Favortism: Do federal employees know it when they see it?

“I know it when I see it.”That was what U.S. Supreme Court Justice Potter Stewart said in the 1964 case of Jacobellis v. Ohio, when he declined to provide a definition for a type of sexually obscene film that is not constitutionally protected. Stewart’s justification underscores how certain materials or practices can seemingly escape adequate description and how their identification is largely a subjective matter.A recently-released Merit Systems Protection Board (MSPB) report on perceptions of favoritism makes clear that many federal employees are applying Stewart’s I-know-it-when-I-see-it standard to this prohibited personnel practice (PPP).The MSPB report shows just how widespread perceived favoritism is in the federal workplace. For example, 28 percent of employees surveyed said they believe their supervisors engage in favoritism and 30 percent of human resources management employees likewise reported a belief in supervisory favoritism.As chairman of the MSPB, I frequently heard individual right of action appeals from whistleblowers who had made disclosures about their supervisors’ alleged engagement in favoritism and who later claimed to have been victims of reprisal. It became clear to me that cases involving allegations of favoritism present issues over definition and personal perception.For starters, the section of statute that defines the merit system principles, which include the “protection against…personal favoritism,” does not define “favoritism.” In its report, the MSPB defined favoritism by borrowing from a subsequent section of law that prohibits the granting of “any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment…for the purpose of improving or injuring the prospects of any particular person for employment.”I would add that favoritism can sometimes be treated as an abuse of authority, which in Pasley v. Department of the Treasury (2008) the Board defined as “an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or preferred other persons.”The perception issues may arise, as the new report suggests, from the fact that the “typical work environment features ambiguity that precludes full confidence in supervisors making merit-based decisions.” But as MSPB chairman, I found that supervisors can often hide in this ambiguous grey area between perceived favoritism and actual favoritism. While the MSPB’s report provides valuable insights on why employees believe this PPP is so prevalent in the federal workplace, I worry that this strong emphasis on perception takes away from the fact that favoritism is an actual problem. Painting the problem as something in the heads of employees could dissuade them from reporting instances of favoritism to the Office of Special Counsel or their agency’s inspector general.Due to the subjective nature of many supervisory decisions, it is often difficult to pin their actions as definitive examples of favoritism. Rare are those cases when an adjudicating body can describe an agency supervisor’s actions as constituting an “old boy network in operation” involving “undiluted favoritism,” as the 1st U.S. Circuit Court of Appeals did in Foster v. Dalton (1995).Nevertheless, federal employees should not refrain from blowing the whistle on a supervisor’s abuse of authority or engagement in favoritism because they lack black-and-white evidence of the PPP. As I noted in the decision I co-authored for Pasley, the

Whistleblower Protection Act (WPA) does not establish a “de minimis [or minimum] standard for abuse of authority as a basis of a protected disclosure,” meaning the WPA should protect them against reprisal so long as they reasonably believe this alleged PPP occurred.I agree with the MSPB in its report that improving transparency will decrease perceptions of favoritism. But I would encourage employees who encounter what reasonably appears to be favoritism, whether in the form of pre-selection or preferential treatment, to call it as they see it.