



## U.S. OFFICE OF SPECIAL COUNSEL

U.S. Office of Special Counsel  
Report of Prohibited Personnel Practice OSC  
File Nos. MA-15-5942 and MA-16-0194

This report has been changed from its original version and some details have been withheld to protect confidential information, including the identity of the parties involved. All Freedom of Information Act (FOIA) inquiries regarding this report should be referred to OSC's FOIA Officer at (202) 254-3716.

## I. INTRODUCTION

The U.S. Office of Special Counsel (OSC) received complaints alleging that officials in the U.S. Department of Justice's (DOJ) International Criminal Investigative Training Assistance Program (ICITAP) attempted to influence veterans to withdraw from competition for two vacant competitive service positions in 2015. During OSC's investigation, we received additional allegations that DOJ re-advertised these positions in 2016 with a Selective Placement Factor (SPF) that may have been designed to prevent the same veterans from qualifying for the positions. OSC investigated these allegations to determine whether they are prohibited personnel practices.<sup>1</sup> OSC concludes that ICITAP officials attempted to influence candidates to withdraw from competition in violation of 5 U.S.C. § 2302(b)(5) and 5 C.F.R. §§ 4.3 and 330.1001. OSC also concludes that ICITAP officials violated 5 U.S.C. § 2302(b)(11) when they recommended an appointment in contravention of a veterans' preference requirement. While OSC does not find that DOJ or ICITAP officials violated 5 U.S.C. § 2302(b)(6) when the positions were re-advertised, we believe DOJ should consult with Office of Personnel Management (OPM) concerning whether the use of the SPF in 2016 was appropriate.

## II. STATEMENT OF FACTS

ICITAP is a law enforcement development organization within DOJ. Its mission is to work with foreign governments to develop law enforcement institutions in support of U.S. foreign policy and national security objectives. As of September 30, 2016, ICITAP maintained 15 field offices outside of the United States. A program manager responsible for interacting with other U.S. government agencies and host nation law enforcement officials heads each field office.

### A. ICITAP Announces Vacancies for Position X and Position Y in 2015

In April 2015, DOJ announced two vacancies in ICITAP, Position X and Position Y. DOJ used merit promotion and delegated examining unit (DEU) procedures for each announcement.<sup>2</sup> Each of the two vacancy announcements was open for approximately one week.

During the hiring process for these vacancies, ICITAP officials provided job descriptions to DOJ human resources, signed SPF justifications, and reviewed final announcements.

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<sup>1</sup> OSC also sought a stay of the appointments for the two positions from the Merit Systems Protection Board (MSPB) to provide OSC with time to investigate the allegations. On September 30, 2016, MSPB granted OSC's request for a 45-day stay. At OSC's request, MSPB later extended the stay through February 12, 2017.

<sup>2</sup> Generally, only candidates with competitive status in the civil service can apply to a merit promotion vacancy announcement. DEU announcements are open to members of the public.

B. ICITAP Officials Have Concerns about Veterans' Preference and Its Effect on the Hiring Process for Both Positions

The issue of veterans' preference and its impact was a subject of discussion for ICITAP from the beginning of the hiring process.<sup>3</sup> Prior to the Position X vacancy announcement closing, an ICITAP official, Official 2, discussed veterans' preference with a potential candidate. In response to the potential candidate's question about a policy of hiring only veterans, Official 2 told the candidate that there were "special provisions" in the recently-opened Position X vacancy announcement that "can trump a vet if they are worthy enough." Similarly, before the Position Y vacancy announcement closed, Official 2 and another potential candidate talked about that candidate's belief that two applicants, Applicant A and Applicant B, had a "leg up" on him because, among other things, Applicant A and Applicant B were veterans. Official 2 also told a third person, who inquired about Position X, that "[i]n case you haven't heard, every bit of advantage is being granted to vets in the hiring process. Basically, if you don't have veteran's status, it's almost impossible to bring a new person into the organization."

After the vacancy announcements closed, DOJ sent ICITAP the certificates of eligible candidates (CERTs) with Applicant A and Applicant B ranked as best qualified for the positions. When ICITAP received the CERTs, Official 1, the selecting official, and Official 2 expressed apprehension about Applicant A and Applicant B, the only candidates for Position X who were preference eligible veterans. Official 1 and Official 2 were concerned they would have to select Applicant A and Applicant B for the positions because Applicant A and Applicant B were veterans.

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<sup>3</sup> Since the time of the Civil War, veterans of the Armed Forces have been given some degree of preference in appointments to Federal jobs. See <https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide-for-hr-professionals>. Recognizing their sacrifice, Congress enacted laws to prevent veterans seeking federal employment from being penalized for their time in military service. *Id.* Veterans' preference recognizes the economic loss suffered by citizens who have served their country in uniform, restores veterans to a favorable competitive position for government employment, and acknowledges the larger obligation owed to disabled veterans. *Id.* Preference applies in hiring from civil service examinations conducted by agencies under DEU authority, for most excepted service jobs including Veterans Recruitment Appointments (VRA), and when agencies make temporary, term, and overseas limited appointments. *Id.* Veterans' preference does not apply to promotion, reassignment, change to lower grade, transfer or reinstatement. *Id.* See also *e.g.*, 5 U.S.C. § 2108 and 5 C.F.R. § 211.102 (defining veterans and veterans' preference) and 5 U.S.C. § 3309 (discussing points awarded to preference eligible veterans).

Official 1 and Official 2 researched veterans' preference. Another ICITAP official, Official 5, provided Official 1 and Official 2 with detailed information on veterans' preference and specific hiring authorities. The information Official 5 provided stated, for instance, that under DEU procedures, veterans' preference applies; that ICITAP "must select a vet or the vet must withdraw"; that "CP/CPS vets (disabled vets) ONLY have to be minimally qualified"; and that veterans preference does not apply to hiring actions under merit promotion procedures. Official 5 also separately highlighted for Official 2 a copy of the regulations pertinent to veterans' preference in the Code of Federal Regulations.

Official 1 and Official 2 weighed potential courses of action. Official 1 contacted Official 4, who arranged a meeting with human resources. In their communications with Official 4, Official 1 and Official 2 compared the qualifications for Position A and Position B with that of a program manager, and mentioned that "under... or marginally qualified candidates who are veterans can easily sail into the job." Official 1 and Official 2 met with human resources in or around late June 2015 and they discussed re-advertising the position using SPFs. Additionally, Official 1 contacted a former ICITAP official, who, according to Official 1, "ranted" about veterans' preference and advised him to return the CERTs without a selection and to re-advertise the positions "over and over again until we have a good candidate." Official 1 and Official 2 agreed that to keep re-advertising the position was not a viable strategy, as they believed Applicant A and Applicant B would re-apply to the new announcements and OPM "would quickly notice an issue." Official 2 also stated:

When certs are returned and re-advertised, red flags are raised, and OPM immediately suspects there's an attempt underway to circumvent the rules. Regardless of how many times we advertised, the candidate we would eventually select will be a vet ... absent a qualified merit applicant.

Instead of re-advertising the positions at that time, Official 1 proposed that ICITAP should interview other candidates who qualified for Position X and not solely Applicant A and Applicant B, who were the only veterans. Official 1 asked Official 2 if it was possible to expand interviews beyond candidates they would be able to select. According to Official 1, "[a]lthough I know it would ultimately lead nowhere, it would be interesting to see a ranked list of candidates and see where our two vets landed." After Official 2 indicated they were free to interview any candidate on the CERT "as long as we understood the eventual outcome," Official 1 advised Official 2 to do so:

I think we should. Even if we know the outcome, it can't hurt our position going forward if we can demonstrate in a tangible way that we are forced into hiring lesser qualified people. Would be interesting if our vets came out at the bottom of the ranking. And of course, if they come out on top, then we have no argument.

Official 2 replied, "Agree - I'm on it."

C. ICITAP Selects a Nonveteran for Position X and a Veteran for Position Y

On August 17 and 18, 2015, ICITAP interviewed candidates for the two positions. Official 1 and Official 2 reviewed and ranked 24 resumes and selected the top 12 candidates for interviews.<sup>5</sup> The interview panel consisted of Official 2, an ICITAP program manager, and a representative from U.S. State Department.<sup>6</sup> The panel asked each candidate 10 identical questions that Official 1 provided to the panelists. After the interviews, the candidates did a short writing test.

The highest scoring candidate was Applicant C, with Applicant D ranked second. Applicant C, a nonveteran and someone who did not have status under merit promotion procedures, [REDACTED]. The interview panel ranked Applicant A and Applicant B sixth and seventh, respectively, for Position X and sixth and eighth, respectively, for Position Y.

Official 1 and Official 2 then drafted memoranda selecting Applicant C for Position X, and Applicant D, a preference eligible veteran, for Position Y. Official 1 and Official 2 drafted this memorandum selecting Applicant C even though Applicant A and Applicant B were the only two candidates on the Position X CERT who were eligible for veterans' preference. Thus, under DEU procedures, ICITAP had to select Applicant A or Applicant B, who human resources rated as best qualified, before selecting any nonveteran candidate like Applicant C, unless ICITAP received an approved bypass in accordance with OPM's requirements. Both Official 1 and Official 2 testified that they understood veterans' preference rules prevented the selection of Applicant C over preference eligible veterans. Official 1 stated his goal was to select the highest scoring candidates. Official 2 stated that he drafted the memoranda because he knew Official 1 wanted to select Applicant C regardless of veterans' preference. Official 2 also stated that he believed there was a chance Applicant A and Applicant B might withdraw their applications.

D. Official 1 and Official 3 Meet Off-Site with Applicant A and Applicant B to Discuss their Selection Prospects for the Positions

Before submitting the memorandum selecting nonveteran Applicant C for Position X to human resources, Official 1 wanted to meet with both Applicant A and Applicant B. On August 20, 2015, the same date of Official 1's memorandum selecting nonveteran Applicant C, Official 3 contacted Applicant B and scheduled a time for Applicant B to meet with him and Official 1.

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<sup>5</sup> Because Applicant A and Applicant B were the only preference eligible veterans on the Position A CERT, human resources did not initially provide ICITAP with the applications for the other candidates. ICITAP requested additional applications from human resources.

<sup>6</sup> ICITAP works closely with the State Department.

[REDACTED]. In his email communications with Applicant B, Official 3 did not specify the reason for the meeting. In his OSC interview, Official 1 recalled “[Applicant B] saying I hope this is good news. I said [Applicant B] I can’t really talk to you about that.” When Official 3 learned that Applicant B would be [REDACTED] on August 21, he arranged for Applicant B to meet Official 1 and him away from ICITAP. Official 3 offered to “head south on 95.” While Applicant B stated that he would “hate for [Official 1 and Official 3] to leave DC,” he suggested a restaurant in Woodbridge, VA. Applicant B also indicated to Official 3 that he had to make child care arrangements in order to meet with Official 3 and Official 2.

Official 3 told OSC he believed Official 1 wanted him at the meetings with Applicant A and Applicant B to serve as a witness and to defend against any allegations he asked the candidates to step aside: “he didn’t want [Applicant A] or [Applicant B] to come back and say this is what was said.”<sup>8</sup> Official 3 stated he believed Official 1 chose him, at least in part, because [REDACTED]. Official 3 also testified that he had reservations about scheduling the meetings because both Applicant A and Applicant B were [REDACTED] and Official 3 did not see any urgent need to schedule the meetings. However, Official 3 did not express any reservations to Official 1. Official 1 told OSC that the meetings were scheduled with urgency because the CERTs were going to expire soon.<sup>9</sup> Ultimately, Official 1 and Official 3 met with Applicant A and Applicant B separately at different restaurants in [REDACTED], approximately 25 miles outside of ICITAP’s [REDACTED], office. Both meetings occurred on August 21 [REDACTED].

Official 1 and Official 3 met first with Applicant B. Applicant B had not previously met Official 1 away from the office and thought there was a possibility Official 1 and Official 3 were there to congratulate him on being selected for one of the positions. [REDACTED]

[REDACTED] Official 1 stated that of the top two candidates for the positions, one was a veteran and one was not. He told Applicant B that the only way ICITAP could select both of the top candidates would be if Applicant A and Applicant B withdrew their applications. Official 1 also stated that he made it clear to Applicant B that, regardless of whether Applicant B withdrew his application, ICITAP would not select Applicant B for any of the positions.<sup>10</sup>

According to Official 1, he did most of the talking during the meeting with Applicant B, but Official 3 participated in the conversation and was responsive to questions.<sup>11</sup> Official 3 testified that he encouraged Applicant B to look forward to opportunities in the future. Other than the vacancies, Official 1 and Official 3 did not discuss any work-related topics with

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<sup>8</sup> In his interview, Official 1 denied that he wanted to bring a witness.

<sup>9</sup> The CERTs provided to OSC have an expiration date of September 3, 2015, two weeks after Official 1 and Official 3’s meetings with Applicant A and Applicant B.

<sup>10</sup> Official 1 and Official 3 provided slightly different testimony to OSC. Official 1 testified that he told the candidates that if the candidates did not withdraw, he would select other applicants from the CERT who were within reach. Official 3 testified that Official 1 told the candidates he would return the CERT without a selection.

<sup>11</sup> Witnesses could not remember what questions Official 3 answered.

Applicant B. Applicant B asked for time to consider whether he would withdraw his application. After they finished eating, Official 1 paid for the meal and left with Official 3 for their next appointment with Applicant A.

During Official 1 and Official 3's meeting with Applicant A, Official 1 told Applicant A that he [REDACTED] during his interview. Official 1 also told Applicant A veterans' preference would not prevent him from selecting another candidate. But he informed Applicant A that if Applicant A withdrew his application, ICITAP would be able to select superior candidates for the positions. Official 3 testified that he could not recall what, if anything, he said during this meeting with Applicant A. Official 1 testified that Official 3 answered questions during the meeting.<sup>12</sup> Like Applicant B, Applicant A asked for time to decide whether to withdraw his application. Applicant A also stated that he wanted to confer with Applicant B.

Official 1 and Official 3 both testified that the reason for the meetings with Applicant A and Applicant B was to convey that they were not going to be selected and that there were better qualified nonveterans on the CERT. According to Official 3, withdrawal from competition was never explicitly mentioned during the meetings with Applicant A and Applicant B.<sup>13</sup> Official 1, however, stated that withdrawal was discussed explicitly, and that he was the first to raise it. Official 1 asserted that neither candidate was encouraged to withdraw his applications because "six or eight times ... I made it exceedingly clear that if they chose to [withdraw their applications], there was no reward for doing so and there was no penalty for not doing so. If they wanted to do that to clear the way for some of their other colleagues, fine; and if they didn't, fine."

Later, Official 5 hand-delivered to human resources the memoranda selecting Applicant C, the nonveteran, for Position X and Applicant D for Position Y. Official 1 addressed both memoranda to Official 6 in human resources. Official 5 also delivered CERTs that Official 1 signed selecting Applicant C and Applicant D for each position. The human resources specialist who was handling these hiring actions at the time told Official 5 that Applicant C's selection was not permitted, adding something to the effect of, "is [Official 1] crazy?" Official 5 indicated that Official 1 was adamant about providing the CERTs to human resources as is.

E. Official 2 Meets with Applicant A and Applicant B to Determine Whether They Would Be Withdrawing their Applications for the Positions

Shortly after Official 1 and Official 3's off-site August 21, 2015 meeting with Applicant A and Applicant B, Official 2 met with both candidates together in his office. With both of them present, he asked whether they were going to withdraw from consideration for the positions. Both indicated that they wished to remain in consideration. Official 2 ended the meeting without discussing any other topics. He estimated the meeting lasted approximately 15 minutes.

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<sup>12</sup> Witnesses could not remember what questions Official 3 answered.

<sup>13</sup> Official 3 testified to OSC, "[Official 1] was very careful to say, 'I'm not asking you to step aside. I just wanted to lay out what the facts were and you guys decide what you think is best.'"

Official 2 testified that he met with Applicant A and Applicant B because he was aware that Applicant A and Applicant B had discussed their applications for the positions at the meeting with Official 1 and Official 3 and that Applicant A and Applicant B were considering whether they would withdraw from competition for the positions. Official 2 believed that ICITAP sending a selection memorandum for a nonveteran when there were qualified, preference eligible veterans on the CERT would cause a dispute with human resources.

Official 2 also communicated with Official 3 about whether Applicant A and Applicant B were going to withdraw their applications. On September 4, 2015, Official 3 emailed Official 2, “[s]o what is the game plan, I understand [Applicant A] and [Applicant B] did not withdraw?” Official 2 initially replied, “[t]hat’s correct. We can talk off-line when you have a chance.” Four minutes later, Official 2 told Official 3, “I forgot to mention - you and my boat broker must have gone to the same salesmanship school. LOL.” In his interview with OSC, Official 2 stated that Official 3 was not telling Applicant A and Applicant B that they have to withdraw, but that the goal of Official 1 and Official 3’s meeting with Applicant A and Applicant B was to “sell” the idea that, “whether you withdraw or not, you’re not going to get [selected].” Official 2 also stated that it was obvious Official 3 “didn’t do a very good job explaining ... because [Applicant B] did not withdraw.”

F. Human Resources Notifies ICITAP that they Cannot Select the Nonveteran for Position X

On August 26, 2015, Official 6 emailed Official 1 stating:

I received a folder yesterday containing your memo requesting selection of a non-veteran over two qualified veteran candidates who made the Best Qualified list. Since federal law requires strict adherence to veterans’ preference requirements, particularly for competitive service positions that are open to all U.S. citizens, I am restricted from taking action on your proposed selection without involving the Office of Personnel Management.

Official 6 also indicated in his email that he had spoken to his supervisor, Official 7, about the matter and proposed a meeting to discuss how they were going to fill the positions. Official 1 responded, “[t]he basic problem here is going to be that the two veterans you reference are [REDACTED]

[REDACTED] I’ll look forward to discussing alternate strategies.”

The meeting occurred on or about August 27, 2015. Official 1, Official 2, Official 6, and Official 7 attended. Human resources officials explained that veterans’ preference rules prevented them from processing Applicant C’s selection. The attendees at the meeting discussed alternative strategies for filling the Position X vacancy, including re-advertising the position using a different SPF. After human resources told Official 1 he could not select Applicant C for Position X, Official 1 returned the Position X CERT to human resources without a selection. The selection of Applicant D for Position Y initially proceeded because Applicant D was a



veteran. ICITAP was, however, unable to hire Applicant D because, [REDACTED] a waiver was required to appoint him. Despite the efforts of ICITAP officials, including a three-page memorandum Official 2 wrote highlighting Applicant D's qualifications, ICITAP was not able to secure this waiver. As a result, both positions remained vacant.

On September 18, 2015, Official 1 sent emails to three candidates who had applied and who worked with ICITAP.<sup>14</sup> He informed them of their interview score and ranking relative to other interviewees. Official 1 also stated that ICITAP was "blocked" from selecting a preferred candidate because of veterans' preference requirements. Official 1 added:

Based on the interview panel's rankings, it is my judgment that those candidates who are entitled to veteran's preference and who are blocking the hiring of [REDACTED]. After some back and forth, we have worked out an alternate way forward with HR, wherein we will decline to make a selection from the current cert list and the position will remain unfilled for the time being.

Official 1 stated in his OSC interview that it was his practice to send emails to all candidates who interviewed and that if no emails were sent to a candidate, he likely called them to communicate the information. Applicant A and Applicant B were the only candidates Official 1 and Official 3 met in person and off-site ICITAP to discuss their results.

One candidate Official 1 emailed apologized for his [REDACTED] performance, "[t]o be honest, my heart wasn't in it for I knew it would go nowhere. I should have been better prepared for it would have strengthened your argument to OPM and CRM HR." The candidate elaborated in the same email, "I am very appreciative that you are fighting this ridiculous regulation."

#### G. ICITAP Re-Announces the Positions in 2016

On April 19, 2016, Official 6 emailed Official 7, an ICITAP official, draft language for an SPF with a justification and asked to meet in person to discuss.<sup>15</sup> On April 21, Official 6 emailed the same SPF to Official 2 and Official 5. After getting them to agree on a date, Official 6 included the same SPF justification in a meeting invite to ICITAP officials and human resources specialists working on the hiring actions.

The 2016 vacancy announcements for the two positions contained SPFs that were different from the 2015 vacancy announcements. Official 2, [REDACTED]

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<sup>14</sup> Official 1 did not send emails to candidates who did not have a close working relationship with ICITAP. He also did not send emails to Applicant A and Applicant B.

<sup>15</sup> Neither Official 6 nor Official 7 were able to recall their meetings during their OSC interviews.

[REDACTED], and the human resources specialist approved the justifications for the SPFs. The SPFs required “experience as a sworn U.S. civilian law enforcement officer with command level experience at the state, local, or federal level.” The justification for the SPF indicated that the qualifying experience must be at least one year in the following types of command level positions “Commander, Assistant Chief, Deputy Chief, Chief or equivalent.” During OSC’s investigation, we received information indicating that ICITAP has used similar SPFs in past vacancy announcements, including in the 2012 vacancy announcement for Position Y.<sup>16</sup>

The 2016 vacancy announcements also required as a minimum qualification the following:

... at least one year of specialized experience at, or equivalent to, the GS-14 Federal grade level. This experience must include: developing, implementing, and delivering law enforcement development projects to foreign countries as part of a justice sector development initiative; advising foreign law enforcement practitioners on policies and programs related to emerging law enforcement programs; and directing and delivering law enforcement training programs.

Like the 2015 vacancy announcements, DOJ announced the 2016 vacancies under both merit promotion and DEU procedures. Fifty people applied to the DEU announcement for Position Y, including 16 preference eligible veterans. Forty people applied to the DEU announcement for Position X, including 12 preference eligible veterans. No veteran satisfied both the minimum qualification requirements and the SPF. As a result, no veteran was found to be qualified on the CERTs for the two positions.

Applicant D, the candidate ICITAP selected for Position Y in 2015, and Applicant C, the candidate ICITAP selected for Position X in 2015, applied again to the 2016 vacancy announcements. Applicant A and Applicant B, the only two veterans who qualified for Position X in 2015, and who also qualified for Position Y in 2015, applied once more to both vacancy announcements. However, of the four, only Applicant C was able to satisfy the SPF and qualify in 2016. Applicant D and Applicant B’s law enforcement experience was not command level. Applicant A had command level experience, but it was gained in the military, and therefore not civilian, as required by the SPF.

Without conducting interviews, Official 2 selected Applicant C and Applicant E for Position X and Position Y, respectively. Official 2 said he based his selections on his knowledge of the individuals, who both have experience with ICITAP. At OSC’s request, the MSPB stayed Applicant C and Applicant E’s appointments while OSC conducted its investigation.

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<sup>16</sup> Because DOJ only retains recruitment records for a three-year period, it could only provide limited information about these earlier hiring actions. ICITAP had also used SPFs requiring similar law enforcement backgrounds in other positions and ICITAP officials stated they have previously asked human resources for similar SPFs.

### III. LEGAL ANALYSIS

A. ICITAP Officials Violated 5 U.S.C. § 2302(b)(5) and 5 C.F.R. §§ 4.3 and 330.1001

Official 1, Official 2, and Official 3's meetings with Applicant A and Applicant B in which they discussed Applicant A and Applicant B withdrawing from competition for Position X and Position Y violated section 2302(b)(5). Under this provision, it is a prohibited personnel practice to "influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment." A section 2302(b)(5) violation requires two elements: (1) a showing that an employee with personnel action authority influenced or attempted to influence a person to withdraw from competition; and (2) a showing that the influence was exerted to improve or injure the employment prospects of any other person. *See Filiberti v. Merit Sys. Prot. Bd.*, 804 F.2d 1504, 1508-09 (9th Cir. 1986); *Special Counsel v. Brown*, 61 M.S.P.R. 559, 565 (1994). Additionally, sections 4.3 and 330.1001, which are analogous to section 2302(b)(5), prohibit employees from influencing, persuading, inducing or coercing an applicant to withdraw from competition for the purpose of improving or injuring an applicant's appointment prospects. *See Filiberti*, 804 F.2d at 1509.

[REDACTED], Official 1, Official 2, and Official 3 had personnel action authority. *See, e.g., Special Counsel v. Filiberti*, 27 M.S.P.R. 498, 504 (1984) (finding that [REDACTED] positions conferred, at a minimum, the ability to make recommendations about appointments, and rejecting technical interpretations of coverage). The facts also show that ICITAP wanted to select Applicant C, a nonveteran, for Position X, but could not do so because Applicant A and Applicant B had veterans' preference. Thus, the only way ICITAP could legitimately select Applicant C, absent an OPM-approved bypass, was if Applicant A and Applicant B withdrew from competition. Additionally, the evidence discussed above demonstrates that Official 1, Official 2, and Official 3 then met with Applicant A and Applicant B in an attempt to influence Applicant A and Applicant B to withdraw from competition so ICITAP could hire Applicant C. While each ICITAP official's level of culpability varies, with Official 1 perhaps being the most culpable, we address only Official 2 and Official 3 below because Official 1 left federal service. We also note the fact that Applicant A and Applicant B did not withdraw from competition does not alter ICITAP's violation. *See Brown*, 61 M.S.P.R. at 565 ("[a]ctual withdrawal of an applicant is not required to establish a violation; an attempt to influence is sufficient"); *see also Filiberti*, 27 M.S.P.R. at 508-509 (it is the conduct itself that is prohibited and not the consequences of the conduct).

1. *Official 3 attempted to influence Applicant A and Applicant B to withdraw from competition for the benefit of Applicant C*

[REDACTED]. Official 3 arranged the off-site meetings with Applicant A and Applicant B on a day when Applicant A and Applicant B [REDACTED], and Applicant B had to make alternate child care arrangements to facilitate this meeting. Official 3 also attended these

meetings with Official 1. Given Official 3's [REDACTED] position, the gravity of him setting up the meetings and being present cannot be discounted. Official 3's role and presence reinforced the message that Official 1 could not select a more qualified nonveteran candidate (such as Applicant C) unless Applicant A and Applicant B withdrew from competition. Even more important, this message had the imprimatur of ICITAP [REDACTED]. Cf. *Brown*, 61 M.S.P.R. at 563 (finding violation where respondent met with candidate and told him that he had serious concerns about his ability to project in the job, that the agency wanted more of a "flag waver" in the position, and that he could ask the candidate to waive his displaced employee priority).

Official 1 also testified that Official 3 participated in the meetings by answering questions, and Official 3 told Applicant B to look forward to opportunities in the future after Official 1 indicated he would not select Applicant B. Moreover, Applicant A and Applicant B's statements to Official 1 and Official 3 that they wanted time to consider whether they would withdraw evidences their belief that the meetings with Official 1 and Official 3 were intended to influence them to withdraw from competition.

Finally, Official 3 also followed up with Official 2 concerning Applicant A and Applicant B's withdrawal from competition. Specifically, Official 3 asked Official 2 "what is the game plan, I understand [Applicant A] and [Applicant B] did not withdraw." This evidence further conveys that ICITAP wanted Applicant A and Applicant B to withdraw from competition and needed a "game plan" to select Applicant C when those efforts failed. Official 2 testified that he compared Official 3's "salesmanship" aptitude to his boat broker because Applicant A and Applicant B did not withdraw from competition.

2. *Official 2 attempted to influence Applicant A and Applicant B to withdraw from competition for the benefit of Applicant C*

Official 2, [REDACTED], called Applicant A and Applicant B into his office to ask them whether they were going to withdraw from competition after their meetings with Official 1 and Official 3. Official 2 stated that Official 1 told him that Applicant A and Applicant B were considering withdrawing, and Official 2 wanted to know whether Applicant A and Applicant B in fact would be withdrawing their applications. As Applicant A and Applicant B had not told Official 2 that they were considering withdrawing, it is suspect that Official 2, a [REDACTED] official at ICITAP, initiated contact and met with Applicant A and Applicant B about whether they would be withdrawing. Significantly, Official 2 discussed no other topics but whether Applicant A and Applicant B would be withdrawing during this meeting. As such, Official 2 essentially revealed that he was aware of and shared the objectives of Official 1 and Official 3, who Applicant A and Applicant B had met with days before. It was an ICITAP [REDACTED] joint effort to have discussions with Applicant A and Applicant B about withdrawing their applications.

Furthermore, the following facts, discussed in depth above, support the conclusion that Official 2 met with Applicant A and Applicant B, preference eligible veterans, to influence them to withdraw from competition so ICITAP could select Applicant C, a nonveteran: (1) his

concerns about veterans' preference affecting ICITAP's abilities to hire nonveteran candidates; (2) his knowledge that ICITAP did not intend to select Applicant A and Applicant B; (3) his knowledge that ICITAP could only select Applicant C if Applicant A and Applicant B withdrew; (4) his drafting of the memorandum for Official 1 selecting Applicant C and believing that this memorandum would create problems with human resources; and (5) his boat broker email to Official 3 after Official 3 inquired about the "game plan" to select Applicant C once Applicant A and Applicant B did not withdraw from competition.

3. *ICITAP officials' assertions that they never asked, instructed, or offered an award to candidates for withdrawing from competition are inapposite*

In their interviews with OSC, Official 1, Official 2, and Official 3 all stated repeatedly that they never instructed nor asked Applicant A or Applicant B to withdraw their applications. Official 1 and Official 3 also stated that they were careful not to tell Applicant A and Applicant B there would be a reward for withdrawing or a penalty for failing to withdraw. Even if these assertions are true, they do not affect OSC's determination because sections 2302(b)(5), 4.3, and 330.1001 cover influencing or attempting to influence withdrawal from competition.

Without explicitly asking the candidates to withdraw, Official 1, Official 2, and Official 3 provided the candidates with reasons why they should withdraw, inferred that this was the preferred outcome for ICITAP [REDACTED], and followed up with the candidates to see if they were going to withdraw. This strong circumstantial evidence of their intent is sufficient. *See Filiberti*, 27 M.S.P.R. at 503 (affirming an administrative law judge's finding that a letter with pessimistic statements about a position to a veteran was a "classic example in negativism, designed to discourage and overwhelm all but the most stouthearted"). Official 1, Official 2, and Official 3 also knew that they could not select Applicant C, a nonveteran, unless Applicant A and Applicant B, preference eligible veterans, withdrew. Thus, these facts support the conclusion that Official 2 and Official 3 attempted to influence Applicant A and Applicant B to withdraw from competition in violation of sections 2302(b)(5), 4.3, and 330.1001. [REDACTED]

B. ICITAP Officials Violated 5 U.S.C. § 2302(b)(11)

ICITAP officials also violated section 2302(b)(11). Under section 2302(b)(11), it is a prohibited personnel practice to knowingly take, recommend, or approve any personnel action if the taking of such an action would violate a veterans' preference requirement.<sup>18</sup> The term veterans' preference requirement includes, for example, the provision at 5 U.S.C. § 2108, which

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<sup>18</sup> OSC can seek disciplinary action under section 2302(b)(11). OSC is not authorized to seek corrective action for cases involving a violation of veterans' preference requirement when these violations occurred on or after October 31, 1998. Under the Veterans Employment Opportunities Act of 1998, corrective action is provided by the U.S. Department of Labor's Veterans' Employment and Training Service.

describes preference eligible, and 5 U.S.C. § 3318, which discusses broadly the procedure to legally bypass a veteran. *See* 5 U.S.C. § 2302(e).

As described above, Official 1 and Official 2 knew Applicant A and Applicant B were preference eligible veterans; knew they had to select Applicant A and Applicant B, whom human resources rated as best qualified for the position, before they could select nonveterans; and knew Applicant C was not a preference eligible veteran. Nonetheless, despite this knowledge, Official 1 and Official 2 recommended Applicant C's selection in violation of a veterans' preference requirement and tried to aid that selection by influencing Applicant A and Applicant B to withdraw from consideration. Even though ICITAP officials may have perceived the veterans' preference rules to be unfair and required them to select candidates they deemed [REDACTED], veterans' preference is the law and agency officials are required to adhere to the law. Moreover, ICITAP officials could have lawfully selected a candidate for Position X under the merit promotion vacancy announcement where veterans' preference is not required. Yet they chose not to do so.

C. OSC Has Concerns about the Hiring Process for Position X and Position Y in 2016

OSC does not believe there is sufficient evidence to show that DOJ or ICITAP officials violated section 2302(b)(6), which prohibits granting a preference or advantage not authorized by law, rule, or regulation for the purpose of improving or injuring a person's employment prospects. Among other things, ICITAP had previously used a similar SPF, including four years earlier in the vacancy announcement for Position Y. We, nonetheless, have some concerns about the process.

First, the SPF may be too restrictive and may require skills that are not essential to perform the duties and responsibilities of the positions. The SPF required candidates to have experience as a sworn U.S. civilian law enforcement officer with command level experience at the state, local, or federal level. The justification for the SPF indicated that the qualifying experience must be at least one year in the following types of command level positions: "Commander, Assistant Chief, Deputy Chief, Chief or equivalent." These requirements mean that candidates must have exceptionally specific experience to qualify for the position.

Second, it appears a more rigorous justification for the SPF is necessary. While the SPF requires exceptionally specific experience, the SPF justification makes mostly conclusory statements about the necessity of that experience, without providing clear and detailed justification. Moreover, the 2016 SPF justification appears to have included language largely recycled from other justifications. For example, although the 2015 SPFs were entirely different from the 2016 SPFs, the justifications for those SPFs are almost identical and include the same typographical errors in the same places.

Third, when DOJ re-announced the positions in 2016, the change in the SPF and the specialized experience ensured generally that none of the preference eligible veterans who applied was qualified for the positions.<sup>19</sup> Specifically, none of the 16 veterans who applied to the DEU announcement for Position Y was found to be qualified. Applicant D, who ICITAP selected in 2015 for Position Y and whose selection ICITAP officials universally praised, was one of the veterans who applied and did not satisfy the required criteria of the SPF in 2016. Likewise, none of the 12 veterans who applied to the DEU announcement for Position X was found qualified.

The use of the SPF under these circumstances created the appearance of an attempt to manipulate the hiring process and undermine the integrity of the merit system process. This perception is compounded by the fact that the SPF, which was not used during the 2015 hiring process for the positions, was added only after [REDACTED] improper attempts to influence preference eligible veterans to withdraw failed. Had Applicant A and Applicant B withdrawn from competition, ICITAP would have been able to select Applicant C, and thus, most likely would not have re-advertised Position X in 2016.

#### **IV. RECOMMENDATION**

OSC recommends that DOJ and ICITAP consider taking appropriate disciplinary action against Official 2 and Official 3. We make no recommendation about Official 1 because he resigned from federal service.

OSC also recommends that DOJ and ICITAP schedule OSC-provided training about the prohibited personnel practices and the merit system principles for its Criminal Division human resources staff and ICITAP management officials. We further recommend that DOJ consult with OPM concerning its use of the SPF in the 2016 hiring process to ensure there are no improprieties concerning the use of this SPF and receive training from OPM as appropriate.

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<sup>19</sup> Another veteran, [REDACTED], who was found to lack the specialized experience, may have been qualified for the positions.