UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD61

61 M.S.P.R. 559

Docket Numbers CB1215910033T1[1] CB1215910034T1

SPECIAL COUNSEL, Petitioner,

v.

JAMES A. BROWN, JENNIFER R. NELSON, Respondents.

Date: April 11, 1994

Bruce D. Fong, Esquire, San Francisco, California, and Anthony T. Cardillo, Esquire, Dallas, Texas.for the petitioner.

M. Elizabeth Bagby, Esquire, Immigration and Naturalization Service, Dallas, Texas, for the respondents.

BEFORE

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

OPINION AND ORDER

This case is before the Board pursuant to the parties' exceptions to a Recommended Decision (RD) by the Board's Chief Administrative Law Judge (CALJ) concerning a seven-count complaint: for disciplinary action. The first four counts concern respondents' handling of Donald Nielson's employment application. The last three counts concern respondent Nelson's selection of Brown as resource manager. The CALJ sustained Count 1 as to Brown, Count 2 as to Brown Nelson, and Count 5 as to Nelson.[2] Based on the sustained charges, the CALJ recommended a 60-day suspension for Brown and a 90-day suspension for Nelson. RD 47. In the exceptions, respondents challenge each of the sustained counts as well as the recommended

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[1] The former numbers are CB1214910033T1 and CB1214910034T1.

[2] The CALJ found insufficient evidence to sustain Counts 3 and 4 as to Nelson. Additionally, he found it unnecessary to address the alternative theories of liability in these counts as they relate to Brown as he previously had sustained Count 1 against Brown. Similarly, because the CALJ sustained Count 5, he found it unnecessary to address the alternative theory of liability in Count 6 or the lesser included offense of Count 5 set out in Count 7.

penalty. The Special Counsel disputes only the penalty. For the reasons set forth below, the Board ADOPTS AS MODIFIED the Recommended Decision.

BACKGROUND

Nielson's Employment Application

During the time relevant to counts one through four, James Brown was employed by the Immigration and Naturalization Service (INS), Southern regional office, Dallas, Texas as a GM-14 resource manager. As the resource manager, Brown was responsible for personnel management in the region. Jennifer Nelson, the other respondent, was Brown's supervisor, employed in the same regional office as a GM-15 Associate Regional Commissioner for Management.

In July 1987, the Office of Personnel Management (OPM) referred Donald Nielson to the INS s an eligible for a vacant GS-12 public affairs specialist position. Nielson was a priority referral under the displaced employee program. Under that program, eligible employees are provided priority referral for positions for which they are qualified and available. *See* 5 C.F.R. Part 330 (1987). In fact, these employees must be given consideration for appointment before a certificate of eligibles is prepared, 5 C.F.R. § 330.305(b) (1987). Other regulations, not specifically directed to the displaced employee program, prohibit agencies from appointing a lower-standing eligible while an objection to an eligible such as a displaced employee is pending, unless the agency has more than one position to fill on the same certificate and holds a position open in the event OPM does not sustain the objection. 5 C.F.R. § 332.406(c) and (d) (1987).

On July 24, 1987, INS certified a register of eligibles for two vacant public affairs specialist positions in the Dallas district office. P-28.[3] The certificate listed five candidates, including Nielson. *Id.* Although Nielson met the qualification standards for the job and was available, Tr. II: 180, two other individuals on the certificate, Lynn Ligon and Jane Friday, were selected for the positions on July 30, 1987. P-28.

Shortly afterwards, INS personnel specialist Sara Watson advised Brown that OPM regulations prohibited the agency from filling the vacancies in the Dallas district office .mess Nielson was selected or an objection was sustained by OPM. Tr. II: 178. Subsequently, on September 10, 1987, a panel composed of respondents Brown and Nelson and Paul Berg, Assistant Regional Commissioner for Border Patrol, interviewed Nielson. Tr. II: 65, 265; IV: 38. The panel members agreed that Nielson failed the interview. P-38 at 11-19. After the Interview, Brown met with Nielson and told him he had serious concerns about his ability, to project in the job, Tr. IV: 45, that INS wanted more of a "flag waver" in the position, and that he could ask Nielson to waive his displace-4 employee priority. RD at 15. Nielson did not withdraw his application.

On September 13, 1987, Lynn Ligon, one of the selectees for the public affairs specialist position in the district office, transferred into that position from the Department of Labor. AF, Tab 8 at 5; para. 2 and Tab 20 at 5, para. 2. On October 7, 1987, Brown

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[3] "P-" refers to petitioner's exhibits: "R-" refers to respondents' exhibits; "Tr." refers to transcript.

filed an objection to Nielson's candidacy with OPM, *Id.*, and six days later Jane Friday was appointed to the remaining public affairs specialist position in the district office. *Id.* On the request for personnel action form (SF-52), Brown certified that Friday's appointment "is in compliance with statutory and regulatory requirements." P-27.

On November 19, 1987, after discussion with OPM, INS submitted an addendum to its original objection to Nielson's candidacy. P-38; P-40. OPM denied the objection to Nielson on December 16, 1987. P-36; P-39. On December 21, 1987, INS Regional Commissioner Stephen Martin requested OPM Regional Director Edward Vela to review the material supporting the objection. P-40. Vela responded that OPM properly denied the objection. P-43.

On February 9, 1988, following an OPM audit of the delegated competitive examining activities performed by INS, OPM informed INS that Friday's appointment violated the displaced employee regulations and that correction °to regularize the certificate" would require appointing Nielson or separating Friday. Tr. II: 6-10. A time limit of 20 days was set. Tr. II: 8. Brown and Nelson do not contest their authority to take corrective action. No corrective action was taken within the 20-day time period.

On March 4, 1988, Brown filed a second objection to Nielson. R-74. OPM denied the second objection on March 23, 1988. R-74, 75. In a March 31, 3988, letter discussing the results of the audit, OPM noted that the certificate had still not been regularized and directed that action be taken within 30 days. P-48. Again Brown and Nelson took no corrective action. By letter dated August 24, 1988, OPM directed INS to hire Nielson or separate Friday within 10 days. P-55. On September 10, 1988, Brown offered Nielson a public affairs specialist position in the Congressional and Public Affairs Division, Office of the Regional commissioner. AF, Tab 8 at 6, Para. 6; Tab 20 at 6, Para. 6. Effective January 17, 1989, Nielson was appointed to this regional office position.

Brown's selection

On March 23, 1987, prior to the events set out above, Brown was detailed from a GM-13 assistant chief patrol agent position to a GM-201-14 personnel officer position in the southern regional office. AF, Tab 8 at 8, Para 2; Tab 20 at 6:, Para. 2. Prior to this detail, Brown had never been assigned to any position in the GS-201 or other specialized personnel management series. *Id.* On May 5, 1987, Nelson reclassified the personnel officer position to resource manager, GM-301-14, and certified that it was "classified/graded as required by Title 5 U.S. Code in conformance with standards published by the Civil Service commission." P-6 at 1, item 21. She also initialed the position description in the block reserved for the classifier of the position. *Id.* at item 15. Brown would not have qualified for the position if it had remained in the 201 series, RD at 41, but with the change in classification, Brown was qualified and Nelson selected him for the position. AF, Tab 8 at 9, Para, 8; Tab 20 at 7, Para. 8

OPM subsequently determined that the reclassification was improper. OPM noted that INS had failed to provide sufficient documentation to support the resource manager position and failed to follow established guidelines in classification. P-13 and 14. On June 11, 1990, OPM directed INS to reclassify Brown's position as a personnel officer,

GM-201, in accordance with 5 U.S.C. § 5110(b) (1988) and 5 C.F.R. § 511.702 (1990). AF, Tab 8 at 10 and Tab 20 at 7.

ANALYSIS

COUNT ONE

Count one charged respondents with violating 5 U.S.C. § 2302(b)(5)(1988). That section prohibits an employee from °influenc[ing] any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment." Actual withdrawal of an applicant is not required to establish a violation; an attempt to influence withdrawal is sufficient. *Special Counsel v. Filiberti,* 27 M.S.P.R. 498, 508-09 (1984), *aff'd in part, rev'd in part and remanded on other grounds*, 804 F.2d 1504 (9th Cir. 1986). It is not the consequences of the conduct which is prohibited, but the conduct itself. *Id.* Thus, the statute requires a two-part showing: (1) that an employee influenced or attempted to influence a person to withdraw from competition and (2) that the influence was exerted to improve or injure the employment prospects of another.

The Special Counsel alleged that Brown influenced Nielson to withdraw from competition for the public affairs specialist position for the purpose of injuring his employment prospects or improving the prospects of Friday.[4] CALJ found that preponderant evidence supported the charge as to Brown. We agree.

Brown influenced Neilson to withdraw from competition

In finding that Brown influenced Nielson to withdraw, the CALJ credited Nielson's testimony and discredited Brown's testimony. Nielson testified that following the panel interview Brown told him "[w]e want someone who is more of (sic) flag waver. OPM referred you to me, and I can ask you to verbally waive your priority.° Tr. II: 85. Brown contends that the CALJ erred in making these credibility findings. Respondents' Exceptions (RE) 12-21. however, the CALJ resolved the credibility issues in accordance with the guidance of *Millen v. Department of Army*, 35 M.S.P.R. 453, 458-62 {1987), and we will not disturb his findings.[5]

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[4] Because all of the Special Counsel's arguments concern injury to Nielson's employment prospects or support of Friday's prospects, we do not consider whether Brown also

[5] Brown asserts that the CALJ erred in his apparent failure to consider Nielson's bias at the time he recorded the post-panel interview conversation with Brown. RE at 18. The CALJ, however, is not required to respond to every theory presented by respondent. *See Marques v. Department of Health and Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table) , *cert. denied,* 476 U.S. 1141 (1986). Further, respondents have not adequately explained why Nielson's interest in obtaining the public affairs position would cause him to record his interview conversation inaccurately.

Brown acted for the purpose of improving Friday's employment prospects

Brown next argues that the CALJ erred in finding that he acted for the purpose of improving Friday's prospects for employment. RE 21-24. Brown's action, however, belies this contention. At the time of Brown's first interview with Nielson, Friday had already been selected for one of two positions in the Dallas district office and personnel management specialist Sara Watson had advised Brown that the DEP eligible Nielson had not been selected. AF, Tab 20, at 3, para. 10. Because Nielson met the basic qualifications for the public affairs position, OPM regulations required his selection or the holding of one position on the certificate while an objection was pending. *See* 5 C.F.R. §§ 330.305(b) and 332.406(c) and (d). Thus, if Brown simply wanted to avoid appointing Nielson for a legitimate reason, he could have left the position vacant pending OPM's decision on an INS objection or filled the position noncompetitively with someone other than Friday.[6] That Brown did not hold one of the two district positions open for Nielson can only be explained by a desire to advantage Friday. Friday lacked competitive status, AF, Tab 8 at 3 and Tab 20 at 3, and therefore could not have been placed in the regional office position for which no certificate was prepared.[7] Tr. II: 183. Thus, it must be inferred that Brown influenced Nielson to withdraw because he blocked Friday's appointment to the district position. Accordingly, the CALJ properly found that Brown acted for the purpose of improving Friday's prospects for employment within the meaning of 5 U.S.C. § 2302(b)(5).

Brown also acted for the purpose of injuring Nielson's employment prospects

The Special Counsel charged Brown with influencing Nielson to withdraw from competition to improve Friday's employment prospects or to harm Nielson's employment prospects. The CAW, however, made no specific finding as to whether Brown acted for the purpose of harming Nielson's employment prospects. The statute requires a showing inter alia, that Brown acted "for the purpose of° injuring the employment prospects of any other person. 5 U.S.C. § 2302(b)(5). Consistent with *Filiberti v. Merit Systems Protection Board*, 804 F.2d 1504, 1509 (9th Cir. 19C6) (*reversed in part and remanded on other grounds*), influencing Nielson to withdraw from competition for the purpose of injuring Nielson's employment prospects is a sufficient basis on which to sustain a violation of 5 U.S.C. § 2302 (b) (5).

Here the Board finds ample evidence that Brown acted for the purpose of injuring Nielson's employment prospects. Brown suggested to Nielson that he waive his right to the priority consideration afforded displaced employee candidates. RD 15. Additionally, Brown provided misleading information to OPM about Nielson's fitness for the public

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[6] An appointing official may fill any position in the competitive service either by competitive appointment from a civil. service register or by selection of a present or former federal employee in accordance with the Civil Service Regulations. 5 C.F.R. § 7.1 (1987).

[7] "Competitive status° means basic eligibility to be noncompetitively selected to till a vacancy in a competitive position. 5 C.F.R. S 1.3(c) (1987). Competitive status may by acquired through service in a career or career-conditional appointment. *Id.* Friday lacked federal experience, P-23.

position by misrepresenting that Nielson used the invective "wets" to refer to Mexicans. RD at. 27. Finally, Brown ignored OPM's orders to take corrective action for an extended period of time. These actions support a finding of intent to harm Nielson's chances of employment. *See Filiberti*, 804 F.2d at 1510 (court found strong suggestion of intent to harm individual's employment prospects where agency provided misleading information to individual and ignored OPM's direction to hire him).

COUNT TWO

Count two charges Brown and Nelson with violating 5 U.S.C. § 2302(b)(11) (1988) by failing to timely correct the violations of 5 C.F.R. §§ 330.305(b) and 332.406(c) and (d) (1987), regulations describing agency responsibilities to displaced employees and the objection process and which implement merit system principles. The OSC described the ,violation as respondents' lengthy delay in appointing Nielson after OPM rejected INS' objection to Nielson.

To establish a violation of section 2302(b)(11) it is necessary to show that a personnel action was taken or not taken; that such action violated a law, rule, or regulation: and that the violated law, rule, or regulation is one which implements or directly concerns merit system principles. *See Special Counsel v. Byrd,* 59 M.S.P.R. 561, 579 (1993). The CALJ found preponderant evidence supported the (b)(11) charge against both respondents on the basis that 5 C.F.R. § 330.305(b) (b) and 332.406(c) and (d) were violated by Friday's appointment, that respondents deliberately failed to take timely corrective action after OPM denied INS objections, and that the violated regulations implemented or directly concerned merit system principles 2301(b)(5) and .(6). Respondents do not contest the finding that the violated regulations implement or directly concern merit system principles, but they do except to the CALJ's other principal findings.

A Delay in taking corrective action constitutes a failure to take a personnel action.

Respondents argue that the CALJ erred in finding a violation of 5 U.S.C. § 2302(b) (11) because the delay in taking corrective action does not constitute a failure to take a personnel action within the meaning of section 2302(b)(11). RE 25. Whether a delay in acting constitutes a failure to act under section 2302(b) (11) is a question of first impression. Under the circumstances of this case, the Board concurs in the CALJ's finding that the lengthy delay is taking corrective action constitutes a failure to act within the meaning of the statute.

Failure is defined as the nonperformance of something due, required or expected. *Webster's Encyclopedic Unabridged Dictionary of the English Language* 510 {1989). Here, in order to correct the regulatory violations, respondents were required to regularize the certificate, i.e., .appoint Nielson or separate Friday after OPM, on December 16, 1987, rejected their objection to Nielson.[8] Respondents, however,

[8] Under 5 C.F.R. § 332.406(c) a position on the same certificate should have been held for Nielson. That OPM did not ultimately require INS to separate Friday some 11 months after her

refused to take action and submitted a second objection which OPM again rejected in a March 31, 1988, letter directing INS to take corrective action within 3o days. After receipt of this letter, respondents still failed to take action. Finally, after OPM directed INS to appoint Nielson or separate Friday within ten days of an August 24, 1988, letter, respondents, on September 10, 1988, offered Nielson a public affairs position in the Office of the Regional Commissioner. P-58. Because the public affairs specialist position was classified as sensitive, Nielson's appointment was subject to a security investigation. R-90; TR I: 54. This process, which lasted only two months in the case of Jane Friday, was not completed until December 30, 1988.[9] Nielson was finally appointed effective January 17, 1989. P-26. We find that under these circumstances the delay in taking corrective action must be viewed as nonperformance of a required act and thus constitutes failure to act within the meaning of the statute.

The personnel action that Brown failed to take was a corrective action. A corrective action is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iii) (1988). Accordingly, Brown's argument that issuance of a certificate is not a personnel action under section 2302(a)(2)(A) misconstrues the action at issue.

Respondents' delay in taking corrective action constitutes a continuing violation of 5 C.F.R. §§ 330.305(b.) and 332.406(c) and (d).

Brown and Nelson next argue that the CAW incorrectly found that they violated 5 C.F.R. §§ 330.305(b) and 336.406(c) and (d). RE 26-29. Section 330.305(b) prohibits agencies from issuing a certificate when an eligible displaced employee is available. Section 332.406 (c) and (d) prohibits agencies from passing over an eligible displaced employee to appoint another candidate on the certificate unless the agency has more than one position to fill from the same certificate and reserves one position for the eligible being challenged.

According to Brown and Nelson, they could not have violated these regulations because they were not involved inFriday' s appointment. Brown and Nelson, however, were not charged with improperly appointing Friday in violation of the regulatIons. Rather, Brown and Nelson were charged with failure to timely correct the improper appointment ofFriday. AF, TAb 8 at 5-7. Therefore, respondents' argument concerning their responsibility for the appointment of Friday is irrelevant.

Additionally, Brown and Nelson argue that they did not violate 5 C.F.R. §§ 330.305(b) and 332.406 because the regulations do not contain time limits and therefore cannot be violated by a failure to take corrective action in a timely manner. RE 29. This argument is unpersuasive. OPM, the author of the displaced employee regulations and charged with their enforcement, 5 C.F.R. § 5.1, found that the appointment of Ms. Friday from the certificate was illegal and, on three separate

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appointment and appoint Nielson to the same position to regularize the certificate does not indicate that OPM endorsed respondents' interpretation of the regulations.

[9] while respondents paint to their request for a waiver of the full field investigation for Nielson as indicative of their good intentions, s*ee* R-92, respondents offer no explanation as to why they waited three months to request such a waiver.

occasions, ordered that action be taken to correct an appointment made contrary to the regulations. *See* P-45 at 11; P-48; and P-55. Because Brown an Nelson :failed to appoint Nielson or separate Friday within the timeframes set up by OPM, they were engaged in a continuing violation of 5 C.F.R. §§ 330.305(b) and 332.4O6(c) and (d).[10]

The regulations violated important merit system principles.

Having found that respondents failed to take a personnel action in the form of a corrective action and that the failure constitutes a continuing violation of 5 C.F.R.§§ 330.305(h) and 332.406(c) and (d), 5 U.S.C. § 2302(b)(11) requires a showing that the violated regulations implement or directly concern the merit system principles in 5 U.S.C. § 2301(b). The CALJ found that the violated regulations implement and directly concern merit system principles (b)(5) and (6) and respondents have not objected to that finding. Accordingly, we find that respondents violated 5 U.S.C. § 2302(b)(11).

COUNT FIVE

Count five charged respondent Nelson with violating 5 U.S.C. § 2302(b) (6) (1988) by giving Brown a preference or advantage not authorized by law, rule or regulation, when SHE caused the title and series of the GM-201-14 personnel officer position to be changed to a GM-301-14 resource manager position for the purpose of improving Brown's chances for appointment to the position. AF, Tab S. The statute requires a showing that preferential action was taken for the purpose of, *inter alia*, improving the prospects of a particular person for employment and that the preference was unauthorized by law, rule or regulation. *Special Counsel v. Byrd*, 59 M.S.P.R. 561 at 570 (1993). The CALJ concluded that OSC established the violation by a preponderance of the evidence. We agree.

The reclassification was improper.

Nelson challenges the CALJ's finding of an unauthorized preference as improperly relying, in part, on the addition of law enforcement duties to the resource manager position description prior to Brown's appointment. We need not decide whether the law enforcement duties were added before or after Brown's appointment because other evidence clearly shows that Nelson misclassified this position in order to improve Brown's chances for appointment to it.[11]

The CALJ found that the reclassification was improper based on the testimony of John Fitzpatrick, OPM supervisory personnel management specialist, and his own comparison of the position classification standards for series 201 and 301 and the duties of the resource manager position. RD at 31-34. This comparison showed that the

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[10] Moreover, respondents admitted in their post-hearing brief that they committed a violation of these regulations, albeit a highly technical one. RHB at 31.

[11] Respondent, however, is mistaken in her belief that the evidence of law enforcement duties pertains to a new charge, creating an improper position description. RE at 54. The evidence of law enforcement duties in the position description was not introduced to show that the position description was improper but to show that the position was tailored for Brown.

duties of the position description matched the duties in the position classification standard for series 201 and that series 301 was therefore inapplicable because it applies only to positions that "involve specialized work for which no appropriate occupational series has been established.'" P-4 at 2.

Nelson knew that the reclassification was improper.

Next, Nelson argues that, contrary to the CALJ's findings, the Special Counsel did not prove that she knew the resource manager position was misclassified. Nelson's factual contentions are nothing more than disagreements with the CALJ's credibility findings. while it is correct that the Board may substitute its judgment for that of the CALJ whEn credibility determinations are based on the record evidence rather than demeanor of the witnesses, substantial questions must exist regarding the credibility resolution before the Board will make such a substitution. *Special Counsel v. Ross*, 34 M.S.P.R. 197 (1987). Here, consistent with *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-63 (1987), the CALJ carefully considered the testimony of all the witnesses on the issues of Nelson's knowledge of the improper classification and her purpose in reclassifying the resource manager position.

On the issue of Nelson's knowledge of the improper classification, the CALJ found that Sandra Scott, the personnel management specialist, told Nelson in person, and by memo, that the resource manager position could not be classified in the 301 series. The CALJ noted Scott's possible bias against Nelson for an earlier admonishment and her involvement in an earlier misclassification action. He also noted Nelson's denial which he termed "less than emphatic," as well as Nelson's claim that she would not be involved in a misclassification because she had been hired to "clean up a mess" created by a misclassified position. The CALJ, however, found Scott more credible than Nelson because her testimony was corroborated by three other INS and former INS employees: Sandra Thompson, personnel management specialist; John Naughton, personnel management specialist; and Joyce Cornett, personnel staffing specialist. He also noted that Scott and Naughton no longer work at INS and that Scott, Thompson and Naughton are not parties to the case and have no reason to lie about Nelson. His conclusions included a detailed response to Nelson's attack on the credibility of Scott, Thompson, and Naughton.

Nelson, however, attempts to undermine the CALJ's credibility findings by criticizing his interpretation of the testimony. Nelson's argument is, simply put, a claim that none of the Special Counsel's witnesses are telling the truth.[12] The CALJ, who heard the testimony, reached the opposite conclusion. Before the CALJ at the time he reached this conclusion was respondents' post-hearing brief which contains the same challenges to credibility and claims of inconsistent and contradictory statements as those set out in respondents' exceptions. Nelson has shown no reason to disturb the CALJ's credibility findings on the issue of her knowledge that the resource manager's position was improperly classified.

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[12] Indeed, Nelson's testimony referring to Joyce Cornett is, "She Lied." Tr. III : 135.

Nelson acted for the purpose of advantaging Brown.

The record supports the CALJ's finding that Nelson changed the classification of the former personnel officer position to advantage Brown. The CALJ found that Nelson, "impressed by Brown's performance during his detail to the southern Region (of INS], reclassified and fashioned the position for his advantage in order that his services might be retained." RD at 40-41. He noted that Brown would not have qualified for the resource manager position if it had remained classified in the 201 series. He also found, based on the testimony of personnel staffing specialist Joyce Cornett that Nelson directed Cornett to rate Brown qualified. The ranking panel then relied on Cornett's determination that Brown's experience on detail qualified him for the resource manager position.

Nelson challenges Cornett's testimony as to her authority to place Brown's name on a list of eligibles as inherently improbable and biased.[13] Nelson made the same claim of improbability to the CALJ. The CALJ rejected this claim finding that respondents conceded that the ranking panel relied on Cornett's determination that Brown's experience on detail qualified him for the position.[14] RD at 42. We concur in the CALJ's determination. we also concur in his determination that Cornett is an unbiased witness. *Id.* Cornett's expressed fear that Nelson might have raassigned her had she not agreed to find Brown qualifiied does not, as Nelson argues, show that Cornett was .predisposed against Nelson. Cornett is no longer an employee of INS and there appears no reason for her to give false testimony. In contrast, as the CALJ found, Nelson was found to have given less than credible testimony on the issue of her knowledge of the improper classification. Moreover, Nelson has an interest in the outcome of the action. Accordingly, her denial of any intent to advantage Brown is entitled to little weight.

PENALTY

Both parties have filed exceptiors to the CALJ's recommendation of a 60-day suspension for Brown's sustained offenses and a 90-day suspension for Nelson's sustained offenses The OSC argues that more severe penalties are required consistent with the penalties applied in other disciplinary action casas for similar offenses. OSC requests demotion to the GS-12, step one level for each respondent, with a duration of

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[13] In view of our earlier determination not to consider the addition of law enforcement duties to the resource manager position description, we find it unrecessary to consider Nelson's challenge to the credibility of Cornett and Edward Banzin on this issue. For the same reason we find it unnecessary to consider Exhibits A, B, C, D, and E attached to respondents' exceptions and offered as "new" evidence that law enforcement duties were not included in the position description prior to its announcement.

[14] Nelson's additional argument that Cornett had no influence over the ranking panel's decision to refer Brown's name to Nelson for selection, thereby providing a more ,--certain chance of selection, is irrelevant to the CALJ's finding of improper advantage. Even if Brown had not been selected, a showing, as here, that Nelson acted for the purpose of advantaging Brown is sufficient to establish a violation of section 2302(b)(6). *Special Counsel v. Deford,* 28 M.S.P.R. 98, 103 (1985).

three years for Nelson and two years for Brown. PE at 15-19. Respondents, in contrast, argue that their long and distinguished careers as federal employees, their relative inexperience in their Positions at the time of the charged misconduct, the "technical nature of the Count two violation and the OSC's delay in bringing the charges require a lesser penalty than that recommended by the CALJ.[15] RE at 64-73.

In a special Counsel disciplinary action case, the selection of a penalty is determined in accordance with the criteria set out *in Douglas v. Veterans Administration*, 5 M.S.P.R 280, 305 (1981). *See Special Counsel v. Hoban*, 24 M.S.P.R 154 (1984). Not all factors will be relevant in every case. *Douglas* at 306. Further, the principle of like penalties for like offenses does not require mathematical rigidity; the circumstances of each case must be considered. *Id.* Thus, the penalty imposed in different cases for violations of sections 2302(b)(5) (6) and (11) need not be identical as the Special Counsel suggests.

Here, the CALJ carefully weighed most of the relevant factors.[16] In addition, we find relevant the impact of respondents' actions on the reputation of the agency. Respondents' misconduct was known to several employees and former employees of the agency as well as the OPM officials involved in the efforts to correct the misclassification of Brown's position and to appoint Nielson. This factor, together with the other factors cited by the CALJ, requires a significant penalty.

Respondents' argument that if the Board finds against them on the merits they should receive, at most, very light penalties is unpersuasive. Respondents' inexperience in their positions at the time of the violations does not weigh in favor of mitigation because such high-level employees way be expected to obtain the necessary knowledge to carry out their duties. Respondents' characterization of their actions in Count two as constituting a "technical" violation requiring a light penalty is similarly unpersuasive. The CALJ found that the violation could not be viewed as *de minimis* where the respondents engaged in deliberate act* of noncompliance with OPM instructions. *See* RD at 24-29.. Indeed Felix Garza, chief of the staffing services division for the Dallas region of OPM, testified that he had never encountered such agency reluctance to comply with a finding in an OPM audit. Tr. III: 25-26. As to the OSC's asserted delay in bringing the charges, as the CALJ found, the delay was not unreasonable or so prejudicial to the respondents that they could not adequately defend themselves. AF, Tab 49. Thus, OSC's delay does not support mitigation. *See*

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[15] In the context of challenging the CALJ's finding that the sustained charges were serious, respondents attempt to reargue the merits. RE at 65-69. We will not revisit the merits in the evaluation of the penalty. Additionally, we will not consider OSC's argument that Nelson violated a criminal statute and the employee code of ethical conduct when she certified the legality of the classification of Brown. These violations were not listed in the complaint or amended complaint. *See* PE at 3 and AF, Tabs 1 and 8. Therefore, it is inappropriate to consider them *SeeHernandez v. Department of Education*, 42 M.S.P.R. 61, 71 (1989).

[16] Respondent Nelson's prior suspension was expunged from agency records. AF, Tab 66. Thus, it may not be considered. *See Richard v. Department of the Air Force,* 43 M.S.P.R. 303, 306-07, aff'd, 918 F.2d 185 (Fed. Cir. 1990) (Table) .

Tamburello v. United States Postal Service, 45 M.S.P.R. 455 (1990) (1990) (mitigation of penalty not warranted where the agency could not have taken disciplinary action earlier and appellant failed to show prejudice by the delay).

We -find, however, that respondent Nelson's performance rating of outstanding for the period July 1, 1991 September 11, 1992 must be considered in mitigation.RE, Att. F. Contrary to the OSC's argument of irrelevance, we find it relevant to her potential for rehabilitation and conclude that no more stringent penalty than the 90-day suspension recommended by the CALJ is the appropriate penalty for respondent Nelson for the reasons set forth in the Recommended Decision.

The recommended 60-day suspension for respondent Brown, however, must be modified in light of his retirement effective December 31, 1993. The choice of penalties following retirement is limited to debarment or an assessment of a civil penalty not to exceed $1000. *Special Counsel v. Doyle,* 42 M.S.P.R. 376, 382-83 (1989). In light of all the factors cited by the CALJ as meriting a 60-day suspension for respondent Brown, we find that the maximum fine of $1000 is an appropriate penalty.

ORDER

Accordingly, the Board ORDERS the agency, INS, to suspend respondent Nelson for a period of 90 days without pay. The Board also ORDERS that, respondent Brown pay a fine in the amount of $1000. Payment of this civil penalty shall be made by respondent Brown 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, N.W. Washington, D.C. 20419. A copy of the check should be sent to OSC as evidence of compliance with this Order.

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

NOTICE TO RESPONDENTS

[NON-MIXED]

You may obtain judicial review of this Final Decision and order in the appropriate court of appeals. *See* 5 U.S.C. § 1215(a) (4) (Supp. IV 1992).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.