ACTING SPECIAL COUNSEL, PETITIONER
v.
PAUL D. SULLIVAN, RESPONDENT

Docket No.
HQ120600018

OPINION AND ORDER

This case is the first disciplinary proceeding brought before the Merit Systems Protection Board (Board)[1] under 5 U.S.C. § § 1206(g) and 1207. Section 1206 confers upon the Special Counsel to the Board broad authority to investigate violations of the federal personnel laws and, under subsection (g), to file complaints for disciplinary actions against federal employees based upon investigations conducted under the section. Section 1207 provides that, if the Board sustains charges brought under section 1206(g), it may, after a hearing,[2] impose penalties, including removal from the federal service, debarment not to exceed five years and a fine of $1,000.

I. INTRODUCTION

Petitioner, the Acting Special Counsel to the Board, has charged respondent Paul Sullivan, a former Executive Director of the Democratic National Committee[3] who, prior to January 20, 1981, served as Associate Deputy Administrator for Support Services of the Small Business Administration (SBA), with flagrant political abuse of the federal civil service merit systems. The charges grew out of Sullivans's role in implementing a periodic rotation policy for SBA district directors which resulted in the SBA's ordering the geographical transfers of 17 district directors, 15 of whom were members of the Republican Party. Specifically, petitioner charged that Sullivan violated 5 U.S.C. § 2302(b)(1)(E), (b)(2), (b)(6), (b)(10) and (b)(11), 5 C.F.R. § 4.2 (1980) and the First and Fifth Amendments of the United States Constitution.[4] As they apply to this case, these provisions generally prohibit discrimination and favoritism based on political affiliation in federal competitive service positions, including those of the SBA district directors.

[1]The Board, which replaced the former Civil Service Commission, was created as an independent adjudicatory body by the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111, 5 U.S.C. § 1101 *et seq.*

[2]In addition to the right to a hearing, section 1207 provides certain other procedural safeguards, including the right to counsel during Board proceedings and to a written transcript and decision.

[3]Sullivan had been Illinois coordinator for the Carter campaign in 1976 and, prior to that, had served in high-level campaign positions for three other Democratic presidential candidates. He joined the Small Business Administration in August of 1978 as Assistant Administrator for Congressional and Legislative Affairs and served in that position until he was named Associate Deputy Administrator for Support Services in April of 1979.

[4]These Constitutional claims were raised for the first time in petitioner's pretrial brief.

In the context of this case, the statutory provisions Sullivan allegedly violated overlap to some extent and, with one exception,[5] petitioner relies upon the same factual assertions to establish each of her charges. Basically, she asserts that Sullivan recommended the rotation of the district directors for political reasons and that he considered the politically motivated recommendations of others. Section 2302(b) applies to "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action. . . ." Section 2302(b)(1)(E) forbids those with such authority to discriminate for or against any employee or applicant for employment "on the basis of . . . political affiliation, as prohibited under any law, rule or regulation. . . ." Inquiries into and consideration of political affiliation are prohibited by 5 C.F.R. § 4.2.

Similarly, section 2302(b)(2) prohibits solicitation or consideration of recommendations based on political considerations. Under that subsection, recommendations for competitive positions must be based upon personal knowledge and an evaluation of the performance and ability or the character and suitability of the individual involved.

Section 2302(b)(10) prohibits discrimination for or against any employee or applicant for employment on the basis of conduct which does not affect his or her performance or that of other federal employees. Petitioner did not articulate a clear basis for this allegation in her complaint, and did not discuss it in her pre-hearing or post-hearing briefs. Apparently she contends the district directors were ordered transferred because of their political affiliations and that those affiliations constitute conduct for purposes of subsection (b)(10).[6]

Section 2302(b)(11) is a catch-all provision prohibiting personnel actions which violate any law, rule or regulation implementing or directly concerning the merit system principles set out in 5 U.S.C. § 2301. Petitioner alleges that Sullivan violated 5 C.F.R. § 4.2[7] and 5 U.S.C.

[5]Petitioner's charge that Sullivan violated 5 U.S.C. § 2302(b)(6) relates only to Ardis Jones, a Democrat who was district director in Jackson, Mississippi. The other charges relate to all the district directors involved in this case.

[6]On February 4, 1981, during the hearing in this case, counsel for Sullivan orally moved to strike this allegation with respect to Ardis Jones on the ground that there was no information related to Jones in the answers to respondent's interrogatory (Ex. R-53-19) where petitioner was asked to "[s]tate with specificity all facts which you contend show that Paul Sullivan violated 5 U.S.C. § 2302(b)(10)." (Tr. Vol. XI, 10.) On February 23, 1981, petitioner opposed the motion on the ground that Jones was implicitly included in her answer to the interrogatory. On February 27, 1981, the Board ruled that the motion would be held in abeyance until issuance of the decision in this case. We find that petitioner's opposition is well-founded and the motion accordingly is denied.

[7]In addition to her claim that Sullivan violated 5 U.S.C. § 2302(b)(1)(E) and (b)(11) by virtue of having violated 5 C.F.R. § 4.2, she alleges that, under 5 C.F.R. § 4.2, mere inquiry concerning the political affiliations of federal employees is prohibited, and that penalties may be imposed against Sullivan under 5 U.S.C. § 1207 because he acknowledges having made such inquiries.

§ 2301(b)(2) and (b)(8) by recommending the geographic transfers in this case. Section 2301(b)(2) and (b)(8) embody merit system principles which, in effect, make political discrimination in federal employment contrary to federal personnel policy. Petitioner also charges a violation of section 2302(b)(11) with respect to certain district directors who retired or resigned rather than accept reassignment. She contends that Sullivan anticipated that they would vacate their positions and recommended their transfers to achieve this result, thereby constructively discharging them without the procedural safeguards provided by 5 U.S.C. § 4301 *et seq.* and 5 U.S.C. § 7513. She claims that those provisions implement or directly concern merit principles contained in 5 U.S.C. § 2301(b)(2), as well as (b)(6), which provides for retention of employees who perform adequately and the removal of those who do not.

Unlike her other charges, which are posited on the claim that the rotation policy in its entirety was a pretext to rid the SBA of Republican district directors, petitioner's allegation that Sullivan violated section 2302(b)(6) relates only to one district director, Democrat Ardis Jones of Jackson, Mississippi. Section 2302(b)(6) forbids the granting of an advantage or preference not authorized by law to any employee or applicant for employment for the purpose of improving or injuring the prospects of any other person for employment. Petitioner asserts that Sullivan recommended Jones for rotation to create a vacancy in the Jackson directorship for the purpose of allowing Russell Davis, a former Democratic Mayor of Jackson, an opportunity to obtain the position, in violation of Section 2302(b)(6). She further alleges that Sullivan made his recommendation because Philip Wise, President Carter's Appointments Secretary, wanted Davis to have the Jackson directorship for political reasons, in violation of section 2302(b)(2).

During the pre-hearing proceedings and the 11-day hearing conducted by the Board in this case,[8] petitioner produced a mass of largely circumstantial evidence which left us with the sense that she had mistaken smoke for fire. While she pointed to a few sparks suggesting the possibility of a fire, we must conclude that the evidence simply did not establish that Sullivan committed the violations charged by anything approaching the required preponderance standard. In light of Sullivan's consistent and unshaken testimony that he had legitimate reasons for his actions and an ample amount of corroborating evidence, we cannot conclude otherwise.

II. FACTUAL ANALYSIS

A. The SBA's History of Political Controversy

The determinative factual inquiry in this case involves Paul Sullivan's intent in recommending the district directors involved for rotation. As

[8]The evidentiary hearing in this case was held on January 21-23 and 26–30, and February 2–4, 1981, in Washington, D.C.

a footing for her contention that his motives were political, petitioner asserts that the entire rotation policy was a sham having no legitimate management purpose. Indeed, she suggests that the rotation policy was the latest addition to an established record of political intrusion into personnel matters at the SBA. She has failed, however, to produce any persuasive evidence to support these contentions.

The SBA has long been regarded as an agency that is unusually subject to partisan political influence, and has often been involved in controversy over charges of political abuse of the merit systems. The agency was established by the Small Business Act, Pub. L. No. 85-536, 72 Stat. 384, on July 18, 1958, to provide financial assistance and related services to business enterprises throughout the nation. It is composed of 10 regions which, in turn, are divided into approximately 60 districts nationwide. These districts are headed by directors who, because of the nature of their positions, enjoy a measure of influence and prestige within their districts. From its inception, the nature of the SBA mission has made the appointment of district directors a matter of interest to Members of Congress. Consequently, the district directors' positions have been widely perceived as political patronage jobs, even though technically they have been competitive service career positions since 1959. This situation has resulted in recurring charges of improper political influence in SBA personnel matters.[9] The SBA's announcement in September of 1979 of the periodic rotation policy for its district directors raised new charges of political intrusion in personnel management, and ultimately resulted in this case.

Whatever may be inferred from the SBA's prior record, it furnishes no basis for an inference that Paul Sullivan acted improperly. On a proper record, past abuses could be relevant to a showing of a consistent

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[9]In a 1974 report to the SBA Administrator entitled "Alleged Political Influence in Personnel Actions at the Small Business Administration" the U.S. Civil Service Commission stated that:

> Sponsorship by partisan figures, political affiliations and political clearances were factors in the selection of four district directors. . . . SBA has permitted a personnel management vacuum to exist in which political interests are allowed to influence appointments to these key positions.

As quoted in letter dated August 26, 1980, from H. L. Krieger, *Director, General Accounting Office*, to Honorable John M. McDade, Committee on Small Business, House of Representatives, regarding Rotation Policy for SBA District Directors (FPCD-80-71) (Ex. P-30-1—Ex. P-30-2).

In November of 1975, the General Accounting Office, in a report entitled "Personnel Management in the Small Business Administration" (FPCD-76-10, Nov. 28, 1975), noted that the SBA generally had taken actions to correct irregularities identified by the Civil Service Commission. *Id.* at P-30-2. In June of 1978, after investigation prompted by Congressional complaints, the Civil Service Commission found that SBA had violated 5 C.F.R. § § 4.2 and 7.2 by considering partisan political affiliation in transferring William F. Miller from his position as district director in Indianapolis to a position as program analysis officer in Washington, D.C. (Ex. P-1.)

pattern of improper personnel actions. Nothing in this record has demonstrated, however, that Sullivan was involved in any of these prior abuses, most of which occurred before he came to the SBA.[10]

B. The Adoption of the Rotation Policy

Similarly, on a proper record it could be inferred that the rotation policy was adopted as a device to disguise political manipulation of the district directorships. However suggestive the circumstances, the record nonetheless fails to provide persuasive evidence that the policy was a sham or that there was a nexus between the adoption of the policy and Paul Sullivan.

A. Vernon Weaver, Jr., who was SBA Administrator until the change of administrations on January 20, 1981, together with other top SBA officials, testified that the rotation policy had several objectives. Weaver began seriously to consider the rotation policy concept in June of 1979. Prior to that time some SBA district directors had used their positions for fraudulent purposes or had been involved in conflicts of interest. (Tr. Vol. IV, 22, 59–60; 143–146; Tr. Vol. V 4, 205–206.) According to Weaver's testimony, he believed that some of these difficulties had developed because district directors became too close to local business communities, and he was convinced the problems could be eliminated by periodic transfers. Weaver also testified that he believed the rotation policy would allow district directors to enhance and refresh their career skills through broader experiences and that it would enable the SBA to match the needs of specific districts with the skills of particular directors. (Tr. Vol. IV 30–31.) Weaver's testimony on these points was corroborated by that of Deputy Administrator William H. Mauk and SBA Associate Administrator for Personnel Management Joseph Maas. None of their testimony was shaken on cross-examination. (Tr. Vol. IV 102–104; Tr. Vol. 20–21.)

Petitioner contends, however, that this rationale was a sham, emphasizing that no feasibility study was done, the district directors were not consulted before the rotation policy was adopted and, in any event, the district directors could not benefit from it since most of them were around 55 years of age and were GS-15's. We are entirely unpersuaded that the absence of a feasibility study or the fact that the district directors were not consulted demonstrates that the rotation policy was adopted for political purposes. In the first place, Weaver was apprised of the legal, financial, political, management and employee morale ramifications of the policy in a memorandum prepared by Personnel Director Joseph Maas in the summer of 1978. (Ex. P-5.)[11] Among other things,

[10]In a legal proceeding where serious penalties may result, such a link obviously cannot be forged merely from the fact that Sullivan is an experienced political operative.

[11]The memorandum was sent to Weaver under the aegis of Roger Jones, a Republican who was opposed to the rotation policy and who was SBA Assistant Administrator for Administration at the time the memorandum was written in 1978. (In a reorganization in April of 1979, he was named Associate Administrator for Data Management Services,

that memorandum pointed out there would be resistance from district directors, a fact any discerning administrator would already have comprehended. (Ex. P-5-7.) Moreover, both Weaver and Mauk were familiar with the use of periodic rotation as a management tool. (Tr. Vol. IV 58; Tr. Vol. V 20–23.) Consequently, we see no significance in their failure to order a full-fledged, formal feasibility study.

The same may be said for the failure to consult the district directors. Weaver and his staff were quite able to gauge their reaction without consultation, and it is not uncommon, either in government or in private industry, to present management decisions to employees only after they are made. Whatever may be said about the wisdom of this practice, nothing in this record causes us to believe that it indicates political manipulation.

Petitioner's contention that the ages and career status of the district directors indicate the rotation policy was a sham is similarly unpersuasive. The fact that they were 55-year-old GS-15's does not mean that they could not become better managers, enjoy new challenges, or progress to the upper reaches of the bureaucracy as members of the Senior Executive Service.

Finally, and most importantly, even if it had been shown that Mr. Weaver's decision to explore the possibility of a rotation policy was for political reasons, there is no evidence at all that Paul Sullivan was associated with that decision. Thus, since it has not been shown that the rotation policy was adopted for political reasons, petitioner's case hinges on what the record before us reveals about Paul Sullivan's motives in carrying out his assignment to implement the policy.

C. Paul Sullivan's Role in Implementing the Rotation Policy Prior to September 5, 1979

It should be noted at the outset of this discussion that Mr. Sullivan spent approximately 12 hours testifying under oath at the hearing in this case, including some 5 ½ hours under direct and cross-examination by counsel for petitioner. In addition, he gave a 129-page sworn deposition prior to the hearing. In his testimony, Sullivan denied having committed any of the violations charged, and offered a plausible explanation of why his actions were proper. This testimony was not shaken on cross-examination, and was corroborated by that of other witnesses.

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and at the time of the hearing in this case he was Acting Administrator of the SBA.) The memorandum concluded that there were "more direct approaches [which] might be more productive or, at least, less expensive" than a rotation policy. It noted that the rotation might be viewed as politically motivated and that some district directors would probably resign rather than transfer, but concluded that rotation would ultimately reduce fraud. (Ex. P-5-5, P-5-12.) Maas, also a Republican, testified that he favored the rotation policy and that he prepared the memorandum to reflect Jones' views. (Tr. Vol. IV 101–102.) Maas gave a copy of the memorandum with his written comments to Sullivan soon after Sullivan was assigned to implement the policy. (Tr. Vol. IV 107.)

In her post-hearing brief, petitioner does not even attempt to refute Sullivan's version of the facts with references to contradictory testimony or documentary evidence. Nor does she point to significant instances in which Sullivan or other defense witnesses testified inconsistently or contradicted themselves. Rather, she merely reasserts her subjective view of the significance of Sullivan's actions. As adjudicators charged with the duty to render objective decisions based on record evidence, we cannot be persuaded by this approach. Rather, we must conclude on the basis of the record that petitioner has not established by a preponderance of the evidence that Sullivan recommended the rotation of any of the district directors in this case for political reasons.

Petitioner's charges that Sullivan recommended the rotation of the district directors for political reasons are based in large part upon notes taken by his secretary, Karla Schnurr, at a meeting on September 4, 1979, called by Sullivan to instruct his staff to prepare a memorandum for Mr. Weaver regarding implementation of the rotation policy. (Ex. P-8-12—P-8-16.) In addition to Sullivan and Ms. Schnurr, Sullivan's two special assistants, Lawrence Hemphill and Mary Margaret Walker, were present. (Tr. Vol IX 84.) Ms. Schnurr's notes of Sullivan's discussion include the names and political affiliations of district directors who were candidates for rotation. (Ex. P-8-12—P-8-15.) Standing alone, Ms. Schnurr's notes do suggest that Sullivan ultimately recommended the rotation of the district directors for political reasons. Those notes, however, must be viewed in light of the entire record and understood in the context in which they were taken.

At the time of the meeting, Sullivan was well on the way to completing an assignment given him by Mr. Mauk in June of 1979 to coordinate the implementation of the rotation policy which had just been approved in principle by Mr. Weaver. (Tr. Vol. III 158; Tr. Vol. V 18–20; Tr. Vol. IX 82.) Sullivan's uncontroverted testimony shows that when he received the assignment he was not well acquainted with the regional administrators or the district directors. (Tr. Vol. II 114.) He therefore traveled to various regional offices during July and August of 1979 to meet the regional administrators and discuss the proposed policy. (Tr. Vol. IX 45.) He testified that his purposes were to identify what political pressures would be applied from within and without the agency to dissuade management from adopting the policy, and to determine how to implement it successfully. (Tr. Vol. IX 39–41.) From his discussions with the regional administrators, he found that they generally favored a rotation policy, although a few had reservations about changes in their districts at the time. (Tr. Vol. IX 46–74.)

Sullivan testified that, in order to assure that the rotation system was not used for partisan political purposes by the regional administrators or others, he asked the regional administrators which district directors they might consider candidates for rotation and, once the names were proffered, what the directors' political backgrounds were. (Tr.

Vol. II 114; Tr. Vol. IX 49–50, 73.) Sullivan testified that at that time he intended to balance those selected for rotation between Democrats and Republicans. (Tr. Vol. IX 93–94.)

Sullivan also attempted to find out how partisan the district directors were. He believed that if they had been state party chairmen, Congressional candidates, members of the state legislature, or had been similarly active in local political affairs, they could be expected to resist leaving their communities. Sullivan testified that he was convinced that, in order to defend the rotation policy as a sound management practice which was not being used for partisan political reasons, he had to identify likely sources of the political pressure it would generate. (Tr. Vol. IX 50.)

On September 4, 1979, Mr. Mauk instructed Sullivan to prepare a memorandum to Administrator Weaver outlining his findings and suggestions for implementing a district director rotation policy. (Tr. Vol. IX 82–83.) Sullivan collected his notes from his consultations with the regional administrators and outlined the information he had obtained in the meeting with his special assistants and Ms. Schnurr, who took what she described in her testimony as "back up" notes. (Tr. Vol. IX, 84, 94.)

Sullivan testified that he reviewed his notes from his sessions with the regional administrators for the first time during the meeting with his staff, and that he explained to them that he wanted to balance the district directors rotated between Republicans and Democrats. (Tr. Vol. IX 84, 94.) This testimony is corroborated by the notes themselves and by Ms. Schnurr's testimony. (Ex. P-8-12—P-8-16; Tr. Vol. I 76–77, 95.)

Sullivan related to his staff the names of the district directors, including two Democrats and 15 Republicans, whom the regional administrators had indicated they would consider recommending for rotation. He also related the political affiliation and degrees of partisanship of the district directors and other details such as how long each had been with SBA and in the civil service; whether he would be likely to object to rotation and retire rather than transfer; his standing in the community; whether his attitude toward the SBA management and policies was cooperative or uncooperative and his attitude toward the Carter Administration. (Ex. P-18-12—P-8-15.)[12]

At the conclusion of the meeting, respondent instructed one of his special assistants, Mr. Hemphill, to prepare a memorandum setting out a strategy for implementing the rotation policy based on his own notes and those of Ms. Schnurr. The following morning, Hemphill submitted a draft which contained references to the political affiliations of those

[12]Ms. Schnurr's notes, which are legible although certain portions are marked through, reflect that respondent listed one unique factor pertaining to District Director Ardis Jones of Jackson, Mississippi: "WH Administration interested in placing another—desires change." (Ex. P-8-13.) This and other facts related to the selection of Ardis Jones for rotation are discussed separately, *infra*.

district directors identified by the regional administrators as possible candidates for rotation. (Tr. Vol. IX 95–98.) Sullivan testified that he realized for the first time when he read the draft that nearly all the directors were Republicans and that he would be unable to strike balance between Democrats and Republicans. (Tr. Vol. IX 93–94.)[13] Sullivan testified that Hemphill's draft was poorly written, and that, because it indicated that most of the directors recommended for rotation were Republican, it erroneously created the impression that the recommendations were a result of their Republican political affiliations. Sullivan concluded that Hemphill had totally misconstrued the purpose of the memorandum and of the rotation policy, and he and Ms. Walker, his other special assistant, rewrote it and deleted the references to party affiliation. (Tr. Vol. IX 98–100.) Unlike Hemphill's draft, the final memorandum, which went to Mr. Weaver on September 5, 1979, described some of the district directors as "uncooperative" or in similar terms. (Ex. P-9.)

Sullivan's explanation of Ms. Schnurr's notes and the events they reflect is plausible in light of his testimony, which is corroborated by that of the regional administrators, that he inquired about the directors' political affiliations only after they were mentioned by the regional administrators as possible transferees. Petitioner, however, asserts that Sullivan influenced the regional administrators to select Republicans for rotation, and that the recommendations therefore were "tainted" from the outset. She apparently infers this "taint" primarily from the fact that the regional administrators were Schedule "C" appointees.[14] In effect, petitioner urges the Board to find that Schedule C administrators as a group routinely discriminate against federal employees for political reasons, and, consequently, that the regional administrators did so here. Suffice it to say that we are unwilling to reach such conclusions based on mere assumptions unsupported by any record evidence. Nor can we find any support for the alleged "taint" in the record. The regional administrators uniformly and consistently testified that they made the recommendations for valid management reasons and that they were not influenced or pressured by Sullivan. Petitioner was unable to make any significant inroads into their testimony, nor did she produce any persuasive contrary evidence. On this record, we can hardly find the testimony of the regional administrators incredible.

Petitioner asserts that the use of descriptions such as "uncooperative" in the final draft is, in effect, a code for "Republicans." We cannot conclude that this is so, since, in the final memo, 12 of the Republicans

[13]One of the regional administrators, Dean Lupkey, testified that all the district directors in one region he had supervised were Republicans. (Tr. Vol. IV 70.)

[14]Seven of the regional administrators were Schedule "C" appointments. After July 1979, four regional administrators became career appointees in the SES, and three became noncareer SES appointees.

who are included in Ms. Schnurr's notes are described as "uncooperative" or in some similar terms, three are described as cooperative, and one is not described as either. Nor do we believe, as petitioner contends, that Sullivan's identification of the district directors who would likely retire rather than transfer suggests a political motive for his recommendation. Rather, it seems evident that such information was required in order to plan district director assignments. Thus we can draw no inference adverse to Sullivan from the fact that several of the directors who ultimately were ordered to transfer in November 1979 retired or accepted lower level positions to avoid rotation.[15]

D. Paul Sullivan's Role in Implementing the Rotation Policy After September 5, 1979

Just as we find that none of the events which preceded Sullivan's September 5, 1979 memorandum to Mr. Weaver establishes that he acted for political reasons, we find that nothing in the events which followed lends any significant support to petitioner's case. Shortly after receiving Sullivan's September 5, 1979, memorandum, Weaver and Mauk met with him to discuss it. Weaver viewed the memorandum as a vehicle for informing himself of the consequences of implementing a rotation policy, particularly in terms of the individual district directors named, but he did not view the individuals listed in the memorandum as a final list of those district directors to be rotated.[16] (Tr. Vol IV 44–45.) Mauk viewed the memorandum as indicating that the regional administrators were giving serious consideration to the policy, and were commenting on how they thought it should be implemented. Like Weaver, Mauk said he did not view the district directors named as being a list of those definitely to be rotated. (Tr. Vol. V 33–34.) Mauk and Sullivan testified that there was no discussion at the meeting regarding the political affiliation of specific district directors. (Tr. Vol. V 31; Tr. Vol IX 116.) Following the meeting, Weaver decided to implement the district director rotation policy.

Implementation of the rotation policy was announced in a memorandum to the regional administrators from Weaver dated September 20, 1979. (Ex. P-11-1—P-11-3.) Procedures for implementing the policy were set out in a supplementary memorandum issued by Sullivan on September 26, 1979. (Ex. P-11-4—P-11-7.) These two communications, which constitute the documentary basis for the rotation policy, were drafted in part by the Office of Personnel staff under the supervision of Mr.

[15]We have been struck throughout this case by petitioner's apparent view that there is something inherently wrong with periodic transfers of federal employees because they have roots in the communities where they live. It is clear that whatever positive or negative impact such transfers may have, they constitute a legitimate management tool which federal administrators may employ.

[16]The parties dispute whether Sullivan had "authority to take, direct others to take, recommend, or approve" personnel actions, such as the transfers involved here, under 5 U.S.C. § 2302. This issue is discussed *infra*, pp. 24-26.

Maas (Tr. Vol. IV 107–109.), who supported the rotation policy and helped develop the criteria for selecting district directors for rotation. (Tr. Vol. IV 101–103; 107–109.) Sullivan's September 26, 1979, memorandum stated that district directors who had been in their positions for six years were to be considered for rotation. Sullivan had considered a shorter time requirement before settling on six years. Other rotation criteria included the need for a different management style in a particular district, possibilities for career development, and a greater contribution to the agency in other districts. (Ex. P-11-4—P-11-5.)

At the suggestion of Maas, a rotation review committee composed of himself, Sullivan and Harold Theiste, Associate Deputy Administrator for Programs, was announced in the September 26, 1979, memorandum to regional administrators. (Tr. Vol. IV 111–112; Ex. P-11-5.) The committee, informally chaired by Sullivan, reviewed the recommendations of the regional administrators for consistency with the criteria for rotation set forth in Weaver's and Sullivan's implementing memoranda. (Tr. Vol. IV 56–57, 113; Tr. Vol. IX 121–122.)

Deputy Administrator Mauk testified that the committee had no authority to select a particular district director for rotation. (Tr. Vol. V 44–45.) The committee, however, did evaluate the status of all district directors, not just those recommended for rotation, to assure that the policy was fully implemented. (Tr. Vol. IV 114.) The committee members discussed each district director and the recommendation of the regional administrator, and voted on the committee evaluation. (Tr. Vol. IV 113; Tr. Vol. VIII 29.) In each case the committee vote was unanimous. (Tr. Vol. IV 113; Tr. Vol. VIII 29.)

After the committee completed its review, Sullivan, Theiste, Mauk and Weaver met and discussed the regional administrators' recommendations. Weaver and Mauk approved the proposed reassignments. (Tr. Vol. III 22-23; Tr. Vol. V 49-50; Tr. Vol. VII 35.) Of the 17 directors who finally were ordered reassigned in November of 1979, 14 were listed in Sullivan's September 5, 1979, memorandum. (Ex. P-9-2—P-9-5; Ex. P-14-4—P-14-5, P-14-7—P-14-12.) Several of the district directors slated for rotation either retired, resigned or chose lower level positions rather than accept rotation. (Ex. P-30-13.)

Petitioner points to Sullivan's determination that all district directors with six years in their positions would be considered for rotation as evidence that Sullivan was out to get Republicans. We do not agree. Assuming that petitioner correctly implies that district directors were appointed on the basis of their political affiliations, the effect of Sullivan's selection of the six-year period, rather than three or four years, was that Republican district directors appointed under Presidents Nixon and Ford from 1973 through 1975 or 1976 were not required to be considered for rotation. The only way more Democrats could have been included would have been by imposition of a one- or two-year period, a result which would have been of doubtful merit from a management

standpoint. Petitioner also asserts that the rotation review committee, in effect, rubber stamped Sullivan's recommendations. However, the other committee members, Maas and Theiste, testified that they made independent determinations. (Tr. Vol. IV 113-117; Tr. Vol. VIII 29.)

Finally, petitioner argues that the failure to put the criteria for implementing the rotation policy into writing until Sullivan's September 26, 1979 memorandum indicates that the policy was a sham. It is apparent from the record, however, beginning with Mr. Jones' memorandum in June of 1978, that the general goals of the policy were understood by the headquarters staff and the regional administrators. We therefore attach no significance to the fact that the criteria were not committed to writing at an earlier time. In sum, the circumstances surrounding Sullivan's role in implementing the rotation policy do not furnish us any basis for concluding that Sullivan acted for political reasons. The evidence bearing more directly upon Sullivan's intent—other than his own testimony—is sparse and equally unpersuasive.

E. The Direct Testimony that Paul Sullivan Acted for Political Reasons

The only direct evidence that Sullivan had political motives in recommending the transfers of the Republican district directors was the testimony of his former special assistant, Mr. Hemphill, and that of Roger Jones, who at the time of the hearing in this case was acting SBA Administrator. Mr. Hemphill testified that Sullivan openly told him during an initial interview and thereafter that the Republican district directors would be moved, and that he (Hemphill) assumed the rotation policy was designed to get rid of Republicans. (Tr. Vol. III 87–88.) However, notes taken by one of petitioner's investigators, Ann Hannon, during an interview with Hemphill on or about June 10, 1980, indicate that Hemphill said he did not know why the district directors were being rotated. (Tr. X 107–108.) Moveover, in an affidavit executed on June 16, 1980, Hemphill stated he did not know the reason for the rotation policy. (Ex. R-3-2.)

Hemphill resigned from the SBA in March of 1980, following the investigation by the SBA Inspector General's Office of the charges that he falsified both his Form 171 and an application for credit. In his testimony, Hemphill admitted that he falsified the credit application and that some of the information on his Form 171 regarding his arrest record was incorrect. (Tr. Vol. III 106–114.) He denied that he attempted to get Sullivan to keep him on at SBA in exchange for his not accusing Sullivan of playing politics with the rotation policy. (Tr. Vol. III 145.) Under these circumstances, we find that Hemphill's testimony is not deserving of any weight, especially in light of the inconsistency between it and his affidavit and the notes of petitioner's investigator.

Roger Jones, the only other witness who gave direct testimony that Sullivan acted for partisan political reasons, had been SBA Assistant Administrator for Administration from 1976 until April of 1979. When

Sullivan became Associate Deputy Administrator for Support Services in April 1979, Jones' position was abolished and he was given the less prestigious position of Associate Administrator for Data Management Services. Sullivan was assigned some of Jones' former duties, including supervision of the personnel office.

Mr. Jones testified that he met with Sullivan to discuss a proposal for moving the Data Management staff from Washington to Baltimore on October 17, 1979. Jones testified that he told Sullivan such a move would be viewed with the same suspicion as the district directors rotation policy which had been announced a few weeks earlier. Jones related that Sullivan told him the district directors involved should not complain they were losing their jobs the same way they got them—*i.e.*, due to their political affiliations. Jones noted that he frequently wrote memoranda for his personal use regarding such conversations, but did not do so in that case because he was too busy. (Tr. Vol. X 179–181, 208–213.) Sullivan denied having made that or any similar remark. (Tr. Vol. XI 12.) Assuming, *arguendo*, that Sullivan made such a remark, whether seriously or in jest, we can attach little significance to it because, standing alone, it is insufficient to support an inference that Sullivan acted for improper reasons.

Similarly, the testimony of the four district directors who appeared at the hearing has little bearing on Sullivan's intent. Three of them, Republican James Reed of San Antonio, Texas, Republican Frank David Ray of Columbus, Ohio, and Democrat Ardis Jones of Jackson, Mississippi testified that they believed they were transferred for political reasons, but none of them testified he knew or believed that Sullivan was responsible. The fourth district director, Republican Douglas Graves, who was transferred to Kansas City in November of 1979, said that he did not believe politics was involved in his transfer because he was replaced by another Republican.

F. Paul Sullivan's Role in the Selection of Ardis Jones for Rotation

Petitioner singles out the recommendation that District Director Ardis Jones of Jackson, Mississippi, be rotated to support her charge that Sullivan violated section 2302 (b)(6).[17] Essentially, petitioner claims that Sullivan recommended the rotation of Jones, a Democrat, to create a vacancy in the Jackson directorship for former Jackson Mayor Russell Davis. Here again, however, petitioner has failed to prove her allegation by a preponderance of the evidence. The record does establish that Davis wanted Jones' job and used his friendship with Philip Wise, President Carter's appointments secretary, along with contacts with Members of Congress and state political figures, to attempt to get it. What is lacking is proof that Paul Sullivan caused Mr. Jones to be selected for rotation in order to give Mr. Davis an opportunity to obtain the position.

[17]She also includes Jones, along with the other district directors, in her other charges.

Regional Administrator Wiley Messick of Atlanta, Georgia, testified that Sullivan suggested Jones as a possibility for rotation in a telephone discussion of district directors in Messick's region sometime after Sullivan visited the Atlanta office in August of 1979. Messick responded that Jones was not one of his "strongest managers." Messick rated Jones at the "bottom third" of his nine district directors. Messick testified that he based this assessment upon Jones' weakness as a manager and his failure to meet agency goals in supporting affirmative action hiring and promoting minority small business. (Messick Deposition 64-65; Ex. R-47-3.) Among other things, an employee in Jones' office had brought a class action lawsuit alleging discrimination in hiring. (*Hall. v. SBA*, Civil No. J75-364(R) (S.D. Miss.)) (Ex. R-67.) The suit resulted in an adverse decision against the defendants specifically citing Jones' discriminatory actions.

Messick recommended Jones for rotation in a memorandum to Administrator Weaver on October 5, 1979, (Ex. R-47-7), with a view toward assigning him to the Charlotte, North Carolina district office (Ex. R-47-3). Messick considered Jones' greatest strength to be his ability to develop good bank relations, and the Charlotte office needed strengthening in that area. (Messick Deposition 28, 52.)

While Davis was given a series of jobs at SBA in apparent response to political pressure, there is little evidence to indicate that any SBA official sought to help Davis achieve his specific goal of becoming district director in the Jackson office. Davis testified that he accepted a GS-9 position in February 1978 as an SBA Disaster Loan Officer (Davis Deposition 5-6, 8) in the belief that he had been promised appointment as SBA District Director in Jackson upon the retirement of Jones. Those promises, however, were made by local Democratic politicians Danny Cupit and Pat MacMillan of Jackson (Davis Deposition 15-20.)

The record also reveals that there was pressure from Mr. Wise which may have resulted in Davis' later being appointed to two positions as a GS-15, the first as a Schedule C Special Assistant to Weaver and the other as a Regional Advocate in Jackson. Davis, however, never obtained the competitive district director's position. Indeed, SBA Personnel Director Joseph Maas testified that when he met Davis in February of 1978, Davis "launched into a harangue" because Richard Hernandez, who was Associate Administrator for Operations at SBA, had told him he could not have the job. (Maas Deposition 142.)

Sullivan testified that he knew Davis wanted the Jackson directorship and had political support, but that he did not recommend Jones' rotation in response to pressure from Philip Wise. (Tr. Vol. II, 115, 145; Tr. Vol. IX, 229, 231–232.) Ms. Schnurr's notes reflect that, at the September 4, 1979, meeting, Sullivan first noted that the White House wanted to put someone else in Jones' position, then amended that statement to "Administration desires a change." Sullivan testified repeatedly that he used the word "Administration" to refer to the SBA and not to the

Carter Administration. (Tr. Vol. IX, 88, 233.) We find this testimony inherently unpersuasive. However, standing alone this does not establish that Sullivan recommended Jones' rotation to assist Davis. In any event, Sullivan's reference to the Carter Administration, if it was one, is consistent with his intent to determine what the political reaction to the rotation policy would be.

Similarly, Philip Wise's telephone logs, which reflect a number of calls to or from Sullivan from January through October of 1979, do not provide sufficient evidence to demonstrate that Wise influenced Sullivan to recommend Jones' rotation. Sullivan testified that he talked to Wise about various matters unrelated to Davis from time to time, and that he spoke to Wise only once about Davis. (Tr. Vol. II 129.) Sullivan testified that he spoke to Wise about Davis sometime after the rotation policy was announced, and told him that Davis was not a good prospect for the job because a Jackson newspaper had published an article saying he had political support for the position. (Sullivan Deposition 102–104.) That article was published on October 25, 1979.

Wise testified on deposition that his recollection was that he talked to Sullivan more than once about Davis, but that he did not mention any particular position. Wise was unable to place his conversation or conversations with Sullivan regarding Davis in a time frame, and so far as we can tell from the transcript, his recollection regarding the number of conversations was not entirely clear. Wise was not called as a witness at the hearing.

On these facts, we cannot conclude that Sullivan recommended the rotation of Ardis Jones to create an opportunity for Russell Davis to obtain the directorship. Accordingly, we find that none of the charges against Paul Sullivan is supported by a preponderance of the evidence.

III. LEGAL ANALYSIS

A. Paul Sullivan's Personnel Authority

The controlling statute in this case, 5 U.S.C. § 2302(b), applies to "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action . . . ." It is undisputed that the reassignments of the district directors in this case were personnel actions. 5 U.S.C. § 2302(a)(2)(A). Sullivan, however, argues that he had none of the personnel authorities set out in section 2302(b) and, therefore, as a matter of law, could not have violated the statute. We disagree.

Sullivan's argument rests on the fact that he had no specific delegation of authority to recommend the reassignment of district directors. The confines of section 2302(b), however, are not sufficiently narrow to give that technicality controlling significance.

Sullivan was Associate Deputy Administrator for Support Services at the SBA and had line authority over the agency's Director of Personnel. He nonetheless contends that he had no authority to order or

recommend the rotation of any district director, and that his sole responsibility with respect to the rotation policy was to assess its feasibility in general and to assist in the development of appropriate general criteria for rotations. Sullivan's superiors at SBA testified that no authority to recommend the rotation of individual directors was delegated to Sullivan. It is not open to serious dispute, however, that he informally chaired a committee of three (one of whom was his subordinate) which reviewed the regional administrators' rotation recommendations before passing them on to the Administrator with comments. In carrying out his responsibility to evaluate the rotation policy, Sullivan acknowledged that he discussed in detail with the regional administrators their likely rotation recommendations and prepared a memo for Administrator Weaver listing likely subjects for rotation. Although Sullivan claims that he acted as a mere conduit for the regional administrators' recommendations, there is no evidence that his authority was so circumscribed that he could not have used it to bring about any specific result.

It is obvious, in fact, that Sullivan's key coordinating role in the implementation of the SBA's rotation policy provided him ample opportunity to influence its outcome in terms of individual reassignments. His position in the agency's chain of command certainly gave him the appearance of authority to recommend specific rotations to those whose opinions were solicited. By his own testimony, which was not contradicted by his superiors, he was empowered to act to prevent politically motivated transfer decisions and in general to screen initial recommendations through the authority which he shared with other review committee members. In light of Sullivan's position and his actual role in implementing the rotation policy, a conclusion that he lacked sufficient authority to violate section 2302(b) cannot be reconciled with any reasonable interpretation of the statutory language. A narrow reading of the statute which would insulate supervisory employees, in the absence of specific formal delegations, from accountability for official actions that result in prohibited personnel practices would ignore its remedial purpose and the actual workings of organizations. In wording the statute to reach authority to recommend or approve personnel actions, Congress obviously mandated that purely formalistic considerations should not be permitted to be invoked as a shield against accountability.

B. Burden and Standard of Proof and Sufficiency of the Evidence

We hold that, in a section 1207 disciplinary proceeding, the Special Counsel bears the burden of proving the allegations by a preponderance of the evidence. Since the parties agree with this conclusion, we need not belabor it. However, because this is the first case decided under section 1207, some explication is appropriate.

As a general rule, the proponent in a civil administrative proceeding bears the burden of persuasion under the preponderance of the evidence standard. *See, e.g., Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F. 2d 240, 243 (D.C. Cir. 1980), *cert. denied*, 101 S.Ct. 105 (1980); IX

J. Wigmore, *Evidence* § 2498 (3d ed. 1940). *See also In re Frazier*, 1 MSPB 159, 178 (1979), where the Board adopted the general rule in the context of a corrective action proceeding under 5 U.S.C. § 1206(c)(1)(B).

In a disciplinary action where, as here, petitioner seeks the imposition of penalties including debarment and a $1,000 fine, a lower standard of proof would not be appropriate. These penalties, however, are civil in nature and do not warrant the imposition of a higher standard. *See Steadman v. SEC*, 101 S.Ct. 999 (1981). There, the Supreme Court rejected the argument that the clear and convincing standard of proof should apply in an administrative disciplinary proceeding which resulted in the permanent debarment of the petitioner from the investment advisory business. Accordingly, since the Congress neither prescribed a different standard under section 1207 nor spoke to the question in the legislative history, adherence to the general rule is appropriate.

Our finding that the record does not establish by a preponderance of the evidence that Paul Sullivan recommended the reassignment of any of the district directors for improper reasons is premised upon well-established legal principles. As is apparent from the factual analysis, *supra*, petitioner's case is based primarily upon circumstantial evidence. Proper circumstantial evidence could, of course, be relied upon to establish Sullivan's intent. *Village of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252, 266–267 (1977). The Board has not hestitated to infer intent when the strength of the evidence warrants such an inference. *E.g.*, *In re Frazier*, 1 MSPB, 186–188. Conclusions as to subjective intent may not, however, be based on mere surmise or speculation as to what plausibly could have occurred. Even objective facts may not be established by a series of inferences which does not leave the fact finder with the sense that the fact sought to be established is reasonably probable and not mere guesswork. *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153, 1160–1161 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 87 (1980). Certainly "[a]n unlawful intent is not lightly to be inferred." *Salinas Valley Broadcasting Corp v. NLRB*, 334 F.2d 604, 613 (9th Cir. 1964). The courts refuse to infer political discrimination from circumstances which may be suggestive considered in isolation but which, in light of the evidence as a whole, permit, at best, only a speculative conclusion which does not rise to the level of proof. *Tanner v. McCall*, 625 F. 2d 1183, 1190–1192 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3788 (April 20, 1981). *See also Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979). This is, however, precisely the method of reasoning we have been asked to employ. For example, petitioner bases her claim that Sullivan and the regional administrators collaborated to select Republicans for rotation in substantial part upon the fact that the regional administrators were Schedule "C" appointees. There simply is no reasonable basis for such an inference.

Similarly, we have been asked to infer that Sullivan considered a recommendaion by Philip Wise that Russell Davis be given the job held

by Ardis Jones based solely upon inconclusive testimony by Wise and the fact that Wise called or was called by both Sullivan and Davis while Sullivan was working on the rotation policy. While the proximity in time of the phone calls is highly suggestive, that alone does not reasonably lead to the conclusion that petitioner's conclusion is reasonably probable. This is especially so because the record shows that Sullivan periodically spoke of Wise about matters having nothing to do with Davis. We will not further belabor this point, which essentially is repetitious of our factual analysis. Suffice it to say that the law does not allow findings of facts which are based upon circumstances which are not persuasive, but, at best, only suggestive.

While we were not persuaded that Paul Sullivan told the truth when he testified that the word "Administration" in Ms. Schnurr's notes referred to the SBA and not to the Carter Administration, that alone does not add sufficiently to petitioner's otherwise inadequate evidence to permit an inference that Sullivan committed the alleged discriminatory acts. Petitioner cannot overcome her failure to prove her case by the preponderance of the evidence on the basis of so tenuous an inference.

C. The Charges Against Mr. Sullivan

We have concluded that the weight of the evidence does not show that Sullivan recommended the rotation of district directors on the basis of their political affiliation or partisanship or that he took any politically motivated action in the exercise of his personnel authority. Consequently we hold that the Acting Special Counsel has failed to prove any *violation warranting or requiring imposition of a disciplinary sanction* under section 1207.

Specifically, petitioner has failed to prove that Sullivan used his personnel authority to discriminate on the basis of political affiliation as prohibited by 5 U.S.C. § 2302(b)(1)(E)[18] and Civil Service Rule IV, 5 C.F.R. § 4.2[19] The same failure of proof requires us to reject the charge

[18]Section 2302(b)(1)(E) provides:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

. . . .

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

[19]5 C.F.R. § 4.2 provides:

Prohibition against racial, political or religious discrimination.

No person employed in the executive branch of the Federal Government who has authority to take or recommend any personnel action with respect to any person who is an employee in the competitive service or any eligible or applicant for a position in the competitive service shall make any inquiry concerning the race, political affil-

that Sullivan's actions were prohibited by section 2302(b)(11)[20] because his recommendations were politically discriminatory, and thereby violated Civil Service Rule 4.2 and the First and Fifth amendments to the Constitution.[21]

The complaint also charged that Sullivan violated section 2302(b)(11) by selecting for rotation those district directors who subsequently retired or resigned and that he did so for political reasons with the expectation that they would vacate their positions, thereby constructively discharging them in circumvention of the procedural requirements for removals under 5 U.S.C. § § 4301 *et seq.* and 7513 and in violation of the First and Fifth Amendments of the Constitution.[22] This charge cannot be sustained because petitioner has failed to show that any district director was rotated for any impermissible reason, let alone any attributable to Sullivan.

Although Sullivan was aware of politically motivated recommendations of Russell Davis for the Jackson, Mississippi district director's job, we cannot find that Sullivan considered those recommendations in violation of section 2302(b)(2) since it was not shown that he acted upon or used this knowledge in any way.[23] Since the evidence does not permit

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iation, or religious beliefs of any such employee, eligible, or applicant. All disclosures concerning such matters shall be ignored, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, political affiliation, or religious beliefs, except as may be authorized or required by law.

[20]Section 2302(b)(11) provides:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
>
> . . . .
>
> (11) 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 systems principles contained in section 2301 of this title.

[21]The First and Fifth Amendments were cited as laws directly concerning various merit systems principles, including 5 U.S.C. § 2301(b)(2), which directs fair and equitable treatment of all employees and applicants "without regard to political affiliation . . .and with proper regard for their privacy and constitutional rights." Because our fact findings make it unnecessary to decide whether petitioner correctly analyzes these constitutional amendments as laws "directly concerning" merit systems principles for purposes of section 2302(b)(11), we do not address this contention.

[22]In petitioner's view, these provisions are incorporated in section 2302(b)(11) because they directly concern the merit principles found in sections 2301(b)(2) (fair treatment without regard to political affiliation and with proper regard for constitutional rights) and 2301(b)(6) ("Employees should be retained on the basis of the adequacy of their performance . . ."). These contentions need not be decided. *See* note 21, *supra.*

[23]There was no evidence that Sullivan solicited political recommendations of Davis or that he solicited or received any prohibited recommendations with respect to other district directors.

us to infer that Ardis Jones was rotated in order to provide a vacancy for Russell Davis, we cannot find that Sullivan granted Davis an unauthorized preference in violation of section 2302(b)(6).

The remaining charge pertains to inquiries which Sullivan conceded he made of the regional administrators concerning the political affiliations of the district directors named by them as probable candidates for rotation. Petitioner contends that these inquiries violated Civil Service Rule 4.2, and were also thereby prohibited under section 2302(b)(11).

In her view this regulation prohibits all inquiries concerning political affiliation, race, or religious beliefs without regard to the purpose or effect of the inquiry. We think that such an interpretation cannot be justified. While its first sentence, read in isolation, provides literally that all such inquiries are prohibited, it is clear that neither common sense nor public policy would permit a reading of the regulation that would result in a prohibition of inquiries which are authorized or required by statute.[24] Not only would such a reading result in a regulatory infringement of statutory provisions, but, moreover, it would entail attributing to the drafters an intent to prohibit legitimate, remedial inquiries.[25] In our view, the regulation must be read as a whole, and in light of its fundamental purpose, to prohibit "racial, political, or religious discrimination." The inquiries it prohibits are those made for such discriminatory purposes. The unconditional wording of the first sentence does suggest that there may be circumstances in which an inquiry concerning the matters covered may be so inherently coercive or discriminatory in effect that there would be a violation whether or not there is any subsequent use of the information.[26] However, petitioner has failed to prove that Sullivan's inquiries concerning the district directors' political affiliations were discriminatory in purpose or inherently coercive in the context in which they were made. We have already found that no discriminatory use of the information by Sullivan was demonstrated. Consequently, we cannot find that Sullivan's inquiries violated 5 C.F.R. § 4.2.

Accordingly, the charges against Paul Sullivan are hereby ordered dismissed.

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[24]Compliance with legal requirements with respect to the reasonable accommodation of an employee's religious beliefs and with respect to affirmative action and other remedies for racial discrimination obviously necessitates such inquiries. Prohibiting all such inquiries would interfere with the Special Counsel's investigations of prohibited personnel practices and would be inconsistent with the obligation imposed on agency heads and personnel managers by Section 2302(c) to prevent prohibited personnel practices.

[25]The rule itself limits its prohibition of discrimination in a final clause: "except as may be authorized or required by law."

[26]In certain contexts, for example, it should be obvious to any reasonable person with personnel authority that asking an applicant or employee subject to that authority about his political affiliation would be improper.

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WASHINGTON, D.C., *June 8, 1981*