



U.S. OFFICE OF SPECIAL COUNSEL

Report of Prohibited Personnel Practice
OSC File No. [REDACTED]

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I. INTRODUCTION

The U.S. Office of Special Counsel (OSC) received complaints alleging that a civilian official with extensive experience in federal employment law at the U.S. Department of the Army, [REDACTED], gave an unauthorized preference or advantage to a candidate for a GS-15 supervisory position in 2014.¹ During OSC's investigation, OSC learned that human resources staff compiled a referral list from the GS-15 vacancy announcement that included a candidate who did not meet the Army's time in grade requirement. Human resources staff advised the Army official that a waiver of the time in grade requirement would be needed to select that candidate. Although the Army official became increasingly interested in that candidate, she did not seek a waiver. Instead, against the advice of human resources staff, she implemented a post-recruitment plan that allowed three internal applicants—including the candidate who did not meet the time in grade requirement—to rotate for a period of time into the GS-15 supervisory position. The Army official's rotation plan redefined the manner of competition and delayed the selection process until after the candidate met the time in grade requirement. After the candidate satisfied the time in grade requirement, the Army official selected him for the GS-15 supervisory position. OSC concludes that the Army official violated 5 U.S.C. § 2302(b)(6) by giving the candidate an unauthorized preference or advantage to improve his employment prospects.

II. FACTUAL BACKGROUND

In spring 2014, [REDACTED] Selecting Official served as [REDACTED] of the U.S. Army's [REDACTED], a senior executive service civilian position, where she supervised [REDACTED] attorneys at [REDACTED] and other locations. As an attorney, she represented federal agencies in employment law disputes involving equal employment opportunity matters and in cases before the Merit Systems Protection Board. As [REDACTED], she advised other organizations and attorneys in the Army on employment law. In fall 2015, after the incident at issue in the case, the Army appointed [REDACTED] Selecting Official as director of [REDACTED]

A. Army Officials Recruit and Conduct Interviews of Internal Candidates for the GS-15 Supervisory Position

After a [REDACTED] announced his intention to retire, [REDACTED] Selecting Official began recruiting for the GS-15 supervisory position in 2014. She appointed herself the selecting official. Eleven internal candidates applied, including one—[REDACTED] Candidate 1—who did not satisfy the Army's time in grade requirement for the position at the time he applied to it. Despite [REDACTED] Candidate 1's lack of time in grade, [REDACTED] associate counsel [REDACTED] Counsel 1 decided to include [REDACTED] Candidate 1 on the referral list given to [REDACTED] Selecting Official. The referral list noted [REDACTED] Candidate 1 lacked time in grade and that a waiver would be required to select him.²

¹ There are two companion matters: [REDACTED]

² The note sent by [REDACTED] Counsel 1 to [REDACTED] Selecting Official with the application materials indicated that [REDACTED] Candidate 1 would satisfy the time in grade requirement on January 12, 2015. However, according to [REDACTED] Candidate 1's SF-50, he would satisfy the time in grade requirement on December 1, 2014.

According to [REDACTED] Counsel 1 he interpreted the time in grade regulation, Army Regulation (AR) 690-200 chapter 213, subchapter 4-8(c), to apply at the *time of selection* rather than the generally-accepted understanding that it must be satisfied at the *time of application*.³ The regulation provides:

Excessively rapid promotions should be avoided. For GS/GM-15 positions and below, normally candidates selected for advancement should have completed at least 1 year of service that is one grade lower than the position to be filled. A waiver may be requested only in cases where hardship or inequity exists in accordance with AR 690-300, chapter 300, paragraph 6-7.

[REDACTED] Selecting Official received the referral list in August 2014 and initially scheduled interviews with every candidate except [REDACTED] Candidate 1. However, when [REDACTED] Selecting Official reached out to [REDACTED] Candidate 1 to inform him of her decision not to interview him, [REDACTED] Candidate 1 reminded her that he voluntarily delayed his last promotion to complete a work assignment. After this conversation, [REDACTED] Selecting Official scheduled an interview with [REDACTED] Candidate 1.⁴ Prior to the interviews, [REDACTED] Selecting Official reviewed each candidate's application materials and spoke with each candidate's supervisors. On August 29, 2014, a panel comprised of [REDACTED] Selecting Official and two external senior executives interviewed all 11 candidates.

Following the interviews, [REDACTED] Selecting Official discussed the candidates during a telephone conversation with her career coach on September 2, 2014. Her call notes indicated that she believed [REDACTED] Candidate 1 was among the strongest candidates. She described [REDACTED] Candidate 1 as "great" and "unflappable," but also expressed concern that he lacked technical experience.

B. Human Resources Advises [REDACTED] Selecting Official that [REDACTED] Candidate 1 Could Not Be Selected Because He Lacked Time in Grade for the GS-15 Supervisory Position

In early September 2014, [REDACTED] Selecting Official called [REDACTED] HR Specialist 1, a human resources specialist assigned to the hiring action, and asked him to look up the date of [REDACTED] Candidate 1's last promotion. [REDACTED] HR Specialist 1 confirmed for her that it occurred less than a year earlier. [REDACTED] HR Specialist 1 stated that [REDACTED] Selecting Official later called him again and they discussed the regulation governing the time in grade requirement and the possibility of a waiver. [REDACTED] HR Specialist 1 recalled that [REDACTED] Selecting Official called again a week or two later "about [a] job rotation," the first time he heard her mention it. [REDACTED] HR Specialist 1 stated:

She said she had during her interviews she had her top 3 candidates and she wanted to put them through a 30 day like rotation into that slot she was filling.

³ See Procedures for the Recruitment of Civilian Attorneys within the Department of the Army, Civilian Human Resources Agency Standard Operating Procedure 213-14-SOP-01 (January 28, 2014) (directing human resources staff to eliminate candidates who fail to satisfy time in grade requirement prior to referral to selection official).

⁴ An email from [REDACTED] Selecting Official to her paralegal, instructing her to schedule [REDACTED] Candidate 1's interview after the other candidate interviews were already scheduled, corroborates her account. However, in his interview with OSC, [REDACTED] Candidate 1 denied discussing his time in grade for the vacant position with [REDACTED] Selecting Official.

And I was like well [REDACTED] Selecting Official I've never heard that done before. And I said well let me see if I can find a regulation either way

[REDACTED] Selecting Official confirmed that she discussed the GS-15 supervisory position with [REDACTED] HR Specialist1. Her testimony corroborated [REDACTED] HR Specialist1's account on several key points: she called him for his opinion on conducting a candidate rotation and whether there would be "an issue" with the rotation, and she specifically mentioned [REDACTED] Candidate1 and that he lacked time in grade for the position. She also stated that [REDACTED] HR Specialist1 told her he would refuse to process [REDACTED] Candidate1's selection due to his lack of time in grade for the position. Specifically, [REDACTED] Selecting Official testified:

I knew that exceptions could be made [to the time in grade requirement]. He didn't seem to realize that so I, that is when I did point him toward the regulation that talks about exceptions to time in grade. Because again, he did not seem familiar with excepted service rules I knew it could be done and he was telling me no, you can't do it. No, it doesn't apply. I mean he was very far off base from what I recollect.

C. Human Resources Again Advises [REDACTED] Selecting Official that [REDACTED] Candidate1 Lacked Time in Grade for the GS-15 Supervisory Position, that a Waiver of the Time in Grade Requirement was not Warranted, and that [REDACTED] Selecting Official's Candidate Rotation Plan Could Be Viewed As Granting [REDACTED] Candidate1 an Unfair Advantage in the Selection Process

On or about September 10, 2014, [REDACTED] Selecting Official contacted [REDACTED] HR Specialist 2, a human resources officer specializing in management and employee relations.⁵ [REDACTED] HR Specialist 2 recalled that [REDACTED] Selecting Official "didn't sound satisfied" with advice she had received from [REDACTED] HR Specialist 1. She noted that it was not unusual for [REDACTED] Selecting Official to solicit her opinion on advice from [REDACTED] HR Specialist 1. [REDACTED] HR Specialist 2 recalled [REDACTED] Selecting Official stated:

... didn't agree with [REDACTED] HR Specialist 1 with regard to reasons why she was told she could not select Mr. [REDACTED] Candidate 1 for the position ... she explained that [she] was told that Mr. [REDACTED] Candidate 1 didn't have time in grade and that she didn't agree with that, that time in grade didn't apply ... that she could use an exception to time in grade.

[REDACTED] HR Specialist 2 further clarified:

... I believe that sort of the order of the discussion was, she called acknowledging that she wanted to select this person, that she was told he didn't have time in grade, that she disagreed, that there was this exception that she felt she could justify based on her knowledge of his previous work assignment and where he was um and the reasons why he stayed there longer than he was supposed to ... I didn't think it was a good idea ... and then she brings up the idea of this rotation

⁵ [REDACTED] HR Specialist 2 provided OSC an email forwarded from [REDACTED] Selecting Official to [REDACTED] HR Specialist 2 on September 10, 2014, containing the referral list for the vacancy announcement. [REDACTED] HR Specialist 2 could not recall whether her conversation with [REDACTED] Selecting Official occurred before or after the date of the email.

assignment. That was like the next thing we discussed and I told her that I disagreed with it

During the conversation, HR Specialist 2 advised Selecting Official [REDACTED] against rotating the candidates for the GS-15 supervisory position. Afterward, she told HR Specialist 1 and his supervisor, Supervisory HR Specialist [REDACTED], about her conversation with Selecting Official [REDACTED]. On September 11, 2014, HR Specialist 2 forwarded them an email she received from Selecting Official [REDACTED] with a draft response to be sent to Selecting Official [REDACTED]. HR Specialist 2 wrote:

Below is a draft email I planned on sending to [REDACTED] [Selecting Official] regarding her selection of a [REDACTED].

She conducted a total of 11 candidates [interviews] and she wants to select Candidate 1 [REDACTED] but he doesn't meet TIG. She narrowed down the candidate pool to three candidates and has two other promising candidates besides Candidate 1 [REDACTED].

The draft email goes on to discuss a waiver of the time in grade requirement: "A waiver may be requested only where hardship or inequity exists IAW AR 690-300, ch. 300, paragraph 6-7. Since you have two other viable candidates, I would say that hardship or inequity does not exist." The draft email continued:

I strongly advise you not make the selection of Candidate 1 [REDACTED] as he does not meet TIG and it is unlikely that a waiver would be approved. Additionally, I advise against the 30 day rotations where these 3 candidates in the final running would serve as [REDACTED]. This could be perceived by all the candidates as an unfair advantage and a violation of a prohibited personnel practice (specifically #6) or merit principle violation (specifically #1 and/or #2)."

HR Specialist 1 replied to all with a recommendation for more definitive language: "I would start off by saying you *can't* make the selection of Candidate 1 [REDACTED] because he does not meet TIG" (emphasis added). However, before HR Specialist 2 could send the email to Selecting Official [REDACTED], Selecting Official [REDACTED] requested a conference call with her and HR Specialist 1 on September 12, 2014. Supervisory HR Specialist [REDACTED] also attended. During the conversation, HR Specialist 2 recalls expressing the same concerns to Selecting Official [REDACTED] that she drafted in her email:

... during the teleconference [we] went over all of our concerns with Selecting Official [REDACTED]. Each one of us voiced our concerns. We all shared the same concerns, me, Supervisory HR Specialist [REDACTED], and [REDACTED] and that we believed that she was at risk of committing a PPP

HR Specialist 2 stated she told Selecting Official [REDACTED] that an exception to the time in grade requirement was not warranted: "... we disagreed [about] her exception to time and grade [and] that it didn't really apply because she wasn't under a hardship. There was no shortage of qualified candidates."

According to HR Specialist 2 [REDACTED], she discussed the inapplicability of an exception to the time in grade requirement on the conference call because she believed Selecting Official [REDACTED] wanted to appoint Candidate 1 [REDACTED] to the position: "I believe when she first called me she already knew that that is who she

wanted to select for the job” and “I believe she was doing this rotation thing or plan as a means of just stretching out time.” HR Specialist 2 recalled Selecting Official indicated she would conduct a candidate rotation and said something to the effect that she would “weather the storm” of any complaint. Because HR Specialist 2 felt she had adequately advised Selecting Official, HR Specialist 2 took no further action and did not send the email she drafted.

HR Specialist 2 testified that she believed that Selecting Official knew that she wanted to select Candidate 1. When asked to explain how she knew, HR Specialist 2 responded:

[Selecting Official] didn’t specifically say “I want to hire [Candidate 1],” she ... kept pushing the issue about Candidate 1 ... typically a selecting official once they are told um an applicant or someone that they wanted to select doesn’t have time in grade and shouldn’t have been on the referral list, they no longer press the issue ... but that didn’t seem to be stopping [her]. She kept pushing the issue. She wanted to hire him and that was like, what may have like kind of red flag stand up for me was look she is pressing the issue this is going to get, this could get out of hand. Um, if somebody were to find out about it or something happens and they want to file a complaint this could be a big problem.

Selecting Official did not corroborate HR Specialist 2’s testimony. Indeed, she told OSC that she could not recall speaking with HR Specialist 2 at all about the vacancy announcement.

Selecting Official also told OSC she believed “exceptions” to the time in grade requirement were available because she had requested them in previous hiring actions. Specifically, she recalled being granted permission to hire a candidate without the requisite two years of legal experience as a GS-12 attorney based on similar experience in a non-legal position; and, on another occasion, she was granted permission to hire an individual as a GS-12 employee on the basis of superior academic credentials and work experience. Selecting Official said she “tried” on a third occasion to hire an individual at a higher grade on the basis of prior work experience, but was unsuccessful because the Civilian Personnel Advisory Center (CPAC) “wouldn’t go for it.”⁶

When asked by OSC whether anyone told her it would be unlikely that waiver for Mr. Candidate 1 would be approved, Selecting Official responded, “Not that I recall.” She provided the same response when asked whether anyone told her that a candidate rotation may be considered a prohibited personnel practice. Selecting Official flatly denied being told the rotations may be contrary to merit system principles.

⁶ It is not clear whether the examples recalled by Selecting Official actually involved the time in grade requirement in AR 690-200, which requires a showing of hardship or inequity in cases where a candidate has less than one year of experience at the required grade level.

D. [REDACTED] Selecting Official Crystallizes Her Preference for [REDACTED] Candidate 1 for the GS-15 Supervisory Position

In early September 2014, [REDACTED] Selecting Official drafted a memorandum to select [REDACTED] Candidate 2 for the GS-15 supervisory position.⁷ The memorandum is almost identical to one later submitted to [REDACTED] headquarters requesting a candidate rotation, but contains the following paragraph discussing [REDACTED] Candidate 1's need for more federal experience:

[REDACTED] Candidate 1 was promoted into a GS-14 position on 1 December 2013, so he would have less than one year in the position. He has had 2 years and four months of Government acquisition experience, although that is added to 10 years of private practice. He was also asked to delay his promotion into the GS-14 slot in order to assist [REDACTED] with additional work, so the promotion was delayed for work reasons. While his work is exemplary, I am not sure he has the experience to supervise personnel in one of the busiest divisions in the office, reviewing and guiding some of the most complex acquisition and labor law cases that the office presently has. [REDACTED] Candidate 1 is likely to become an excellent supervisory attorney once he has a little bit more experience in Federal practice.

By September 15, 2014, [REDACTED] Selecting Official had changed her mind. She ranked [REDACTED] Candidate 1 above the other candidates, but she continued to be concerned that he lacked experience. In her interview with OSC, she stated:

I thought [REDACTED] Candidate 1 was number one. He handled the interview with the most skill of anyone. So he was very good in that respect. I also knew from his work generally that he had very good people skills and that he could write pretty well. So again, I thought he was number one but I also thought that, I also had concerns about whether he could; he actually had met that threshold of technical expertise.

E. Despite Warnings from Human Resources, [REDACTED] Selecting Official is Permitted to Use the Candidate Rotation Plan for the GS-15 Supervisory Position

In a memorandum dated September 15, 2014, addressed to [REDACTED] command counsel [REDACTED] Counsel 2, [REDACTED] Selecting Official provided a list of the favored candidates and noted that the selection was "a close call." Significantly, she also proposed to rotate the top three candidates—with [REDACTED] Candidate 1 listed as her top choice—to "properly evaluate the potential for leadership of the three candidates." [REDACTED] Candidate 1's lack of time in grade is discussed on the first page: "Although one candidate, [REDACTED] Candidate 1, had slightly less than one year in grade, his name was forwarded by [REDACTED]. His deferment of his prior promotion as well as his private practice experience warranted his consideration for an interview."

[REDACTED] headquarters quickly approved [REDACTED] Selecting Official's candidate rotation plan. On September 24, 2014, [REDACTED] Counsel 1 reviewed the memorandum for the first time and drafted an approval memorandum for review by deputy command counsel [REDACTED] Counsel 3 [REDACTED] Counsel 3

⁷ According to available electronic metadata, it appears that the memorandum was drafted between September 4 and September 10, 2014 and was not submitted to [REDACTED] headquarters.

forwarded the memorandum to Counsel 2, who sent a scanned copy of the signed approval to Selecting Official only two hours later in an email reading: “M’am—here is our approval of your request. Sorry for the delay.” Counsel 1 and Counsel 3 told OSC they approved the request quickly because they had previously discussed a candidate rotation plan with Selecting Official and did not have any concerns. Recollections differ on whether they discussed Candidate 1’s lack of time in grade during those calls. Neither Counsel 3 nor Counsel 1 recalled it. Selecting Official told OSC she “believed” she spoke about the time in grade issue with Counsel 1, but could not recall any specifics of their conversation.

With permission from [REDACTED] headquarters, Selecting Official proceeded with the candidate rotation plan, which she characterized as necessary for “determining essentially, really the strengths and weaknesses of the candidates. That would really help in kind of differentiating a group that I thought was pretty closely packed.” As a senior executive [REDACTED] Selecting Official recruited for numerous positions during her tenure at [REDACTED]. However, she admitted that this is the first time she used a post-recruitment rotation to evaluate candidates. She also testified that she is unaware of any other Army component that has rotated candidates after interviews have been conducted.

F. After Three Candidates Perform One-Month Rotations, Selecting Official Selects Candidate 1 for the GS-15 Supervisory Position

In late 2014, three candidates—Candidate 1, Candidate 2, and Candidate 3—each served 30-day rotations in the GS-15 supervisory position. Selecting Official distributed to each candidate a list of evaluation criteria. Though some criteria were objective (e.g., attend at least one special emphasis event during the rating period), most required subjective evaluation (e.g., provide accurate, clear and thorough analysis of significant issues in the division). She also arranged for the three candidates to meet with customers of her office and spoke to her deputy about the hiring decision. Selecting Official remained the deciding official.

On January 16, 2015, after all three candidate rotations were completed, Selecting Official sent [REDACTED] headquarters a memorandum recommending Candidate 1’s selection for the GS-15 supervisory position. The routing slip for the approval memorandum provided the following description:

[REDACTED] has selected Candidate 1 for the vacant Supervisory position. [REDACTED] request [sic] and was granted an approval to delay selection. At the time of the announcement Candidate 1 did not meet time in grade requirements for the position. As of 12 January 2015, Candidate 1 does meet time in grade requirements for the position.

Counsel 3 and Counsel 1 both initialed the routing slip and wrote “concur” in the comments section. On January 28, 2015, Counsel 2 signed the approval memorandum.

In February 2015, Selecting Official met with Candidate 2 and Candidate 3, the two candidates she did not select for the GS-15 supervisory position. During Candidate 3’s meeting, he told Selecting Official that he did not think she should have selected Candidate 1 due to his lack of time in grade for the position.

He recalled [REDACTED] Selecting Official said something to the effect of “that is brave of you to say.” [REDACTED] Candidate 3 interpreted the comment as a threat. [REDACTED] Selecting Official acknowledged that she called [REDACTED] Candidate 3 brave, but said her intent was to compliment him and encourage staff members to raise questions about her decisions.

III. LEGAL ANALYSIS

Under section 2302(b)(6), it is a violation to grant an unauthorized preference or advantage—including defining the scope or manner of competition—to a particular individual for the purpose of improving or injuring the employment prospects of any person. To establish a violation of section 2302(b)(6), the Special Counsel must show that an action was taken with the intent to benefit a particular individual. *See Special Counsel v. Lee*, 114 M.S.P.R. 57, 60 (2010) *rev'd in part*, 413 F. App'x 298 (Fed. Cir. 2011); *see also Price v. Dep't of the Army*, 14 M.S.P.R. 161, 164 (1982) (“[B]y its plain language, to come within the prohibition of section 2302(b)(6), any preferential action must be undertaken with the purpose of improving one person or injuring another.”). Notably, a valid hiring practice, if used for the purpose of improving or injuring the employment prospects of a particular person, violates section 2302(b)(6). *See Special Counsel v. Byrd*, 59 M.S.P.R. 561, 570-72 (1993). The key requirement is a showing that the *purpose* is to give an advantage. *See Special Counsel v. DeFord*, 28 M.S.P.R. 98, 103 (1985).

A. The Army’s Candidate Rotation Plan for the GS-15 Supervisory Position, as Requested and Implemented by [REDACTED] Selecting Official, Constituted an Unauthorized Preference or Advantage Because It Defined the Manner of Competition

1. *The Candidate Rotation Plan Departed from the Army’s Ordinary Practice and Was Not Justified in This Instance*

The vacancy for the GS-15 supervisory position is the first time in [REDACTED] Selecting Official’s career as a senior executive that she requested and used a candidate rotation plan. She admitted she was not aware of post-recruitment candidate rotations used to hire in any other Army component. An employer’s departure from ordinary practice may be direct evidence of an impermissible motive. *See Kouychinov v. Parametric Tech. Corp.*, 537 F.3d 62, 68 (1st Cir. 2008) (finding unexplained deviation from standard practices may be evidence of pretext). That appears to be the case here.

[REDACTED] Selecting Official’s September 15, 2014 memorandum concluded a candidate rotation was necessary because “the selection is clearly a close one” and a rotation was necessary “to properly evaluate the potential for leadership of the three candidates.” [REDACTED] Selecting Official also told OSC she believed a rotation would “be of assistance in evaluating the strengths and weaknesses” of the top candidates, who she stated were “closely packed.” These arguments are specious. [REDACTED] Selecting Official had not previously requested a candidate rotation in any of the other hiring actions with which she had been involved as a senior executive nor had she planned to do so when the Army announced the vacancy at issue. Her concerns, while broadly important, are at issue in many, if not all, selections for leadership positions. OSC found no credible business reason for such a dramatic departure from past practice. *See, e.g., Nguyen v. AK Steel Corp.*, 735 F. Supp. 2d 346, 374 (W.D. Pa. 2010) (finding that failure to follow established procedures is evidence of weakness in an articulated rationale).

2. *The Availability of Alternative, Less Costly Assessment Tools is Further Evidence that the Candidate Rotation Plan Was Pretextual*

Even assuming an unprecedented parity among the candidates for the GS-15 supervisory position, the availability of other, less costly forms of evaluation suggests the purpose of the rotation plan was not to evaluate the candidates, but to benefit [REDACTED]. Where employers make decisions that adversely impact some employees and not others, the presence of alternatives serving the same legitimate interest that would not have had that impact may be evidence of intent. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (finding an employer's failure to use available, less drastic means to achieve the same legitimate interest may be evidence of pretext).

Alternative assessment methods for candidate evaluation, which would not have delayed the selection by three months, were widely available. [REDACTED] even employed some of them during the rotations—for example, when she asked customers of her office to interview the candidates, when she spoke to another management official about her decision, when she spoke to the supervisors of the top candidates, and initially when she used [REDACTED]'s lack of time in grade as a basis to differentiate him from the other candidates. In addition to the measures [REDACTED] employed, the U.S. Office of Personnel Management (OPM) maintains a list of assessment tools on its website.⁸

While any of the various assessment methods may have helped evaluate the candidates efficiently, [REDACTED]'s choice of a rotation was costly. It delayed a permanent appointment in an important leadership position and forced both employees and customers to adapt to three leadership changes in a three-month time span. Moreover, the rotation benefitted only [REDACTED] as he was the only candidate that did not satisfy time in grade requirement. The rotation delayed the selection for the vacancy until after he satisfied the time in grade requirement and made his selection possible without a waiver. The choice to use a rotation rather than available and more efficient assessment tools further supports the conclusion that the rotation was pretextual and motivated by an intent to improve [REDACTED]'s employment prospects.

3. [REDACTED] *Knew the Candidate Rotation Plan Constituted an Unauthorized Preference or Advantage*

Human resources specifically advised against [REDACTED]'s proposed candidate rotation plan. HR Specialist 2 testified that she told [REDACTED] that “she was at risk of committing a PPP.” [REDACTED]'s response, that she would “weather the storm” should there be negative consequences from the rotation, strongly suggests that she knew it was improper. [REDACTED]'s response to [REDACTED]'s objection to [REDACTED]'s selection—that he was “brave”—also suggests something more: that those who question her tactics should be afraid. The nature of [REDACTED]'s statements underscores that she knew the candidate rotation plan was improper, that others knew it as well, and that she did not expect consequences for her actions. *See Byrd*,

⁸ *See OPM's website, Assessment & Selection, Other Assessment Methods, Assessment Method Considerations: <https://www.opm.gov/policy-data-oversight/assessment-and-selection/other-assessment-methods/assessment-method-considerations/> (last visited January 26, 2018).*

59 M.S.P.R. at 577 (finding a violation of section 2302(b)(6) where official “knew or should have known” that use of a hiring authority was improper).

B. The Army’s Improper Candidate Rotation Plan for the GS-15 Supervisory Position Was Intended to Improve Candidate 1’s Employment Prospects

1. Candidate 1 Was the Only Candidate Without Sufficient Time in Grade for the GS-15 Supervisory Position

It is undisputed that Selecting Official knew Candidate 1 lacked adequate time in grade to be selected for the GS-15 supervisory position in September 2014. This fact is evidenced in both the referral list for the position as well as her testimony, wherein she admitted that she discussed the issue with HR Specialist 1 (and with Candidate 1 when they discussed whether he would be interviewed for the position). She also noted the same concern in her request for approval of her proposed candidate rotation plan.

Although Selecting Official denies discussing the vacancy announcement with HR Specialist 2 and Supervisory HR Specialist in human resources, contemporaneous emails contradict Selecting Official’s recollection. The emails are also consistent with HR Specialist 2’s and HR Specialist 1’s testimony that they (and Supervisory HR Specialist) held a conference call with Selecting Official on September 12, 2014, in which they unequivocally advised her that the time in grade regulation precluded Candidate 1’s selection for the position.

HR Specialist 1 and HR Specialist 2 also advised Selecting Official that a waiver to the time in grade requirement should not be approved. Although Selecting Official told OSC she could not recall being advised on the unlikely granting of a waiver, emails are again consistent with the testimonies of HR Specialist 2 and HR Specialist 1 that they advised her at least three times that the prospects for a waiver were dim. In her interview with OSC, Selecting Official said she believed “exceptions” to the time in grade requirement existed because she believed she had obtained them two out of three times she tried in the past. However, it is not clear the examples recalled by Selecting Official related to the time in grade regulation at issue. It is also notable that the prior unsuccessful attempt failed because of CPAC’s objections. Ultimately, a waiver—the sole mechanism provided for by the regulation at issue—was neither requested nor granted for Candidate 1 in this case.

In the end, all of the discussion regarding time in grade concerned only one candidate: Candidate 1. Any extension of the period of time to make a selection for the GS-15 supervisory position would also serve to benefit only one candidate: Candidate 1.

2. Selecting Official Wanted to Select Candidate 1 for the GS-15 Supervisory Position Prior to Implementing the Candidate Rotation Plan

While OSC found no evidence Selecting Official preferred Candidate 1 when recruitment for the GS-15 supervisory position commenced, she clearly preferred him to the other candidates by the time interviews were concluded. She lauded Candidate 1 in discussion with her career coach. She admitted to OSC that she thought Candidate 1 to be the best candidate, a position reflected in her request for a rotation in which he is her top choice. Additionally, Selecting Official contacted human

resources multiple times to discuss Candidate 1's lack of time in grade for the position, an issue only relevant if she wanted to select Candidate 1 prior to implementing the candidate rotation plan.

Human resources officials testified that Selecting Official's preference for Candidate 1 was so apparent that they thought it necessary to advise against selecting him prior to the candidate rotations. HR Specialist 2's September 11, 2014 email to her supervisor stated Selecting Official "wants to select Candidate 1 but he doesn't meet TIG" and sought to advise her against it. HR Specialist 1 thought it would be better to be even more direct, arguing in favor of a flat "no" on Candidate 1's selection for the position. This consistent, corroborating testimony, buttressed by Selecting Official's own statements, demonstrates that she preferred Candidate 1 to the other ten candidates for the position after the interviews were completed.

3. *Selecting Official's Discussions with Human Resources about the Time in Grade Requirement for Candidate 1 Occurred Close in Time to Her Request for the Candidate Rotation Plan for the GS-15 Supervisory Position*

The evidence shows a clear timeline. During the week of September 8, 2014, Selecting Official spoke with both HR Specialist 1 and HR Specialist 2 about the vacancy for the GS-15 supervisory position and Candidate 1's lack of time in grade for the position. Emails show Selecting Official spoke again about these same issues—including ways to get around the time in grade requirement, such as a waiver or a candidate rotation plan—with HR Specialist 2 on or about September 10, 2014. Selecting Official's conference call about these same issues with HR Specialist 2, HR Specialist 1, and Supervisory HR Specialist occurred on September 12, 2014. HR Specialist 1 sent additional emails to Selecting Official about the time in grade regulation shortly after their conference call.

Three days later, Selecting Official requested a candidate rotation on September 15, 2014. The timing, number, and frequency of Selecting Official's contacts with human resources, combined with her admission that she was aware of Candidate 1's lack of time in grade and her unsupported and extraordinary request for a candidate rotation plan show that Selecting Official intended to use the rotation as a means to improve Candidate 1's employment prospects.

IV. CONCLUSION

For the foregoing reasons, OSC has reasonable grounds to believe that Selecting Official violated section 2302(b)(6) by conducting an improper post-recruitment candidate rotation as part of the selection process for a GS-15 supervisory position at the Army. Based on OSC's understanding of the facts and the law, the purpose of the rotation plan was to provide Candidate 1, the only candidate who lacked time in grade for the position, an unfair advantage aimed at improving his employment prospects for the position. Accordingly, OSC recommends the Army take appropriate corrective and disciplinary action.