

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,  
Petitioner,

v.

WILLIAM C. BYRD and  
JOEL RUBINSTEIN,  
Respondents.

DOCKET NUMBERS  
CB1215910016-T-1  
CB1215910017-T-1<sup>1</sup>

DATE: NOV 10 1993

Lynn Alexander, Esquire, and Ruth Robinson, Esquire,  
Washington, D.C., for the petitioner.

Edward H. Passman, Esquire, Washington, D.C., for  
respondent Byrd.

Michael J. Riselli, Esquire, Washington, D.C., for  
respondent Rubinstein.

BEFORE

Ben L. Erdreich, Chairman  
Jessica L. Parks, Vice Chairman  
Antonio C. Amador, Member

Member Amador recused himself and did not participate in this  
adjudication.

FINAL DECISION AND ORDER

This case is before the Board on the Recommended  
Decision of Chief Administrative Law Judge (CALJ) Reidy,  
issued pursuant to a complaint filed under 5 U.S.C.  
§ 1215(a)(1) (Supp. III 1991) by petitioner, the Office of  
Special Counsel (OSC), seeking disciplinary action against  
respondents William C. Byrd and Joel Rubinstein in their

<sup>1</sup> The docket numbers below were HQ12149010020 and  
HQ12149010021. The docket numbers have changed as the  
result of the Board's adoption of a new docketing system  
after the issuance of the Recommended Decision.

role as employees of the United States Customs Service (USCS or Customs). The complaint, consisting of three counts, charged respondents with violating 5 U.S.C. §§ 2302(b)(6) and (b)(11), and, alternatively, 5 C.F.R. § 735.201a(b). The complaint accused the respondents of giving Heidi Ward-Ravenel<sup>2</sup> an unauthorized preference by using the USCS's temporary limited appointment (TLA) authority to hire her for a Management Program Officer (MPO) position in Charleston, South Carolina, in July 1988. The complaint further alleged that this action violated laws, rules, and regulations implementing or directly concerning merit system principles. Alternatively, the complaint alleged that this same conduct created the appearance of giving preferential treatment in violation of 5 C.F.R. § 735.201a(b).<sup>3</sup> A hearing was held before the CALJ. In the

<sup>2</sup> Heidi Ward Ravenel will be referred to as "Ward-Ravenel." Her name changed from Ward to Ravenel upon her marriage to Arthur Ravenel III on June 18, 1988, and the two names were used almost interchangeably throughout the proceedings.

<sup>3</sup> The statutes allegedly violated, 5 U.S.C. §§ 2302(b)(6) and (b)(11), provide:

(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--

....  
 (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....

....  
 (11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly

Recommended Decision, the CALJ found that OSC failed to prove by a preponderance of the evidence that respondents engaged in the alleged violations, and accordingly dismissed the complaint. We have carefully considered the Recommended Decision and the record in light of the exceptions filed by OSC and the opposition of respondents to those exceptions.

We find that the facts in this case present one of the clearest possible examples of abuse of the merit system. If we cannot see a violation in this case, the very meaning of the merit system is in question. We find that the Office of Special Counsel (OSC) proved by a preponderance of the evidence that the respondents violated law and regulation as they were charged. Their actions disregarded the merit principles which Congress incorporated into the Civil Service Reform Act of 1978, and violated the Office of Personnel Management's regulations and rules which support and effect those principles. The undisputed facts demonstrate that, in contravention of merit system principles, the respondents' actions were designed for no other purpose but to hire a specific individual, Heidi Ward-

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concerning, the merit system principles contained in section 2301 of this title....

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:

(b) Giving preferential treatment to any person.

Ravenel. Accordingly, we DO NOT ADOPT the Recommended Decision and we SUSTAIN the three charges in the complaint.

#### BACKGROUND

The series of events leading to the respondents' violations began in 1985, when the United States Customs Service (USCS) centralized its personnel and administrative functions, leaving the field offices without local administrative support. Exh. R. 19; Exh. P. 1.<sup>4</sup> To supply needed support, the USCS Commissioner initiated the MPO program to recruit a cadre of highly qualified administrative personnel at the GS-9 to GS-13 levels in its 67 district field offices. *Id.* In April 1988, the directors of these 67 offices, including respondent Byrd, were given the opportunity to examine the MPO positions and to give their input concerning the appropriate grade levels in their region. Exh. R. 19. Pursuant to this input, the USCS finalized plans for the MPO position that included extensive training requirements and career-ladder promotion potential. Exh. P. 1. The resultant staffing announcement planned and issued for all 67 districts included an MPO position in Charleston, South Carolina, where GS-11/12 was determined to be the appropriate grade for the position. *Id.*; T-I at 28-29, 43.<sup>5</sup> The merit staffing announcement,

<sup>4</sup> "Exh. R." and "Exh. P." refer to respondents' and petitioner's exhibits, respectively.

<sup>5</sup> "T" refers to the transcript of the hearing before Chief Administrative Law Judge (CALJ) Reidy.

which opened on July 1, 1988, and closed on July 29, 1988, was limited to applicants with competitive status, or persons with reinstatement eligibility, and certain handicapped individuals and disabled veterans. Exh. P. 1; T-I at 41-43.

Twelve qualified candidates applied under the merit staffing announcement for the MPO job in Charleston. T-I at 89. These candidates were not ranked or considered, because Heidi Ward-Ravenel had already been selected for the position. T-I at 46. Ward-Ravenel could not compete under the merit staffing announcement with the twelve candidates because she lacked competitive status, and was not eligible for reinstatement or for consideration as a veteran or a handicapped person. Instead, she received a temporary appointment under the agency's TLA (Temporary Limited Appointment) authority. Hers was the only MPO position in the 67 districts that was filled by TLA appointment. T-I at 47-48.

The genesis of Ward-Ravenel's selection was in or around April 1988. At that time, she was a GS-13 Associate Director of Cabinet Affairs at the White House, under a political appointment that did not confer competitive status and was not in the career civil service. She was looking for employment in the Charleston area because of her impending marriage to Arthur Ravenel II, the son of a South Carolina Congressman. T-II at 43-46. She discussed her job interest with Edward Stuckey, a former executive assistant

to the USCS Commissioner, who referred her to his former colleague, respondent William Byrd, the USCS Area District Director for Charleston, South Carolina. T-II at 44-46; T-III at 9.

After Stuckey's referral, Ward-Ravenel called Byrd and arranged for an interview. During the interview, Byrd indicated that there was a job vacancy for the position of import specialist and that he had received a memorandum indicating that the agency was considering the establishment of the MPO position or a new type of administrative position. T-II at 47-48, 68-69; T-III at 40. Byrd's impression at the time of the interview was that Ward-Ravenel's position at the White House "rang an awful lot of bells" with him. Exh. P. 8 at 15; T-I at 192. At the conclusion of the interview, Byrd took Ward-Ravenel for a tour of the Customs House, joking with personnel along the way that she was a "two-fer" because of her congressional and White House connections. T-I at 192; T-II at 48-49; Exh. P. 8.

After the interview, Ward-Ravenel received a phone call from Lynn Gordon, the executive assistant to the Commissioner. T-II at 51-52. Gordon informed Ward-Ravenel that the MPO position in Charleston was available and urged her to apply. *Id.* Gordon also called Debra Jane Spero, the Acting Deputy Director for the Office of Human Resources. T-II at 77. Gordon informed Spero that Ward-Ravenel was a "management referral" and that she should be placed on the

rolls as an MPO by a certain date. T-II at 78, 93-98, 104. Spero conveyed this information to the Director of the Operations Division, Lori Goerlinger, and forwarded Ward-Ravenel's application for employment, form SF-171, to her. T-II at 94. Goerlinger in turn referred Ward-Ravenel's SF-171 to respondent Joel Rubinstein. *Id.*

At that time, Rubinstein was the branch chief in charge of the Southeast and Southwest regions, which employed 3,000 USCS employees. T-II at 184-86. When Spero and Goerlinger gave Rubinstein Ward-Ravenel's application to review, he personally checked her qualifications and determined that, although she was qualified for the MPO position, she lacked the status in the competitive service to apply under the merit staffing announcement. T-II at 80, 105, 216-219. He suggested to his superiors that if they wanted her to be considered, they should use the TLA authority. He recommended that a public announcement for a TLA position could "piggyback" the merit staffing announcement. *Id.* His superiors did not express any concern about this recommendation because they considered the recommendation as a "solution to a problem." T-II at 81, 109, 216.

Rubinstein called Byrd to inform him that if he was interested in considering Ward-Ravenel, the only way she could be hired was through the Office of Personnel Management (OPM) register route or through the TLA.<sup>6</sup> T-II

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<sup>6</sup> In planning the MPO program, the USCS contemplated external recruitment through the use of OPM registers.

at 224. Byrd replied that he was interested in Ward-Ravenel, and that filling the position under the TLA would be satisfactory. T-II at 224; T-III at 19. Rubinstein then called Ward-Ravenel to inform her that the MPO position could be filled with the TLA and that a public notice would be going out announcing the TLA position. Rubinstein personally sent her the announcement, and when she received it, she sent in another SF-171 form. T-II at 52, 54, 224.

Rubinstein, himself, prepared the public notice announcement for the TLA position which opened on June 29, 1988, and closed on July 11, 1988. T-I at 79. After preparing the notice, he gave it to Clark Woodson, a personnel staffing specialist, who finalized it and handled the distribution and staffing. T-II at 226; T-I at 76-79. Rubinstein informed Woodson that the public announcement was for "an MPO, high priority" and that he should "stay on top of it." T-II at 225-26, 251.

Woodson received six applications in response to the TLA public notice and he determined that three applicants were qualified. T-I at 88. Woodson's handling of this assignment, however, was fraught with errors. Although he was required to distribute the public notice to OPM to enhance competition, he did not do so. T-I at 106. Moreover, he did not consider the application of a 30 percent disabled veteran, although Chapter 333 of the FPM, Indeed, the OPM register route was used to fill one of the 67 MPO positions. T-I at 42, 61.

Subchapter 1-6, directs consideration of such a veteran even if the application is late. T-I at 89-90; Exh. P 5(j). Woodson claimed that he did not consider the veteran's application because it was received after the closing date of the announcement. T-I at 89-90. Although the application was date-stamped by the agency before the closing date of the announcement, Woodson nevertheless stated that the postmark on the envelope, which was lost from the file, was dated after the closing date of the announcement. T-I at 89-90; 120-21, 123; Exh. P 5(j). The veteran's application was the only one of the six applications responding to the public notice for the TLA position that was not initialed by Woodson. T-I at 122-23, 86-88.

Woodson forwarded to Byrd, the selecting official, the names and applications of the 3 TLA applicants he found qualified. T-I at 90; T-III at 22-23. On July 22, 1988, without interviewing a single candidate, Byrd selected Ward-Ravenel for the position. T-I at 90-91; T-III at 49-53. Indeed, Byrd's only interview with Ward-Ravenel did not specifically address the MPO position pursuant to either announcement for that position. On August 29, 1988, Ward-Ravenel reported for work as an MPO in Charleston, South Carolina, as a GS-12, step 8.

Meanwhile, on August 7, 1988, United States Senator Ernest F. Hollings of South Carolina wrote to Patrick Conklin, the Inspector General of OPM, stating that his

office had been "inundated with complaints" about the alleged preselection of Ward-Ravenel and that several of his constituents, employees of the USCS, had alleged that Byrd stated that Ward-Ravenel had been selected for the MPO position even before the job vacancy had been announced. Exh. P. 7; T-I at 1 80-82. This letter, eventually forwarded to the OSC, precipitated the instant complaint before the Board.

### ANALYSIS

In examining these facts, we have no doubt that the respondents' actions were for no other purpose but to ensure that Ward-Ravenel was hired for the MPO position in Charleston, South Carolina. In order to hire her, the respondents departed from the methods the agency was using to fill the 66 other MPO positions across the country at the same time. They used an authority designed for temporary appointments to fill a permanent job without any legitimate need for temporary staffing. They purposely chose this type of appointment because it, unlike the methods being used to fill the other 66 jobs, would allow them to hire Ward-Ravenel. The respondents restricted all meaningful consideration of candidates for the Charleston MPO position to her alone, to the virtual exclusion of at least 14 other applicants, by limiting advertising under the TLA public notice announcement to a narrow geographical area; by shortening the length of time in which to apply for the job from 28 days under the national merit staffing announcement

to 12 days under the TLA public notice announcement; by recruiting for the TLA position at the GS-12 grade level instead of at grades GS-11 and 12 as specified by the national merit announcement for Charleston;<sup>7</sup> by submitting to the selecting official only the applications considered qualified under the TLA; and by never interviewing a single candidate for the position. Without these extraordinary actions on the part of the respondents, Ward-Ravenel, having no competitive status to apply for the MPO position under the nationwide merit staffing announcement, could not even have been considered for the position. The respondents' actions achieved their goal, to place Ward-Ravenel on the "rolls as an MPO by a certain date." T-II at 104.

The Board finds that the Office of Special Counsel (OSC) proved all three charges against the respondents by a preponderance of the evidence. It showed that the respondents afforded Ward-Ravenel preferences which were not authorized by law, with the aim of improving her prospects for getting the MPO job in Charleston. Their selection and use of the TLA authority exactly fits one of the two examples of unauthorized preference given in 5 U.S.C. § 2302(b)(6) because these actions defined competition for the MPO job in order to improve Ward-Ravenel's prospects of

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<sup>7</sup> Limitation of the grade under the TLA public notice announcement to GS-12 narrowed competition. Ward-Ravenel was hired at a high step in that grade, probably enabling her to keep the salary she had received at the White House as a GS-13.

getting it.<sup>8</sup> By hiring Ward-Ravenel based on this preference, the respondents violated laws, rules and regulations that implement or directly concern merit system principles which require fair and open competition, and thus violated 5 U.S.C. § 2302(b)(11), as the Special Counsel charged. Because the Special Counsel proved the third charge concerning the respondents' violation of 5 C.F.R. § 735.201(a) in terms of an alternative charge, and because the Special Counsel proved her first two charges, it is unnecessary to consider this third charge. But, we note, nevertheless, that this charge has been proved through the Special Counsel's proof of the first two charges; thus, the respondents were in violation of 5 C.F.R. § 735.201(a).

A. The Charge Under 5 U.S.C. § 2302(b)(6)

Section 2302(b)(6), United States Code, Title 5, states that it is a prohibited personnel practice to

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.

Thus, an employee with personnel action authority may give only those preferences authorized by law, rule or regulation. For example, preferences in recruitment and

<sup>8</sup> Section 2302(b)(6) includes, in parentheses, as an example of an unauthorized preference, "defining the scope or manner of competition or the requirements for any position."

selection are given by Congress to veterans, Indians in the Bureau of Indian Affairs, persons with reemployment rights, handicapped individuals, etc. See, e.g., 5 C.F.R. §§ 3 et seq., 307, 352, 353, and FPM Chapter 316.4-.7. Ward-Ravenel was not a member of any of these groups and respondents have failed to point to any entitlement to a preference in her case. Thus, the preference given to Ward-Ravenel was not authorized by law, rule, or regulation and was violative of § 2302(b)(6).

We agree with OSC that the words "not authorized by law, rule or regulation" refer to the preference that is prohibited, not to the type of action used in granting the preference. However, we do not agree with respondents' argument that Ward-Ravenel's preference was "authorized by law" just because the TLA authority, which respondents used to hire her, is a valid hiring authority. This position is like the suggestion that, because reduction-in-force procedures validly govern separations during a reorganization, using those procedures to discharge an employee for political reasons is also lawful. Although a selecting official does not commit a prohibited personnel practice under this section merely by using a hiring method in good faith that later turns out to be illegal, it is clear that that same official would indeed violate this section if the purpose in employing that hiring method was to improve or injure a particular person's prospects for employment. That is exactly what happened in this case.

In order to find a violation under this section, Board case law requires 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 her prospects for employment." See, e.g. *Baum v. Department of the Treasury*, 14 M.S.P.R. 392, 395 (1983), *aff'd*, 727 F.2d 1117 (Fed. Cir. 1983) (Table). The evidence clearly establishes that the intentional actions of respondents Rubinstein and Byrd in using the TLA had no other purpose but to hire Ward-Ravenel. Indeed, we believe the respondents' violation of § 2302(b)(6) is obvious, because their purpose in using the TLA -- to define the scope or manner of competition to enable them to pick Ward-Ravenel for the MPO position -- is one of the two examples that the statute gives as violations of that section. We thus find that the respondents' actions were intentionally taken in order to give a preference to Ward-Ravenel for the purpose of improving her chances at the MPO position.

Moreover, the totality of the evidence does not support the Recommended Decision's (RD's) conclusion that the respondents' reason for giving Ward-Ravenel a preference was that she was the most qualified for the job.<sup>9</sup> See Johnson

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<sup>9</sup> Hiring even the best qualified person for the job must be accomplished through competitive means consistent with law and merit system principles. Thus, an agency may not grant a preference even to the best qualified person, unless it is authorized "by law, rule, or regulation." As we have already concluded, the preference given here was not authorized by law, rule, or regulation.

*v. Department of the Army*, 48 M.S.P.R. 54, 58 (1991) (the Board is free to substitute its own determinations of fact for those of the administrative judge, giving the administrative judge's findings only so much weight as may be warranted by the record and by the strength of the administrative judge's reasoning). The respondents did not know whether Ward-Ravenel was the most qualified applicant because they did not consider the qualifications of other applicants. The evidence demonstrates that the twelve candidates who applied under the nationwide merit staffing announcement were never evaluated by the respondents. If Byrd was really interested in hiring "the best," Byrd and Rubinstein should have at least looked at the qualifications of these twelve candidates. RD at 27; T-I at 46. In this regard, we note that one of the twelve applicants responding to the nationwide merit announcement for Charleston was ultimately chosen for the MPO position in San Diego at the GS-12 level. See T-I at 188-189; Petitioner's Exhibit 4. This fact indicates that there were highly qualified candidates on the nationwide list. Therefore, the fact that Byrd never considered any of the 12 applicants undercuts his assertion that he was interested in hiring the best. Moreover, Byrd never interviewed either of the other two candidates on the register of qualified candidates under the TLA public notice announcement, even though one of the candidates had a master's degree and could arguably have been more qualified than Ward-Ravenel. T-III at 49-53.

Further, contrary to the finding of the RD, the only witnesses at Customs who testified that they were "impressed" with Ward-Ravenel's qualifications were respondents Byrd and Rubinstein, and Byrd's secretary Rebecca Dukes Lee. Lee testified that she was impressed with Ward-Ravenel's resume because she had worked at the White House and because she had gone to law school.<sup>10</sup> Other evidence indicating that Ward-Ravenel was not preferred because she was "the best" was the testimony of OSC's expert witness, Edward McHugh, who found that Ward-Ravenel was only "basically qualified," as did the other OPM experts to whom McHugh referred her application. T-I at 271-274.

Because the evidence does not establish that Byrd gave Ward-Ravenel a preference for being "the best," we must look to his testimony for his real reasons. That testimony indicated that Byrd was impressed with Ward-Ravenel's White House and congressional connections and her connections with the Executive Assistant to the Commissioner, Lynn Gordon. See Petitioner's Exhibit 8 at 15; T-I at 192. Based on this testimony and on the facts of this case, we conclude that Byrd gave an illegal preference to Ward-Ravenel because he was impressed with her political connections. See *Delessio v. United States Postal Service*, 33 M.S.P.R. 517, 519 (1987) (inferences allowable from circumstantial evidence depend upon the strength of that evidence).

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<sup>10</sup> Ward-Ravenel attended law school for 4 - 5 months. Petitioner's Exhibit 5(h).

Moreover, the evidence shows that Edward Stuckey, Ward-Ravenel's contact from her White House stint, referred Ward-Ravenel to Byrd and to Lynn Gordon, Executive Assistant to the Commissioner. Two of Rubinstein's superiors testified that Gordon desired that Ward-Ravenel be hired by a certain date, and that her application was given to Rubinstein to accomplish this goal. From this evidence, we infer and find that Rubinstein purposefully sought to give Ward-Ravenel a preference to please his superiors by recommending and using the TLA authority in order to assure that she could be hired. See *id.*

Further evidence that Rubinstein did whatever possible to hire Ward-Ravenel in order to please his superiors is apparent in his personal involvement with the preparation of the TLA public notice announcement and in his directions to his subordinate, Woodson, that the MPO assignment was "high priority" and to "stay on top of it." T-I at 79; T-II at 225-26, 251. Rubinstein's job required that he communicate the objectives of management to his employees and that he ensure that work in his branch was carried out properly. Therefore, based on the orders of Rubinstein's superiors, Rubinstein's responsibilities in conveying the management objective to hire Ward-Ravenel in Charleston and Rubinstein's general directions, Woodson's claim that he was unaware of the need to hire Ward-Ravenel for the Charleston position, as well as the suggestion that Rubinstein was unaware of Woodson's handling of the action, strain

credulity. While there is no direct evidence of Rubinstein's personal involvement or knowledge regarding the improper handling of the veteran's application, the circumstances surrounding that application are consistent with Rubinstein's giving Woodson general directions that Ward-Ravenel was to be hired. Woodson's mishandling of the application supports a finding that Rubinstein directed that Ward-Ravenel be hired, and Rubinstein may have chosen not to know the details. The suspicious circumstances surrounding the veteran's application were the following: (1) the envelope with the alleged late postmark date was missing from the file (T-I at 89-90; 120-21); (2) the application, although signed by the veteran on the closing date of the TLA public notice announcement, was agency date-stamped two days earlier (Petitioner's Exhibit 5(j); T-I at 123); (3) the application was the only one of the six applications received that was not initialed by Woodson (T-I at 86-88); and (4) as personnelists, Woodson and Rubinstein should have known that under Chapter 333 of the FPM, Subchapter 1-6, such an application had to be accepted even if it was late.

In addition, we find that the use of the TLA authority to fill a continuing (MPO) position with no need for a temporary incumbent was an illegitimate use of the authority. The fact that the respondents resorted to an illegitimate use of an appointment authority supports the proposition that they were taking whatever steps were

necessary to hire Ward-Ravenel in violation of section 2302(b)(6).

Our conclusion that the TLA authority was illegally used in this case is supported by an examination of the applicable regulations and Federal Personnel Manual (FPM) provisions. Under OPM's regulation at 5 C.F.R. § 316.401 (1988), entitled "Purpose and duration," OPM may authorize an agency to make a temporary limited appointment only "to meet an administrative need for temporary employment, such as to fill a temporary position or a continuing position for a temporary period...." Moreover, under 5 C.F.R. § 316.402(a) (1988), an agency cannot use the TLA authority unless it has

specific authorization from [OPM], except under the conditions published by [OPM] in the Federal Personnel Manual or as provided in paragraph (b) of this section.

Here, there is no evidence to indicate that the TLA was authorized under section 316.402(b) or that OPM gave the "specific authorization" mentioned in paragraph (a) of that section. Indeed, the respondents' use of the TLA exceeded the OPM delegations of authority that are described in FPM chapter 316, paragraph 4-1, and went against the purpose of the TLA as described in section 316.401, because it was not used to fill a temporary position or to fill a continuing position for a temporary period, and because it does not fit

the description of any of the four circumstances listed in paragraph 4-1.<sup>11</sup>

Additionally, the FPM letters at issue in this case, FPM letters 316.21 (December 24, 1984), and 316.23 (February 17, 1987), like the provision of FPM chapter 316 described above, constitute delegations of authority to which 5 C.F.R. § 316.401 refer. See Petitioner's Exhibits 12(k) and 12(l); FPM chapter 171, subch. 1-1b (purpose of FPM letters is to "issue continuing instructions which, because of urgency, cannot be put into basic manual or supplement pages at time of issuance"). The content of the FPM letters delegating or declining to delegate appointing authority to employing agencies therefore can determine whether an appointment exceeds an agency's delegated authority and whether that appointment therefore constitutes a violation of 5 C.F.R. § 316.402(a). Our review of the contents of these FPM letters indicates that the respondents exceeded their agency's delegated authority.

FPM letter 316.21, Paragraph 3, informed agencies that they could use the TLA authority "in any appropriate situation, as determined by the agency." After listing examples of situations where temporary appointments are

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<sup>11</sup> The four circumstances described in the FPM as appropriate for TLAs are the following: (1) positions not expected to last more than one year; (2) seasonal positions; (3) part-time and intermittent positions that are not clearly of a continuing nature; and (4) continuing positions, when temporarily vacated for periods of less than one year.

"appropriate," the letter also stated, "[i]n these and other situations which the agency determines to be appropriate, temporary appointments may be made." (Emphasis supplied.)<sup>12</sup> Byrd and Rubinstein argue that this language gave agencies unbridled discretion to use the TLA in any way they chose. They claim, in effect, that it negated the requirement of an "administrative need for temporary employment." This argument, however, ignores the word "appropriate" and the regulation's stated purpose for having temporary limited employment. See 5 C.F.R. § 316.401. Thus, a TLA was not authorized by any delegation of authority published in this FPM letter.

Moreover, we find the respondents' purported reliance on the broad language of FPM Letter 316-21 unpersuasive because the respondents also had available to them FPM Letter 316-23. OPM published this letter on February 17, 1987, because the broad language of its earlier letter (316-21) had the potential for merit system abuse.<sup>13</sup> FPM Letter

<sup>12</sup> None of the examples listed contravenes merit principles. Among the examples were the following: (1) filling vacancies that occur in commercial activities being studied under Office of Management and Budget Circular A-76; (2) staffing continuing positions when future funding and workload levels are uncertain; and (3) filling permanent positions temporarily in order to save them for eventual incumbency by career or career conditional employees expected to be displaced from other activities.

<sup>13</sup> Indeed, as the MSPB stated in a 1987 report, "Temporary appointing authority should not be used in lieu of competitive procedures when the intent is to fill a position permanently. Doing so puts the merit system principles at risk." Expanded Authority for Temporary Appointments: A Look at Merit Issues at 6 (December 22, 1987).

316-23, which summarized the key requirements governing the proper use of the temporary appointing authority, made it clear that agencies' discretion to use the TLA was limited to situations in which its use would not be contrary to "veterans' preference provisions and merit system principles, as well as other statutory requirements." FPM Letter 316-23, Paragraph 2.

In order to ensure that agencies' use of the TLA authority was proper and in accordance with merit system principles, FPM Letter 316-23 also set forth the requirements that OPM be notified of positions being filled through the TLA authority, and that agencies indicate the reason the appointment is being made on a temporary basis in the remarks section of the Notification of Personnel Action Form (Form SF-50). These requirements were not met in this case. The agency never documented on the SF-50 form why the position was suddenly "temporary," as required by FPM Supp. 296.33. This fact indicates that there was no legitimate reason for filling the MPO position on a temporary basis. Moreover the fact that the agency did not give the local OPM office a copy of the public notice announcement as required by 5 C.F.R. § 330.102 suggests that the person responsible for this notification had been informed that a TLA was being used for the improper purpose of hiring Ward-Ravenel.

Here, the evidence establishes that there was no valid administrative need to use the TLA authority for temporary employment in Charleston. The MPO program, personally

instituted by Commissioner von Raab, was meant to be a permanent professional level position in 67 district field offices. In accordance with the Commissioner's plan, documents describing the MPO program show that the MPO position was a continuing position, and contain no suggestion of a need to fill it on a temporary basis. See T-I at 30-33, 43; Petitioner's Exhibits 1 and 2.

Gary Seiner, Supervisory Personnel Management Specialist, the person responsible for finalizing the MPO program plan, testified that the MPO program was not experimental or temporary. T-I at 39, 45, 57. Seiner also testified that he was not aware of any temporary need in Charleston that would have justified using the TLA authority. T-I at 69. The description of the position provided for promotion, training, and a career ladder. These are not features typical of temporary employment. For example, a person hired under the TLA authority would not be eligible for promotion, and an agency would not normally use its training budget to train a person if that person was in temporary employment. T-I at 259-60.

Other evidence also supports the view that the agency had no administrative need for temporary employment for the Charleston MPO position. Respondents' argument that the TLA method was justified because time was of the essence and the position had an uncertain future is belied by the facts. Before Ward-Ravenel sent her SF-171 form to Lynn Gordon at her White House friend's (Edward Stuckey's) request, and

before Rubinstein was told by his superiors to staff out her application (T-II at 80, 94, 105, 216, 219), the MPO position in Charleston was to be advertised as a permanent position. T-I at 262-65. Although the agency had contemplated hiring outside the government, it anticipated that this would be done through OPM registers, and not through the TLA authority. T-I at 42. Thus, even though the public notice announcement of the TLA position in Charleston was put out one day earlier than the nationwide announcement, the MPO position had not been thought of as "temporary employment" and it was only Ward-Ravenel's appearance on the scene that suddenly changed this attitude. See T-I at 69. Indeed, the Charleston position was the only one of 67 identical positions around the country filled through TLA authority.

Further evidence indicating that there was no "administrative need" for "temporary employment" of the MPO in Charleston is found in Byrd's testimony at the hearing. Byrd never testified that there was an administrative need for temporary employment for the MPO position, nor did he state that he preferred the TLA authority over the OPM register because it was faster; he testified only that the TLA sounded fine in filling the MPO position and in order to consider Ward-Ravenel. T-III at 19; T-II at 224. Byrd's testimony indicates that he did not use the TLA authority because there was an "administrative need" for "temporary

employment" in Charleston, but rather that he wanted to hire the "two-fer," Ward-Ravenel.

The only suggestion in the record that using the TLA authority was appropriate for the Charleston MPO position is in a brief statement by Rubinstein at the hearing. T-II at 220-21. He asserted that, although the MPO position was a permanent position, the TLA was appropriate because the MPO position had undergone a major change and it had a questionable future. *Id.* He never made this claim, however, to the Special Counsel during the investigation. T-II at 258. There is no evidence that this view was shared by Commissioner von Raab or anyone else in a position to influence the program. And there is no indication in Rubinstein's testimony why the TLA was appropriate in Charleston but in none of the other 66 regional offices hiring MPOs.

Rubinstein also testified that after he was charged by the OSC, he consulted with Van Yee of OPM's Operations Branch, who purportedly told him that the use of the TLA authority in this case was proper. T-I at 241; 274-75. However, in light of the fact that OPM's expert on the TLA authority, Edward McHugh, testified under oath at the hearing at length about the illegality of the TLA in this case (T-I at 211-12, 216, 274-75), and Van Yee never testified at the hearing, Rubinstein's hearsay testimony about Van Yee's opinion is entitled to little weight. See *Robinson v. Department of Health & Human Services*, 39

M.S.P.R. 110, 117 (1988). Respondent Rubinstein as a personnelist and Byrd as a selecting official knew or should have known that their use of the TLA authority was improper and was not a legal authority to give a preference to an applicant for employment. See testimony of expert witness McHugh, T-I at 236-40, 256. Nevertheless, even assuming Rubinstein subjectively believed the position could legitimately be offered as a TLA, the evidence is to the contrary, and use of the TLA was in contravention of 5 C.F.R. § 316.402(a), and therefore unlawful. The conclusion is thus inescapable that the preference given to Ward-Ravenel was illegal by virtue of this use of the TLA which was not authorized by law, rule, or regulation. Rubinstein's subjective belief that the TLA was legally used would be germane only in deciding what penalty was warranted for the legal violation. See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

We are not surprised that Rubinstein's superiors did not express concern about using the TLA hiring method in order to consider Ward-Ravenel because it was thought to be a "solution to a problem."<sup>14</sup> T-II at 81, 94, 109, 216. The

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<sup>14</sup> The fact that Rubinstein's superiors did not object to the use of the TLA in this case does not mean that its use was lawful here, or even that they thought the use of the TLA was proper. T-II at 80-81; 105, 109, 216, 220. In any event, because they were personnelists, they should have known that the use of the TLA authority in this situation was improper or illegal. The fact that they were not charged with prohibited personnel practices was a matter left to the Office of Special Counsel's prosecutorial discretion. Moreover, the opinion of respondents' witnesses, private personnel management consultants, David

"problem" that Rubinstein's superiors referred to was finding a way of "legally" placing Ward-Ravenel in the MPO position by a certain date. In this regard, Rubinstein's superiors, Spero and Goerlinger, testified that Ward-Ravenel had been given a preference, and that "[w]e knew that she worked at the White House and we knew that everybody would love it if we could place her...." T-II-94.

Contrary to the RD's finding, it is incredible to suggest that the respondents used the TLA authority in order to expand competition. The facts indicate that the TLA public notice announcement limited competition far more than the nationwide competitive announcement because the TLA public notice announcement was advertised only in Charleston, closed before the nationwide merit announcement (by almost 2 weeks), and restricted the position to one grade level instead of the merit announcement's two grade levels.

Moreover, if the intention had been to expand competition by issuing the TLA announcement, it would have been reasonable to consider responses to that announcement in addition to the applications submitted under the nationwide announcement. Indeed, the original idea for the TLA announcement came from Rubinstein, who had initially planned to "piggyback" the TLA announcement with the

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Burckman and Richard Wood, that the TLA authority was proper in this case, is unsupportable, and contrary to the overwhelming evidence that it was improper.

nationwide announcement. T-II at 80, 105, 216-19. Under Rubinstein's "piggyback" plan, the twelve applications that were submitted pursuant to the nationwide announcement should have been considered. Instead, only the three applications submitted pursuant to the TLA announcement were considered, and the twelve applications were not considered at all. See T-I at 89. Thus, competition was not expanded by the TLA announcement, but was limited by it.

In addition, as indicated previously, no applicant responding to the public notice announcement for the TLA position was interviewed, including Ward-Ravenel. When her application was submitted, the public notice announcement's objective had been met. No other applicant needed to be considered and interviewed and Ward-Ravenel was hired.

Thus, the Board finds that OSC has established that the use of the TLA authority in this case was not a proper one and that its use constituted a preference given to Ward-Ravenel which was not authorized by law, rule or regulation. As indicated above, the evidence clearly shows that the use of the TLA authority was proposed wholly in response to the request by Gordon to place Ward-Ravenel in Charleston by a specified date, and that the public notice announcement had no objective other than to hire her. The totality of the evidence reveals that the respondents used the entire TLA recruitment process as a sham to accomplish the goal of hiring Ward-Ravenel. Cf. *Special Counsel v. DeFord*, 28 M.S.P.R. 98 (1985) (Director of Administrative Services'

order to a personnel officer to promote an employee on his immediate staff in order to give that employee an advantage in a potential reduction in force violated 5 U.S.C. § 2302(b)(6)). We hold that Byrd and Rubinstein violated section 2302(b)(6) because Byrd was the selecting official who made the decision to hire Ward-Ravenel through the TLA authority and Rubinstein recommended the TLA authority and carried out the administrative aspects of this course of action that gave her the preference improving her chances at employment.<sup>15</sup> Cf. *Special Counsel v. Ross*, 34 M.S.P.R. 197, 200 (1987) (where personnelists developed a job description in such a way so that a particular person could qualify for it and that particular person was then selected from a certificate of eligibles, the Board found a violation of 5 U.S.C. § 2302(b)(6)).

B. The Charge Under 5 U.S.C. § 2302(b)(11)

Section 2302(b)(11), United States Code, 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 ... take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

<sup>15</sup> This case is distinguishable from *Special Counsel v. Nichols*, 36 M.S.P.R. 445 (1988), because, unlike *Nichols*, there was no emergency situation in the office, there was no reason to hire someone quickly, and there was no lack of qualified applicants for the position.

As an initial matter, we disagree with the RD's finding that a violation of section 2302(b)(11) in this case requires proof of an improper motive. The statute simply does not contain that requirement, and the plain words of the statute show that only three elements must be proved by the preponderance of the evidence in order to find a violation of 5 U.S.C. § 2302(b)(11). These elements are: (1) a personnel action was taken; (2) the taking of this action violated a civil service law, rule or regulation; and (3) the law, rule or regulation violated implements or directly concerns a merit system principle. See *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 599-600 (1984) *rev'd on other grounds*, 802 F.2d 537 (D.C. Cir. 1986); *Wells v. Harris*, 1 M.S.P.R. 208, 241 (1979).

The RD's reliance on *Harvey v. Merit Systems Protection Board*, 802 F.2d 537 (D.C. Cir. 1986), and *Starrett v. Merit Systems Protection Board*, 792 F.2d 1246, 1253, n.12 (4th Cir. 1986), to conclude that improper motive is a necessary element of finding a violation of this section is misplaced. Unlike this case, the courts' discussion of motive and intention in *Harvey* and *Starrett* was appropriate because the charges in those cases specifically stated that personnel actions were deliberately taken that violated laws which included elements requiring proof of improper motive. For example, in the *Harvey* and *Starrett* discussions of improper motive, the courts were addressing how the personnel actions of the respondents had violated 5 U.S.C. §§ 2302(b)(6) and

(b)(9). These sections prohibited reprisal for certain protected conduct, and reprisal requires proof of an improper motive.<sup>16</sup> See *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). Moreover, in *Harvey*, the OSC charged the respondent with the personnel action of "deliberately idling" another employee. Thus, the charge's use of the word "deliberately" connoted "knowing or intentional conduct" and became an element to prove in that particular case. See *Harvey*, 802 F.2d at 544. We therefore find that the elements of proof of a violation of section 2302(b)(11) depend on the specific charges and, thus, may or may not include proof of an improper motive.

Here, the respondents are charged with violating 5 C.F.R. §§ 316.401, 330.102 and Chapter 316 of the Federal Personnel Manual. As discussed previously, section 316.401 states that the purpose of temporary limited employment is to "meet an administrative need for temporary employment, such as to fill a temporary position or a continuing position for a temporary period." As we have found in our discussion of the respondents' violation of 5 U.S.C. § 2302(b)(6), the respondents' improper use of the TLA under this charge was contrary to the purpose of temporary limited

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<sup>16</sup> The language of these sections was amended by the Whistleblower Protection Act of 1989 to change the prohibition of a personnel action "as a reprisal for" the exercise of a specified right to "because of" the exercise of a specified right. See 5 U.S.C. § 2302(b)(8)-(9) (Supp. III 1991).

employment.<sup>17</sup> To the extent that FPM chapter 316 pertains to the conditions under which an agency may correctly use temporary limited employment, the respondents also violated FPM chapter 316 by their improper use of the TLA.<sup>18</sup>

These rules and regulation do not include any element of motive, and it is therefore unnecessary to prove an improper motive to establish a violation of section 2302(b)(11) through a violation of the rules or regulation.<sup>19</sup> Moreover, the charge itself did not contain

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<sup>17</sup> Although section 316.401 is indeed the applicable OPM regulation detailing the purpose of the TLA authority, the agency in fact takes this authority from section 316.402(a) "under the conditions published by the Office in the Federal Personnel Manual...." Therefore, section 316.401 is inextricably intertwined with section 316.402. We also note that the Special Counsel's failure to cite 5 C.F.R. § 316.402 specifically does not preclude our finding that the respondents violated that section. It is clear that the parties understood that the charge concerned the respondents' misuse of the TLA authority that had been given to their agency. Furthermore, by submitting evidence relevant only to an allegation that they had violated section 316.402, the respondents implicitly consented to be tried for such a violation. See *Special Counsel v. Narcisse*, 51 M.S.P.R. 222, 227 (1991).

<sup>18</sup> Provisions of the FPM have long been considered rules for the purposes of the Board's exercise of authority under 5 U.S.C. § 1204(f) to review "any rule or regulation." See *Pollard v. Office of Personnel Management*, 52 M.S.P.R. 566, 569 (1992), citing *National Treasury Employees Union v. Devine*, 8 M.S.P.R. 640, 642 n.1 (1981). By analogy, we find that provisions of FPM chapter 316 which prescribe the conditions for making a TLA constitute "rules" for purposes of 5 U.S.C. § 2302(b)(11).

<sup>19</sup> The respondents have not been shown to have had direct knowledge of Woodson's failure to notify OPM of the TLA announcement, or of his mishandling of the veteran's application. We therefore do not sustain OSC's specification that they violated 5 C.F.R. 330.102, which required notice to OPM.

words that would require proof of motive or intent. Motive or intent is, however, a proper factor to consider for the purpose of determining the penalty. See *Carson v. Veterans Administration*, 29 M.S.P.R. 631, 634 (1986); *Douglas*, 5 M.S.P.R. at 305.

Because section 2302(a)(2) designates an "appointment" as a covered personnel action within the meaning of the statute, we find the first element satisfied. Use of the TLA authority to make the appointment in this case violated civil service laws, rules and regulations, as discussed, *supra*. The violated provisions directly concern the merit system principle contained in 5 U.S.C. § 2301(b)(1), which states:

Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(Emphasis supplied.)

We have previously concluded that, because Byrd approved the use of the TLA, and Rubinstein recommended and implemented its use without a valid administrative need for temporary employment, they violated 5 U.S.C. § 2302(b)(6) and 5 C.F.R. §§ 316.401 and 316.402(a). This unwarranted use of the TLA authority had the effect of curtailing competition (see discussion of violation of section 2302(b)(6)), in violation of the merit system principle

stated in § 2301(b)(1). We therefore find that the Special Counsel has proved a violation of § 2302(b)(11) by preponderant evidence.

C. The Charge Under 5 C.F.R. § 735.201(a).<sup>20</sup>

This section prohibits an employee from acting in a way that might result in or create the appearance of giving preferential treatment to any person. OSC presents this charge as an alternative theory. Because we sustain the first two charges, this third charge need not be considered. But we note that by proving the first two charges, OSC proved the third, *a fortiori*. The respondents' actions were egregious and caused a strong and notorious appearance that they had given an illegal preference to Ward-Ravenel. The preponderant evidence shows that Byrd and Rubinstein created the appearance of a preference when they advertised the MPO position through both the nationwide merit announcement and the shortened TLA public notice announcement and selected Ward-Ravenel for the TLA appointment. Rubinstein created the appearance of a preference by personally recommending the TLA appointment route, composing the announcement himself and by limiting competition under that announcement by shortening the application time period, advertising in a narrower geographical area and recruiting for the position from one grade level instead of the originally planned two grade levels.

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<sup>20</sup> Contrary to the respondents' contention that the Board cannot reach this issue, we find that, because we have found violations of sections 2302(b)(6) and (b)(11), there is a nexus to prohibited personnel practice claims and the Board does have jurisdiction over the standard of conduct violations alleged here. See *Horner v. Merit Systems Protection Board*, 815 F.2d 668 (Fed. Cir. 1987).

Moreover, even before the announcements were issued, Byrd specifically created the appearance of giving Ward-Ravenel preferential treatment when he introduced her to Customs employees joking that she was a "two-fer." Byrd also created the appearance of a preference when he failed to interview a single applicant for the MPO position.

Senator Hollings' letter indicated that he was inundated by complaints about Ward-Ravenel's "preselection." Testimony by Missel, Sayas, Dukes-Lee, Ward-Ravenel and Byrd established that Ward-Ravenel's selection was widely discussed in the Charleston Regional Office at Customs. Ward-Ravenel and Byrd both testified that the opposition to her appointment was so strong that she considered not taking the job. These facts establish that the appearance of a preference was created in the mind of a reasonable person. Moreover, because we have found that a preference was actually given in this case, the appearance of a preference was undoubtedly a reasonable conclusion. See *Special Counsel v. Nichols*, 36 M.S.P.R. at 455.

#### PENALTIES

In a disciplinary action case, a final order of the Board may impose a penalty as warranted 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.

5 U.S.C. § 1215(a)(3) (Supp. III 1991). In determining the appropriate penalty in this case, the Board takes into

account the relevant factors enumerated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). See *Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984) (the *Douglas* factors are applicable to disciplinary action cases). In considering these factors, the Board also takes into account the particularized circumstances of this proceeding. See *Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 313 (1988).

With regard to Byrd, we find that his violations of 5 U.S.C. § 2302(b)(6) and (b)(11) were very serious. The record shows that Byrd was interested in hiring Ward-Ravenel even before the announcements for the MPO position were posted. Further, his actions in the process of selecting her, including the approval of the TLA authority, were the topic of discussion in the "office grapevine" in Charleston which he did nothing to dispel, and were therefore disruptive to that office.

The seriousness of Byrd's violation is magnified by his position as the district director with a staff of 150. Because of the prominence of his position and duties, including law enforcement responsibilities and personnel responsibilities, we hold Byrd to a higher standard of conduct than subordinate employees. See *Special Counsel v. Zimmerman*, 36 M.S.P.R. at 293.

In deciding the penalty for Byrd, we recognize that he was in the Charleston office for six years and that he received a rating of fully successful during the rating period from July 1, 1988 to June 30, 1989. See T-III at 4-

5; Respondent's Exhibit 3. We are also aware that Byrd had been subject to disciplinary action before, in that he had received a one-day suspension for obtaining floor samples of liquor for a group of law enforcement personnel who had come to a national convention in Charleston. T-III at 33.

In mitigation of a penalty, Byrd has contended that he was unaware of the illegality of using the TLA authority in this circumstance. However, we find that, as a manager with responsibility for 150 employees and with personnel matters a part of his position description, Byrd had to have some knowledge of personnel matters from experience. Thus, we find that he should have known that employees are to be selected competitively on the basis of merit and that an unauthorized preference is prohibited. Additionally, even if he had no specific knowledge of the applicable federal personnel regulations involving the appropriate use of the TLA authority, common sense should have suggested that the TLA authority should be used to hire employees to meet temporary needs. We therefore find that Byrd cannot avoid responsibility for his violation of federal law and regulations by asserting a lack of knowledge. The record indicates that Byrd, in the past, used whatever means possible to work around the limitations placed on managers by the federal personnel system, e.g., avoidance of OPM registers because they included older veterans. See, e.g., Petitioner's Exhibit 8 at 41-44. We agree with the Special Counsel that Byrd's purported lack of interest, knowledge,

and responsibility with respect to personnel matters puts into question his competence to serve as a federal manager. We also note, however, that it was not unusual at Customs to consider the TLA as a means to quickly hire qualified employees who lacked civil service status. T-II at 194.

Taking into account all of the factors considered above, plus the fact that Byrd terminated his Federal service effective March 15, 1991, see Official File, Vol. II, Tab 51, we have determined that the appropriate penalty for Byrd is a fine of \$1000.00, the maximum amount permitted by law pursuant to 5 U.S.C. § 1215(a)(3) (Supp. III 1991). Cf. *Special Counsel v. Doyle*, 42 M.S.P.R. 376, 382-83 (1989) (In view of respondent's retirement, the appropriate penalty would be debarment or an assessment of a civil penalty not to exceed \$1,000.)

With regard to Rubinstein, we find that the evidence indicates that his violations of 5 U.S.C. § 2302(b)(6) and (b)(11) were the result of his superiors' directing that he solve the problem of finding a way to place Ward-Ravenel in the MPO position in Charleston. A person in Rubinstein's position, however, should have known that the use of the TLA authority was inappropriate in this case and should have discussed this with his superiors. Indeed, because of his area of expertise, he had the professional responsibility to advise management that using the TLA in this case was illegal. There is no evidence in the record that he so advised management. Moreover, it was

upon his recommendation that the TLA authority was misused in this case. Thus, we find Rubinstein deserving of a significant penalty for his violations. In this regard, we note that OSC recommended a minimum penalty of demotion to a GS-13 or below, nonsupervisory position, for a minimum of three years. See Petitioner's Post-Hearing Brief at 62.

In mitigation of the penalty, however, we find that Rubinstein was considered an exemplary employee who had worked in the personnel field for 16 years. T-II at 186, 192. Ordinarily, employees at Customs who worked with Rubinstein, such as Woodson, Spero, Goerlinger and Kilner, considered him a "strictly by the rules" individual who would not do anything improper. See T-I at 104-05; T-II at 84, 111, 118, 137. Moreover, although Rubinstein should have known that the TLA authority was improper here, as we noted also with respect to the appropriate penalty for Byrd, many at Customs did not see anything wrong in using this method as a quick way of bringing on board qualified candidates lacking in civil service status. See T-II at 194. Certainly, his superiors never questioned using the TLA authority, in this way and there is evidence that he was pressured by his superiors to find a way to enable Byrd to hire Ward-Ravenel. Balancing these mitigating factors with the seriousness of the violations, we have determined that the appropriate penalty for Rubinstein is a suspension for 60 days.

We conclude that finding violations and meting appropriate penalties in this case serve Congress' interest in putting agencies subject to the Civil Service Reform Act (CSRA) on notice that selections for employment must be made in accordance with law and must not be the result of personal or political favoritism. See H. Rep. No. 969, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 2723, 2725. Indeed, in enacting the Civil Service Reform Act of 1978, Congress reflected that "[t]he civil service system is the product of an earlier reform, which in protest against the 19th century spoils system, promised a work force in which employees were selected and advanced on the basis of competence rather than political or personal favoritism." *Id.* Thus, agency officials subject to the CSRA must make selections of employment in accordance with law, and an agency's evasion of this principle should not be allowed to stand.

#### ORDER

Accordingly, the Board ORDERS that respondent Byrd pay a fine in the amount of \$1000.00. Payment of this civil penalty shall be made by respondent Byrd within forty-five (45) days from the date of this Order by a certified or cashier's check, made payable to the Merit Systems Protection Board, sent to the Office of the Clerk of the Board, 1120 Vermont Avenue, Washington, D.C. 20419. A copy of the check should be sent to OSC as evidence of compliance with this Order. The Board also ORDERS that the agency,

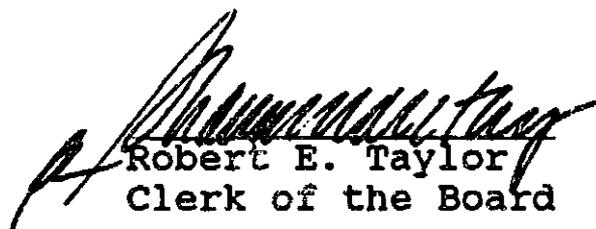
USCS, suspend respondent Rubinstein for a period of 60 days without pay.

This is the final order of the Merit Systems Protection Board. The respondents may seek judicial review of the Board's action as provided in 5 U.S.C. § 1215(a)(4) (Supp. III 1991).

Within 60 days of the date of this order, the Special Counsel shall file a report with the Clerk of the Board on the status of compliance with the Board's Order regarding the penalties in this case.

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board