



U.S. Office of Special Counsel  
Report of Prohibited Personnel Practice  
OSC File Nos. MA-12-3757 and MA-13-0665

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## I. INTRODUCTION AND SUMMARY OF FINDINGS

This prohibited personnel practice report contains the investigative findings of the Office of Special Counsel in OSC File Numbers MA-12-3757 and MA-13-0665. The investigation evaluated whether the Department of Education (ED) granted unauthorized preferences to preselected applicants in two competitive examinations conducted by the agency pursuant to its delegated examining and merit promotion authorities. The investigation confirmed that ED granted such preferences. OSC established that ED officials manipulated the competitive examination to assist two favored candidates in such a manner as to provide the candidates an unfair competitive advantage. OSC concludes that ED committed prohibited personnel practices in violation of 5 U.S.C. § 2302(b)(6) and (12) and recommends appropriate disciplinary and corrective action.

OSC File No. MA-12-3757 is a referral from the Office of Personnel Management (OPM) based on an OPM audit. OPM's Associate Director of Merit System Audit and Compliance alleged that ED may have committed a prohibited personnel practice by improperly converting [Employee A], a political appointee, to a career [redacted] position. OPM determined that the appointment was improper because [Employee A] lacked the minimum qualifications for the position. In accordance with OPM's advice and findings, ED is currently correcting the appointment by removing [Employee A] from the position. OPM referred the results of its audit to OSC to determine whether a prohibited personnel practice was committed and whether disciplinary action is warranted.

OSC's investigation showed that ED officials made two attempts to appoint [Employee A] to a position in its [redacted]. The first attempt failed because [redacted] lacked an available political position for [Employee A]. The second attempt succeeded, but only after ED officials manipulated the competitive hiring process in order to qualify and select this candidate. The investigation found that ED officials granted [Employee A] preferences that were not authorized by law, rule, or regulation when it provided [redacted] a competitive advantage by creating a position that was specifically tailored for [redacted] qualifications. The investigation showed that [Employee A] suggested criteria that ED would use to advantage [redacted] candidacy.

The second case grew out of OSC's investigation of the [Employee A] matter. During the [Employee A] investigation, OSC discovered evidence that ED also manipulated a competitive examination in order to appoint [Employee B] to a [redacted] position. The evidence showed that [Employee B] was an acquaintance of [redacted] C [redacted]. [redacted] C [redacted] recruited [Employee B] from [redacted], where the two had previously worked together. To enhance [Employee B's] competitive chances, [redacted] C [redacted] provided [redacted] with proposed position descriptions and suggested ways to improve [redacted] application. Other ED officials assisted [redacted] C [redacted] in the recruitment of [Employee B]. After qualifying [Employee B] for selection, ED officials awarded [redacted] a \$15,000 recruitment incentive in violation of the applicable regulation and agency policy.

OSC finds that ED committed prohibited personnel practices in violation of 5 U.S.C. § 2302(b)(6) and (12). We recommend that ED consider taking disciplinary action against two ED officials who participated in these prohibited personnel practices: [REDACTED] D and [REDACTED] E. We make no recommendation for [REDACTED] C as [REDACTED] has resigned from federal service. We recommend further that ED regularize the [REDACTED] Employee B appointment, as appropriate, in consultation with OPM. In addition, we recommend that ED review the appropriateness of the recruitment incentive paid to [REDACTED] Employee B and take corrective action. Finally, we recommend that ED provide training to its HR staff and the management of [REDACTED] on merit systems principles and prohibited personnel practices.

## II. FACTUAL FINDINGS AND ANALYSIS

### A. Factual Background

#### 1. Appointment of [REDACTED] Employee A

The pertinent events of the [REDACTED] Employee A appointment occurred in 2010 and 2011. [REDACTED] Employee A was a Schedule C excepted-service employee in ED's [REDACTED]. In early October 2010, [REDACTED] C [REDACTED] tried to hire [REDACTED] Employee A in [REDACTED] C [REDACTED] envisioned that [REDACTED] Employee A would serve [REDACTED] as a [REDACTED]. Because [REDACTED] Employee A was already in a Schedule C position and therefore did not have competitive status, [REDACTED] C [REDACTED] attempted to reassign [REDACTED] noncompetitively to another Schedule C position in [REDACTED].

[REDACTED] C's [REDACTED] attempt was unsuccessful because there were no available Schedule C positions in [REDACTED] to accommodate [REDACTED] Employee A's appointment. So, [REDACTED] C [REDACTED] devised "a back-up plan" to hire [REDACTED] Employee A competitively. This required use of the agency's delegated examining authority. The plan was to convert [REDACTED] Employee A's noncompetitive appointment to a competitive appointment through a vacancy announcement. For this purpose, [REDACTED] C [REDACTED] used a vacant [REDACTED] position and made changes to reflect [REDACTED] Employee A's qualifications. [REDACTED] C [REDACTED] told OSC that [REDACTED] Employee A possessed the specific skill set that [REDACTED] had in mind for the [REDACTED] position and cited evidence of [REDACTED] Employee A's advanced degree in [REDACTED].

The problem facing [REDACTED] however, was to ensure that [REDACTED] Employee A's application would be strong enough so [REDACTED] could be within reach for selection in a competitive examination. [REDACTED] C [REDACTED] conveyed [REDACTED] assessment of [REDACTED] Employee A's strengths to [REDACTED] E [REDACTED] the [REDACTED], who would be the supervisor of the position. According to [REDACTED] E, [REDACTED] C [REDACTED] said [REDACTED] found a candidate with the skills [REDACTED] needed for the [REDACTED] position and identified [REDACTED] Employee A as the

candidate. [REDACTED] C [REDACTED] emphasized [REDACTED] Employee A's [REDACTED] experience in [REDACTED] and [REDACTED] degree in [REDACTED] in advocating for [REDACTED] candidacy.

To ensure that [REDACTED] Employee A [REDACTED] was competitive, [REDACTED] C [REDACTED] provided [REDACTED] Employee A [REDACTED] with a draft position description (PD) for the [REDACTED] position for [REDACTED] Employee A [REDACTED] to review. [REDACTED] C [REDACTED] asked for and received a copy of [REDACTED] Employee A's [REDACTED] résumé. [REDACTED] C [REDACTED] also went a step further; [REDACTED] asked [REDACTED] Employee A [REDACTED] to draft a list of unique position requirements for the position that would match [REDACTED] Employee A's [REDACTED] own strengths. [REDACTED] Employee A [REDACTED] submitted the following:

- Requires a Masters Degree in Education and classroom experience implementing best practices for EL [English learner] students in developing proficiency in English and achieving high content standards.
- Candidate must have significant legislative experience with a concentration on K-12 policy.
- Must have significant experience with collaboration and coordination among federal, state, and local programs serving English language learners.
- Must have experience providing technical assistance on legislative proposals and a history working with members of Congress and Congressional Staff on policy matters.
- Candidate must demonstrate a history of having written materials for Congressional purposes and following the appropriate legislative procedures.
- An ideal candidate would be fluent in a foreign language and a technology background is preferred.
- Candidate must be able to develop long term goals, policy priorities, and manage relationships with key stakeholders in the EL field.
- Must have experience in organizing and executing large scale conferences that include a variety of communities.

[REDACTED] C [REDACTED] then forwarded [REDACTED] Employee A's [REDACTED] list to [REDACTED] D [REDACTED] and [REDACTED] E [REDACTED] so they could finalize the PD and vacancy announcement.

The rest was straightforward. [REDACTED] E [REDACTED] with guidance from [REDACTED] D [REDACTED] took a standard PD for the position and added information to a separate section entitled "Unique Position Requirements." In that section, they listed seven requirements not covered in the "Major Duties" section of the PD. The additional requirements paraphrased [REDACTED] Employee A's [REDACTED] list,

sometimes even lifting [redacted] words verbatim. The final PD thus included phrases that echoed [Employee A's] list such as “provides policy guidance with a concentration in elementary and secondary education [K-12]”; “collaboration and coordination . . . among federal, state, and local programs serving English language learners”; “provides assistance on . . . legislative proposals and . . . a history working with Members of Congress and Congressional Staff on education policy matters”; “provides assistance with writing materials for Congressional purposes by following appropriate legislative procedures”; “provides assistance in developing long-term goals, policy priorities, and works with key stakeholders in the English learner [EL] field”; “organizes . . . in executing conferences.” Comparing these two lists, it is apparent that the differences between [Employee A's] and the PD's were more stylistic than substantive.

The PD states that the objectives of the position “are achieved through the management of grants, contracts, and loans as well as through professional leadership and expertise.” Yet the unique position requirements that [redacted] C [redacted] D and [redacted] E added are largely unrelated to grant and contract management. Further, several duties listed in the added section appear to be associated with [Employee A's] old legislative duties in [redacted] and less related to the grants, contracts and loans that [redacted] managed. Nonetheless, as approving supervisor, [redacted] E certified on the cover sheet that the attached PD contained an accurate statement of the duties and responsibilities of the position.

[redacted] F classified the PD. [redacted] also certified on the cover sheet that the position was classified and graded in accordance with Title 5 of the United States Code. When questioned, [redacted] F could not provide OSC the basis for approving the unique requirements of the job that [Employee A] had suggested. [redacted] said [redacted] could not remember [redacted] reasons and [redacted] could not find the notes [redacted] said [redacted] took at the time. However, after reviewing the unique position requirements that were included in the PD, [redacted] F conceded that they were generally distinct from the classified duties of the position and that the position description with [Employee A's] suggestions had not been properly classified.

In addition to the unique requirements suggested by [Employee A] ED skewed the competitive process in [Employee A's] favor in other ways. For example, in the vacancy announcement ([redacted] 2011-0002), [redacted] E developed a selective placement factor (SPF), which [redacted] D reviewed and approved, that favored [Employee A's] legislative experience. The drafted SPF stated that candidates “[m]ust have experience interpreting elementary and secondary education legislation and preparing written analysis of legislation.” This SPF proved a perfect match for [Employee A's] work experience in [redacted] political position in [redacted] and other past positions. At the time, [redacted] E and [redacted] D provided justification for the SPF by representing that the position's duties “requiring legislative experience constitute a major percentage of time of the position” and that the “incumbent would require previous experience in elementary and secondary education in order to effectively perform in the position.”

[redacted] E testified that [redacted] did not know what an SPF was and would not have known to use it in the vacancy announcement if [redacted] D had not advised [redacted] [redacted] E stated that

the SPF required legislative experience because legislative experience was critical to the performance of the [REDACTED] position. But the major duties of an [REDACTED] according to the position description was the management of [REDACTED] grants, contracts and loans, not interpreting and analyzing legislation that may relate to elementary and secondary education.

[REDACTED] D told OSC that [REDACTED] questioned [REDACTED] E about the SPF because the experience required was not typical of the GS-12 grade level. [REDACTED] D said [REDACTED] E told [REDACTED] that because [REDACTED] is very small, it needed someone who could multitask and have “responsibility for the legislation going up on the Hill and dealing with this legislation.” [REDACTED] D stated that [REDACTED] E’s answer was feasible, and [REDACTED] believed the justification for the SPF was legitimate.

In the announcement’s assessment questions that would be used to rate and rank the candidates, ED chose narrow questions that pertained to [REDACTED] Employee A’s list, not questions related to the experience required to perform the major duties identified in the PD. [REDACTED] E who also worked on the assessment questions with [REDACTED] D could not explain how the weights for some of the questions were determined. For example, [REDACTED] E and [REDACTED] D gave great weight to an applicant’s fluency in a foreign language over other factors. While fluency in a foreign language could be desirable for an [REDACTED] in [REDACTED] we found it difficult to understand how bilingual fluency could warrant such importance in rating the competition other than to advantage [REDACTED] Employee A. If bona fide, [REDACTED] E should have been able to provide a rational reason for this oddity. [REDACTED] had none.

ED’s intention to consider only [REDACTED] Employee A for the vacancy was also revealed in the events that occurred on the opening and closing dates of the announcement. On the day the announcement opened, [REDACTED] E reminded [REDACTED] C to “give . . . [REDACTED] Employee A a heads up about the publication of the vacancy announcements and the short turn-around time.” This was to ensure that [REDACTED] Employee A’s application for the competitive examination was timely. [REDACTED] C informed [REDACTED] Employee A that the vacancy was open so [REDACTED] could apply. Then on the day the vacancy closed (multiple vacancies closed that day), [REDACTED] D called [REDACTED] E to make sure that the applicants they wanted applied. [REDACTED] asked [REDACTED] E to “give me a buzz and just give me a couple of names that we’re looking for.” Approximately 30 minutes later, [REDACTED] D left [REDACTED] E a message indicating that [REDACTED] had “good news”: [REDACTED] Employee A had applied for the position. This was unusual. [REDACTED] D confirmed to OSC that [REDACTED] would not normally call the program office to find out if a preferred candidate had applied for a job. [REDACTED] agreed that a person in [REDACTED] position should not give the impression “that we were giving disparate treatment (sic) to one candidate over another.”

On February 11, 2011, a few weeks after the vacancy announcement closed, [REDACTED] E told [REDACTED] C that [REDACTED] Employee A was eligible for selection. Without interviewing any of the eligible candidates, [REDACTED] E selected [REDACTED] Employee A for the [REDACTED] position.

Because [REDACTED] Employee A was a political appointee, [REDACTED] conversion to the competitive service required OPM’s approval. OPM mandated this in 2009 shortly after the change

in Administrations. ED, however, failed to send **Employee A's** conversion forward for OPM's approval. **D** claimed that **█** was not aware of the OPM requirement, which had been in effect for over a year. **D** said that they processed the conversion without seeking approval upon the advice of another ED employee in Executive Resources, who is now retired.

## 2. Appointment of **Employee B**

In March 2011, ED appointed **Employee B** to a GS-12 career position as a **█** in **█**. ED also awarded **Employee B** \$15,000 as a recruitment incentive. **C**, **E** and **D** were the ED officials responsible for the **Employee B** hire and **E** again served as selecting official. **C**, **E** and **D** also provided **Employee B** with a recruitment incentive. **E** wrote a memorandum for **C's** signature requesting the incentive and **D** advised them on the incentive. Other officials in HR, who are no longer ED employees, approved the incentive.

**Employee B's** recruitment and selection contained many of the same elements that undermined the legitimacy of **Employee A's**. The evidence showed that there was a personal connection between **C** and **Employee B**. The latter worked for the former at **█**. **C** said **█** liked **Employee B's** "skill sets" and **Employee B** would fit in at **█**. **C** told supervisor **E** about **█** prior relationship with **Employee B** and **█** high opinion of the potential candidate. **C** assured **E** that **Employee B** could manage grants.

In October 2010, a few months before the **█** vacancy announcement opened, **C** contacted **Employee B** to find out if **█** would be interested in working for **█**. When **Employee B** expressed an interest, **C** reached out to assist **Employee B** in the application process. For example, before the vacancy opened, **C** provided **Employee B** with a GS-12 and a GS-13 position description for **█**. **C** sent **Employee B** a copy of draft language for potential unique requirements for the position so **Employee B** could have a better understanding of what **█** application should contain.

From October through December 2010, **C** worked with **Employee B** on **█** résumé, reviewing drafts and providing feedback to improve them. **C** had an ED employee send **Employee B** the résumé of another individual so **Employee B** could use it as a model. Three weeks before the vacancy announcement opened, **C** reviewed **Employee B's** résumé one more time, after which **█** expressed satisfaction. **█** wrote:

I've just given your attached resume a quick read . . . and WOW, it's much stronger and focused now! Good job! I think it's ready to go. I would just recommend a statement of responsibilities for the **█** period . . . don't leave it empty.

I'll read the attachment more closely this weekend and get back to you. Tomorrow, I'll check where things are with the postings.

█████ E will be gone tomorrow, but I'll check in with █████ D █████ for a status report.

The coordination between █████ announcement of the position and its assistance to Employee B is plain from the e-mail quoted above. It is also evident in the differences between the first résumé that Employee B submitted to █████ C for review in October 2010 and █████ final résumé. A comparison shows the fruits of █████ C's assistance. During █████ OSC interview, █████ C acknowledged that █████ helped Employee B refine █████ résumé for the █████ position, and in doing so, █████ gave █████ preferential treatment that █████ did not extend to other applicants. Additionally, █████ C sought input from █████ D on Employee B's competitive chances. For example, before the vacancy announcement opened, █████ C asked █████ D to "evaluate [Employee B's résumé] in terms of a █████ position." █████ D testified that █████ reviewed Employee B's résumé and advised █████ C that Employee B would qualify as a GS-12.

As in the Employee A case, on the day the vacancy announcement opened, █████ E reminded █████ C to "give █████ Employee B . . . a heads up about the publication of the vacancy announcements and the short turn-around time." █████ C contacted Employee B and told █████ that the █████ vacancy was open. Also, as in the Employee A case, the day the vacancy announcement closed, █████ D and █████ E communicated about the status of Employee B's application. This time █████ D left █████ E a message with "bad news." █████ told █████ E that it did not appear that Employee B applied. █████ D also reminded █████ E that because it was the closing date for the announcement, they would have to either make sure that Employee B applied that day or extend the time period for the vacancy announcement. Later in the day, █████ D left █████ E another message indicating the "good news": that Employee B "got [█████ application] in." █████ D also asked █████ E to tell Employee B that █████ application had been received.

Employee B was deemed qualified for the █████ position. Shortly after the certificate was issued, █████ E selected Employee B again without conducting any candidate interviews. In the recruitment process, ED awarded Employee B a \$15,000 recruitment incentive, which was approximately 25 percent of Employee B's basic pay and the highest amount allowable. The \$15,000 award was the only recruitment incentive ED awarded in 2011, and █████ E testified that █████ had not previously given this recruitment incentive to a candidate. Based on records from fiscal years 2009 through 2011, Employee B was the only █████ who received a recruitment incentive.

Authority to provide recruitment incentives derives from OPM regulations in 5 C.F.R. Part 575. Specifically, 5 C.F.R. § 575.106(b) sets forth the mandatory factors that must be considered in determining whether a position requires an incentive. The general principle holds that incentives may only be used where it is likely to be difficult to fill a position without one.

ED's Personnel Manual Bulletin, which delineates ED's policy on recruitment incentives under 5 C.F.R. Part 575, similarly permits a recruitment incentive in cases where "there is a determination that, in the absence of such a bonus, difficulty would be



encountered in filling the position with a high quality candidate.” ED’s policy states that the relevant factors for recruitment difficulty include the following: “the success of recent efforts to recruit high quality candidates for similar positions in the commuting area, including indicators such as (1) offer acceptance rates, (2) the proportion of positions filled and (3) the length of time required to fill similar positions”; the “Labor-market factors that may affect the ability of the Department to recruit high quality candidates for similar positions in the commuting area, now or in the future”; and “Special qualifications needed for the position.” These factors track those set out in OPM’s authorizing regulation. *See* 5 C.F.R. § 575.106.

In justifying why **Employee B** should receive the recruitment incentive, **C** emphasized in a memorandum, which **E** prepared and **C** reviewed and approved, that the position required the performance of three major duties and that **Employee B's** application provided evidence of “recent and extensive experience” related to all the critical duties. The memo stated that the position was critical to the effective staffing of **██████████**. Furthermore, the memo indicated that **Employee B** was the only candidate who demonstrated experience in all the duties and concluded that it would be difficult to recruit a high quality candidate that met the needs of the position in a timely manner without offering **Employee B** the recruitment incentive. The memorandum, however, failed to analyze the specific factors that OPM’s regulation and ED’s policy required.

Additionally, the critical duties cited by the memorandum to justify the incentive were not the position’s major duties, but the unclassified duties that were added to the PD presumably for **Employee B's** benefit. Thus, it appears that by tailoring the PD with specific duties and tweaking **Employee B's** résumé, **██████████** was able to make the case for an incentive appear stronger than it was.

Finally, the investigation determined that it was **C** not **Employee B** who brought up the recruitment incentive. **Employee B** told OSC that **██████████** never communicated to ED that **██████████** needed a recruitment incentive in order to accept the position.

Although **E** drafted the memorandum for **C** **██████████** told OSC that **██████████** did not believe **Employee B** qualified for the recruitment incentive because the position was not difficult to fill. **E** as the selecting official, was in a position to know this and **██████████** received advice from other officials at ED who concluded similarly that the position was not difficult to fill. In **E's** view, the position was generic and did not require any special qualifications. Also, **E** said that this was **██████████** first attempt to fill the position, and **██████████** could recruit high quality candidates easily given the economic climate and the availability of other qualified candidates on the certificate. **E** said **██████████** told **C** that **██████████** did not believe **Employee B** qualified for the incentive and recommended that they select another candidate if **Employee B** would not accept the position without a recruitment incentive. However, according to **E** **C** told **██████████** to go ahead and prepare a justification and **C** would sign it.

**B. [REDACTED] Violated 5 U.S.C. § 2302(b)(6) and 5 U.S.C. § 2302(b)(12)**

Under Section 2302(b)(6) of Title 5, it is a prohibited personnel practice for an official with personnel action authority to grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment for the purpose of improving or injuring the prospects of any particular person for employment. The following elements must be established by a preponderance of the evidence to prove a violation of 5 U.S.C. § 2302 (b)(6): (1) a preference or advantage was granted; (2) the official who granted the preference or advantage had personnel authority; (3) the preference or advantage was not authorized by law, rule, or regulation; and (4) the official who granted the preference or advantage did so with the intent of improving the prospects of one employee or applicant or injuring the prospects of another employee or applicant.

The gravamen of a (b)(6) violation is the purposefulness of the activity. *Price v. Dept. of Army*, 14 M.S.P.R. 161, 164 (1982). “It is the preference itself that is prohibited and not the type of action used in granting the preference.” *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 570 (1993), aff’d, 39 F.3d 1196 (Fed. Cir. 1994) (Table). The statute aims to prevent merit systems abuse when officials act for the “purpose of improving one person or injuring another” through preferential treatment. *Price, supra*. As the Board has reminded, the Civil Service Reform Act put all agencies “on notice that selections for employment must be made in accordance with law and must not be the result of personal or political favoritism.” *Byrd*, 59 M.S.P.R. at 584. The statute, in fact, plainly warns that illegal preferences include “defining the scope or manner of competition or the requirements of the position.” 5 U.S.C. § 2302(b)(6).

**1. [REDACTED] Employee A case**

Based on the evidence outlined above, OSC concludes that [REDACTED] officials violated 5 U.S.C. § 2302(b)(6) by granting an unauthorized preference or advantage to [REDACTED] Employee A. Specifically, the evidence shows that [REDACTED] particularly [REDACTED] C was predisposed to selecting [REDACTED] Employee A and engineered the [REDACTED] position to ensure that [REDACTED] Employee A would qualify. As discussed above, [REDACTED] hired [REDACTED] Employee A for a competitive service [REDACTED] position after it could not move [REDACTED] into a political position within its office. [REDACTED] officials sought information from [REDACTED] Employee A to craft a position description and vacancy announcement that matched [REDACTED] Employee A's strengths. The duties ED used to recruit for the position and the SPF, both of which highlighted legislative experience, were atypical for an [REDACTED] position within [REDACTED]. All the actions taken to manipulate the competitive examination process and to favor [REDACTED] Employee A were contrary to the merit systems principles in 5 U.S.C. § 2301 and civil service rule 7.1, which mandate that government positions be subject to fair and open competition and be filled on the basis of merit and fitness. In essence, the competition used to hire [REDACTED] Employee A was rigged, rendering it unfair and a prohibited personnel practice. 5 U.S.C. § 2302(b)(6).

## 2. Employee B case.

The evidence also shows that [REDACTED] violated 5 U.S.C. § 2302(b)(6) by granting an unauthorized preference or advantage to Employee B [REDACTED] officials, particularly [REDACTED] C [REDACTED] were predisposed to selecting Employee B [REDACTED] for the competitive service [REDACTED] position and were in frequent contact with Employee B [REDACTED] to prepare [REDACTED] for the competitive examination. [REDACTED] C [REDACTED] provided Employee B [REDACTED] with copies of draft position descriptions and draft language for the potential unique position requirements to help Employee B [REDACTED] prepare [REDACTED] application. [REDACTED] assisted Employee B [REDACTED] to improve [REDACTED] résumé for the competitive examination and consulted [REDACTED] D [REDACTED] for assistance. Employee B [REDACTED] was the only candidate for the vacancy whom ED assisted in this way. Finally, ED ensured that Employee B's [REDACTED] application was submitted by the closing date of the vacancy announcement and indicated that it would have been open to extending the application period if Employee B [REDACTED] had not submitted [REDACTED] application on time. It would not have done this for any other potential applicant. Finally, ED made a one-time decision to award Employee B [REDACTED] a recruitment incentive that [REDACTED] neither asked nor qualified for. These actions are not consistent with the merit system principles assuring that there be fair and open competition and equitable treatment. Thus, as with the Employee A [REDACTED] recruitment, we conclude that the competition used to hire Employee B [REDACTED] was rigged, rendering it unfair and a prohibited personnel practice. 5 U.S.C. § 2302(b)(6).

ED's award of a recruitment incentive to Employee B [REDACTED] also violated 5 U.S.C. § 2302(b)(12). Under subsection (b)(12), it is a prohibited personnel practice for an official to take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles. To prove a violation of (b)(12), preponderant evidence must show the following: (1) proof of a personnel action; and (2) proof of a violation of law, rule, or regulation implementing or directly concerning at least one of the merit systems principles.

As explained above, ED awarded Employee B [REDACTED] a recruitment incentive shortly after [REDACTED] was hired although [REDACTED] position did not meet the criteria required by 5 C.F.R. Part 575 (5 C.F.R. § 575.106) and by ED's own policy. The restrictions governing recruitment incentives implement and directly concern the merit systems principles that selection determinations be based on relative ability, knowledge and skills, not personal favoritism or arbitrariness, that applicants have equal opportunity, be treated fairly and equitably in all aspects of personnel management, that incentives be appropriate, that the work force should be used efficiently and effectively, and that employees maintain high standards of integrity. See 5 U.S.C. § 2301(b)(1), (2), (3), (4), and (8)(A). The evidence showed that the award was highly unusual, that [REDACTED] failed to evaluate the relevant factors, and that [REDACTED] had not previously granted a recruitment incentive for this position. Based on testimony, there appears to have been no need to grant the incentive to recruit Employee B [REDACTED]. Moreover, it was unlikely that [REDACTED] would have granted an incentive to another candidate who did not have a preexisting relationship with [REDACTED] C [REDACTED]. Therefore, ED's award of the recruitment incentive to Employee B [REDACTED] violated regulations and

rules directly concerning and implementing merit systems principles. 5 U.S.C. § 2302(b)(12).

### III. RECOMMENDATIONS

#### A. Disciplinary Action

We recommend that the agency consider taking appropriate disciplinary action against **E** and **D**. While the interest to hire **Employee A** and **Employee B** did not originate with them, each played a significant role in the prohibited personnel practices. As officials with personnel management responsibility, each “had a professional responsibility to advise management that using [the methods] in this case was illegal.” *Byrd*, 59 M.S.P.R. at 577, 583-84. With respect to their responsibilities as employees with personnel management authority, each violated **statutory duty to prevent prohibited personnel practices and violations of civil service law, rule, and regulation. 5 U.S.C. § 2302(c).** Finally, their activities to aid and abet **C’s** efforts to hire **Employee A** and **Employee B** were serious and went straight to the heart of their responsibilities as a manager and human resources professional respectively.

1. **E**. The evidence showed that **E** knew of **C’s** desire to hire **Employee A** and **Employee B**. **E** also knew of **Employee B’s** prior relationship with **C** at **\_\_\_\_\_**. With such knowledge, **E** aided and abetted **C** in advantaging the candidates by serving as selecting official and participating in **\_\_\_\_\_** scheme to provide them unfair competitive advantages in the following ways:

**Employee A**: (1) **E** participated with **D** to prepare a PD that was tailored to **Employee A’s** competitive strengths; (2) certified that the duties were accurate; (3) developed a selective placement factor that favored **Employee A** and that was used to screen out other candidates; (4) participated in developing narrowly tailored assessment questions of dubious merit that favored **Employee A’s** candidacy; (5) acted to ensure that **Employee A** was aware of the short timeframe to apply for the vacancy; (6) coordinated with **C** and **D** to ensure that **Employee A** applied; (7) kept **C** informed about the status of **Employee A’s** candidacy; and (8) without interviewing any candidate – including **Employee A** – selected **\_\_\_\_\_** for the position.

**Employee B**: (1) **E** reminded **C** to inform **Employee B** of the vacancy announcement; (2) worked with **D** to monitor the status of **Employee B’s** application; (3) selected **Employee B** without interviewing any of the candidates; and (4) drafted the deficient memorandum that provided justification for awarding **Employee B** a recruitment incentive even though **\_\_\_\_\_** believed it was not justified.

2. **D**. The evidence showed that **D** knew of **\_\_\_\_\_** desire to hire **Employee A** and **Employee B**. **D** also knew of **Employee B’s** prior relationship with **C** at **\_\_\_\_\_**. With such knowledge, **D** aided and abetted **C** in advantaging the

candidates by participating in [REDACTED] scheme to provide them unfair competitive advantages in the following ways:

**Employee A**: (1) [REDACTED] **D** served as the HR representative in the staffing action and provided advice and guidance to [REDACTED] **C** and [REDACTED] **E** (2) participated with [REDACTED] **E** in tailoring the PD to **Employee A's** competitive strengths; (3) participated with [REDACTED] **E** in preparing written justification for a dubious SPF that was designed to provide **Employee A** a competitive advantage; (4) checked to ensure that **Employee A** applied; (5) rated and ranked the competitive candidates and found **Employee A** qualified; and (6) processed [REDACTED] selection and appointment.

**Employee B**: (1) [REDACTED] **D** served as the HR representative in the staffing action and provided advice and guidance to [REDACTED] **C** and [REDACTED] **E** (2) reviewed **Employee B's** résumé before the competitive examination to ensure that **Employee B** would qualify for the position; (3) monitored with [REDACTED] **E** the status of **Employee B's** application to ensure that [REDACTED] timely applied; (4) rated and ranked the competitive candidates and found **Employee B** qualified; and (5) processed **Employee B's** selection and appointment.

OSC recommends that ED consider individualized disciplinary action based on these findings in accordance with the *Douglas* factors.

## **B. Corrective Action**

We also recommend that ED consult with OPM about regularizing the **Employee B** appointment. Moreover, we recommend that ED consult with OPM to take appropriate corrective measures concerning the recruitment incentive that **Employee B** received. Further, ED should provide training to its HR staff and [REDACTED] management officials on the merit systems principles and the prohibited personnel practices.