This case is before the Board on the January 16, 1987 Recommended Decision of Chief Administrative Law Judge (CALJ) Reidy regarding a complaint filed by petitioner, the Office of Special Counsel (OSC), seeking disciplinary action against respondent Jeannette Nichols. The complaint charged respondent with violating 5 U.S.C. § 2302(b)(6), which prohibits the use of personnel authority to grant a preference or advantage not authorized by law for the purpose of improving or injuring a particular person's prospects for employment. The same conduct was also alleged
to have created the appearance of giving preferential treatment in violation of 5 C.F.R. § 735.201a(b).\footnote{1} A hearing was held before the CALJ, who issued a Recommended Decision which found petitioner failed to establish by the preponderance of the evidence that respondent engaged in the alleged violations and therefore dismissed the complaint. The Board has carefully considered the Recommended Decision and the record in light of the exceptions filed by the Special Counsel and the opposition of respondent to those exceptions. For the reasons stated below, we ADOPT the Recommended Decision as MODIFIED herein and incorporate it into this final decision as an Appendix.

\footnote{1 The statute allegedly violated, 5 U.S.C. § 2302(b)(6), 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 --

\[\ldots\]

(6) 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 \ldots.

The regulation said to have been violated, 5 C.F.R. § 735.201a(b), provides:

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in or create the appearance of:

\[\ldots\]

(b) Giving preferential treatment to any person.
The complaint charged respondent Nichols with violating 5 U.S.C. § 2302(b)(6) by creating an unnecessary position in the office which Nichols managed for the sole purpose of bringing a personal friend, Jacqueline Williams, into the agency so that Williams could compete for promotion to another position against a reemployment priority candidate. The priority candidate, Keith Sterzing, had expressed an interest in the vacancy, and the agency's rules did not permit individuals outside the agency to compete with him. The same actions also were alleged to have resulted in, or created the appearance of, giving preferential treatment to Williams in violation of 5 C.F.R. § 735.201a(b).

The facts found by the CALJ in his Recommended Decision (R.D.), may be summarized as follows. In October 1984 Nichols was appointed Manager of the Southern Administrative Service Center of the Department of the Interior's Minerals Management Service (MMS). She initially joined MMS in February 1984 as a GS-13 Support Services Supervisor (SSS), filling a position that had been left vacant since October 1982. Nichols previously worked for the Department of Energy (DOE), where Jacqueline Williams was a colleague and friend. At the time Nichols joined MMS, the Southern Administrative Service Center (SASC) was disorganized and suffering from a lack of direction, and after a review of the operation in March 1984, the SASC was required to take steps to improve its services. When
Nichols was appointed Acting Manager in late September 1984, her immediate supervisor advised her to fill promptly the vacancy created by her own promotion and other vacancies in the MMS because of the imminence of a hiring freeze. Nichols immediately had an announcement published to solicit a replacement for the SSS position and rewrote the job's inaccurate position description (PD). At the same time respondent rewrote many other PD's to reflect more accurately the duties involved and promoted certain other employees. R.D. 2-4.

Only two or three applicants responded to the initial vacancy announcement, a number which respondent viewed as too few for such a critical position, even if one of them was highly qualified. Moreover, a cursory review of the candidates led Nichols to conclude none had the specialized experience she believed necessary. For this reason, Nichols readvertised the position and extended the grade level to GS-12/13 to widen the universe of potential candidates. The readvertisement of the SSS job attracted additional applications and a new list of qualified candidates was referred to Nichols for a selection. R.D. 5-6.

During the time she was recruiting for the SSS position, Nichols hired Williams from DOE as a GS-12 Program Analyst. Nichols created the position because she saw a need for it in the MMS where there were clearly program analyst duties to be performed. R.D. 6. Nichols's supervisor had told her the duties involved had to be
performed, and he approved establishment of the position. R.D. 17. Nichols appointed Williams because she was a proven product capable of performing the job's duties well. After her appointment (as a lateral transfer), Williams was immediately detailed back to her GS-12 position at DOE for about 30 days at DOE's request because of the workload in her former office. This arrangement was used in order to place Williams on the Department of the Interior (DOI) rolls before an impending hiring freeze. R.D. 3-7.

Once on the rolls at DOI, Williams became eligible to compete for the Support Services Supervisor position. Prior to that time she was ineligible because there was a reemployment priority eligible interested in the position and DOI rules would not allow employees of other agencies to compete against the preferred former employee. The SS5 vacancy was of no particular concern to Williams until after her transfer to DOI. R.D. 12, 20. Williams applied for the position after her transfer while she was on detail back to DOE. Williams, following competition with other applicants, including the priority applicant, was selected by Nichols. Nichols obtained "pre-clearance" approval of the appointment from her supervisor, as she was required to do, and appointed Williams to the position at the GS-13 level. R.D. 6-7.

Nichols did not fill the GS-12 Program Analyst position after Williams was promoted. Instead, she abolished the position, restructuring it into a new GS-11 job, while
assuming some of the former position’s duties herself. To fill the new position, Nichols promoted Herbert Fondy, a GS-9 employee she supervised and in whom she had recently gained confidence. One reason Nichols gave for restructuring these duties was to cut back on slots and avoid being over ceiling. R.D. 6.

Analysis

Petitioner has filed numerous exceptions to the CALJ’s finding that petitioner has failed to show by the preponderance of the evidence that the agency created an unnecessary position (Progr. 94, 95-96). Jacqueline Williams for the sole purpose of allowing Williams to compete for promotion to another position (Support Services Supervisor GS-13) against a reemployment priority candidate.

In general, OSC contends that while the Recommended Decision formally acknowledges the applicable standard of proof (preponderance of the evidence), the CALJ in reality applied a more stringent standard which resulted in his making various findings which petitioner contends are erroneous. Petitioner also contends that the CALJ failed to give reasoned explanations for his credibility determinations, as required by Spithaler v. Office of Personnel Management, 1 M.S.P.R. 587 (1980). Based on our examination of petitioner’s specific exceptions to the Recommended Decision, however, we do not agree with these contentions.
In its first exception, OSC asserts that the CALJ misinterpreted or failed to give sufficient weight to sworn testimony of Susan Scherr, the SASC personnel officer given during an OSC investigatory interview, the transcripts of which OSC introduced into evidence. According to OSC, the CALJ erred by ignoring Scherr’s testimony that she informed Nichols that only DOI employees could compete with the reemployment priority candidate for the GS-12 SSS position and that at another time she and Nichols discussed whether there was a vacancy at DOI which Williams could be given so that she could compete for the SSS position. In his Recommended Decision, the CALJ found that the OSC interviewers were unsuccessful in their repeated attempts to have Scherr testify that Nichols's intent in creating the Program Analyst position was to bring Williams into DOI in order for her to obtain the SSS position. He concluded that Scherr did not believe Williams was hired in the GS-12 position solely for this purpose and that her testimony did not support the improper purpose on Nichols's part charged by petitioner. R.D. 21.

Petitioner argues that the CALJ erred in relying on Scherr's opinion as to Nichols's motives, as opposed to Scherr’s testimony that she and Nichols had a discussion of ways for Williams to be considered. OSC also contends the CALJ erred by relying on Scherr’s view that an ultimate purpose to hire the best qualified candidate, whoever it was, would excuse acting for the sole purpose of allowing an
otherwise ineligible individual to compete, the violation with which Nichols was charged. Our review of the Scherr interview indicates that, even as interpreted by OSC, her testimony at most would offer only weak support for the conclusion that Nichols created the Program Analyst job and appointed Williams to it for the alleged improper motive rather than because of a need for the position and Williams's qualifications for it. We conclude that the CALJ reasonably reached the contrary conclusion concerning the overall import of Scherr's testimony, particularly in light of the other evidence in the record.

Moreover, we find that even if Scherr's hearsay evidence is given petitioner's interpretation, it deserves less weight than the contrary live testimony which the CALJ found credible. The Recommended Decision notes, "Investigative interviews alone are not the preferred way to address essential and disputed facts." R.D. 19. The agency counsel chose not to call Scherr in the belief that she would not testify at hearing the same as she had during her interrogation by two OSC staff members. R.D. 20. Petitioner argues that Scherr's hearsay testimony is nonetheless inherently reliable to the extent it inculpates Nichols, her supervisor, because the testimony clearly reveals her as a loyal defender of respondent against whom she would not knowingly falsify evidence. The absence of a motive for falsely inculpating Nichols is a factor for giving weight to Scherr's statements, along with the fact
that they were made under oath. However, the leading nature of the examination which produced them is clear from the transcript. Moreover, the fact remains that, although available, Scherr was not called to testify at the hearing and her testimony was therefore not subjected to cross-examination, which can test the accuracy of a witness's memory as well as the witness's motives and can ensure that the context of the matters testified to is fully brought out. We do not believe that Scherr's ambiguous hearsay evidence has sufficient reliability to outweigh the contradictory sworn live testimony which the CALJ found credible. See Borninkhof v. Department of Justice, 5 M.S.P.R. 77, 87-89 (1981).

The CALJ found that respondent Nichols testified truthfully at the hearing and in two adversarial interviews conducted by OSC when she "steadfastly" denied she hired Williams as a GS-12 Program Analyst in order to allow her to compete for the GS-13 Support Services Supervisor position. R.D. 21. In crediting Nichols's testimony that her actions were based on legitimate managerial considerations and that there was no connection in her mind between the two personnel actions, the CALJ noted the "emphatic" and "unwavering" manner of her testimony, the plausibility of the reasons given for her actions, and the corroboration of her testimony by other evidence in the record. R.D. 21-22. We reject petitioner's contention that the Recommended Decision provides insufficient explanation for this
credibility finding. We find no basis for disturbing the CALJ's credibility determination concerning Nichols's testimony in view of the deference due his opportunity to observe her demeanor and hear her testimony. See Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133-34 (1980), aff'd, 686 F.2d 613 (9th Cir. 1982). Moreover, the record corroborates Nichols's account of her actions.

The most important piece of evidence corroborating Nichols's testimony concerning her motives in hiring Williams is that the GS-12 Program Analyst position in which she was hired was in fact needed. The second major exception raised by OSC is that the CALJ erred in finding this to be the case. According to petitioner, the history of the job's position description shows it was error for the CALJ to find the job had a legitimate foundation based on Nichols's testimony concerning the need for the duties it involved. R.D. 16. The position description was drawn from one for a GS-13 Program Analyst job which had earlier been proposed for Keith Sterzing to provide him work after the position he occupied had ceased to have any function. On the basis of the non-approval of this proposed position and

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2 Respondent is mistaken in her contention that the Board has no authority to review the CALJ's decision. Nothing in 5 U.S.C. § 1207 precludes the Board's delegation of the case to an ALJ for hearing and a recommended decision while reserving a final decision to itself. See Starrett v. Special Counsel, 792 F.2d 1246, 1252 (4th Cir. 1986). We also see no basis for respondent's alternative contention that the scope of the Board's review of a recommended decision under section 1207(a)(3) is more restricted than its review of an initial decision under 5 U.S.C. § 7701(b).
Sterzing's subsequent separation in a reduction in force (RIF) with the notation "no work available," OSC mistakenly contends that the proposed position was unnecessary makework. In fact, the GS-13 Program Analyst position was not approved because the duties did not support the proposed grade, and the notation on the RIF notice merely indicated that there were no encumbered positions to which Sterzing had an assignment right. In a RIF, an employee has no entitlement to placement in a vacant position in lieu of separation. See 5 C.F.R. § 351.201(b). The agency's failure to create a program analyst position at a lower level for Sterzing does not show that such duties did not need to be performed.

We also find, contrary to petitioner's unexplained contention; that Nichols's testimony cited by the CALJ concerning her conversations with her supervisor supports the CALJ's finding that respondent's supervisor had told her the duties encompassed by the Program Analyst position had to be performed and that the supervisor approved the position's establishment. R.D. 17. The supervisor's inability to recall all of the matters discussed in this conversation does not render Nichols's testimony unbelievable. We are also unpersuaded by petitioner's contention that the CALJ erred in not inferring from Nichols's abolition of the GS-12 Program Analyst position following Williams's promotion that the position had been created unnecessarily. According to petitioner,
the CALJ accorded Nichols absolute managerial discretion when he accepted as plausible Nichols's explanation of why she redistributed the position's duties in December, upgrading GS-9 employee Herta Fondren to a GS-11 Program Analyst position, while transferring other, higher-graded program analyst duties to herself. Nichols testified that she did so because she had learned the SASC's total positions would be cut and because she realized from additional exposure to Fondren that she was not being fully utilized. Her increased confidence in Fondren as a result of what she learned of her work since becoming SASC Manager in October and the new concerns about personnel ceiling changes are entirely credible explanations for the redistribution of program analyst duties after Williams's promotion. We find the CALJ properly declined to infer an improper motive from this development. R.D. 13-14.

Another exception raised by petitioner is that the CALJ erred in declining to find evidence of the alleged improper purpose of respondent's actions in the meeting between respondent and John Rankin, the MMS Regional Director. R.D. 19-20. At the meeting respondent sought Rankin's assistance in her efforts to staff SASC by asking to borrow a vacancy to bring "somebody" (Williams) on to her staff, a position which she ultimately did not need. At the same meeting she informed Rankin that the reemployment priority candidate, Keith Sterzing, was interested in the Support Services Supervisor position. OSC argues that the evidence shows
Nichols asked Rankin to find a vacancy on his staff for Williams solely to get her on the rolls and able to compete with Sterzing for the SSS job and urges the fact that at the same meeting she informed Rankin of Sterzing's interest in that job, knowing that Rankin did not respect Sterzing's abilities, as further evidence of her improper scheme. However, we find that the evidence, including the testimony of OSC's own witnesses, shows that respondent was seeking to borrow a slot to permit her to hire Williams to perform needed duties in SASC. As to the discussion of the two different subjects at the same meeting, we decline to infer on so slender a basis that the two matters were connected in the manner alleged by petitioner.

In another exception, OSC contends that Nichols readvertised the SSS position to permit Williams to apply and that the CALJ erred in finding that Nichols extended the announcement and broadened the position to GS-12/13 in order to obtain more candidates and because a cursory review indicated to Nichols that the initial applicants lacked the specialized experience she was looking for. R.D. 5-6. Contrary to petitioner's assertion that respondent never mentioned widening the universe of applicants as her purpose, Nichols did testify that the position was readvertised to get more candidates. Hearing Transcript 256-58. And notwithstanding petitioner's contentions concerning the qualifications of one of the initial applicants, we cannot infer improper purpose merely because
respondent's cursory review of the applications did not lead her to the same conclusion concerning that candidate's experience. Moreover, respondent's view that it was appropriate to readvertise even if one of the applicants was highly qualified is a reasonable one, and an expert witness agreed the number of applicants was too few for the type of job involved.

Petitioner also asserts that the CALJ erred in finding that Williams was not particularly concerned about the vacancy in the SSS position while she was still at DOE and in finding that this fact and Williams's expressions to others of uncertainty about transferring to DOI tend to undercut the existence of the alleged conspiracy to give Williams an unauthorized advantage. R.D. 12-13. OSC does not deny that Williams did not apply for the SSS position at that time, however, and in our view the fact that Williams and Nichols may have spoken during this period about the vacancy created by Nichols's promotion does not contradict the CALJ's finding that Williams was uncertain about whether to transfer to DOI. We also agree with the CALJ that Williams's uncertainty is inconsistent with her participation in the alleged joint effort to circumvent the civil service rules.

Nor does Williams's own testimony contradict the finding that she had difficulty deciding whether to leave DOE, as petitioner maintains. In the testimony cited by OSC, Williams did not state that she took the GS-12
position in order to be on the rolls at DOI and compete for the GS-13 position. Rather, she stated that while she was interested in both positions, she took the lower-graded one in order to be on the rolls before a hiring freeze prevented her from obtaining either of them. Petitioner’s Exhibit 33, pp. 37-38. The record fully supports the CALJ’s conclusion that “[d]espite repeated and incessant questioning by investigators on the matter, [Williams] denied that at the time of her transfer to DOI there had been discussions about her applying for [and] then obtaining the GS-13 position vacated by respondent.” R.D. 20.

Petitioner also objects to the CALJ’s resolution of a conflict between Williams’s testimony and that of Melissa Smith, a co-worker of Williams at DOE, and to the CALJ’s failure to explain the basis for his credibility determination in favor of Williams. OSC contends that Smith’s testimony is evidence that Williams knew she would be given the GS-13 supervisory position and that her transfer was therefore part of a plan to circumvent civil service rules, as alleged. Smith testified that while Williams was on detail back to DOE after her transfer to SASC, Smith told Williams that her friend Sidney Whalen worked at SASC and Williams replied that she would be Whalen’s supervisor. Smith also testified that Williams added that perhaps she should not have said that and later explained she merely meant that there was a potential for promotion to the supervisory job. In her interview by OSC,
Williams testified that she did not remember making such a statement about Whalen and expressed doubt that she could have made it since at that time she had not even met Whalen. The CALJ found that because Williams did not know Whalen, Smith’s testimony was incredible. R.D. 20.

The CALJ erred by failing to explain the basis for his credibility determination resolving the conflict between Smith’s and Williams’s testimony. However, we need not make our own determination because we find that a different resolution of the conflict would not affect the outcome of this case. Assuming that Williams made the statement to which Smith testified, Williams’s expectation that she would be successful in her application for the GS-13 position need not have been based on any improper assurance from Nichols that she would be selected. This evidence is simply insufficient to support an inference that Nichols created the GS-12 job for Williams solely for the purpose of permitting her to compete for the GS-13 position, as charged. The evidence as a whole supports the CALJ’s contrary conclusion, as discussed above. Accordingly, we find the error in failing to explain the basis for resolving the conflict in the testimony and the alleged error in how the conflict was resolved were harmless. Similarly, we find the other subordinate fact findings made by the CALJ to

3 For the same reason, it is unnecessary to address petitioner's exception to the CALJ's ruling that testimony which it attempted to elicit from Smith concerning how Williams knew of Whalen was inadmissible on grounds of relevance.
which petitioner objects are too insignificant to affect the ultimate findings even if petitioner's contentions were accepted.

On the basis of the same factual findings, the CALJ found petitioner failed to prove its second charge that respondent's personnel actions created the appearance of giving preferential treatment to Williams in violation of 5 C.F.R. § 735.201a(b). We have recognized that conduct which actually involves no wrongful use of public office for private purposes may nonetheless create an appearance of such wrongdoing. See Burnett v. U.S. Soldiers' & Airmen's Home, 13 M.S.P.R. 311 (1982) (finding a violation of 5 C.F.R. § 735.201a(a)). This is the first time, however, that we have addressed whether hiring a friend creates an appearance of impropriety in violation of section 735.201a(b). It seems evident that we must examine the question against an objective standard on the facts of each case. Fundamental fairness precludes disciplining an employee for conduct unless he or she should have known it would appear improper to a reasonable observer under the circumstances.

We believe this standard is in accord with the approach of the Office of Government Ethics (OGE), the agency primarily responsible for developing rules and regulations pertaining to conflicts of interests and standards of conduct. 5 C.F.R § 738.102(a)(3). The OGE has recognized that "[a]ppearance questions require decisions on a case-by-
case basis. . . .” Letter No. 86-6, June 23, 1986. The only statutory prohibition addressing relationships in hiring is limited to the hiring of relatives. 5 U.S.C. § 3110; see 5 U.S.C. § 2302(b)(7); 5 C.F.R. Part 310. The OGE has not expanded the statutory restriction by establishing general prohibitions relating to the appearance of preferential treatment in the hiring of friends and acquaintances. In these circumstances, it would be inappropriate for the Board to establish general prohibitions based on degree of friendship, and the Board will instead apply a case-by-case approach based on an objective, “reasonable person” standard to charges that section 735.201a(b) has been violated.

Moreover, petitioner’s argument for finding a violation is not based on the specific nature of the relationship between Nichols and Williams. The only theory articulated by OSC for finding that respondent’s actions created an appearance which violated the regulation, even if they did not grant a preference prohibited by 5 U.S.C. § 2302(b)(6), is based on Nichols’s discussions with regional director Rankin and personnel officer Scherr concerning vacancies at DOI for Williams. Petitioner contends that respondent seemed to indicate in these conversations an intention to give Williams a position for the sole purpose of permitting her to compete for a different one and thus created an appearance of giving preferential treatment even if she did not subsequently
grant such treatment. Petitioner's exceptions 54-55. However, neither Rankin nor Scherr testified that respondent revealed such a purpose, nor would her remarks have been so construed by a reasonable listener. See supra, 7-9, 12-13. Nichols specifically denied to OSC investigators that she told anyone in the personnel department that the reason for hiring Williams was because otherwise Williams could not compete for the GS-13 opening. Petitioner's exhibit 31 at 83-85. We have found Nichols a credible witness, and we find that the evidence concerning her conversations with Rankin and Scherr does not support the contention that she violated the regulation in the manner alleged. Petitioner has asserted no other specific basis for finding that even if respondent did not give preferential treatment to Williams, she created the appearance of such treatment. A suspicion grounded on the mere fact that respondent hired and then promoted a friend and former colleague is an insufficient basis for finding a violation of the regulation. 4

Petitioner's final exception is to the ruling in the Recommended Decision concerning an attempt by OSC to redefine the charge against respondent towards the end of

4 Because we find the alleged regulatory violation has not been proven, this case does not require us to decide whether violations of the employee standards of conduct contained in 5 C.F.R. Part 735, when committed in the exercise of personnel authority, are within the Special Counsel's jurisdiction under 5 U.S.C. § 1206(e)(1)(D), as interpreted by Horner v. Merit Systems Protection Board, 815 F.2d 668 (Fed. Cir. 1987).
the hearing. The complaint alleged that Nichols created an unnecessary Program Analyst position for the sole purpose of bringing Williams on to the agency’s rolls so that she could compete for the SSS position, and OSC repeatedly described the charged violation in terms of "sole" purpose until late in the proceeding. At virtually the end of the hearing, OSC sought to question respondent’s expert witness as to whether section 2302(b)(6) would have been violated if Nichols created the Program Analyst position for the primary purpose of improving Williams’s prospects for the other job. The CALJ sustained respondent’s objection to this line of questioning as irrelevant. In the Recommended Decision he ruled that petitioner waited until too late to change the theory of the complaint, and he rejected OSC’s reliance on notice pleading principles and on respondent’s awareness of the general nature of the charges. R.D. 25-26.

In its exceptions, OSC contends that, despite its language charging "sole purpose," the complaint gave respondent sufficient notice of the facts on which petitioner would rely for respondent to be held liable on the alternative theory that she acted for the primary purpose of granting an unauthorized preference. According to petitioner, respondent would not be prejudiced because her defense against the "sole purpose" charge necessarily encompassed defenses against a charge of "primary purpose." However, we find that the CALJ correctly sustained the objection to petitioner’s line of questioning because the
information sought to be elicited was at variance with the theory of the complaint and petitioner did not seek to amend its charge.

On the basis of Rule 15(b) of the Federal Rules of Civil Procedure, petitioner now argues that its alternative theory of liability should have been treated as if it had been raised in the complaint because it was allegedly tried with respondent's implied consent. However, we agree with the CALJ that this is not a case where amendment to the pleadings should be allowed in light of the evidence presented because OSC has failed to demonstrate respondent's alleged implied consent to the litigation of the alternative charge. The test is whether respondent failed to object to the introduction of evidence, or introduced evidence herself, that was relevant only to the new, unpled issue. Lynch v. Dukakis, 719 F.2d 504, 508 (1st Cir. 1983). To meet this test, OSC cites respondent's consent to evidence concerning her motives and her own introduction of evidence bearing on that issue, but clearly this evidence is relevant to the complaint's charge as well as to the belatedly advanced alternative theory of liability.

The CALJ indicated that if an attempt to amend the charge at the close of the hearing had been made, it would have been denied on grounds of undue delay and prejudice to respondent's right to meet it. R.D. 25. We believe that a

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5 In various contexts, the Board looks to the Federal Rules of Civil Procedure for guidance. See, e.g., 5 C.F.R. §§ 1201.27(c), 1201.72(a).
motion to add the proposed alternative charge at that point could also have been denied on grounds of futility because we find that petitioner's evidence was insufficient to show that the charged prohibited purpose was a primary or substantial motive for respondent's acts. This seems also to have been the CALJ's conclusion. R.D. 26. Because of this failure of proof, we are not required to decide here what rule applies in cases where both proper and improper motives have contributed to the personnel action for which imposition of discipline under 5 U.S.C. § 1207 is sought, i.e., the extent to which the action must have been based on the improper motive in order for discipline based on a violation of section 2302(b)(6) to be imposed. However, we note that we have never required as a basis for discipline a showing that the purpose prohibited by section 2302(b) was the respondent employee's only motive for the exercise of personnel authority involved, and we do not do so here.6

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6 Petitioner contends that the CALJ erred by ruling section 2302(b)(6) is violated only where the supervisor's sole purpose is to confer an unauthorized advantage in order to improve the prospects of a particular employee. To the extent the CALJ's observations concerning the statute's use of the definite article, R.D. 25-26, were intended as such a ruling in the alternative, the decision is not adopted.
Conclusion

For the foregoing reasons, we ADOPT the Recommended Decision as MODIFIED, finding that petitioner has failed to prove respondent committed the violations charged, and DISMISS the complaint.

FOR THE BOARD:

[Signature]
Robert E. Taylor
Clerk of the Board

Washington, D.C.