investment is needed to reduce nepotism also may be found in internal agency surveys (including, but not limited to, exit surveys) indicating nepotism perceptions or OIG reports finding repeated instances of nepotism or a pervasive culture of nepotism.

Surveys can help agencies learn what is happening in different organizations, but to obtain information related to nepotism, the survey must offer a related question. Many OIG investigations rely upon an employee reporting wrongdoing, but the employee must choose to contact an OIG or be prompted by questions from an investigator. As with other types of wrongdoing, if the agency seeks this information and creates a culture where employees believe that reporting nepotism will result in change, the agency will have a better chance to get the information that it needs.[78]

There are other methods that might identify nepotism that has already occurred, such as auditing personnel action case files. But, to most efficiently direct agency resources, agencies need employees who see something suspicious to report it. Agencies should send the message that they want to know about issues such as nepotism.

It also is important for agencies not to use only one large-scale source of information to determine if nepotism is occurring. For example, as shown in figure 1, the 2010 MPS survey data for the Department of Justice (DOJ) indicated that, agency-wide, DOJ had a lower rate of perceptions of nepotism than most other large agencies. Yet, in 2012, DOJ's OIG reported "the third occasion in eight years" in which the OIG found illegal hiring practices involving a particular division in DOJ. The OIG reported finding multiple acts of nepotism in 2008-2010[79] – the same period covered

[78] *See* U.S. Merit Systems Protection Board, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*, Nov. 2011, at 16-17, available at www.mspb.gov/studies (explaining that when deciding whether to report wrongdoing, many employees factor in the likelihood that something will be done to correct the issue).

[79] U.S. Department of Justice, Office of the Inspector General, *Report Regarding Investigation of Improper Hiring Practices in the Justice Management Division*, Jul. 2012, at 2-7.

by the MPS. If DOJ limited itself to only agency-wide survey data, then it would have remained unaware of serious problems in one of its divisions.

An agency must perform an analysis on all of the information available to it, not just take a single source of information or an agency-wide result and assume it presents the entire picture. A single source of information can sound important warning bells, but it is unlikely to tell the whole tale in adequate detail.

Make Better Use of Human Resources

Customer service is considered an important competency for HR employees.[80] In our 2011 Fair and Open Competition Survey (FOCS), we asked HR employees if their supervisors would consider it "bad customer service" for an HR employee to report that a customer had committed a PPP. Twenty percent agreed that it would be considered bad customer service. Only 74 percent stated that their supervisor would support them if they refused to aid a customer in the commission of a PPP. Yet, when we asked representatives of HR Directors and CHCOs for their viewpoints, only one agency agreed that its HR supervisors would consider it bad customer service if an HR employee reported nepotism to an OIG.

It may be that most HR leaders gave us what they considered the "socially desirable" response or that they were unaware of how HR supervisors are perceived by their subordinates. In either case, because of HR's involvement in personnel actions, particularly recruitment actions, HR employees are in a particularly good position to help agencies prevent nepotism. But, HR employees need to believe that the agency considers it part of HR's job to prevent nepotism from occurring and that it is safe to intervene to prevent the PPP from happening. Agencies should create a culture where HR employees believe that if an official appears to be asking for something

[80] OPM defines the customer service competency as follows: "Works with clients and customers. . . to assess their needs, provide information or assistance, resolve their problems, or satisfy their expectations; knows about available products and services; is committed to providing quality products and services." U.S. Office of Personnel Management, *Multipurpose Occupational Systems Analysis Inventory - Close-Ended (MOSAIC)*, available at https://www.opm.gov/policy-data-oversight/assessment-and-selection/competencies/mosaic-studies-competencies.pdf.

improper, the socially and politically correct thing to do will be to seek clarification from that official and provide any necessary education. If this does not resolve the problem, there must be an environment in which the HR employees will feel that they can safely disclose wrongdoing.[81] Intervening to prevent PPPs, including nepotism, is an act of service to the agency. Agencies need to establish a culture where HR employees will trust that management will see it as such and that doing the right thing will not have negative consequences for the employee. Otherwise, an important opportunity for the agency to prevent improprieties may be wasted.

Certifications Regarding Relatives

Optional Form 306 (Declaration for Federal Employment)

The OF-306 asks an applicant a series of questions. Question 14 on the OF-306 asks the applicant, "Do any of your relatives work for the agency or government organization to which you are submitting this form?" If the answer is yes, the applicant is not automatically disqualified, but simply must explain the relationship so that the agency can ensure that the relationship did not affect the selection process.

We asked OPM to identify "all hiring authorities that require the use of the OF-306." OPM replied that, "The OF-306 is not tied to specific hiring authorities. It is used when an individual is applying for Federal employment."[82] As explained below, in practice, agency use of the form tends to vary by the circumstances.

We asked agencies about the circumstances under which they require applicants to complete an OF-306. In general, agencies reported using it for new appointments when the individual was not yet employed with the agency, regardless of appointing

[81] For recommendations on creating a positive culture for whistleblowing, *see* U.S. Merit Systems Protection Board, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*, Nov. 2011, at ii, available at www.mspb.gov/studies.

[82] U.S. Office of Personnel Management, Response to MSPB Nepotism Questionnaire, Jun. 22, 2015. OPM also stated that, "The OF-306 is not required for Executive branch hiring conducted outside of the provisions of title 5, United States Code." *Id.*

authority. However, when the individual already was employed with the agency, agencies were less likely to use the OF-306 for a new appointment.

The delegated examining unit (DEU) handbook and training materials state that an OF-306 must be signed at the "time of appointment."[83] There are no exceptions for individuals who are already employed with the agency. We asked agencies whether they require the completion of the OF-306 for DEU appointments under four different circumstances: (1) the individual had no prior civil service employment history; (2) the individual was reinstatement eligible; (3) the individual currently worked for a different Federal agency; and (4) the individual was currently employed with the hiring agency. All agencies that answered these questions reported that they require the OF-306 for DEU appointments under the first three sets of circumstances. However, of the 14 agencies that supplied a "yes" or "no" answer to the question regarding current employees, only 5 reported requiring the OF-306 for new DEU appointments, while 9 replied that they did not require it.[84]

We also asked about the use of the OF-306 for Pathways Recent Graduates.[85] All agencies that gave a "yes" or "no" answer reported using it for individuals who: (1) had no prior civil service employment history; (2) were reinstatement eligible; or (3) currently worked for a different Federal agency. But, nine agencies reported they

[83] U.S. Office of Personnel Management, Delegated Examining Operations Handbook, at 79, available at http://www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/deo_handbook.pdf. The training materials for agencies to obtain DEU certification state that the "OF 306, Declaration for Federal Employment contains a signature block with all of the necessary certifications. The signature on the OF 306 is required at the time of appointment." U.S. Office of Personnel Management, Delegated Examining Training, Module 4-12. Our questionnaire to agencies did not ask if they opt to also request the form be submitted at an earlier stage, such as with the initial application. However, responses from agencies to other questions indicate that some agencies may be requesting the OF-306 as part of the initial application process.

[84] "Not sure/not applicable" was another response option.

[85] The Pathways Recent Graduates Program is an appointment into the excepted service with later conversion to the competitive service. It may be substantially more valuable to individuals than their current positions because the program is designed to provide developmental experiences. *See* U.S. Office of Personnel Management, "Hiring Authorities: Students & Recent Graduates," https://www.opm.gov/policy-data-oversight/hiring-authorities/students-recent-graduates/.

did not require it for Recent Graduate appointments of current employees and only seven agencies reported requiring it under those circumstances.

We recommend that OPM provide clearer guidance to agencies regarding when the OF-306 is optional and when it is required. *If OPM decides that its use is optional for new appointments involving current employees*, agencies should assess the conditions under which new appointments within the same agency may still warrant the use of the OF-306. It also may be appropriate to use the OF-306 for reassignments or promotions that do not involve a new appointment. In addition to the question about relatives, the OF-306 asks about whether the individual has been convicted of a crime, whether he or she currently has any criminal charges pending, and whether he or she is delinquent on a Federal debt. That a person is already in a position with the agency does not alter the fact that a new appointment may involve different circumstances than the original appointment (such as a relative who is the selecting official for the new position or placing the individual in a position requiring a different degree of trust) or that the individual's personal circumstances may have changed since the initial appointment.

One of the disadvantages of waiting until the "time of appointment" to learn that the applicant has relatives employed by the agency is that the agency is faced with an individual who is expected to begin work that day, yet investigating the relationship to determine if nepotism has occurred may take time.[86] OPM may find that a better practice would be to instruct agencies to have the form completed at a stage after the initial application but before the time of appointment when the number of applicants is narrowed or has been limited to just the selectee.

[86] It also may be helpful to learn other information on the OF-306 prior to the time of appointment, such as the applicant's past convictions or terminations for cause from other jobs.

Using Certifications to Ensure Appointments Are Not Influenced by Nepotism

The "mechanism by which an agency chooses to ensure that nepotism has not occurred is a matter of that agency's internal policy."[87] We asked agencies how they handle "yes" responses on question 14 of the OF-306 to ensure that nepotism is not occurring. Most agencies reported that they have HR review the action to see if the relative is in the chain of command. Only a few indicated that they check to see if the relative *influenced* the selection process. This is an important distinction, because 5 U.S.C. § 3110 prohibits officials from acting to "appoint, employ, promote, advance, or advocate" for a relative. If an agency's process does not include investigating the possibility that personnel actions were influenced by advocacy, then the agency may fail to prevent nepotism. Two agencies particularly recognize this risk, because when a relative is hired, these agencies require that an additional form be completed.

One agency, the Smithsonian Institution,[88] has a form completed by HR. The form inquires, "Has the relative currently employed with the Smithsonian in any way advocated or advanced the hire of his/her family member?"[89] The action is reviewed by an HR specialist and must be approved by the agency's HR Director. Interviewing the selecting official would be a logical step for HR in such a process. (The Smithsonian also requires applicants to disclose as a part of their *application* whether they have any relatives employed by the agency.)

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[87] U.S. Office of Personnel Management, Response to MSPB Nepotism Questionnaire, Jun. 22, 2015.

[88] While the Smithsonian Institution uses the civil service employment system, the Smithsonian considers itself an instrumentality rather than an agency. For ease of reference and comparison to other civil service employers, this report refers to the Smithsonian as an agency. *See* http://www.si.edu/OHR/faq (explaining the relationship between the Smithsonian and Federal Government).

[89] "The Smithsonian employs individuals in Federal Civil Service and non-Federal (Trust) positions." For an explanation of trust positions and their similarity to civil service positions, *see* http://www.si.edu/OHR/faq.

The second agency, DOJ, goes a bit further with the certification process.[90] The applicant must certify in writing, under penalties of perjury, whether he or she has any relatives employed by the agency.[91] Unlike the OF-306, the DOJ form also covers *domestic partners, those with whom the applicant shares a household, and distant relatives with whom there is a close personal relationship*. While such relationships may not be covered by 5 U.S.C. § 2302(b)(7), they can be indicative of relationships that may pose ethical violations if the official becomes involved on behalf of the other person.

There is a separate DOJ form in which the selecting official must certify in writing whether the selection was influenced by an employee who is a relative of – or in a covered relationship with – the selectee. The selecting official also must certify whether or not there has been *contact* with an employee who is a relative of – or in a covered relationship with – the selectee, and if there has been contact, explain why the contact did not affect the selection. Copies of the forms are in Appendix D.[92]

DOJ's policy requires that both of these forms be reviewed by a senior official uninvolved in the hiring process before a final job offer can be made. If the senior

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[90] DOJ's process appears to be a result of the recommendations of its OIG in that OIG's 2012 report that found repeated acts of nepotism. *See* U.S. Department of Justice, Office of the Inspector General, *Report Regarding Investigation of Improper Hiring Practices in the Justice Management Division*, Jul. 2012, at Appendix A (agreeing to the recommendation by the OIG that certifications be used to ensure relationships between applicants and employees are disclosed).

[91] The form is required for employees moving to a new position within the agency as well as external applicants.

[92] The Justice Management Division (JMD) within DOJ uses a form for applicants that is essentially the same as the form used by the rest of DOJ. We have therefore only placed the DOJ form in Appendix D. However, the selecting official form differs a bit, and copies of both the DOJ and JMD forms for selecting officials are in Appendix D. The differences in the forms may be a result of JMD's role in the decision that such forms should be used in DOJ hiring. *See* U.S. Department of Justice, Office of the Inspector General, *Report Regarding Investigation of Improper Hiring Practices in the Justice Management Division*, Jul. 2012, at Appendix A (agreeing to the recommendation by the OIG that certifications be used to ensure relationships between applicants and employees are disclosed).

official who usually would perform this task is involved in the hiring action, an alternate independent official is to perform the review.[93]

Agencies may want to consider using forms such as the ones being used by DOJ. Additionally, agencies may benefit from expanding the form signed by the selecting official to include checking for inappropriate advocacy for unsuccessful applicants in addition to the selectee. However, as with any procedure, a cost-benefit analysis would be wise. There are already complaints that the hiring process is overly burdened with procedures and paperwork;[94] but, the more vulnerable a position is to nepotism or ethical violations, the more appropriate it becomes to apply additional protections, despite the additional time and effort it may require.

The DOJ form focuses on the selecting official. However, agencies can set their internal policies around their particular processes. For example, where an assessment or interview board is used, agencies could have members certify that:

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[93] Given how awkward it could be for a low-level HR specialist to handle any statements that a high-ranking official may have made an attempt at nepotism, placing a final review stage at a high level may be a useful precaution. The extent to which this is a suitable use of time for a high-ranking official may depend on any history the agency has of encountering situations in which individuals of higher rank appear to seek to influence the selection process. *See, e.g.*, U.S. Department of Justice, Office of the Inspector General, *Investigation of Allegations of Improper Hiring Practices at INTERPOL Washington*, Feb. 2015 (finding that an executive officer used his position to instruct his subordinate to include the executive officer's son in the 2011 INTERPOL Washington summer internship program); U.S. Department of Justice, Office of the Inspector General, *Report Regarding Investigation of Improper Hiring Practices by Senior Officials in the Executive Office for Immigration Review*, Nov. 2012 (finding that the Director of the Executive Office violated the nepotism statute by becoming involved in the employment of his niece); U.S. Department of Justice, Office of the Inspector General, *Report Regarding Investigation of Improper Hiring Practices in the Justice Management Division*, Jul. 2012 (finding that the HR Assistant Director advocated for her daughter's appointment; the Facilities and Administrative Services Staff (FASS) Director advocated for his son's appointment; the FASS Deputy Director and Assistant Director in HR Policy sought to aid each other's relatives to obtain positions; the Senior Advisor to the Deputy Assistant Attorney General for Human Resources and Administration sought employment for her son and niece; and the HR Director sought employment for his cousin and nephew).

[94] *See* Barack Obama, Presidential Memorandum, *Improving the Federal Recruitment and Hiring Process*, May 11, 2010, available at https://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process (asserting that "the complexity and inefficiency of today's Federal hiring process deters many highly qualified individuals from seeking and obtaining jobs in the Federal Government.")

(1) they are not related to – or in a covered relationship with – any of the candidates on the referral list; and (2) to the best of their knowledge, no one who is employed by the agency has attempted to influence the hiring or selection process to benefit a relative or covered individual. If appropriate, a similar form requiring a statement and signature by the HR staff involved in the personnel action could be used.[95] Just knowing that such a form would be used may help prevent nepotism by making potential advocates for relatives aware that others would be required to report inappropriate contact about the position.[96]

When deciding whether to require forms from HR staff and selection board members, an agency should weigh the extra burden of completing the paperwork against the level of risk of corruption of the hiring process if the additional precautions are not used.

Nearly all agencies reported that, when looking to see if nepotism occurred, HR performs the task. However, as explained above, DOJ has a senior reviewing official look at the forms. The Smithsonian reported that it has its "Office of Protection Services" look at the case. (This has the added advantage of ensuring that someone experienced with conducting investigations is performing oversight.) Agencies must determine which staff inside their particular agency is best suited to check for nepotism in such personnel actions. HR is not the only option.

Education and Guidance

Agency officials with authority over personnel matters have a responsibility under 5 U.S.C. § 2302(c) to prevent the commission of PPPs, including nepotism. OPM has the responsibility under 5 U.S.C. § 1104 to ensure compliance with the civil service

[95] To qualify for delegated examining authority, an agency "must establish written policies and procedures for accepting and processing applications from all applicants, including… delegated examining staff and their relatives or household members." U.S. Office of Personnel Management, Delegated Examining Training, Module 1-11 (capitalization and punctuation modified).

[96] Agencies could include a warning that a false statement may be grounds for discipline up to and including removal or debarment from Federal service, or even require that the signature be given under the penalties for perjury if the agency deems it necessary.

laws, rules, and regulations. According to the agency officials who answered our questionnaire, agencies and OPM may be able to better meet these responsibilities through the use of improved education and guidance to HR staff, supervisors, employees, and applicants.

Education and Guidance Provided by the Employing Agency

When we asked respondents to our agency questionnaire what they thought agency leadership could do to better prevent nepotism, the most common answer was better education for supervisors and managers about what nepotism is and the consequences for engaging in it. OSC added that agency leadership should send "a message from the top that retaliation and hiring violations will not be permitted."[97]

There also were recommendations for better training for HR employees on how to identify nepotism and what their responsibilities are when it is found. OSC informed us that "OSC strongly believes that HR employees play a critical role in preventing PPPs. Education and training for HR employees and management on their roles and responsibilities in preventing PPPs is one method of empowering and educating these officials."[98]

No agency mentioned or suggested the idea of training non-supervisory line employees. However, we believe that it may be helpful if agencies inform such employees about nepotism via ethics training and provide them with information about the ability to report wrongdoing, including nepotism, to OSC or agency OIGs.[99]

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[97] Office of Special Counsel, Response to MSPB Questionnaire, May 29, 2015.

[98] *Id.* (Capitalization modified).

[99] Compared to many other PPPs, such as retaliation for whistleblowing activities, the rate at which nepotism is reported to OSC is disproportionately low to the rate at which it is perceived. When asked why this might be the case, OSC stated that, "There are several possible explanations for this, the most likely being that workers are not aware they can file nepotism complaints with OSC, even if they perceive it as a problem." Office of Special Counsel, Response to MSPB Questionnaire, May 29, 2015. No FEAR Act training may be one opportunity for agencies to provide such information, as the agencies already are required by law to provide training to their

The appropriate frequency of the training and dissemination of information regarding nepotism may vary, but there are certain events that stand out as appropriate opportunities for particular types of education. These include:

- When a person is selected as a supervisor, manager, or senior executive (training and information sheet).
- When a political appointee begins work (training and information sheet).
- When an official is assigned to serve on a selection board (information sheet).
- When an official is given a referral list (information sheet).
- When a person is hired to serve as a staffing specialist or generalist in an HR office (training and information sheet).[100]
- When providing information to all employees on ethical behavior in general or the PPPs in particular (training and/or information sheet).

For employees, such training may cover how to recognize and report nepotism (as well as other PPPs), and, if applicable, how to avoid committing it. Training for supervisors, managers, and executives should address how to recognize, report, and avoid nepotism. It should also communicate to these officials that when an employee reports what he or she reasonably perceives as nepotism, he or she must be protected from retaliation for making such a report.[101]

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employees regarding their rights and remedies under whistleblower protection laws. *See* Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act, P.L. No. 107-174, §§ 201-202.

[100] Not all staffing specialists or generalists involved in issuing referral lists are trained to issue DEU certificates. Thus, while DEU training includes nepotism, these other HR officials also may need training when hired and refresher training at suitable intervals.

[101] *See* 5 U.S.C. § 2302(b)(8) (protecting employees against retaliation for disclosing information that an employee reasonably believes evidences any violation of any law, rule, or regulation).

Education and Guidance Provided by the U.S. Office of Personnel Management

When we asked agencies what OPM could do to help prevent nepotism, education was again the most common reply. Methods identified for OPM to accomplish this included providing: a lesson in HR University (HRU); a list of questions and answers (Q&As) on OPM's website pertaining to nepotism; and a desk guide covering nepotism and the other PPPs.

While title 5 permits OPM to "delegate, in whole or in part, any function vested in or delegated to the Director," the delegation comes with responsibilities for OPM. This includes that OPM shall: (1) "establish standards which shall apply to the activities of" an agency acting under a delegated authority; and (2) "establish and maintain an oversight program[.]" Additionally, the statute's authorization to delegate cannot be "construed as affecting the responsibility of the Director to prescribe regulations and to ensure compliance with the civil service laws, rules, and regulations." [102]

One of the most important things that OPM could do to educate agencies would be to create a public, well-organized system of guidance regarding personnel matters, with clarity on what is recommended and what is mandatory. Until the 1990s, OPM issued a "Federal Personnel Manual" (FPM) which was a highly-organized, 10,000-page book that offered guidance on agencies should implement most personnel laws and regulations. In accordance with the recommendations of the National Performance Review (NPR), the FPM was abolished and the sunset of the document was completed by 1994. [103] It was hoped that by ending the FPM, agencies would be more empowered to manage their own personnel systems. [104] Yet, the underlying laws that the FPM was intended to help implement remained in place.

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[102] 5 U.S.C. § 1104.

[103] General Accounting Office, *Management Reform: Implementation of the National Performance Review's Recommendations*, Letter Report, Dec. 5, 1994, GAO/OCG-95-1, available at http://www.gpo.gov/fdsys/pkg/GAOREPORTS-OCG-95-1/html/GAOREPORTS-OCG-95-1.htm. The General Accounting Office was later renamed the Government Accountability Office.

[104] The National Performance Review Report stated: "We must enable all managers to pursue their missions, freed from the cumbersome red tape of current personnel rules. The

In 1994, the General Accounting Office (today known as the Government Accountability Office) (GAO), noted that: "In general, the FPM and agency directives provide guidance to federal managers on how to interpret and apply the statutes pertaining to federal employment. To the extent that they can be simplified and automated, they could possibly better accomplish their purposes." [105]

Following the abolishment of the FPM, agency HR offices, facing steep cuts in resources, did not replace all the relevant information from the FPM with simplified and automated guidance. Additionally, OPM found that there were a variety of needs that it still had to meet, resulting in a multitude of different products. [106] For example, information on veterans' preference rights today may be found in OPM's VETGUIDE, OPM's Delegated Examining Operations Handbook, and OPM's regulations in title 5 of the Code of Federal Regulations. [107] Furthermore, both the

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President should issue a directive phasing out the Federal Personnel Manual and all agency implementing directives. The order will require that most personnel management authority be delegated to agencies' line managers at the lowest level practical in each agency. It will direct OPM to work with agencies to determine which FPM chapters, provisions, or supplements are essential, which are useful, and which are unnecessary. OPM will then replace the FPM and agency directives with manuals tailored to user needs, automated personnel processes, and electronic decision support systems." Vice President Al Gore, *Report of the National Performance Review*, Sep. 7, 1993, available at, http://www.nsf.gov/pubs/stis1993/npr93a/npr93a.txt.

[105] GAO, *Management Reform: Implementation of the National Performance Review's Recommendations*, Letter Report, Dec. 5, 1994, GAO/OCG-95-1, available at http://www.gpo.gov/fdsys/pkg/GAOREPORTS-OCG-95-1/html/GAOREPORTS-OCG-95-1.htm.

[106] Our Spring 2014 *Issues of Merit* newsletter discussed the sunset of the FPM and noted that today it can be difficult for OPM to organize and maintain the currency of its guidance in a decentralized system with complex laws. We also noted the need to distinguish between OPM's binding dictates and non-binding advice and recognized that making a distinction between advice and mandates in the FPM was difficult. *Issues of Merit*, "Looking for Guidance," Spring 2014, available at www.mspb.gov/studies.

[107] *See Vassallo v. Department of Defense*, 122 M.S.P.R. 156, ¶¶ 4, 8 (2015). The Board had rejected OPM's interpretation of the Veterans Employment Opportunities Act of 1998 in OPM's VETGUIDE, but granted reconsideration on the basis of deference to OPM's regulations issued in 5 C.F.R. §§ 335.106 and 315.611 because a regulation is a different authority than a guide. *See also*, U.S. Merit Systems Protection Board, *Veterans' Employment Redress Laws in the Federal Civil Service* (2014), at 41 (explaining that the Delegated Examining Operations Handbook has not yet been updated to comport with *Shapley v. Department of Homeland Security*, 110 M.S.P.R. 31 (2008), and

Board and the Federal Circuit still use the FPM as "useful guidance" [108] and a "valuable resource" [109] to construe the meaning of OPM regulations in the absence of more recent interpretations issued by OPM.

We asked OPM about the *Wallace* case, discussed earlier, in which the Board used the FPM to determine Federal policy, even though the FPM was ordered to sunset by 1994. [110] OPM said, "The policy in the FPM is OPM's policy unless subsequently changed. It is a gloss on the statute that is worthy of respect." [111] We later noted to OPM that they had made this statement and asked OPM for its position on using the FPM in other contexts. OPM replied, "It may be considered for guidance in conjunction with more current guidance from OPM. To the extent it is inconsistent with the current statute, and the current regulations, agencies must follow the law." [112] OPM also stated, "As we have previously noted, agencies and tribunals are free to continue to consult the FPM as to matters for which there is not superseding law or guidance." [113]

If the FPM remains OPM's policy, provides useful "gloss" to statutes, and may be considered guidance by agencies and tribunals, then we encourage OPM to make the FPM – or the parts that remain most relevant – easily available to agencies once again. The FPM was sunsetted for its imperfections, but the laws for personnel are even more complicated today than they were in 1994 and technology now offers

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therefore contains instructions that could cause an agency to violate a veteran's preference rights under the Veterans Employment Opportunities Act of 1998).

[108] *Drury v. Office of Personnel Management*, 79 M.S.P.R. 493, ¶ 8 (1998).

[109] *Markland v. Office of Personnel Management*, 140 F.3d 1031, 1036 (Fed. Cir. 1998).

[110] *Wallace v. Department of Commerce*, 106 M.S.P.R. 23, ¶ 11 (2007); 59 Fed. Reg. 66629 (explaining that the majority of the FPM was subject to "sunset" in 1993, with some portions remaining in effect for another year to permit time to establish regulations and manuals necessary in the absence of the FPM).

[111] U.S. Office of Personnel Management, Response to MSPB Nepotism Questionnaire, Jun. 22, 2015.

[112] U.S. Office of Personnel Management, Response to MSPB Adverse Action Questionnaire, Apr. 29, 2016.

[113] *Id.*

more options for presenting information. Agencies will be empowered to more easily exercise their flexibilities – an NPR goal – as well as comply with the rules if OPM provides a well-organized, centralized, public, automated system of guidance, that is regularly updated, with clarity regarding what is recommended and what is mandatory. Such a system also may help adjudicators to reach accurate conclusions about agency compliance with OPM's rules, as adjudicators, agencies, and employees will all be able to operate from the same source of guidance.

Fair and Open Competition

It is a merit principle that selection and advancement should occur "after fair and open competition which assures that all receive equal opportunity."[114] As explained below, avoiding perceptions of nepotism and opportunities for employees to commit nepotism may be additional reasons to hold fair and open competitions.

In our 2011 FOCS, we asked HR employees whether supervisors serviced by their offices "practice nepotism when it comes to hiring decisions (giving an unfair advantage to relatives)." Sixteen percent agreed that this occurred.

We also asked HR respondents about how often positions were open for at least two weeks and how often they were open to all sources. We used this data to create a vacancy announcement practices openness score, and compared those results to the rate of employee perceptions of nepotism from the 2010 MPS. As shown in the table below, 10 agencies were compared.[115]

[114] 5 U.S.C. § 2301(b)(1).

[115] Our criteria for inclusion in the comparison group was that the agency must have at least 100 respondents to the FOCS. This gave us 10 agencies to compare. The agencies with the highest and lowest rates of nepotism perceptions on the 2010 MPS reported earlier in this chapter were not in this comparison group because we did not have enough FOCS responses from those agencies for them to be included.

Table 1: Comparison of Perceptions Regarding Nepotism from MPS and Openness of Practices from FOCS.

	Percent of 2010 MPS Respondents Reporting Perception of Nepotism	Percent of 2011 FOCS Respondents Reporting Less Open Practices for Vacancy Announcements
Interior	15.0%	29.2%
Air Force	14.6%	80.3%
Navy	13.9%	71.3%
Defense (Other)	13.5%	57.0%
Army	13.2%	54.4%
Veterans Affairs	12.4%	45.9%
Homeland Security	12.4%	42.9%
Agriculture	10.4%	30.8%
Treasury	7.7%	23.6%
Justice	7.5%	44.4%

In general, the less open the vacancy announcement practices reported on the 2011 FOCS, the greater the rate of employee perception of nepotism for that agency on the 2010 MPS. Two agencies (marked with red boxes in the table), however, did not follow this pattern. Within the comparison group, the Department of the Interior had the highest rate of nepotism perceptions on the MPS, but the second lowest percentage of HR respondents on the FOCS reporting less open practices. DOJ had the lowest rate of nepotism perceptions, but its openness score would place it in the middle of the comparison group.

In other words, vacancy announcement openness cannot tell the whole story regarding fairness in competition. Rather, the data show that a vacancy announcement can take the agency only so far. A vacancy announcement shapes the pool of applicants, but it is only one step in the hiring process. From the creation of the duties, to the area of consideration, to the assessment of qualifications, all the way to the actual selection, the entire process must have integrity and be based on merit.

When we asked agencies what OPM could do to prevent nepotism, one agency suggested that OPM "closely monitor" hiring using non-competitive hiring

authorities and authorities that permit agencies to limit the pool of candidates, such as the Pathways Programs.[116] Unfortunately, OPM has very limited resources. From FY 2010 to FY 2014, the number of audits of DEUs performed by OPM dropped from 168 to 114. While greater oversight of other hiring programs to ensure fair and open competition within the rules of those authorities may be beneficial, it is important that the DEU audits not be unduly harmed as a result. Nevertheless, to the extent that OPM's resources allow it, greater auditing of hiring under non-competitive authorities could be beneficial for the prevention of PPPs, including, but not limited to, nepotism.[117]

Holding Officials Accountable

While OSC has the authority to prosecute PPPs,

> The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. . . Any individual to

[116] On March 25, 2016, OPM announced that it would "conduct a Governmentwide study on the use of excepted service hiring authorities, *excluding those covered by the Pathways Programs*." (Emphasis added). OPM intends to "assess excepted service staffing activities, subject to title 5 provisions, with regard to their effectiveness and compliance with law, regulation, and merit system principles." U.S. Office of Personnel Management, Memorandum from Ana A. Mazzi, Deputy Associate Director, Merit System Accountability and Compliance (Mar. 25, 2016) available at, https://www.chcoc.gov/content/upcoming-governmentwide-study-excepted-service-hiring-authorities. In light of concerns that have been expressed about Pathways, we recommend that OPM reconsider its decision to exclude Pathways from this study. Additionally, the expressed purpose of the study includes assessing compliance with merit system principles and the law. There is a merit system principle that opposes favoritism (5 U.S.C. § 2301(b)(8)(A)), and a PPP prohibiting the tailoring of the scope of competition to favor a particular candidate (5 U.S.C. § 2302(b)(6)). Thus, we recommend that OPM also consider including in its study competitive service authorities that have restricted applicant pools, such as the Veterans Employment Opportunity Act (VEOA).

[117] Nearly all PPPs touch on fair and open competition, including the prohibitions against: discrimination; soliciting or considering recommendations not based on personal knowledge of the applicant's qualifications; rejecting applicants based on political activity; obstructing the right of a person to compete; influencing a person to withdraw from competition; granting preferences or advantages in competition not authorized by law; failure to hire in reprisal for past whistleblowing activity or past appeal or complaint activity; discrimination for factors unrelated to successful performance on the job; violation of veterans' preference rights; or other actions that violate a law, rule, or regulation that implements the merit system principles. *See* 5 U.S.C. § 2302(b).

> whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation. [118]

Many of the positions that give an individual the responsibility to prevent PPPs also are positions that place the individual in a position to commit PPPs – namely those individuals to whom "the agency delegates authority for personnel management." [119] We asked OSC, if an individual who engages in nepotism is an executive, ethics officer, or HR officer, to what extent does OSC believe the individual's position should play a substantial role in determining the appropriate penalty for the infraction? OSC replied that "those with greater knowledge of – and responsibility for – enforcing these rules have a greater obligation to comply. The individual's position and their working knowledge of PPPs should play a substantial role in determining the appropriate penalty." [120]

This is consistent with the Board's *Douglas* factors, which state that when determining the appropriate penalty to impose, factors that agencies should consider include: the relationship of the offense to the employee's position, duties, and responsibilities; the employee's job level and type of employment (including any supervisory or fiduciary role); and the clarity with which the employee was on notice of the rules. [121]

Nepotism is: a serious offense that strikes at the heart of a merit-based civil service; harmful to the engagement and morale of the workforce; [122] damaging to the ability of an agency to effectively accomplish its mission; [123] and a violation of law. [124]

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[118] 5 U.S.C. § 2302(c).

[119] *Id.*

[120] Office of Special Counsel, Response to MSPB Questionnaire, May 29, 2015 (punctuation and capitalization modified).

[121] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981).

[122] *See* Appendix C: The Effects of Nepotism.

Agencies are responsible for protecting the efficiency of the service from these harms. Agency leaders must send the message that nepotism will not be tolerated, and, when necessary, act on that message through appropriate discipline, up to and including demoting offenders to remove their supervisory authority, removal from service, and even debarment from service if the circumstances warrant. [125]

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[123] Approximately 70 percent of agencies responding to our questionnaire strongly agreed that nepotism is harmful to an agency's ability to effectively perform its mission while less than 10 percent disagreed at all.

[124] 5 U.S.C. §§ 2302(b)(7), 3110.

[125] As noted in our recent report on due process, agency leaders determine the level in the organization at which decisions about discipline will occur. U.S. Merit Systems Protection Board, *What is Due Process in Federal Civil Service Employment?* (2015), at 42, available at www.mspb.gov/studies. A culture of nepotism should not be allowed to create immunity that prevents responsibility for nepotism. It may be necessary for agency leadership to think carefully about where the authority should reside for proposing and deciding upon such disciplinary actions.

CONCLUSION

Nepotism is a serious offense that damages the ability of the civil service to operate effectively, efficiently, and based upon merit. It also is unethical, illegal, and in some cases, criminal. The President, employing agencies, OPM, employees, and applicants all play a role in keeping nepotism out of the civil service. Below we discuss measures that each can take to limit the potential for nepotism to occur.

The President of the United States

Under 5 U.S.C. § 2302(c), the head of an agency is responsible for the prevention of PPPs. While some political appointees may already know about the rules for nepotism and the other PPPs, we recommend against assuming this knowledge is present. Transition plans between presidential administrations should include preparations to educate political appointees about the PPPs, including nepotism, and how PPPs such as nepotism can be avoided. Additionally, once a new administration is in place, there will be inevitable turnover. As new political appointees come to serve, they too may require education about the PPPs, including nepotism.

Agencies

Agency leaders and those to whom they have delegated personnel authorities are obligated to prevent nepotism. Means by which this may be achieved include:

1. Making better use of HR staff as partners to advise employees about the rules and to raise concerns if personnel actions seem suspicious.

2. Requiring additional certifications that personnel actions have not been improperly influenced when the agency deems such precautions necessary.

3. Educating executives, managers, supervisors, and employees about the rules of ethical conduct, including what it means to avoid nepotism and how they can achieve a merit-based workplace.

4. Ensuring that competitions for positions are as fair and open as is practical for the positions in question.

5. Holding employees accountable for their own conduct and for supervising the conduct of their subordinates.

U.S. Office of Personnel Management

OPM has delegated to Federal agencies much of the responsibility for hiring, including the prevention of nepotism. However, OPM should provide clear guidance to agencies on how they can accomplish this. OPM's guidance regarding when the OF-306 is to be used is either incomplete, unclear, not followed, or has some combination of these issues. We recommend that OPM provide better guidance to agencies regarding the circumstances under which the OF-306 is required.

OPM's guidance on some other matters involving nepotism (such as subordinates hiring relatives of their supervisors) is also unclear because, while purportedly still valid policy, it is contained in the FPM – a document that was sunset more than two decades ago. There were reasons for the sunset of the FPM, including concerns that it resulted in HR offices being more inflexible. However, one of the best attributes of the FPM was a central and organized source of guidance. We recommend that OPM consider how it can take advantage of changes in technology since the abolishment of the FPM in 1994 to maintain a public, well-organized reference system containing helpful guidance with clear distinctions between what OPM mandates and what it merely recommends that agencies consider. Nepotism policies are just one area that could benefit from such a system.

In the meantime, OPM might consider creating a nepotism Q&A section on its website, an HRU class on nepotism, or other educational materials.

Employees

Employees who engage in nepotism may face possible criminal (18 U.S.C. § 208) or administrative sanctions (5 U.S.C. §§ 2302(b)(7)), 1215(a), 7503(a), 7513(a)). The

conduct that qualifies as nepotism and the penalty for such conduct can differ between titles 18 and 5. Ultimately, an employee is responsible for his or her own actions. However, for both title 18 and title 5, an employee may greatly reduce the risk that the penalties will be applied to him or her if the employee follows three steps:

1. Consultation: If a situation could pose a conflict of interest, the employee should consult an ethics advisor. An employee should exercise good judgment by not trying to judge his or her own case.

2. Disclosure: The employee should disclose the issue to a supervisor or other appropriate agency official so that the agency can decide the proper approach. An employee's silence can damage the ability of the agency to trust the employee in the future.

3. Recusal: An employee should ask to recuse himself or herself from involvement in the personnel action. The best way not to become entangled in questionable conduct is for the employee to entirely avoid involvement in such situations whenever possible.

Applicants

Regardless of the hiring authority being used, agencies will likely ask external (and sometimes internal) applicants whether they have a relative employed by the agency. It is extremely important that applicants answer such questions candidly. The Federal Government takes the integrity of the hiring process very seriously. Merely having a relative employed by the same agency does not automatically disqualify an applicant; but an individual can be fired for unethical conduct that occurs before or after the appointment begins.[126] A lack of candor or outright falsehood in an

[126] *See* 5 C.F.R. §§ 315.803-805.

application can result in the person's removal or even debarment from Federal service.[127] Honesty is truly the best policy.

[127] The Board has specifically found that intentional misrepresentations in application documents raise serious doubts regarding an individual's honesty and fitness for employment and are sufficient to support a negative suitability determination, even where only one incident of falsification is at issue. *McClain v. Office of Personnel Management*, 76 M.S.P.R. 230, 241 (1997) (finding that separation and debarment was an appropriate result when the individual intentionally falsified an answer on the OF-306). *See Christopher v. Department of the Army*, 107 M.S.P.R. 580, ¶¶ 17, 20 (finding that removal may be warranted when an employee revealed only some but not all requested information on his application forms), *aff'd*, 299 F. App'x 964 (Fed. Cir. 2008).

APPENDIX A: RELEVANT STATUTES

18 U.S.C. § 208

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest— [s]hall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply—

> (1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;
>
> (2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies. . .

18 U.S.C. § 216

(a) The punishment for an offense under section 203, 204, 205, 207, 208, or 209 of this title is the following:

> (1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.
>
> (2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

(b) The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater. The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

5 U.S.C. § 3110

(a) For the purpose of this section—

(1) "agency" means—

(A) an Executive agency;

(B) an office, agency, or other establishment in the legislative branch;

(C) an office, agency, or other establishment in the judicial branch; and

(D) the government of the District of Columbia;

(2) "public official" means an officer (including the President and a Member of Congress), 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; and

(3) "relative" means, with respect to a public official, 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.

(b) A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.

(c) An individual appointed, employed, promoted, or advanced in violation of this section is not entitled to pay, and money may not be paid from the Treasury as pay to an individual so appointed, employed, promoted, or advanced.

(d) The Office of Personnel Management may prescribe regulations authorizing the temporary employment, in the event of emergencies resulting from natural disasters or similar unforeseen events or circumstances, of individuals whose employment would otherwise be prohibited by this section.

(e) This section shall not be construed to prohibit the appointment of an individual who is a preference eligible in any case in which the passing over of that individual on a certificate of eligibles furnished under section 3317(a) of this title will result in the selection for appointment of an individual who is not a preference eligible.

5 U.S.C. § 2302(a)-(c)

(a)

(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination;

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) "agency" means an Executive agency and the Government Printing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);

(ii)

(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or

(iii) the Government Accountability Office; and

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

(i) any 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.

(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) any 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) any violation (other than a violation of this section) 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—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

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

(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;

(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; or

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest

of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

5 U.S.C. § 2301

(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 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.

(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.

Appendix B: General Principles of Ethical Conduct for Federal Employees

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

Source: 5 C.F.R. § 2635.101(b).

APPENDIX C: THE EFFECTS OF NEPOTISM

In MSPB's 2011 report on the prohibited personnel practices, we noted that seeing a PPP has an effect on the motivation and engagement levels of employees directly affected by the action as well as employees who observe the action without being directly affected.[128] MSPB defines engagement as a heightened connection between employees and their work, their organization, or the people they work for or with. The greater an employee's level of engagement, the more likely it is that the employee will go above and beyond the minimum required and expend discretionary effort to provide excellent performance.[129] Motivation interacts with engagement, as motivation drives *what* employees do, *how* they do it, *how hard* they will try, and *how long* they will persist in a given endeavor.[130]

As shown in figures 2 and 3 on the next page, data from the 2010 MPS show that engagement levels and reports of motivation are lower when employees report a perception of nepotism.[131]

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[128] U.S. Merit Systems Protection Board, *Prohibited Personnel Practices* (2011), at 37, available at www.mspb.gov/studies.

[129] For more on the advantages of having an engaged workforce, please see our 2008 report, *The Power of Federal Employee Engagement*, available at www.mpsb.gov/studies.

[130] U.S. Merit Systems Protection Board, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* (2012), at 3, available at www.mspb.gov/studies.

[131] The engagement levels in figure 2 were calculated based upon a respondent's combined responses to MSPB's engagement questions, which form the engagement scale. For a copy of the questions that form the engagement scale, *see* U.S. Merit Systems Protection Board, *Prohibited Personnel Practices* (2011), at 37, available at www.mspb.gov/studies. The reported motivation levels in figure 3 come from respondents' responses to a single question on the MPS asking employees whether they feel highly motivated in their work.

Figure 2: Levels of engagement among those respondents who agreed that they perceived that an official in the work unit advocated for the appointment, employment, promotion, or advancement of a relative.

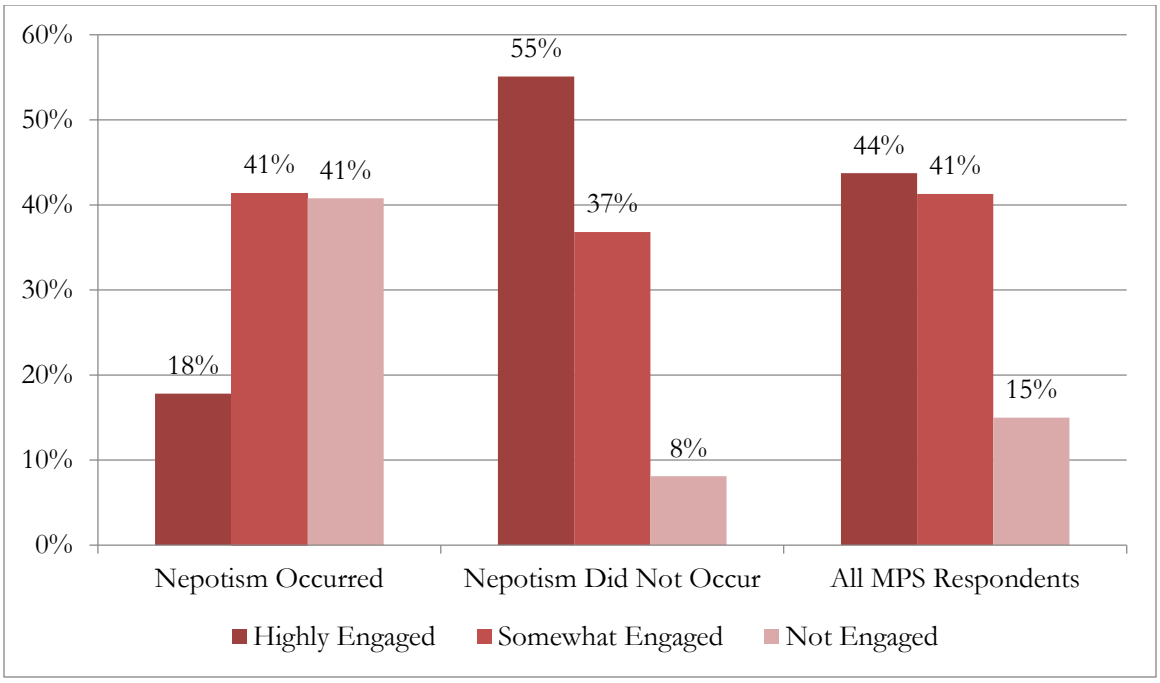
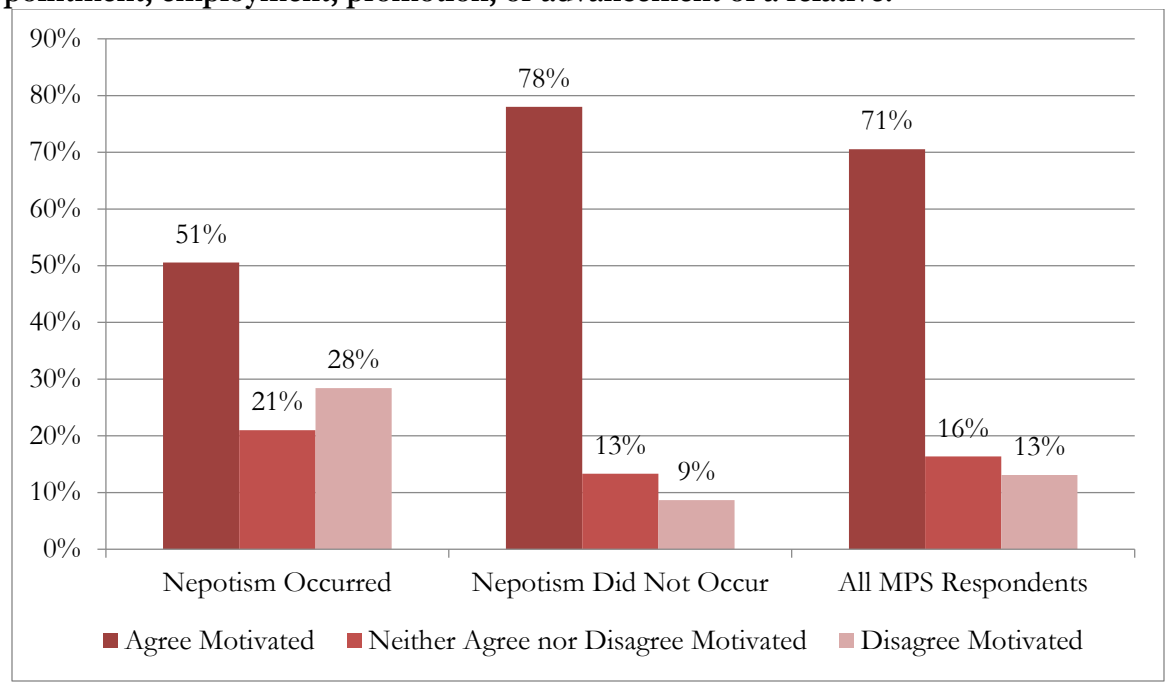


Figure 3: Levels of agreement that the employee feels highly motivated among those respondents who agreed that they perceived that an official in the work unit advocated for the appointment, employment, promotion, or advancement of a relative.



Our agency questionnaire asked whether the respondents agreed with the statement, "When nepotism occurs, it is harmful to an organization's morale." While the strength of agreement varied by agency, no agency disagreed. [132] We also asked if they agreed with the statement, "When nepotism occurs, it is harmful to an organization's ability to effectively perform its mission." While the strength of agreement again varied by agency, no agency disagreed. [133]

Officials who desire that their organizations run efficiently and effectively should take steps to ensure that nepotism does not occur. Disciplining the offender is only one method available to agencies; prevention is better.

[132] Two-thirds of respondents strongly agreed with this statement regarding morale.

[133] Over half of respondents strongly agreed with this statement regarding effective performance of the mission.

APPENDIX D: DEPARTMENT OF JUSTICE SAMPLE DISCLOSURE FORMS

Applicant / Employee Disclosure Form

APPLICANTS: Thank you for your interest in the Department of Justice (DOJ). Having a relative already employed at DOJ does not affect our consideration of you for employment; however, the information requested below is necessary to help DOJ assure that all hiring decisions are free of inappropriate influence by relatives employed in the Department and otherwise are consistent with applicable laws and policies.

EMPLOYEES: You must submit this certification in connection with a personnel action by which you will move to a different position than the one you currently encumber.

Merit System Principles set forth in Section 2301(b) of title 5, U.S.C. provide guidance on federal personnel management. 5 U.S.C §§ 2302(b) and 3110(b) contain provisions identifying as a prohibited personnel practice engaging in nepotism (i.e., to appoint, employ, promote, or advance relatives; or advocate for the same) by public officials. It is also a prohibited personnel practice to grant a preference or advantage not authorized by law, rule or regulation to an employee or applicant for the purpose of improving or injuring any individual's prospects for employment. Consistent with these laws and applicable ethics requirements, you are asked to identify relatives or other covered individuals (defined below) who work anywhere in the Department. For purposes of this form, the term "relative" includes a DOJ employee's or applicant's spouse, parent, guardian, grandparent, sister/brother (including step/half relationships), child/grandchild (including biological, adopted, foster, or step child, legal ward, or child for whom the employee/applicant stands *in loco parentis)*, in-law, aunt, uncle, nephew, niece, or first cousin. "Other covered individuals" include a domestic partner, more distant relatives than those listed above with whom the employee/applicant has a close personal relationship, or anyone currently residing in the employee's/applicant's household, even temporarily.

- **I do ____/ do not ____ have a relative or other covered individual who works for the Department.** Relevant details are provided below and on an attached page if necessary.
- **Additional information is___ / is not___ attached.**

Name	Relationship	Department of Justice Organization

SIGNATURE, CERTIFICATION, AND RELEASE OF INFORMATION

YOU MUST SIGN THIS DOCUMENT. Read the following carefully before you sign.

- A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or imprisonment (U.S. Code, title 18, section 1001).
- **I certify** that, to the best of my knowledge and belief, all of my statements are true, correct, complete, and made in good faith.

Applicant / Employee Name (Please Print)	
Applicant / Employee Signature	**Date Signed (Month, day, year)**
Reviewing Official Signature	**Date Signed (Month, day, year)**

Please submit this form to _____

Privacy Act Notice: The information provided on this form is covered by and will be used and maintained in accordance with the Privacy Act of 1974, as amended.

DOJ Selecting Official
Acknowledgment and Disclosure Form

Selecting / Requesting Official Name:	**Applicant / Employee Name:**
Organization/Component:	**Position:**

I am familiar with the Merit System Principles found in Section 2301(b) of title 5, U.S.C. which provide guidance on federal personnel management, including 5 U.S.C §§ 2302(b) and 3110(b), which contain provisions identifying nepotism as a prohibited personnel practice. Nepotism is engaging in action to appoint, employ, promote, or advance relatives, or advocate for any of these actions, by a public official.

I understand that:

- It is a prohibited personnel practice to grant a preference or advantage not authorized by law, rule or regulation to an employee or applicant for the purpose of improving or injuring any individual's prospects for employment.
- The applicable ethics rules prohibit me from taking official action to affect my own financial interest, or misusing my official position to promote a private interest, for example, by recommending my domestic partner or a member of my household for a position at DOJ.
- For purposes of this form, the term "relative" includes a Department of Justice (DOJ) applicant's or employee's spouse, parent, guardian, grandparent, sister/brother (including step/half relationships), child/grandchild (including biological, adopted, foster, or step child, legal ward, or child for whom the employee stands in loco parentis), in-law, aunt, uncle, nephew, niece, or first cousin. "Other covered individual" includes a domestic partner, a more distant relative not included above with whom the employee has a close personal relationship, or anyone currently residing in the employee's or applicant's household, even temporarily.

I understand that before I select a candidate for employment with DOJ or other personnel action (transfer, reassignment, competitive promotion, or similar action), I must disclose on this form my knowledge of a relative or other covered individual of an employee of DOJ, by responding to each of the following:

1. I certify that to the best of my knowledge:
The individual I am selecting / requesting does not have a relative or other covered individual employed at DOJ;
_____ (Initial Here)

OR

The individual I am selecting / requesting has a relative or other covered individual employed at DOJ. _____ (Initial Here)

2. If the individual I am selecting / requesting has a relative or other covered individual employed at DOJ, I certify that my selection decision has not been influenced by either the selectee's relationship with the DOJ employee or any communication by the DOJ employee relating to the personnel action. _____ (Initial Here) _____ Not Applicable (i.e., I have no awareness of a relative or other covered individual)

3. I am aware that individuals in the hiring process, including myself, may have had contact with a relative or other covered individual of the selectee. If "yes", I am satisfied it did not affect the personnel action and have attached a brief explanation of the circumstances of which I am aware.
_____ Yes _____ No. If Yes, I have attached an explanation.

Names of relatives or other covered individuals known to work for DOJ:

Relative's/Individual's Name	**Relationship to Employee**	**DOJ Organization**

As the selecting/requesting official, I certify that the selection was made, or other personnel action was taken, in compliance with Merit System Principles, and the applicable ethics rules.

_____ _____

Selecting / Requesting Official Signature & Date Reviewing Official Signature & Date

Please submit this form to _____
Privacy Act Notice: The information provided on this form is covered by and must be used and maintained in accordance with the Privacy Act of 1974, as amended.

Rev. November 2014

Selecting Official
Acknowledgment and Disclosure Form

Selecting / Requesting Official Name:	**Applicant / Employee Name:**
Organization/Component:	**Position:**

Merit System Principles are found in Section 2301(b) of title 5, U.S.C. and provide guidance on federal personnel management. 5 U.S.C §§ 2302(b) and 3110(b) contain provisions identifying as a prohibited personnel practice engaging in nepotism (i.e., to appoint, employ, promote, or advance relatives; or advocate for the same) by public officials. It is also a prohibited personnel practice to grant a preference or advantage not authorized by law, rule or regulation to an employee or applicant for the purpose of improving or injuring any individual's prospects for employment. Consistent with these laws and applicable ethics requirements, this form contains the certification of the selecting official in applicable personnel actions that the selection was made and/or the action was taken in compliance with Merit System Principles. For purposes of this form, the term "relative" includes a Department of Justice (DOJ) applicant's or employee's spouse, parent, guardian, grandparent, sister/brother (including step/half relationships), child/grandchild (including biological, adopted, foster, or step child, legal ward, or child for whom the employee stands *in loco parentis)*, in-law, aunt, uncle, nephew, niece, or first cousin. "Other covered individuals" include a domestic partner, a close personal friend, more distant relatives than those listed above with whom the employee/applicant has a close personal relationship, or anyone currently residing in the employee's or applicant's household, even temporarily..

CERTIFICATION: I have reviewed these provisions and their prohibitions relating to the hiring of relatives or other covered individuals. I understand that before I select a candidate for employment with the DOJ or other personnel action, I must disclose any proposed selection of or action taken regarding an individual for employment, transfer, reassignment, competitive promotion, or similar action who is a relative or other covered individual of an employee of DOJ.

(NOTE: Either Box 1 or all of Box 2 must be completed.)

1. To the best of my knowledge, I certify that the individual I am selecting / requesting is not a relative or other covered individual of a DOJ employee.

_____ (Initial Here)

2. a. The individual I am selecting / requesting is a relative/other covered individual of a DOJ employee. I certify that I have made inquiry of the relevant individuals involved in the selection process, and that neither the relationship with the DOJ employee nor any communication by the DOJ employee has influenced the selection decision.

_____ (Initial Here)

2. b. Prior to, or during the selection process: 1) I am aware that individuals in the hiring process may have had contact with a relative or other covered individual of the selectee (as defined above); and/or 2) A relative or other covered individual of the selectee has been in communication with me regarding this selection.

____Yes (if yes, attach explanation) ____No _____ (Initial Here)

Explanation of "yes" in #2.b., and/or the relative(s)/other covered individual(s) who works for DOJ is/are:
(Additional information ***is ___ / is not ___*** *attached.)*

Relative's/Individual's Name	**Relationship to Employee**	**DOJ Organization**

_____ _____

Selecting Official Signature & Date Reviewing Official Signature & Date (DAAG/PMP)

Please submit this form to Assistant Director, JMD/HR Services, 2CON, Suite 9W.300.
Privacy Act Notice: The information provided on this form is covered by and must be used and maintained in accordance with the Privacy Act of 1974, as amended.

Rev. November 2014