



U.S. OFFICE OF SPECIAL COUNSEL

Memorandum

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

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INTRODUCTION

This report contains the investigative findings in Office of Special Counsel (OSC) File Number MA-11-1724, a complaint of a prohibited personnel practice. The complaint alleges that the [REDACTED] Office of the Health and Human Services (HHS), Indian Health Services (IHS) violated an applicant's veteran's preference in connection with the selection of a Supervisory Dental Officer [REDACTED]. The Office of Personnel Management (OPM) referred this case to OSC after evaluating the delegated examining practices of the [REDACTED] in December 2010. During its evaluation, OPM discovered that IHS improperly denied an applicant, **Veteran A**, his veteran's preference entitlement by failing to select him for the position even though he was the highest-scoring applicant on the certificate.

After finding the violation, OPM worked with IHS to ensure that IHS corrected the violation and placed **Veteran A** in the position. OPM then referred the case to OSC for consideration of whether the IHS officials involved *knowingly* violated **Veteran A** preference, in violation of 5 U.S.C. § 2302(b)(11), and whether disciplinary action was appropriate under the circumstances. As explained below, OSC has concluded that the violation was knowingly made and that discipline is required for the human resources specialist involved in the action.

FACTUAL FINDINGS AND ANALYSIS

1. The selection improperly passed over an applicant entitled to veterans' preference.

The hiring action at issue was for a Supervisory Dental Officer, GS-680-13 at the [REDACTED]. IHS originally advertised the position on November 5, 2009, but that announcement was cancelled and the position was re-advertised three subsequent times. In total, four announcements were issued for the vacancy from November 5, 2009 until April 20, 2010. For all but the third announcement, **B** was the Human Resources Specialist assigned to the hiring action.

OSC focused its investigation on the fourth announcement that was issued on April 20, 2010. A computer program determined the applicants' scores based on how they answered occupational-related questions. **B** did the qualifications analysis for the applicants. On May 12, 2010, **B** referred three applicants to **C**, the selecting official and Chief Executive Officer [REDACTED]. The three applicants and their respective scores were as follows:

- **Veteran A** 103.5;
- **D**, 97.6; and
- **E**, 90.3.

The certificate identified both ^{Veteran A} and **E** with the designation “TP,” signifying that they were entitled to a 5-point veterans’ preference. On May 18, 2010, Ms. **C** selected **D** for the position, notwithstanding that ^{Veteran A} scored higher and was entitled to the preference. **D** had previously worked as a dentist for IHS in , and **C** knew **D** and was impressed with his qualifications.

Later on May 18, **C** returned the certificate to **B**. According to **B** even before she received the certificate back, **C** began calling her and asking her whether she had made the offer to **D**. Later on May 18, **B** received the certificate from **C** and proceeded to audit it that same day. The purpose of the audit was to ensure that the selection had been reviewed for errors. While doing the audit, **B** changed **E**’s status from TP to non-veteran because her review of his application had revealed that he was not entitled to a preference. **B** left ^{Veteran A} preference designation untouched.

B claims that she overlooked ^{Veteran A} entitlement to veteran’s preference during her audit. **B**’s excuse for the oversight was that **B** felt pressure from **C** to make the job offer quickly. **B** told OSC that she felt intimidated by **C** and that **C** was one of the more demanding managers with whom **B** worked. Because of the pressure that **B** felt from **C**, **B** worked quickly to process the selection. **B** explained that **C**’s intimidating conduct consisted of telephone calls and emails. An example of **C**’s pressure that was particularly memorable for **B** was that **C** had sent **B** a one-line email, asking “did you offer the job offer?” **B** conceded that **C** did not yell at her or threaten her in connection with the **D** action.

Following the audit, **B** worked with **C** to determine the appropriate salary to offer **D**. On May 21, 2010, **B** made the offer to **D** and he accepted. The effective date of his selection was June 6, 2010.

2. OSC concludes that the violation was knowingly made.

There is no dispute that the selection of **D** was improper. ^{Veteran A} was in fact entitled to the veterans’ preference and he scored higher than **D**. IHS has already taken the required corrective action to place ^{Veteran A} in the position. The remaining issue is whether the violation was made knowingly. Although **B** asserts that **B** merely overlooked ^{Veteran A}’s status because of pressure from **C**, substantial evidence supports that **B** was aware of ^{Veteran A}’s status at the time that **B** processed the action and chose to ignore it. Accordingly, OSC has concluded that **B** knowingly violated ^{Veteran A}’s veteran’s preference when **B** processed **D**’s selection in violation of 5 U.S.C. § 2302(b)(11). OSC did not, however, find that **C** shared in the fault.

The evidence shows that **B** was aware of ^{Veteran A}’s status. First, when preparing the certificate, **B** handwrote the TP designations next to ^{Veteran A}’s and

E's names. Second, **Veteran A** had a score of 103.7. **B** acknowledged that the only way an applicant's score can exceed 100 is if the applicant were entitled to veterans' preference. Third, after issuing the certificate, **B** reviewed the applications and determined that **E** was not entitled to the preference, but that **Veteran A** was. Upon receiving the certificate back from **C** and while auditing the propriety of **D**'s selection, **B** scratched **E**'s TP designation off the certificate. Importantly, **B** left **Veteran A** TP status unchanged. Given that **B** was mindful of veterans' preference issues while auditing the certificate, it defies credibility that **B** did not notice **Veteran A** status at the same time, particularly since there were only three names on the certificate.

Nonetheless, **B** claims that **B** only first discovered the denial of **Veteran A** veterans' preference when **B** was preparing for the December 2010 OPM evaluation. According to **B** upon discovery of the violation, **B** informed her first-level supervisor, **F**. Ms. **F** told **B** that they needed to bring the file to the attention of OPM, which they did.

OSC interviewed **F** and her testimony calls **B** veracity into question. **F** confirmed that **B** first showed her the certificate one day before the OPM audit began. **F** recalled that she had asked **B** how the mistake had happened. **B** initially responded that **B** did not know what **B** was thinking when **B** processed the selection. Then, according to **F**, **B** changed her explanation and claimed that she had requested and received approval from someone at the OPM "help desk" to bypass **Veteran A** and offer the position to **D**. **F** was not aware that OPM had a help desk to handle such matters. Rather, **F** explained that the ordinary process for bypassing a veteran would be for the Human Resources Specialist to make the initial request to **F**. If **F** approved the request, then she would formally request a bypass from OPM.

F asked **B** if **B** had any documentation to support that **B** spoke with someone at OPM about **Veteran A**. **B** could not locate any such documentation. Then **B** changed her explanation again, telling **F** that she processed the selection because another Human Resources specialist, **G**, had processed a similar action where a veteran had been bypassed.

B's shifting explanation is indicative of a guilty conscience attempting to deflect blame. **B**'s evident dishonesty to **F** calls into question her testimony to OPM and OSC that she simply overlooked **Veteran A** status. Had that simple explanation been the case, **B** would have just explained her error to **F**. Instead, **B** resorted to an elaborate story about seeking OPM's approval for a bypass, even though such a story could not withstand scrutiny.

Based on **F**'s testimony, OSC asked **B** if she had sought approval from OPM to bypass **Veteran A**. **B** denied having told **F** that she had contacted the OPM Help Line concerning the **D** selection, sticking instead with

her explanation that she had overlooked ^{Veteran A} because of pressure from **C**. In an apparent effort to explain away **F**'s testimony, **B** claimed that she had called the OPM help desk on a previous occasion concerning an unrelated question about veterans' preference, and that she had described this earlier interaction to **F**. OSC asked **B** for more details concerning this alleged conversation with OPM, and **B** was halting in her response. She eventually explained that she had called OPM because an IHS human resources employee from **B** with whom **B** previously had worked, had asked **B** for assistance regarding a veterans' preference question. **B** could not recall the name of the HR Specialist whom she was helping, although she thought it was probably **H**. **B** claims that she relayed this unrelated conversation with OPM to **F** when she had disclosed the ^{Veteran A} violation.

B's testimony about her alleged inquiry to OPM is not credible. Rather, it strikes OSC as a new lie – that **B** made an unrelated inquiry to OPM – to explain away an old lie – that **B** told **F** that she had requested a bypass from OPM.¹ **F**'s recollection is more believable, i.e., that **B** had told **F** that she had requested a bypass from OPM. **F** has no motivation to mislead OSC about this issue, whereas **B** does have the motivation to reconcile two very different stories – on the one hand, that she told OPM and OSC that she simply overlooked ^{Veteran A} status and, on the other hand, that she told **F** that she had noticed ^{Veteran A} status and sought permission from OPM to pass him over.

The most reasonable explanation for why **B** would resort to elaborate stories to explain away the violation is that she sought to cover up a knowing violation. When faced with explaining herself to **F**, **B** resorted to an unsupportable story of seeking a bypass. When asked by OPM, she gave a different explanation that would be less easily scrutinized – that, under pressure from **C**, she overlooked ^{Veteran A} status. Her first instinct, to mislead **F**, suggests a guilty conscience and an attempt to cover up a knowing violation of the veteran's preference. Her second instinct, to claim to OPM that she overlooked ^{Veteran A} status, heightens the appearance of a cover up; **B** would need to change her explanation because she could not credibly tell OPM that she had sought approval from that agency's help line.

¹ OSC remains skeptical that **B** made any inquiry to OPM about veteran's preference. First, **B** could not recall how OPM responded to her alleged inquiry. Second, when OSC asked her how OPM responded to the inquiry, **B** faltered in her response, suggesting a discomfort with the inquiry: "The answer was ... I'm sorry I'm really struggling with this. [long pause]... I don't think I gave an answer to [**F** on this either." Third, **B** also stated that she never provided a response from OPM to the HR specialist whom she ostensibly was helping. Finally, OSC spoke with **H** and she did not recall ever having a conversation with **B** concerning veterans' preference. Rather, **H** explained that the only work-related conversations that she has had with **B**, since **B** left **B**, concerned Job Assessments.

OSC does not suggest that [B] had a malicious intent in bypassing [Veteran A]. The likely explanation for [B]'s failure to protect [Veteran A] preference was that [B] feared telling [C] that she could not have her preferred applicant. Both [B] and [F] have opined that [C] is a demanding manager. [B] explained that she felt intimidated by [C]. [F] also described [B] as somewhat timid. Furthermore, [B] conceded that she was aware that [C] preferred [D] because he had previously worked for IHS in the [] Area and he was a known quantity. Given [C]'s reputation for being demanding and [B]'s timid personality, it is likely that [B] feared informing [C] that [C]'s preferred selectee could not be offered the position and, thus, [B] did not bring [Veteran A] status to light.

[B]'s fear, however, was not a valid excuse for the violation. The only pressure from [C] consisted of several emails and phone calls. [B] conceded that [C] did not yell at her or threaten her. Furthermore, [B] admitted that she had no reason to believe that [C] would not have selected [Veteran A], if [B] had told her she must.

In OSC's view, [C] does not share culpability for the violation, even though she had been trained regarding veterans' preference. OSC asked [C] why she selected [D] given that [Veteran A] scored higher and was entitled to a preference. [C] explained that, at the time that she made the selection, she did not know that [] definitely qualified for the preference. Rather, she understood the TP designation to mean "tentative preference." Accordingly, she assumed that [B] had not made a final determination on whether [Veteran A] and [E] were entitled to the preference. [C] explained that, in at least one earlier hiring action, an applicant who was identified as TP subsequently turned out not to be entitled to the preference. Thus, [C] did not base her selection on [Veteran A] TP preference designation. Rather, [C] assumed that [B] would inform her if she was required to select [Veteran A] over [D].

OSC finds [C]'s testimony to be credible. The reasonableness of [C]'s belief was substantiated here because, after [B] issued the certificate with the TP designations and after [C] selected [D], [B] determined that [E] was not entitled to the preference. Post-selection, [B] changed the certificate to remove [E]'s TP designation. Thus, at least with respect to [E] the TP designation was tentative and not definitive. [C]'s confusion was also understandable because [B] also referred to TP as a "tentative preference." The apparent misnomer – referring to an actual preference as merely tentative – was historic. The TP designation previously meant that the preference was tentative, but now, under OPM guidelines, it means that an applicant is entitled to a five-point preference. [B] conceded that it was understandable that someone, like [C] would interpret the TP designation on a certificate to be less than definitive.

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 **D** 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 **D**'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 **B** 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 A] 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 [B]'s testimony were credited, that she simply overlooked [Veteran A] 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 [B] [B] acknowledged that she was aware of the veterans' preference law. [B] 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 [B] changed [E]'s status, but left [Veteran A] unchanged, strongly suggests that she knew the violation was occurring. [B] was also aware that IHS's delegated examining practices had come under OPM scrutiny, which should have prompted her to review all hiring actions with heightened scrutiny.

[B]'s work history and lack of prior discipline do militate against an overly severe penalty. We do not believe, however, that [B] was operating under any mitigating job tensions. Although [B] expressed her belief that [C] was a demanding manager, the pressure that [B] described from [C] was not unreasonable. [B] could only point to emails and phone calls as examples of the allegedly intimidating conduct. The one example that was most memorable to [B] 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 [B]'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.