

U.S. OFFICE OF SPECIAL COUNSEL

Memorandum

March 23, 2012

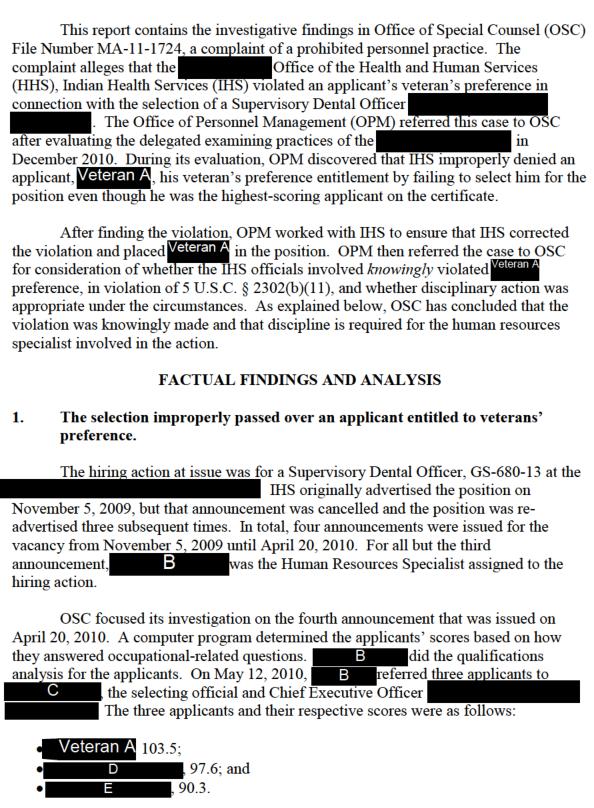
U.S. Office of Special Counsel Report of Prohibited Personnel Practice OSC File No. MA-11-1724 (OPM Referral)

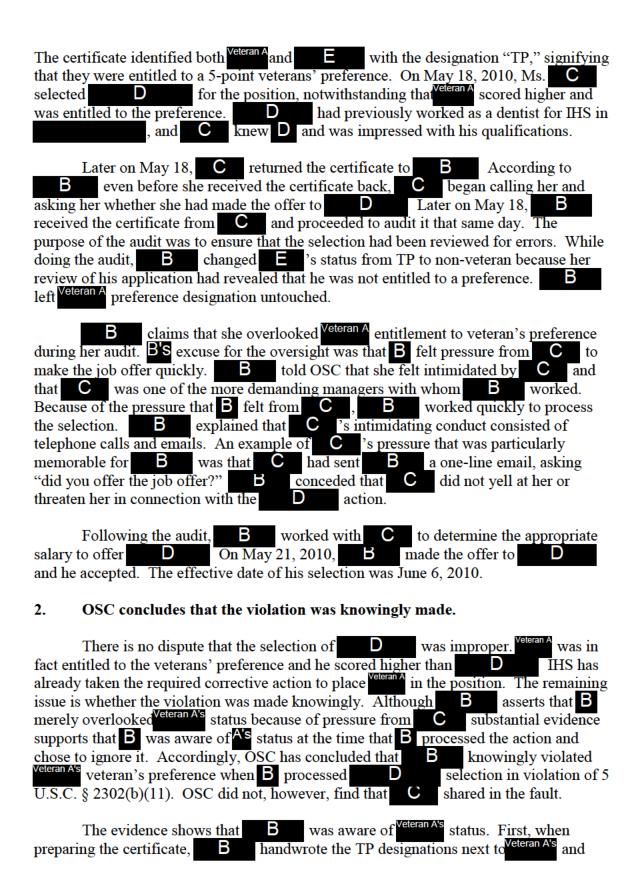
Attorney

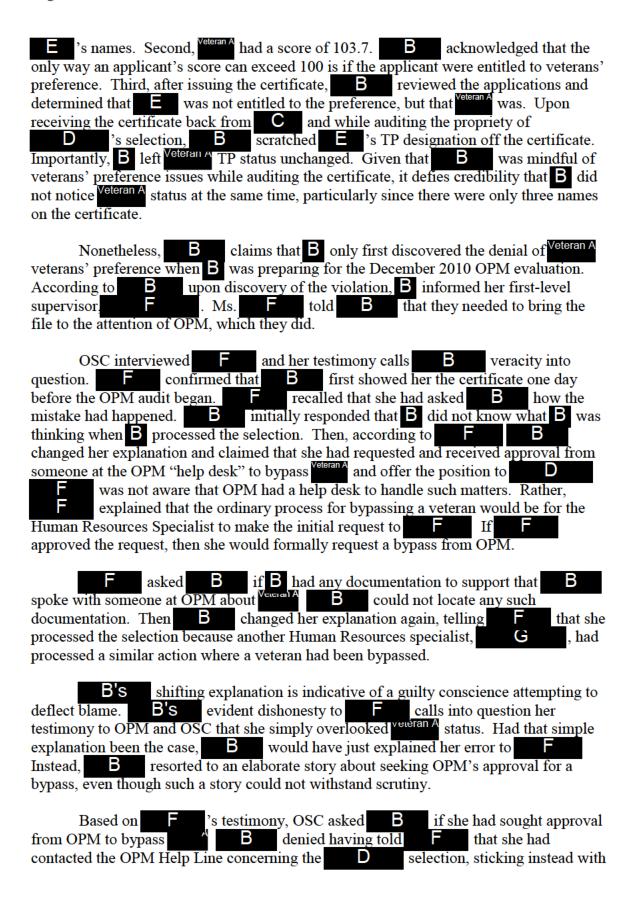
Investigator

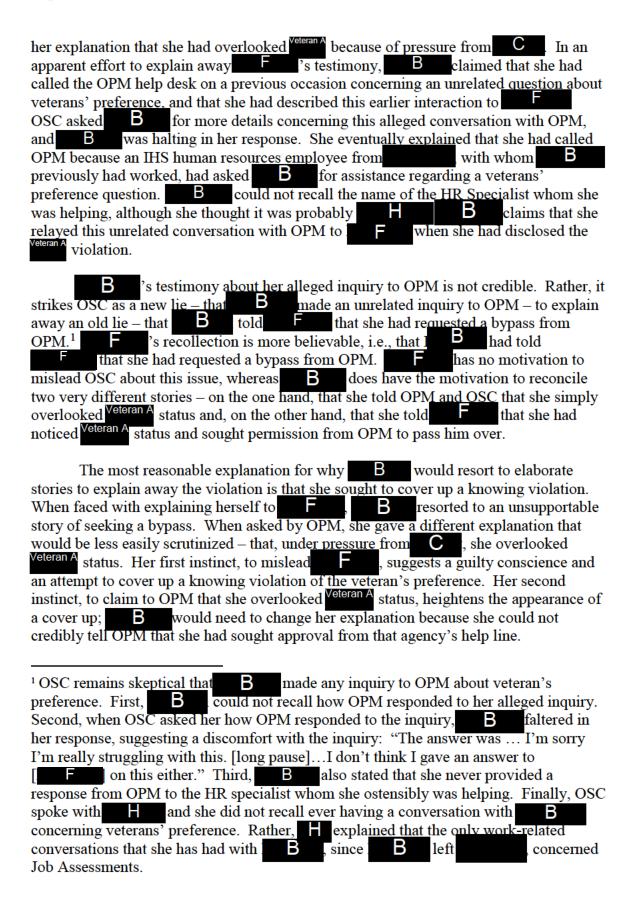
By providing this report to the Indian Health Service (IHS) for the sole purpose of aiding in its determination of whether to take corrective or disciplinary action, OSC does not waive any protections or privileges that may apply to information disclosed in the report or to the sources of that information. In addition, neither the report nor the information contained therein may be disclosed to any individual not deemed essential to the determination of whether to take corrective or disciplinary action, unless OSC consents in writing to such disclosure. Specifically, it is requested that IHS not disseminate any information provided by OSC to the subject officials of this investigation or to potential witnesses in any future litigation that may arise should this matter not be resolved informally. Moreover, if IHS receives a Freedom of Information Act (FOIA) request to which this report is responsive, IHS shall not release the report to the requester, but rather promptly advise OSC of the FOIA request and advise the FOIA requester that OSC will provide a reply with respect to the report. Please contact OSC immediately and return this report, if IHS objects in any way to these conditions. Questions regarding this paragraph should be directed to OSC's Office of General Counsel at (202) 254-3600.

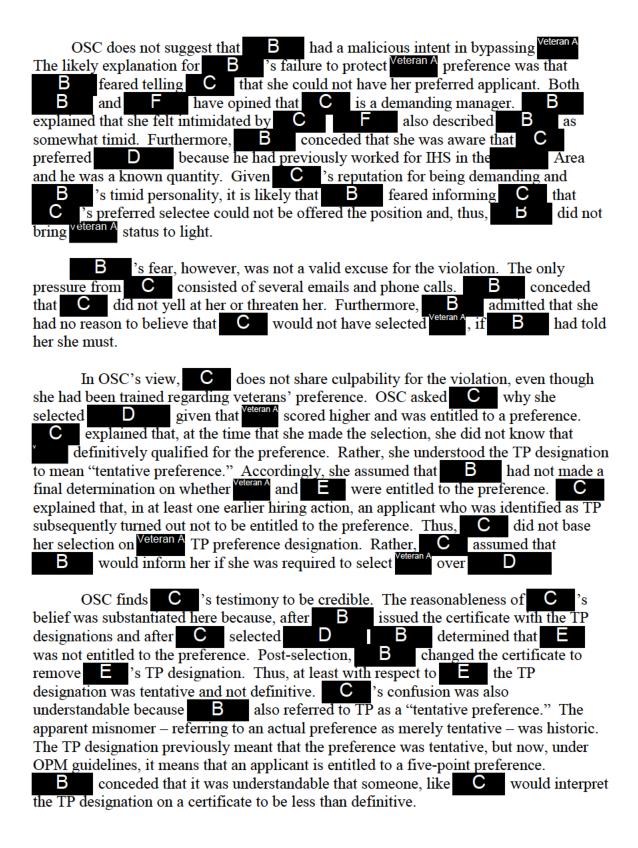
INTRODUCTION











DISCIPLINARY ACTION

OSC believes disciplinary action is necessary in this case because it involves a knowing violation of law. For purposes of assessing the appropriate level of discipline, we apply the factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). OSC also looks to Merit Systems Protection Board decisions involving similar violations for guidance. There are a number of cases that involve hiring offenses by personnel officials. The cases frequently involve the official providing an unauthorized advantage to some applicants or interfering with an applicant's right to compete for a position. See, e.g., Special Counsel v. Beatrez, 114 M.S.P.R. 57 (2010) overturned in part by Beatrez v. Merit Systems Protection Board, 413 Fed. Appx. 298 (Fed. Cir. Mar. 25, 2011) (finding two human resource officials gave an unauthorized preference to an applicant; finding overturned by Federal Circuit as to the less-involved official); Special Counsel v. Byrd, 59 M.S.P.R. 561 (1993) (finding manager and human resources specialist violated 5 U.S.C. § 2302(b)(6) by giving an unauthorized advantage to an applicant); Special Counsel v. Ross, 34 M.S.P.R. 197 (1987) (finding personnel officers interfered with applicants' right to compete, influenced applicants to withdraw from competition and gave an unauthorized advantage to an applicant in violation of 5 U.S.C. §§ 2302(b)(4), (5), and (6)); Filiberti v. Merit Systems Protection Board, 804 F.2d 1504 (9th Cir, 1986) (finding personnel officers influenced a veteran to withdraw from competition).

In these cases, the penalties have included substantial suspensions, ranging from 45 to 60 days, and demotions for one year. *See Beatrez*, 114 M.S.P.R. at ¶48 (imposing 45-day suspension on the more-involved personnel officer; 10-day suspension for the less-involved officer was overturned by Federal Circuit); *Byrd*, 59 M.S.P.R. at 583-84 (imposing 60-day suspension on personnel officer, noting he "had the professional responsibility to advise management."); *Ross*, 34 M.S.P.R. at 203 (imposing a one- and two-grade demotion on personnel officers for one year); and *Filiberti*, 804 F.2d at 1510-11 (imposing 60-day suspension on personnel officials involved in the violation).

Although the aforementioned cases provide a guide, they do present somewhat more severe factual circumstances than are at issue here. The cases above all involved personnel officials taking active steps to rig the system in favor of a particular applicant. Here, OSC does not believe that B actively set out to create an advantage for at veteran A expense. Rather, she passively, albeit knowingly, failed to do her job. In her failure, she knowingly violated 5 U.S.C. § 2302(b)(11) by processing S selection instead of intervening to correct the violation. Accordingly, and as outlined below, OSC believes that a suspension short of the 45-60 days in the above-mentioned cases is in order.

Applying the *Douglas* factors here, OSC believes a suspension of five to 14 days would be appropriate. While we do not believe that Barra acted with malice or for personal gain, the violation does go to the heart of her duties as a human resources

specialist. B had a responsibility to ensure that veteran was afforded his veterans' preference and to ensure that she gave proper guidance and advice to C As a Supervisory Human Resource Specialist, GS-13, B must have the confidence and fortitude to deliver potentially unwelcome news to managers to ensure that selections conform to applicable laws and regulations. Furthermore, as a supervisor, she must set an example for subordinate human resource employees. The offense did create some notoriety for the agency, given that OPM became aware of the violation during its evaluation. See Special Counsel v. Brown, 61 M.S.P.R. 559 (1994) (explaining that OPM's knowledge of the violation and involvement in correcting it contributed to notoriety for the agency).

Although IHS does not have a table of penalties, HHS does and it provides at least a guide for what the range of discipline should be. Under the HHS table of penalties, the penalty for a deliberate or malicious failure to follow regulations ranges from a letter of reprimand to removal. Even if status, the penalty for a negligent failure to follow regulations ranges from a letter of reprimand to a 14-day suspension. As we explained above, however, OSC has concluded that the violation was deliberate, albeit not malicious.

The clarity of the law and the violation weigh against acknowledged that she was aware of the veterans' preference law. The veteran's status was apparent from the face of the certificate — he had the TP designation and a score that exceeded 100. The fact that acknowledged that the TP designation and a score that exceeded 100. The fact that acknowledged that the TP designation and a score that exceeded 100. The fact that acknowledged that the TP designation and a score that exceeded 100. The fact that acknowledged that she knew the violation was occurring. The veteran's status was apparent from the face of the certificate — he had the TP designation and a score that exceeded 100. The fact that acknowledged that she was aware that the transfer of the veterans' preference law.

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's work history and lack of prior discipline do militate against an overly severe penalty. We do not believe, however, that В was operating under any expressed her belief that mitigating job tensions. Although В В demanding manager, the pressure that described from was not could only point to emails and phone calls as examples of the unreasonable. В allegedly intimidating conduct. The one example that was most memorable to was the one-line email: "did you offer the job offer?" While this may have reflected impatience on the part of C it was not so intimidating that a reasonable person in 's position would fail to perform her duties.

In short, OSC believes that her failure was a knowing violation of 5 U.S.C. § 2302(b)(11). OSC is also concerned over what appears to be a lack of veracity in B 's explanation to F and in B 's subsequent attempts to reconcile that explanation with her testimony to OPM and OSC. Accordingly, it is OSC's position that IHS should address B 's conduct with sufficient severity to assure it will not happen again. OSC recommends a suspension of five to 14 days. Such a suspension appropriately reflects the severity of the violation and is of a sufficient weight to deter future violations.