



U.S. OFFICE OF SPECIAL COUNSEL

U.S. Office of Special Counsel
Report of Prohibited Personnel Practice
OSC File No. MA-14-2635
(U.S. Department of Treasury,
Financial Crimes Enforcement Network)

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I. INTRODUCTION

This report by the U.S. Office of Special Counsel (OSC) contains the investigative findings in OSC File No. MA-14-2635, a complaint of prohibited personnel practices referred to OSC by U.S. Department of Treasury, Office of Inspector General, concerning hiring practices at the Financial Crimes Enforcement Network (FinCEN or agency) in Washington, DC.

A joint audit conducted by the Treasury Department and the Office of Personnel Management (OPM) determined that FinCEN required attorney experience and prior federal service for a series of GS-1801 investigator positions, although neither requirement was listed in the corresponding vacancy announcements. OSC was asked to determine whether FinCEN's appointments constituted prohibited personnel practices under 5 U.S.C. § 2302(b).

After conducting an investigation, OSC determined that FinCEN violated federal hiring rules and regulations concerning merit system principles, in violation of 5 U.S.C. § 2302(b)(12). In addition, by misleading applicants about the qualifications required for the jobs, FinCEN willfully obstructed the right of applicants without attorney experience and with no prior federal service to compete for the positions, in violation of 5 U.S.C. § 2302(b)(4).

II. STATEMENT OF FACTS

A. **FinCEN Sought to Hire Attorney-Applicants with Prior Federal Service for Non-Attorney Positions that Required No Federal Work Experience**

In mid-2013, FinCEN was in the process of reorganizing into six divisions based on key functions: Enforcement, Policy, Intelligence, Liaison, Technology, and Management. Among other vacancies, three new supervisory positions were announced. Both the position descriptions and vacancy announcements identified these jobs as GS-1801 investigator positions. Nevertheless, FinCEN leadership determined that they wanted attorneys to fill the positions.¹ In their view, new plans to emphasize Bank Secrecy Act enforcement made attorney experience particularly desirable.

Shortly before these jobs were advertised, FinCEN asked the Treasury Department for permission to hire its own GS-0905 attorneys. Treasury officials denied that request, explaining that the department requires all employees in the GS-0905 series to report through its Office of Chief Counsel. Instead, during a meeting in July 2013, Treasury officials recommended a potential workaround. Specifically, they said that FinCEN's Human Resources (HR) staff could show managers how to ask questions in the vacancy announcements about skills or experiences that attorneys would likely have, thus allowing attorneys to be hired into the non-attorney positions. During her OSC interview, a senior FinCEN official said that her understanding of this conversation was that FinCEN should ask questions that *only* attorneys could answer. She

¹ The three investigator positions discussed in this report were not the only ones that FinCEN believed should be filled by attorneys. OSC's conclusions and analysis with respect to these three positions apply to all instances where FinCEN used the same techniques to hire attorneys into non-attorney positions.

approved of this approach, stating, “if we can hire them into another series and recruit attorneys into a non-attorney series, great, we’ll go back and do that.” Thus, going forward, FinCEN decided to retain the investigator positions, but use the recruitment process to target attorneys instead.

FinCEN leadership also determined that the three investigator positions should require prior federal service. One official explained that, while attorneys with no federal work experience could fill lower-graded positions, these supervisors would need a federal government background to ensure that they could get to work without delay.

B. FinCEN Improperly Used Vacancy Questions and Crediting Plans to Ensure That Attorney-Applicants with Prior Federal Service Would Be Hired for Non-Attorney Positions that Required No Federal Work Experience

In August 2013, FinCEN posted job announcements for the three investigator positions, which included vacancy questions that did not appear to require either attorney experience or prior federal service. Indeed, the announcements stated that “no prior federal experience is required” and only mentioned “attorneys” as one of multiple careers that could demonstrate the required knowledge, skills, and abilities. Specifically, the questions asked applicants to choose from six job types to demonstrate how they had developed the required knowledge, skills, and abilities: (1) examiner; (2) compliance officer; (3) government employee in a compliance or enforcement program; (4) paralegal; (5) law enforcement agent; or (6) federal government attorney.²

Nevertheless, FinCEN created hiring “score cards” called crediting plans that only awarded points to applicants in the sixth category: federal government attorney. Where “federal government attorney” was a possible answer to a vacancy question, the crediting plan assigned it 25 points, while every other job type was assigned no points. Because these job-specific questions comprised half of the total questions asked for each position, there was no way for a

² For example, one of the vacancy questions at issue is reproduced below:

Select the one statement that most accurately represents your knowledge of anti-money laundering laws, the Bank Secrecy Act, or other laws related to financial crimes.

- 1. I have obtained extensive knowledge of anti-money laundering laws, the Bank Secrecy Act, or other laws related to financial crimes serving as an examiner of financial institutions.*
- 2. I have obtained extensive knowledge of anti-money laundering laws, the Bank Secrecy Act, or other laws related to financial crimes serving as a compliance officer for a financial institution.*
- 3. I have obtained extensive knowledge of anti-money laundering laws, the Bank Secrecy Act, or other laws related to financial crimes as a government employee serving in a compliance or enforcement program.*
- 4. I have obtained extensive knowledge of anti-money laundering laws, the Bank Secrecy Act, or other laws related to financial crimes serving as a paralegal.*
- 5. I have obtained extensive knowledge of anti-money laundering laws, the Bank Secrecy Act, or other laws related to financial crimes serving as a federal, state, or local law enforcement agent.*
- 6. I have obtained extensive knowledge of anti-money laundering laws, the Bank Secrecy Act, or other laws related to financial crimes serving as federal government attorney.*
- 7. None of the above.*

non-attorney or applicant without prior federal service to score enough points to advance in the selection process despite meeting all the publicly-stated requirements.

FinCEN leadership played an active role in developing both the vacancy questions and the crediting plans for the investigator positions. While it appears that they communicated with HR staff about the job announcements, HR staff maintained that leadership officials provided the questions and weights themselves. In an email exchange, one senior official provided HR staff with the point totals for all three announcements. She later forwarded the chain to her supervisor, explaining that applicants must “answer at least three of the four ‘federal government attorney’ answers” to be eligible for interviews. When OSC asked the supervisor whether the questions made a law degree a requirement for the position, she replied “in essence, yes.” Additionally, she acknowledged that the questions required prior federal service.

Although FinCEN leadership understood the effect the vacancy questions and crediting plan would have, they stated that they were not aware of any concerns about them until well after the jobs were posted. Some HR officials disputed this notion, stating that, at a minimum, they advised leadership that job announcements should not contain questions such as those used here. One HR official stated that she spoke to FinCEN leadership about the questions several times and that it ended in a “stalemate,” where HR staff was convinced of one view and leadership was convinced of another. Another HR official said that “the questions are skewed, and I screamed about these” She acknowledged that she had not reviewed every job announcement, so she did not know if she saw the specific investigator announcements before they were posted, but she recalled that similar questions were used for other positions over her objections. Nevertheless, HR staff explained that they felt a great deal of pressure to post job announcements as the leadership team wanted and that eventually they stopped pushing back. Ultimately, HR staff signed off on the crediting plans just before posting the three investigator job announcements.

FinCEN received an average of 43 applications for each of the three investigator positions. Once the job announcements closed, the crediting plans eliminated all applicants who had not served as federal government attorneys by virtue of their answers to the vacancy questions. In the end, FinCEN selected three attorneys with prior federal service for the vacant positions.

Over the next few months, FinCEN used variations on the vacancy questions and crediting plans described above to recruit and hire for other non-attorney positions. For one, the job announcement did not require attorney experience, but the crediting plan did. For another, the job announcement did not require prior federal service, but the crediting plan did. A joint Treasury Department-OPM audit in February 2014 concluded that all of these announcements and related appointments were similarly flawed. The Treasury Department’s Office of Inspector General then referred the matter to OSC to determine whether FinCEN’s hiring practices with respect to these job announcements constituted prohibited personnel practices.

III. LEGAL ANALYSIS

A. **FinCEN Violated Section 2302(b)(12) by Targeting and Hiring Attorney-Applicants with Prior Federal Service for Non-Attorney Positions that Required No Federal Work Experience**

Under section 2302(b)(12), it is a prohibited personnel practice to take or fail to take a personnel action if doing so would violate any law, rule, or regulation implementing or directly concerning a merit system principle. *See* 5 U.S.C. § 2302(b)(12); 5 U.S.C. § 2301 (listing merit system principles). FinCEN took at least three personnel actions when it appointed individuals using improper job announcements and selection instruments. *See* 5 U.S.C. § 2302(a)(2)(A) (appointment is a personnel action). The appointments violated civil service rules and regulations that concern a merit system principle.

1. **FinCEN's Appointments Violated Civil Service Rules and Regulations by Incorrectly Stating Job Requirements and Improperly Using Crediting Plans**

A federal job announcement must accurately state the qualification requirements for the position advertised. *See* 5 C.F.R. § 330.104. Here, the three investigator announcements in question did not reflect the actual qualifications that FinCEN used in assessing applicants. For example, while the announcements specifically stated that no prior federal service was required, only those applicants with federal work experience could accrue enough points in the crediting plans to qualify for the positions. Similarly, although the announcements listed as many as six ways that an applicant could possess the required knowledge, skills, and abilities, only job experience as a “federal government attorney” received any points in the crediting plans. As a result, both prior federal service and attorney experience were requirements, although the job announcements did not state them as necessary qualifications.³

The job announcements also violated FinCEN's own merit promotion plan, which applies to all agency hiring actions, including “the filling of positions by competitive appointment.” *FinCEN Directive re: Merit Staffing and Promotion Plan, December 11, 2006.*⁴ According to the merit promotion plan, a vacancy announcement must contain both the area of consideration (i.e., who may apply) and the job requirements, including the minimum qualifications prescribed

³ This practice is also contrary to OPM guidance, which instructs all federal agencies to “clearly and adequately identify the requirements of a position in the vacancy announcement so that applicants understand the basis on which their application will be evaluated.” *OPM General Schedule Qualification Policies, Application of Qualification Standards, Section 6* (current as of February 28, 2017). OPM states that “[w]here specific qualifications beyond the general and specialized experience are required, an agency may consider use of a selective factor Agencies cannot require applicants to meet selective factors that were not established prior to advertising a position, nor can they require selective factors that were not made known to applicants.” *Id.* Here, the job requirements FinCEN built into its crediting plans amount to hidden selective factors.

⁴ FinCEN's merit promotion plan, which implements recruitment-related laws and policies, is a rule for purposes of section 2302(b)(12). *See* 5 U.S.C. § 551(4) (rule defined as “the whole or a part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy”).

or approved by OPM and any selective factor(s) essential for successful performance. *See FinCEN Merit Staffing and Promotion Plan, § 3(d)*. Implicit in the instruction to include that information is the requirement that the information be accurate. Here, the investigator announcements displayed an area of consideration and job requirements that were in direct conflict with the corresponding crediting plans, which control whether applicants are eligible for selection. Because the announcements inaccurately described both who could apply and what work experience applicants needed, they did not comply with the requirements set forth in FinCEN's merit promotion plan.

In addition, federal regulations require that employment selection practices for federal positions be based on a job analysis that identifies (1) basic duties and responsibilities; (2) required knowledge, skills, and abilities; and (3) factors that are important in evaluating the candidates. *See 5 C.F.R. § 300.103(a)(2)*. These practices include "the development and use of examinations, qualification standards, tests, and other measurement instruments," such as the crediting plans used here. *5 C.F.R. § 300.101*.

Here, FinCEN did not base the crediting plans on the corresponding job analyses. Rather than focusing on the required knowledge, skills, and abilities identified in the job analyses for the investigator positions, FinCEN placed undue weight on prior federal service and the specific job title that applicants previously held. For instance, the job analysis for one position called for "expert knowledge...in relation to the Bank Secrecy Act" and an "ability to develop and manage a sizeable staff of investigators and compliance and enforcement specialists," among other competencies. None of the knowledge, skills, or abilities listed indicated any specific need for either prior federal service or attorney experience. Yet these were absolute requirements for the position based on the crediting plans. Because FinCEN inaccurately stated the job requirements and improperly used crediting plans for the investigator positions, it violated civil service rules and regulations.

2. The Civil Service Rules and Regulations Violated by FinCEN Implement or Directly Concern a Merit System Principle

The merit system principle at section 2301(b)(1) states that:

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.

FinCEN's merit promotion plan and the above-discussed civil service regulations implement or directly concern that principle, as they outline specific, consistent procedures for federal appointments. These procedures are supposed to ensure fair and open competition among qualified applicants. As discussed above, however, FinCEN's vacancy questions and crediting plans for the investigator positions improperly excluded qualified applicants and undermined the principle of fair and open competition by obscuring the true criteria for selection.

Because all the elements of the prohibited personnel practice are met, OSC concludes that the FinCEN appointments violated section 2302(b)(12).

B. FinCEN Violated Section 2302(b)(4) by Deceiving or Willfully Obstructing Applicants from Competing for Employment

Under section 2302(b)(4), it is a prohibited personnel practice to deceive or willfully obstruct any person with respect to such person's right to compete for employment. *See* 5 U.S.C. § 2302(b)(4). By its terms, this section requires (1) an individual's right to compete for employment; and (2) the deception or willful obstruction of that right. "Willful" is not defined by the statute, but the legislative history indicates that the action must be "deliberate." According to the Merit Systems Protection Board (MSPB), a person with the authority to take, direct others to take, recommend, or approve a personnel action may not "engage in deception or otherwise raise obstacles to the appointment of a qualified individual." *MSPB Featured Prohibited Personnel Practice, February 2012.*

1. Applicants for FinCEN's Investigator Positions Had a Right to Compete for Employment

FinCEN announced the vacancies for the three investigator positions at issue in this case to the public with an explicit statement that they were open to all U.S. citizens. Consequently, all applicants who were U.S. citizens had the right to compete for these federal jobs.

2. FinCEN Deceived or Willfully Obstructed the Right of Applicants to Compete for Employment by Incorrectly Stating Job Requirements

Though precedential decisions addressing section 2302(b)(4) are scarce, they suggest that the MSPB would view FinCEN's recruitment and appointments for the three investigator positions as deception or willful obstruction of applicants and, thus, a prohibited personnel practice. For example, in *Special Counsel v. Ross*, 34 M.S.P.R. 197 (1987), the MSPB found that two HR employees engaged in conduct designed to eliminate certain qualified applicants from competition. Among other actions, the HR employees intentionally failed to mail inquiries to four qualified candidates concerning their availability for the position. *See Ross*, 34 M.S.P.R. at 203. The HR employees in effect deceived the candidates about their status in the selection process and obstructed them from competing when they had the right to do so.⁵

Here, FinCEN's actions are comparable. All ostensibly qualified applicants with no prior federal service were likewise deceived about their status, as publicly available information

⁵ In *Kligman v. Office of Personnel Management*, 103 M.S.P.R. 614, 618 (2006), the MSPB rejected a section 2302(b)(4) argument because the job requirement imposed by the agency only addressed how the competition would take place and therefore did not obstruct the right to compete. This is not a similar situation. While the *Kligman* applicants competed with full knowledge of the job requirements and were fairly considered, *id.*, the FinCEN applicants applied believing they met the stated job requirements, but were automatically disqualified by a secret requirement not tied to the position descriptions or job analyses. *Id.*

indicated that they would be considered, when in reality, there was no chance of it. Similarly, the positions were identified as GS-1801 investigators and the questions listed several ways that the relevant knowledge, skills, and abilities might have been acquired, leading any reasonable applicant to conclude that non-attorneys could qualify. Behind the scenes, however, FinCEN leadership and HR staff ensured that this was not the case. Using the crediting plans, which applicants never see, they awarded points to answers in the vacancy questions in a manner that eliminated all non-attorneys from competition, making attorney experience a hidden requirement for the jobs. It was equivalent to throwing out every application that did not contain a writing sample when no writing sample was requested. Surely, this is the type of obstacle to competition section 2302(b)(4) was intended to prevent.

Moreover, there is no question that FinCEN's actions were willful. This was not an oversight, a lost application, or a mistake in assessing one applicant's qualifications. FinCEN purposely set the point values in the crediting plans with a clear understanding of the result. FinCEN's HR staff confirmed to OSC that leadership officials specifically wanted attorneys for these positions and that the crediting plans as written allowed only attorneys to qualify. Likewise, leadership officials acknowledged that they crafted the vacancy questions and point values specifically so that they could hire attorneys for these investigator positions. One admitted that, when her original plan to hire GS-0905 attorneys was rejected, she adopted the Treasury Department's idea of using questions to target the knowledge, skills, and abilities that attorneys are likely to have. Emails between leadership officials and HR staff indicate that they took that idea a step further and developed job-specific questions focused on the attorney position, rather than any particular knowledge, skills, and abilities that they may possess. FinCEN understood that, by doing so, it would rule out all but those attorney-applicants with prior federal service. In short, because FinCEN could not openly recruit and hire its preferred subset of qualified applicants, it intentionally excluded everyone else.

By deceiving or willfully obstructing non-attorney applicants and those with no federal work experience from their right to compete for the publicly-announced investigator positions, FinCEN violated section 2302(b)(4).⁶

C. CONCLUSION AND RECOMMENDATION

During OSC's investigation, FinCEN leadership emphasized that both FinCEN's HR staff and Treasury Department officials advised them that it was permissible to pursue attorneys for the non-attorney investigator positions through targeted vacancy questions. And it may indeed be appropriate to give significant weight to knowledge, skills, and abilities that attorneys are likely to have, as the Treasury Department appears to have suggested. However, for the reasons stated above, making attorney experience and prior federal service *absolute* requirements

⁶ Unlike the prohibited personnel practice described in 5 U.S.C. § 2302(b)(6), section 2302(b)(4) does not require proof that agency officials acted for the purpose of improving or injuring the employment prospects of any particular person. Thus, FinCEN's reasons for obstructing qualified applicants are irrelevant in assessing whether a violation of section 2302(b)(4) occurred. Instead, the key inquiry is whether agency officials intentionally deceived or obstructed any person with a right to compete. Given FinCEN's understanding that the crediting plans would eliminate qualified applicants, we conclude that it had the requisite intent.

for non-attorney positions requiring no such federal work experience goes too far.

FinCEN provided a reasonable explanation for seeking to hire attorneys with prior federal service for the investigator positions in question, and appears to have chosen exceptional applicants to fill those roles. However, genuine attempts to hire talented people must still be in accordance with civil service rules and regulations; they apply even when agencies have the best of intentions, to guard against the times when they do not. When an agency violates such rules and regulations, as it did in this case, fair and open competition may be improperly restricted and confidence in the recruitment process diminished.

To its credit, the Treasury Department sought to correct the improper appointments as soon as the audit uncovered them. Even before the matter was referred to OSC, FinCEN's authority to hire independently was temporarily rescinded and steps were taken to regularize the improper appointments. In January 2017, the Treasury Department confirmed that these efforts were complete.

OSC recommends that all FinCEN managers and HR staff receive training from OSC on the prohibited personnel practices to ensure that they follow merit system principles and recruit and appoint new employees in a fair manner.⁷ See 5 U.S.C. §§ 1214(b)(2)(B) and (C); 1214(f); 2302(c).

⁷ OSC decided not to seek disciplinary action in this case, particularly because the agency officials most involved in the relevant recruitments and appointments have left federal service.