

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 89

Docket No. CB-1215-08-0014-T-1
CB-1215-08-0015-T-1

Special Counsel,

Petitioner,

v.

Richard F. Lee,

Diane L. Beatrez,

Respondents.

May 14, 2010

Anne M. Gullick, Esquire, and Joan Marshall, Esquire, Dallas, Texas, for the petitioner.

Lorna Jerome, Esquire, Washington, D.C., for respondent Richard F. Lee.

Robert Bruce, Esquire, Washington, D.C., for respondent Diane L. Beatrez.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mary M. Rose, Member

Vice Chairman Wagner issues a separate, concurring opinion.

OPINION AND ORDER

¶1 These cases arise from complaints filed by the Special Counsel under the Special Counsel's authority to investigate allegations of prohibited personnel practices. *See* [5 U.S.C. §§ 1214-1215](#). The Special Counsel asks the Board to review the initial decision of the administrative law judge dismissing the Special

Counsel's complaints against the respondents for violating [5 U.S.C. § 2302\(b\)\(6\)](#) by granting a preference or advantage to an employee of the U.S. Coast Guard, improving his prospects for obtaining a promotion. For the reasons set forth below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#), REVERSE the initial decision, and find that the respondents committed a prohibited personnel practice that warrants discipline.

BACKGROUND

¶2 On May 22, 2008, the Board received a complaint seeking disciplinary action against Richard F. Lee. Lee Complaint File (LCF), Tab 1. On May 30, 2008, the Board received a complaint seeking disciplinary action against Diane L. Beatrez. Beatrez Complaint File (BCF), Tab 1. The Special Counsel charged both Beatrez and Lee, in their roles as Human Resources (HR) Specialists for the U.S. Coast Guard, with one count each of violating [5 U.S.C. § 2302\(b\)\(6\)](#) by granting a preference or advantage to Coast Guard Senior Legal Instrument Examiner Eric Woodson for the purpose of improving his prospects of obtaining a promotion to a supervisory position.¹ BCF, Tab 1 at 3; LCF, Tab 1 at 3. After a two-day hearing, in which the administrative law judge took testimony from several witnesses, and after the parties submitted closing briefs, the administrative law judge found that neither Beatrez nor Lee had committed any prohibited personnel practice in violation of [5 U.S.C. § 2302\(b\)\(6\)](#), and he dismissed the complaints against both respondents. Initial Decision (ID) at 1-16.

¶3 The Special Counsel has filed a petition for review. Petition for Review File (PFR File), Tab 1. The respondents have filed responses. PFR File, Tabs 3-4.

¹ The administrative law judge found that the record does not show that Woodson sought any preferential treatment or otherwise behaved improperly, Initial Decision at 2 n.1, and the Special Counsel did not file a complaint against him.

ANALYSIS

Governing Law

¶4 Section 2302(b)(6) of title 5 states:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment

¶5 To establish a violation of [5 U.S.C. § 2302\(b\)\(6\)](#), Board case law requires that the Special Counsel establish an intentional or purposeful taking of a personnel action in such a way as to give a preference to a particular individual for the purposes of improving his prospects. *Special Counsel v. Byrd*, [59 M.S.P.R. 561](#), 570 (1993), *aff'd*, 39 F.3d 1196 (Fed. Cir. 1994) (Table). This standard is consistent with the plain text of the statute, which specifies that the preference must be given “for the purpose of” providing the improper advantage. [5 U.S.C. § 2302\(b\)\(6\)](#). It is the preference itself that is prohibited and not the type of action used in granting the preference. *Byrd*, 59 M.S.P.R. at 570. In other words, it is possible to violate section 2302(b)(6) using hiring authority and recruitment vehicles that would be acceptable under other circumstances. The Special Counsel bears the burden of proving that a respondent has violated section 2302(b)(6), and the Special Counsel must do so by preponderant evidence. *Special Counsel v. Cummings*, [20 M.S.P.R. 625](#), 632 (1984); [5 C.F.R. § 1201.56\(a\)\(1\)\(ii\)](#).

Common Facts

¶6 The events in controversy took place at the U.S. Coast Guard Regional Examination Center (REC) in Los Angeles, California, and at Coast Guard Headquarters in Washington, D.C. On or about January 1, 2004, the Supervisory Merchant Marine Evaluation Specialist, GS-1801-11, at the REC retired. Hearing

Transcript (HT) at 284-85 (testimony of Commander (CMDR) Laura O’Hare). After being informed of the retirement, CMDR O’Hare, Chief of the REC, contacted the Coast Guard’s Civilian Personnel Office in Washington, D.C., and requested assistance in filling the position. LCF, Tab 1 at 3; BCF, Tab 1 at 3; HT at 295 (testimony of O’Hare). The appointee would be responsible for highly specialized work overseeing merchant mariner classes, evaluating merchant mariners for a variety of levels of credentialing and licensing, and supervising the lower graded civilian employees in the office. HT at 205, 290-92, 359 (testimony of Lee, O’Hare, Woodson).

¶7 The REC had both civilian employees and uniformed personnel. Woodson served as the Senior Legal Instrument Examiner, GS-6986-08, at the REC. HT, Ex. 10A at 6. Additionally, there were three Legal Instrument Examiners, GS-07, and one Cashier, GS-05. HT at 358 (testimony of Woodson). After the Supervisory Merchant Marine Evaluation Specialist at the REC retired, Woodson was assigned some of his duties, but he was not formally detailed to that GS-11 position. HT at 244, 360-61, 363-64 (testimony of Lee, Woodson).

¶8 The Coast Guard issued parallel vacancy announcements on January 20, 2004: a delegated examining unit (DEU) announcement that was open to all qualified U.S. citizens; and a merit promotion announcement open to “status eligibles.” HT, Ex. 4A at 1, 4. Both announcements sought candidates for the GS-11 level only, *id.*, even though limiting consideration to a single grade level would have generally excluded applicants below the GS-09 level, unless the individual could qualify via education or a combination of education and experience, HT at 65 (testimony of Jean House, an HR Specialist in the West Branch of the Civilian Personnel Office in Washington, D.C., who was handling the recruitment action prior to Beatrez), HT, Ex. 4A at 1, 4.

¶9 Woodson applied under the merit promotion announcement but was not referred because, as a GS-8 employee, he was ineligible for promotion to GS-11. LCF, Tab 1 at 3-4; HT at 64-65, 307 (testimony of House, O’Hare). CMDR

O'Hare contacted Lee, an HR Specialist who serves as the Command Staff Advisor in the field for Coast Guard facilities in California, to inquire as to why Woodson had not been referred. HT at 306-07 (testimony of O'Hare). CMDR O'Hare then requested via email that HR "reopen" the DEU announcement and create a new list for referral. HT at 307-08 (testimony of O'Hare), *id.*, Ex. 6. Lee forwarded the request to House. HT at 37, 40-43 (testimony of House), *id.*, Ex. 6. Lee's email stated: "Can we open the D1 [DEU] announcement? Eric Woodson, an employee there applied under MP was rated ineligible because of time in grade. He should have applied under competitive." *Id.*, Ex. 6. Lee testified that CMDR O'Hare specifically wanted to reopen the DEU list so that Woodson's nongovernmental experience could be considered. HT at 200, 225. On March 1, 2004, House instructed Lee to "have Commander O'Hare talk about lack of adequate candidates[.]" HT at 79 (testimony of House). The DEU referral certificate bears a handwritten annotation by CMDR O'Hare, stating that she wanted to re-advertise the job "[b]ecause of a lack of sufficient, well-qualified candidates[.]" HT, Ex. 4A at 7.

¶10 The vacancy was opened a second time, using both merit promotion and DEU announcements, on March 4, 2004. HT, Ex. 7A at 1, 5. The second set of vacancy announcements, however, did not differ in substance from the first set, and the position was advertised only at the GS-11 level. *Compare id.* and HT, Ex. 4A at 1-8.

¶11 By the time that the second set of vacancy announcements closed, the staffing assignment for this action had been transferred to Beatrez, who, like House, was also an HR Specialist based in Washington, D.C. HT at 84, 135 (testimony of House, Beatrez). On April 2, 2004, Beatrez notified Lee via email that she had been told "the reason the job was re-advertised was to try and reach Mr. Woodson." HT, Ex. 8 at 2. Beatrez then explained that she was unable to qualify Woodson at the GS-11 level, and asked if Lee wanted the qualified applicants incorporated with those found qualified under the first set of vacancy

announcements. *Id.* On April 5, 2004, Lee notified CMDR O’Hare: “They did not find [Woodson] qualified for the position based on his resume and how he responded to the KSAs. My recommendation if you want to [consider] him is to cancel and advertise the position as a GS-9 with potential to GS-11.” *Id.* On May 17, 2004, CMDR O’Hare notified Lee via email that she wanted the position re-announced as a “GS-9/11 to expand the pool of qualified applicants with specific licensing experience. Please limit the solicitation to all current and former federal employees, and limit to LA/LB [Los Angeles/Long Beach] local area.” HT, Ex. 9. CMDR O’Hare also instructed Lee to advertise the vacancy “for the minimum amount of time.” *Id.* That same day, Lee passed the request on to Beatrez, stating that she should re-announce the position as a GS-09/11 merit promotion vacancy with the area of consideration limited to the Los Angeles commuting area. *Id.* The position was re-announced on May 20, 2004, as merit promotion only in the local commuting area, and the announcement closed on May 28, 2004. HT, Ex. 10B.

¶12 On June 17, 2004, CMDR Christopher Hogan relieved CMDR O’Hare as the Chief of the REC. HT at 254-55 (testimony of Hogan). CMDR Hogan conducted interviews and selected Woodson for the position based upon the referral list, which now included his name. HT at 256-57 (testimony of Hogan). CMDRS Hogan and O’Hare, and one other individual, comprised the interview panel. *Id.* at 256.

¶13 The administrative law judge organized his analysis of the respondents’ activities into three sets of events. ID at 7. The first event involved the decision to re-advertise the vacancy after the first set of vacancy announcements closed. This event occurred prior to Beatrez’s involvement and pertained only to Lee. *Id.* The second event involved the cancellation of the second set of vacancy announcements. Both respondents were involved at that point. *Id.* The third event was the decision to issue a third vacancy announcement, with the position redesignated as a GS-09/11. Again, both respondents were involved. *Id.*

The Decision to Re-Advertise after the First Set of Vacancy Announcements

¶14 The Special Counsel alleges that the transactions between Lee and O'Hare and Lee and House show that Lee granted a preference or advantage to Woodson when he assisted CMDR O'Hare in her request to re-advertise the position after the first set of vacancy announcements. LCF, Tab 18 at 3-5, 9-10. The administrative law judge found that the timing of the email exchange might have created the appearance that Lee was advising CMDR O'Hare on how to create a pretext for re-announcing the position, but he credited CMDR O'Hare's testimony regarding her own motivations, which he found supported a different conclusion: CMDR O'Hare's initial failure to understand the complexities of the federal personnel system caused her to be confused as to the best way in which to structure an announcement that would capture candidates with the most relevant experience. ID at 13-14. CMDR O'Hare had testified that when she first sought to fill the position, she had only a limited understanding of how the civilian personnel hiring system worked, and the various types of hiring authority that were available. HT at 311-12. The administrative law judge found that the Special Counsel failed to establish by preponderant evidence that Lee had any reason to consider CMDR O'Hare's request as pretextual. ID at 14.

The Decision to Cancel the Second Set of Vacancy Announcements

¶15 The Special Counsel alleges that the transactions between Lee and Beatriz and Lee and CMDR O'Hare show that Lee and Beatriz helped CMDR O'Hare grant an illegal preference by defining the scope and manner of competition for the position when they cancelled the second vacancy announcement without rating, ranking or referring the candidates who applied. BCF, Tab 21 at 10-11; LCF, Tab 18 at 10-11. The administrative law judge, however, relied on Lee's testimony that he could recall telephone conversations with CMDR O'Hare that took place at this stage of the recruitment action, during which they discussed a need for a larger pool of candidates, including persons from other Coast Guard RECs. ID at 15; *see* HT at 204-10. He likewise relied upon the testimony of

Richard Kogut, Chief of Civilian Personnel for the Coast Guard at the time of the action. ID at 8. The administrative law judge found that, while the email messages would certainly have aroused suspicions, the second set of vacancy announcements was cancelled for lack of sufficient qualified candidates in the selection pool. *Id.* at 9, 14-15; *see* HT at 380 (testimony of Kogut). The administrative law judge found that this was a legitimate reason for canceling the announcements and the true motive for re-announcing the vacancy later. ID at 8.

¶16 The administrative law judge also pointed out that Beatrez had testified without any challenge from the Special Counsel that when she “saw that there were just a limited number of applicants, most of which were applicants under the D1 or open competitive announcement, [she] made an assessment that the position was advertised in error” and canceled the second set of vacancy announcements. ID at 9-10; *see* HT at 153. Beatrez testified that the second set of vacancy announcements generated only one new applicant on the merit promotion list, and five new applicants on the DEU list. HT at 154. She explained that the number of applicants generated “wasn’t going to meet [management’s] need to have more names because under open competitive procedures, management is limited to the top three scored applicants.” HT at 155. The administrative law judge reasoned that, given that the first and second sets of announcements were substantially the same, the failure of the second set of announcements to generate an adequate pool of applicants was not surprising. ID at 11, 14; *compare* HT, Ex. 4A at 1-6, *with id.*, Exhibit 7A at 1-8. He found that the first and second set of announcements would have been unlikely to have met the alleged illegitimate motive of granting a preference to Woodson, as well as ineffective with regard to the legitimate goal of attracting a larger pool of qualified candidates. ID at 11. The only correct thing to do, he concluded, was to re-announce the position as a GS-9/11, though the Coast Guard “could have been saved a great deal of effort, and avoided the appearance of impropriety . . . if they had simply done the proper thing sooner.” *Id.*

The Decision to Issue a Third Vacancy Announcement

¶17 As for the third vacancy announcement, the Special Counsel identifies a number of factors that could lead to the conclusion that Beatrez and Lee helped confer an illegal preference upon Woodson. The Special Counsel points to Beatrez’s testimony that the announcement would “expand the area of consideration, to give management more applicants to consider, and to also consider – allow them to consider Mr. Woodson, hoping that he would be qualified,” as well as CMDR O’Hare’s admission that the changes in the third vacancy announcement allowed Woodson to qualify. BCF, Tab 21 at 6; *see* HT at 159, 335-36 (testimony of Beatrez, O’Hare). The Special Counsel additionally points to the email exchange between Lee and CMDR O’Hare regarding the parameters for the third vacancy announcement. LCF, Tab 18 at 12. The Special Counsel likewise notes the geographical limitations adopted for the third announcement and the brief period for which it was open. LCF, Tab 18 at 6; BCF, Tab 21 at 6.

¶18 The administrative law judge, however, found that it was reasonable for the Coast Guard to restyle the position for both GS-09 and GS-11 applicants and re-announce the vacancy again, given that the second set of vacancy announcements would not have captured any GS-07 and GS-08 internal employee, even such an employee with applicable specialized experience. ID at 11. The administrative law judge pointed to testimony from Beatrez that the second set of announcements had been erroneous in light of the results produced by the first set. ID at 11; *see* HT at 155-56. The administrative law judge also noted Lee’s testimony that the second set of announcements would not have generated “any highly qualified candidates with the specific experience . . . because the nature of the work is inherently Government Coast Guard.” ID at 11; *see* HT at 203.

¶19 In reaching all of these findings, the administrative law judge gave particular credit to the Coast Guard’s official position that the respondents had done nothing improper, which was conveyed via Kogut’s testimony and that of

Cynthia Nelson-Possinger, Beatrez's second-level supervisor at the time. ID at 11; *see* HT at 390-91, 433-37. The administrative law judge also considered Lee's testimony regarding the importance of internal promotion opportunities in sustaining employee morale, *see* HT at 229-31, and that of Kogut, who testified that "probably . . . between 40 and 60 percent" of positions in the agency are designed as developmental positions to "be able to give internal candidates the opportunity to career ladder up, to get promoted internally," ID at 16; HT at 383. He thus credited Lee's testimony that he believed CMDR O'Hare was not just trying to reach Woodson but was seeking to consider internal candidates who may have had qualifications similar to those of Woodson. ID at 15-16; *see* HT at 235.

The Special Counsel's Arguments on Review

¶20 Most of the Special Counsel's arguments on review pertain to the findings of fact. The Special Counsel argues that the administrative law judge "neglected to consider or address all the crucial facts, testimony and evidence contained in the record." PFR File, Tab 1 at 1. Before the Board will undertake a complete review of the record, the petitioning party must explain why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error. *Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133 (1980), *review denied*, [669 F.2d 613](#) (9th Cir. 1982) (*per curiam*). The petition for review must be sufficiently specific to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record. *Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 92 (1992).

¶21 Whether the respondents violated [5 U.S.C. § 2302\(b\)\(6\)](#) turns on whether they *intended* to afford preferential treatment to Woodson. *See Byrd*, 59 M.S.P.R. at 570. It is not the action itself that violates the law, but, instead, the intent behind the action. *See id.* Legally permissible actions, such as canceling a vacancy announcement or selecting one specific type of hiring authority over another, can be used for an illegal purpose if the intent is to afford preferential treatment to an individual. The same actions, however, would be entirely

permissible absent any intent to afford preferential treatment to an individual, even if the actions taken by the agency for valid reasons had the unintentional effect of favoring one applicant over the others. *See id.*; *see also* *Abell v. Department of the Navy*, [343 F.3d 1378](#), 1383-84 (Fed. Cir. 2003) (“An agency has discretion to cancel a vacancy announcement”), *citing*, *Scharein v. Department of the Army*, [91 M.S.P.R. 329](#), 339 (2002), *aff’d*, No. 02-3270 (Fed. Cir. Jan. 10, 2003).

¶22 The administrative law judge’s analysis of intent here rests largely on credibility determinations made from the testimony of the respondents and their managers. Normally, the Board must defer to the credibility determinations of an administrative judge when they are based, explicitly or implicitly, upon the observation of the demeanor of witnesses testifying at a hearing, because the administrative judge was in the best position to observe the demeanor of the witnesses and determine which witnesses were testifying credibly. *Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002); *Smith v. Department of Veterans Affairs*, [93 M.S.P.R. 424](#), ¶ 4 (2003). Conversely, the Board may substitute its own determinations of fact for those of an administrative judge, even where his credibility findings are based in part on demeanor evidence, if the Board can articulate a sound reason, based on the record, for a contrary evaluation of the evidence. *Haebe*, 288 F.3d at 1300; *Dogar v. Department of Defense*, [95 M.S.P.R. 527](#), ¶ 4 (2004) (“Although we seldom exercise this prerogative, we could not ignore in the case before us the serious inconsistencies between the appellant’s account and the documentary evidence, including the findings of the agency’s extensive investigation.”), *aff’d*, 128 F. App’x 156 (Fed. Cir. 2005). The Board may overturn credibility determinations when the findings are incomplete, inconsistent with the weight of the evidence, and do not reflect the record as a whole. *Faucher v. Department of the Air Force*, [96 M.S.P.R. 203](#), ¶ 8 (2004); *see, e.g., Wallace v. Department of Commerce*, [106 M.S.P.R. 23](#), ¶¶ 14-16 (2007) (finding that the administrative judge failed to

consider conflicting evidence); *Velez v. Department of Homeland Security*, [101 M.S.P.R. 650](#), ¶ 18 (2006) (finding that the appellant's purported exculpatory explanation was not only contradicted by the undisputed evidence, it was inconsistent with the appellant's and a subordinate employee's previous sworn statements, and it was also inconsistent with the record evidence as a whole), *aff'd*, 219 F. App'x 990 (Fed. Cir. 2007); *Moore v. Equal Employment Opportunity Commission*, [97 M.S.P.R. 684](#), ¶ 12 (2004) (rejecting the administrative judge's credibility determination in favor of the testimony of one agency witness, where the testimony conflicted with sworn statements by three impartial witnesses supporting the appellant's account of events).

¶23 Here, the administrative law judge did not ignore the evidence that would support a finding of preferential treatment, and indeed he acknowledged several times that some of their actions might imply or create the appearance of wrongdoing. *E.g.*, ID at 4-5, 8-9, 11-13. His findings and credibility determinations are nevertheless inconsistent with the weight of the documentary evidence and do not reflect the record as a whole. It is our view that the administrative law judge gave a sizable body of particularly telling circumstantial evidence too little weight in favor of *some* direct testimony that was inconsistent with that body of evidence. As a result, he explained away serious contradictions between the testimony and the other less favorable evidence in the record, crafting an improbable account of the events leading up to Woodson's appointment to the vacant position. *See Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987) (factors for assessment of credibility include the contradiction of the witness's version of events by other evidence or its consistency with other evidence, and the inherent improbability of the witness's version of events). For example, with regard to Beatrez's cancellation of the second set of vacancy announcements, the administrative law judge found:

[The Special Counsel] entered into evidence an email from Mr. Lee to CMDR O'Hare dated April 5, 2004 in which Mr. Lee stated:

“They did not find [Woodson] qualified for the position based on his resume and how he responded to the KSAs. My recommendation if you want to consider [sic] him is to cancel and advertise the position as a GS-9 with potential to GS-11.” HT, Exhibit 8. Viewed in isolation, [the Special Counsel’s] attention might understandably be caught by those statements. However, a lack of sufficient qualified candidates in the pool is a legitimate reason for cancelling a vacancy announcement. HT at 380, Testimony of Kogut. I believe this was the true motive for the re-announcement.

ID at 9. As for Lee’s communication to CMDR O’Hare of advice from House regarding the second set of vacancy announcements, the administrative law judge explained:

On March 1, 2004, the staffing specialist working on the recruitment action, Ms. Jean House, instructed Mr. Lee to . . . “have Commander O’Hare talk about lack of adequate candidates[.]” HT at 79. In a handwritten note to Mr. Lee on that same date, written on a DEU certificate of names, CMDR O’Hare stated she wanted to re-advertise the job “[b]ecause of a lack of sufficient, well-qualified candidates[.]” HT, Exhibit 4a at 7.

It is understandable that this prompting may have looked to [the Special Counsel] like HR advising a manager on how to create a pretext for a new announcement weeks after the decision was already made to re-announce the position. However, Federal human resources laws and regulations can be rather complex, and managers, particularly those in the military, may not have a firm understanding of how those regulations work. CMDR O’Hare admitted that she had only a limited understanding of how the civilian personnel hiring system worked and “was confused about it.” HT at 311-312, Testimony of O’Hare.

ID at 13-14.

¶24 An agency may rely upon proper circumstantial evidence to establish intent. *Naekel v. Department of Transportation*, [782 F.2d 975](#), 978 (Fed. Cir. 1986); *Delessio v. U.S. Postal Service*, [33 M.S.P.R. 517](#), 519, *aff’d*, 837 F.2d 1096 (Fed. Cir. 1987) (Table). The inferences that may be drawn from such evidence depend upon the strength of the evidence. *Delessio*, 33 M.S.P.R. at 519. Where proof of intent must be inferred from circumstantial evidence, no per se evidentiary rule applies and all of the evidence must be considered. *Naekel*, 782 F.2d at 979;

Delessio, 33 M.S.P.R. at 519. Even where an administrative judge has made credibility determinations pursuant to *Hillen*, the Board may on review resolve the question of intent from the totality of the evidence, applying the preponderance of the evidence standard. *See, e.g., Johnson v. Department of the Army*, [48 M.S.P.R. 54](#), 57-58 (1991), *aff'd*, 960 F.2d 156 (Fed. Cir. 1992) (Table); *Delessio*, 33 M.S.P.R. at 519-21.

¶25 The record includes a fairly significant paper trail of email messages described above, which were written or received by CMDR O'Hare, Lee and Beatrez, and which clearly document CMDR O'Hare's desire to select Woodson for the position. HT, Exs. 6, 8, 9; *see also id.*, Ex. 4A at 7. When we consider the totality of the evidence, we find that these messages, together with some of the material testimony, persuasively show that CMDR O'Hare was indeed seeking to grant Woodson a preference not authorized by law, rule, or regulation. CMDR O'Hare's email messages specifically identify Woodson and no other potential candidate for the vacant position. *See, e.g.,* HT at 200-01, 225 (testimony of Lee); *id.*, Ex. 8 at 1-2, 9. Between these blatant references to Woodson, and the documentation and direct testimony regarding the assistance forthcoming from the respondents, a pattern of cooperation between the respondents and CMDR O'Hare emerges in support of CMDR O'Hare's efforts to grant an illegal preference to Woodson.

¶26 For instance, after CMDR O'Hare declined to interview any of the seven best-qualified candidates referred to her under the first set of vacancy announcements, she emailed Lee and specifically asked him why Woodson's name did not appear on the certificate. HT at 223, 306-07 (testimony of Lee, O'Hare). After Lee explained that Woodson lacked the requisite experience to qualify pursuant to the merit promotion procedures under which he had applied, CMDR O'Hare asked Lee to readvertise the position in order to give Woodson the chance to apply under the DEU procedures. HT at 200, 307-08 (testimony of Lee, O'Hare); *id.*, Ex. 6. Lee forwarded CMDR O'Hare's February 18, 2004 request to

House, the HR Specialist handling the recruitment action at that time, and asked the following: “Can we open the . . . [DEU] announcement? Eric Woodson, an employee there applied under MP was rated ineligible because of time in grade. He should have applied under competitive.” HT, Ex. 6; HT at 37, 40-41, 67-70 (testimony of House). Notably, this email did not address CMDR O’Hare’s alleged interest in reaching a larger pool of candidates or take the position that an insufficient number of qualified candidates had applied. HT, Ex. 6; *see also* HT at 71, 139-40, 196, 198 (testimony of House, Beatrez, Lee). In response, House had instructed Lee to “have Commander O’Hare talk about lack of adequate candidates[.]” HT at 79 (testimony of House). House fully understood that CMDR O’Hare was seeking to consider Woodson in making this request. HT at 70-71, 74, 119-21 (testimony of House); *see also* HT at 140-41 (testimony of Beatrez). Indeed, House annotated a copy of the email message: “Will need to combine the two certificates and [management] must have good reason for re-advertising.” HT at 79 (testimony of House); *id.*, Ex. 6. Lee conveyed the information from House, HT at 196-97 (testimony of Lee), and on the same day, March 1, 2004, CMDR O’Hare stated in a facsimile message, handwritten on the referral certificate, that she wanted to re-advertise the job “[b]ecause of lack of sufficient, well-qualified candidates[.]” HT, Ex. 4A at 7; *see also* HT at 80-81 (testimony of House). CMDR O’Hare testified that she and Lee had spoken face-to-face about this issue, and he advised her to develop a “good reason for re-advertising.” HT at 312-13.

¶27 After the second set of vacancy announcements closed, and Woodson still did not qualify for the GS-11 position because he lacked time in grade, Lee and Beatrez, who by this time was servicing the vacancy announcements, HT at 84, 86, 141-42 (testimony of House, Beatrez), advised CMDR O’Hare regarding the specific language to use to request a cancellation of the second set of vacancy announcements and a re-posting of the position with a lower grade of GS-9/11, which would allow Woodson to be considered. Indeed, Beatrez was well-aware

of CMDR O'Hare's intent to reach Woodson, and she reviewed Woodson's application and qualifications first, immediately after the second set of vacancy announcements closed. She found that he was not qualified for the position as it was advertised and told Lee accordingly. HT, Ex. 8 at 2, HT at 142-43 (testimony of Beatrez). Additionally, we note, Beatrez informed Lee that House had told her that "the reason the job was re-advertised was to try and reach Mr. Woodson." HT, Ex. 8 at 2. Beatrez also told Lee that she was unable to qualify Woodson at the GS-11 level, and she asked if Lee wanted the qualified applicants incorporated with the prior list. *Id.*

¶28 In an email message dated April 5, 2004, after the second set of vacancy announcements closed, Lee told CMDR O'Hare: "They did not find [Woodson] qualified for the position based on his resume and how he responded to the KSAs. My recommendation if you want to [consider] him is to cancel and advertise the position as a GS-9 with potential to GS-11." *Id.* at 2. This message, however, did not address the alleged goal of reaching a broader range of qualified candidates or of wanting a larger pool of candidates from which to choose. *Id.*; HT at 90, 144 (testimony of House, Beatrez). On May 17, 2004, CMDR O'Hare notified Lee via email that she wanted the position re-announced as a "GS-9/11 to expand the pool of qualified applicants with specific licensing experience. Please limit the solicitation to all current and former federal employees, and limit to LA/LB [Los Angeles/Long Beach] local area." HT, Ex. 9. She also wanted the vacancy to be advertised "for the minimum amount of time." *Id.* Lee passed the request on to Beatrez, stating that she should re-announce the position as a GS-09/11 merit promotion only vacancy with the area of consideration limited to the Los Angeles commuting area. HT at 156, 159, 226-29 (testimony of Beatrez, Lee). Accordingly, Beatrez cancelled the second set of vacancy announcements and issued the third announcement as requested, with an open period of only eight days. HT, Exs. 10B, 28C; HT at 146, 153, 156 (testimony of Beatrez).

¶29 Along with the record of cooperation between CMDR O’Hare and the respondents, we also must consider the carefully tailored nature of the third and final vacancy announcement that virtually ensured that the position qualifications would allow Woodson to be incorporated into the pool of qualified applicants. The announcement expanded the experience level for potential applicants by advertising the open position at both the GS-9 and GS-11 levels, while at the same time, it limited consideration of applicants to “Federal employees with competitive status (including reinstatement eligibles) in the local commuting area,” as well as veterans eligible under the Veterans Employment Opportunities Act of 1998 and applicants eligible under the Career Transition Assistance Program or Interagency Career Transition Assistance Program.² HT, Ex. 10B. Under such specifications, candidates from other Coast Guard REC facilities might be precluded from consideration, even though they were a precise match for the position in terms of their experience.³ Indeed, Beatrez testified that Coast Guard management hoped that Woodson would qualify under that announcement. HT at 159. We further note that this position is supervisory and had always been filled at the GS-11 level prior to this time. HT at 257-58, 426, 433-34, 436-37 (testimony of Hogan, Kogut, Nelson-Possinger).

¶30 As for the nature of CMDR O’Hare’s email correspondence, the administrative law judge relied upon CMDR O’Hare’s own explanation for her actions, specifically that she “didn’t really understand the difference between the D[EU] applications and the M[erit Promotion] applications,” HT at 311, and that because of lack of training in civilian staffing, she “was confused” about the correct procedures to follow, HT at 312; *see* ID at 3. Notably, however, the administrative law judge made no demeanor-based credibility findings regarding

² Previous applicants were also considered. HT, Ex. 10B.

³ The Coast Guard has RECs at various locations, including New Orleans, Louisiana, and Portland, Oregon. HT at 282-83 (testimony of O’Hare).

this particular testimony, and instead seemed to accept it at face value. When an administrative judge's findings are not based on the observation of witnesses' demeanor, the Board is free to re-weigh the evidence and substitute its own judgment on credibility issues. *Haebe*, 288 F.3d at 1302. Even if CMDR O'Hare had been truly confused about the operation of the civilian personnel system, such confusion is not inconsistent with our finding that she intended to grant Woodson an improper preference in hiring, in light of all the evidence in the record that points to such intent. Indeed, CMDR O'Hare admitted that she "may have" told Woodson that the position would be advertised for the third time. HT at 339. We thus reject the respondents' and the Coast Guard's assertion that CMDR O'Hare was simply seeking to make a selection from a more highly qualified applicant pool and that she was solely concerned about a lack of qualified candidates in the applicant pool.

¶31 The respondents submitted considerable testimony from senior Coast Guard management officials and documentary evidence intended to show that Lee and Beatrez were acting in accordance with agency HR policies and civil service regulations governing promotion and hiring. *See, e.g.*, HT at 380-83, 386-90, 433-443 (testimony of Kogut, Nelson-Possinger), *id.*, Ex. 1 at 10; [5 C.F.R. § 335.103\(b\)\(2\)](#) (areas of consideration for merit promotion programs "must be sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered"). Likewise, the respondents submitted testimony that internal candidates such as Woodson offered the most relevant experience for the position, despite the fact he was at a low grade, because of the exact nature of the work he performed. In other words, by advertising the position only at the GS-11 level, the respondents asserted, the Coast Guard would have precluded the most qualified candidates from consideration. *See* HT at 161, 265-66 (testimony of Beatrez, Hogan). Additionally, the respondents point out that the Special Counsel has not adduced direct evidence that Woodson was pre-selected. PFR File, Tab 3 at 11.

¶32 As the Board stated in *Dogar*, however, “we [can]not ignore in the case before us the serious inconsistencies between the [respondents’] account and the documentary evidence,” namely the email record and material testimony regarding the interaction between CMDR O’Hare, the respondents, and other HR specialists. *Dogar*, [95 M.S.P.R. 527](#), ¶ 4. We acknowledge here that the strongest evidence of intent points not to the respondents, but to CMDR O’Hare. The Special Counsel requested on May 20, 2008, that the Department of Homeland Security impose disciplinary action against CMDR O’Hare, but she retired effective November 30, 2008, before a hearing could be held. PFR File, Tab 1 at 10-11 n.3; *see* HT at 279, 342 (testimony of O’Hare). Nevertheless, given the rather blatant intention of granting a preference to Woodson that CMDR O’Hare’s communications express to the respondents, we also cannot ignore the actions of the respondents, who are HR professionals, in intentionally facilitating an obvious violation of section 2302(b)(6). *See Byrd*, 59 M.S.P.R. at 577, 583-84 (finding that because of respondent Rubenstein’s “area of expertise” as a personnelist, “he had the professional responsibility to advise management that using the TLA [(temporary limited appointment authority) to give an improper preference to an applicant for employment] ... was illegal” under [5 U.S.C. § 2302\(b\)\(6\)](#) and (b)(11)). We therefore interpret [5 U.S.C. § 2302\(b\)\(6\)](#) to reach conduct that aids and abets another who is violating the statute.

¶33 Our interpretation of [5 U.S.C. § 2302\(b\)\(6\)](#) here may seem at first glance to conflict with another long-standing tenet of civil service law frequently implicated in insubordination cases. Government employees may not refuse to do work merely because of disagreements with management, and they fail to perform their assigned duties at the risk of being insubordinate. *Nagel v. Department of Health & Human Services*, [707 F.2d 1384](#), 1387 (Fed. Cir. 1983). Further, the Board has held that an employee does not have the unfettered right to disregard an order merely because there is a substantial reason to believe that the order is not proper; rather, he must first comply with the order and then register his

complaint or grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation, or when complying with the order would cause him irreparable harm. *E.g.*, *Bowen v. Department of the Navy*, [112 M.S.P.R. 607](#), ¶ 15 (2009); *Pedelease v. Department of Defense*, [110 M.S.P.R. 508](#), ¶¶ 16-18, *aff'd*, 343 F. App'x 605 (Fed. Cir. 2009); *Cooke v. U.S. Postal Service*, [67 M.S.P.R. 401](#), 407-08, *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table). For the subordinate employee, the “obey now, grieve later” doctrine can be a safety net, because the Board has declined to sustain charges of misconduct where the employee has, despite his own misgivings, met his obligation under *Nagel* to perform as directed, and the order he obeyed is found to be an improper one. *See, e.g.*, *Blake v. Department of Justice*, [81 M.S.P.R. 394](#), ¶ 25 (1999) (holding that one specification of a charge could not be sustained where the appellant’s actions underlying the specification had been “taken under the explicit directions of much more highly placed . . . superiors” at the agency); *Rose v. Department of Housing & Urban Development*, [26 M.S.P.R. 356](#), 360 (1985) (holding that the appellant, whose actions were directed by his supervisors, “should not be disciplined in this case because Government employees may not refuse an instruction to do certain work merely because they challenge its propriety”). Indeed, where intent is a relevant consideration in the charge, it should “properly be imputed, not to the appellant, but to the person who issued the order,” as it is not the appellant’s “responsibility or prerogative to determine the rightness or wrongness” of the order. *Blake*, [81 M.S.P.R. 394](#), ¶ 25.

¶34 The facts now before us may be distinguished from a typical “obey now, grieve later” situation. There is no evidence that CMDR O’Hare *ordered* the respondents to take actions that would ensure that Woodson appeared on the certificate of eligibles, nor was either respondent one of CMDR O’Hare’s subordinates. Instead, the respondents were part of the Coast Guard’s headquarters Civilian Personnel Office. Lee was the Command Staff Advisor for the Los Angeles/Long Beach area in the field, and Beatrez, who is now the West

Branch Chief and Lee's direct supervisor, was a Washington, D.C.-based HR Specialist in the West Branch at the time. HT at 37-41, 135, 180-81, 375-76, 401-02 (testimony of House, Beatrez, Lee, Kogut). While Lee may have been "the personal point of contact in [the Civilian Personnel Office] with the management officials and employees that he serviced," HT at 401 (testimony of Kogut), and "answer[ed] questions from management officials about any issue related to operational personnel," *id.*, he was nevertheless in the chain of command for the Civilian Personnel Office, as was Beatrez, and not for the Los Angeles REC. As such, neither respondent was a subordinate to CMDR O'Hare. Even if CMDR O'Hare's questions and requests regarding personnel management matters could be construed as orders, the respondents were responsible to a separate organization. Because he was on-site, Lee may have been more susceptible to the influence of local management; however, in his testimony, Kogut repeatedly characterized Lee's role as *advisory*. Kogut testified that Lee "answers questions" and "gives that face-to-face direct contact with" local management. HT at 401. Lee "advised Commander O'Hare and subsequently Commander Hogan on the recruitment process, the hiring process, the announcement process, answered questions from Commander O'Hare with regard to the recruitment process . . . a typical command staff advisor role." HT at 402. As HR advisors outside of the local chain of command, the respondents should have exercised their independent judgment and challenged local management's fairly obvious efforts to grant a preference to Woodson for the purpose of improving his prospects for selection as the Supervisory Merchant Marine Evaluation Specialist for the Los Angeles REC. *See Byrd*, 59 M.S.P.R. at 577, 583-84.

¶35 In reaching this conclusion, we are mindful of our obligation to faithfully uphold the merit system principles as set forth by Congress, *see* [5 U.S.C. § 2301](#), and to "serve Congress'[s] interest in putting agencies subject to the Civil Service Reform Act . . . on notice that selections for employment must be made in

accordance with law and must not be the result of personal or political favoritism.” *Byrd*, 59 M.S.P.R. at 584. In section 2302(b)(6), Congress set forth the plainest of language prohibiting the granting of a preference or advantage not authorized by law, rule, or regulation for the purpose of improving or injuring the prospects of any particular person for employment by any employee who has authority to take, direct others to take, recommend, or approve any personnel action. Although some may see the respondents as lacking any improper motive or reasonably relying on unquestioned past practices, the Board has spoken before on this issue. In *Special Counsel v. Ross*, for example, the Board affirmed and adopted as modified the recommended decision sustaining charges that a Personnel Officer and a Personnel Management Specialist engaged in prohibited personnel practices in violation of [5 U.S.C. § 2302\(b\)\(4\)](#), (5), (6), by manipulating the selection process to place a temporary employee in an open permanent position despite the fact that she was the lowest-ranked candidate on the certificate of eligibles, after management “name-requested” that employee for the position. *Special Counsel v. Ross*, [34 M.S.P.R. 197](#), 200-03 (1987). Likewise, in *Byrd*, the Board sustained charges that respondent Rubinstein, a personnelist, had engaged in prohibited personnel practices in violation of [5 U.S.C. § 2302\(b\)\(6\)](#), (11), when he assisted respondent Byrd, the selecting official, in using TLA authority to grant a hiring preference to a politically-connected candidate for a position that was filled under a merit staffing announcement in the hiring at the agency’s other locations, because he “should have known that the use of the TLA authority was inappropriate in this case” and “he had the professional responsibility to advise management that using the TLA in this case was illegal.” *Byrd*, 59 M.S.P.R. at 577, 583-84. Accordingly, we find that the Special Counsel has proven by a preponderance of the evidence that both respondents violated 5 U.S.C. § 2302(b)(6) when they intentionally assisted CMDR O’Hare in granting an illegal preference for employment to Woodson.

Penalties

¶36 We now turn to the issue of penalties. The Special Counsel recommends a suspension of not less than sixty days for each respondent. BCF, Tab 21 at 1, 19-20; LCF, Tab 18 at 1, 19-20; PFR File, Tab 1 at 24. The Special Counsel argues that the seriousness of the offense merits a severe penalty. BCF, Tab 21 at 19; LCF, Tab 18 at 19; *see Velez*, [101 M.S.P.R. 650](#), ¶ 26 (in evaluating a penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated).

¶37 The range of penalties for a Special Counsel disciplinary action is set forth in [5 U.S.C. § 1215\(a\)\(3\)](#):

A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.

In determining the penalty in Special Counsel disciplinary actions, we apply the factors that are set forth in *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981); *see, e.g., Byrd*, 59 M.S.P.R. at 582. In considering these factors, the Board also takes into account the particularized circumstances of this proceeding. *See id.* We address these factors in turn.

¶38 As to the nature and seriousness of the offense, and its relation to the respondents' duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated, *see Douglas*, 5 M.S.P.R. at 305, we find that the offense was, in fact, serious and goes straight to the heart of the respondents' duties, positions, and responsibilities. However, while we have found that the respondents' offense was intentional, the Special Counsel has adduced no evidence to suggest that it was committed maliciously or for gain, or that it was frequently repeated.

¶39 As to the respondents' job level and type of employment, including supervisory or fiduciary roles, contacts with the public, and prominence of the position, *see Douglas*, 5 M.S.P.R. at 305, Beatrez was a nonsupervisory, journeyman-level HR Specialist in the agency's Washington, D.C.-based Civilian Personnel Office at the time of the events leading to the complaint, and she had limited public contact and no fiduciary responsibilities, HT at 393, 446 (testimony of Kogut, Nelson-Possinger). Lee, also a journeyman-level HR Specialist, was the Command Staff Advisor for the Civilian Personnel Office and serviced agency organizations throughout California. HT at 401 (testimony of Kogut). Nelson-Possinger testified that, while playing a prominent role in the agency's West Coast operations, Lee did not have fiduciary responsibilities. HT at 456.

¶40 As for the respondents' past disciplinary records, *see Douglas*, 5 M.S.P.R. at 305, they had none, HT at 393-94, 446, 456 (testimony of Kogut, Nelson-Possinger). Turning to their past work records, including length of service, performance on the job, ability to get along with fellow workers, and dependability, *see Douglas*, 5 M.S.P.R. at 305, Kogut testified that Beatrez was "a very responsible employee who has many years of federal service . . . without any negative comments in her record," HT at 394. Nelson-Possinger characterized Beatrez as a "stellar" employee in terms of dependability, with twenty-one years of federal service, more than ten years of which have been with the Coast Guard. HT at 446-47. Beatrez's performance appraisals showed that her work has "been at the highest levels." HT at 447. Nelson-Possinger characterized Lee as an "extremely dependable" employee, who "really has carried the weight of the Alameda office on his shoulders as long as [she has] been there." HT at 456-57.

¶41 As for the effect of the offense upon the respondents' ability to perform at a satisfactory level and its effect upon supervisors' confidence in their ability to perform assigned duties, *see Douglas*, 5 M.S.P.R. at 305, Kogut testified that

proof of wrongdoing would affect his confidence in Beatrez to the extent that he “would have to get her additional guidance instruction” and perform “additional oversight of her work,” HT at 395. Nelson-Possinger testified that the Special Counsel’s investigation and hearing in these complaints has not affected Beatrez’s ability to do her work:

Even during the last six or more months that we’ve been preparing for this hearing, she has not missed a beat. She’s continued to supervise her branch, she’s continued to take on new responsibilities, and has, even as the branch chief, in lots of instances taken the lead for special projects.

HT at 447. As for Lee, Nelson-Possinger testified that he had “taken on even additional work” related to the Coast Guard’s modernization during the pendency of the complaint. HT at 457. “There would be no degradation of [Lee’s] performance at all.” *Id.*

¶42 When asked about consistency of the penalty with those imposed upon other employees for the same or similar offenses, *see Douglas*, 5 M.S.P.R. at 305, both Kogut and Nelson-Possinger testified that there had been no similar offenses in the Coast Guard that they were able to find, HT at 395-97, 447-48, 458. Nelson-Possinger explained that the Coast Guard’s table of penalties would allow penalties ranging from reprimand to removal and that she believed a “reprimand should be the most” severe penalty imposed on Beatrez. HT at 447-48.

¶43 As for the notoriety of the offense or its impact upon the Coast Guard’s reputation, *see Douglas*, 5 M.S.P.R. at 305, Kogut testified that the offense was “not notorious . . . not widespread, widely known. . . . I haven’t read about it in the newspaper I haven’t seen it anywhere.” HT at 396-97. Kogut described a contrasting situation, the prominent news coverage following the arrest of the Federal Security Director at Dulles International Airport for driving while intoxicated. HT at 397. Nelson-Possinger opined that there had been no loss of reputation for the agency because of the respondents’ actions. HT at 448.

¶44 As for the clarity with which the respondents were on notice of any rules that were violated in committing the offense, or whether they had been warned about the conduct in question, *see Douglas*, 5 M.S.P.R. at 305, Kogut testified that neither Beatrez nor anyone else at the agency had notice:

As I said before, your honor, this is a process that in the Coast Guard occurs frequently where we announce jobs, reannounce jobs to get the best quality candidates. This is not a one-time occurrence. So just the opposite. [Beatrez] would have seen this as something that was proper, appropriate versus inappropriate and wrong.

HT at 398. Nelson-Possinger testified: “There was no clarity. [Beatrez] did not know and neither did I that the Coast Guard was committing a prohibited personnel practice.” HT at 449. Regarding Lee, she added, “This whole charge by [the Special Counsel] hit us out of left field, so we were not on notice. We did not know we were doing anything wrong. . . . [Lee] had no prior knowledge that anything, any advice he gave Commander Hogan would be turned into a charge of prohibited personnel practice.” HT at 458-59.

¶45 Both Kogut and Nelson-Possinger found high potential for both respondents to be rehabilitated. *See Douglas*, 5 M.S.P.R. at 305. Kogut testified, “I strongly believe that [Beatrez] would be very easily rehabilitated.” HT at 399. Nelson-Possinger stated that Beatrez’s potential for rehabilitation was “excellent.” HT at 449. As for Lee, she said, “Now that he understands [the Special Counsel’s] interpretation . . . he understands and can be rehabilitated.” HT at 459.

¶46 Neither Kogut nor Nelson-Possinger could identify any mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter, that would apply in this case. HT at 399, 449, 459; *see Douglas*, 5 M.S.P.R. at 305. Finally, as to the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the respondents or others, *see Douglas*, 5 M.S.P.R. at 306, both witnesses emphasized

the importance of retraining HR employees so they would not commit similar offenses in the future, HT at 399, 450, 459-60.

¶47 We find that both respondents are strong performers and valued employees without prior discipline and with rehabilitation potential. Neither was a supervisor or manager at the time that the charged conduct took place. The major difference between the respondents that would affect the penalty is the degree and duration of their support for CMDR O'Hare's pre-selection efforts. This difference goes to the first and most important *Douglas* factor, the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities.

¶48 Lee was involved with the REC's recruitment efforts for a longer period of time and on a much more intimate level than Beatrez. His improprieties began with the cancellation of the first set of vacancy announcements. Lee worked directly with REC management, and by the agency's admission, he served as HR liaison between the REC and the Civilian Personnel Office. Lee was thus in the best position to dissuade local management from prohibited personnel practices. Indeed, that was part of his job, and there is no indication he did so. In determining the appropriate penalty, we are guided by *Byrd*, 59 M.S.P.R. at 577, 583-84. As mentioned previously, in *Byrd* the Board found that a personnelist violated [5 U.S.C. § 2302](#)(b)(6) and (11) by using a hiring authority, which he knew or should have known was improper, to give an individual an advantage in hiring. The Board recognized that his actions were the result of his superiors directing him to find a way to hire the individual in question. The Board found, though, that someone in the personnelist's position should have known that using temporary limited appointment hiring authority was improper and should have informed his supervisors of that fact, but he failed to do so. *Id.* at 583-84. The Board then determined that a 60-day suspension was warranted despite the personnelist's 16 years of service and status as an "exemplary" employee. *Id.* at 584. Lee's situation is remarkably similar to the one described in *Byrd*.

Balancing the mitigating factors with the seriousness of the offense, we impose on respondent Lee a suspension without pay of forty-five days as the appropriate penalty under the circumstances of this case.

¶49 Beatrez only became entangled at some point before the second set of vacancy announcements closed. Although, as the headquarters HR Specialist servicing the vacancy announcements, she was in a position to help halt the ongoing prohibited personnel practice, she did not act in this case and she bears liability for her serious offense. Balancing the mitigating factors with the seriousness of the offense, we impose on respondent Beatrez a ten-day suspension without pay as the appropriate penalty under the circumstances of this case.

ORDER

¶50 Accordingly, the Board ORDERS the U.S. Coast Guard to suspend respondent Lee for a period of forty-five days without pay. The Board also ORDERS the U.S. Coast Guard to suspend respondent Beatrez for a period of ten days without pay.

¶51 Within sixty days of the date of this Order, the Special Counsel shall file a report on the status of compliance with the Board's Order regarding penalties in this case.

NOTICE TO THE RESPONDENTS REGARDING THEIR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeals if the court has jurisdiction. See [5 U.S.C. § § 1214\(c\)](#), 1215(a)(4), and 7703(b). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than sixty calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than sixty calendar days after the receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* [5 U.S.C. § 7703\(b\)\(1\)](#). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.caafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

CONCURRING OPINION OF ANNE M. WAGNER

in

Special Counsel v. Richard F. Lee, Diane L. Beatriz

MSPB Docket Nos. CB-1215-08-0014-T-1, CB-1215-08-0015-T-1

¶1 I fully agree with the Board's opinion finding that the respondents committed a prohibited personnel practice that warrants discipline. However, in balancing the mitigating factors with the aggravating factors in this case, I would impose suspensions without pay on Lee and Beatriz of shorter duration than the penalties ordered in the Board's decision.

Anne M. Wagner
Vice Chairman