



U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

OSC Pursues Discipline for Homeland Security Officials Alleged to Have Violated Civil Service Laws

Special Counsel Utilizing 2012 Enhancements to the Whistleblower Protection Act

FOR IMMEDIATE RELEASE **CONTACT: Nick Schwellenbach, (202) 254-3631; nschwellenbach@osc.gov**

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Yesterday, the U.S. Office of Special Counsel (OSC) filed complaints against three Customs and Border Protection (CBP) career officials alleging they unlawfully manipulated the hiring process to select then-CBP Commissioner Alan Bersin's favored candidates for career appointments at the agency. CBP is an agency within the Department of Homeland Security (DHS). The information provided below is based on the facts alleged in OSC's complaints, which must still be proven before the Merit Systems Protection Board.

The complaints charge two of the three CBP officials with discriminating in favor of political appointees and against all other potential candidates. They did so by improperly intervening in the hiring process to convert non-career political appointees into career appointments (known as "political burrowing"). The prohibited discrimination was based on the political appointees' close affiliation with the campaign to elect Barack Obama, the Obama Administration, and CBP's politically appointed Commissioner.

The complaints name CBP's then-Deputy Assistant Commissioner of Human Resources Management (Deputy Assistant Commissioner) and two other senior human resources employees. OSC does not allege that Mr. Bersin engaged in any wrongdoing.

"Human resources officials are on the front lines when it comes to upholding our merit system and preventing improper political burrowing into the career civil service," said Special Counsel Carolyn Lerner. "They should be the last people violating civil service rules."

These disciplinary actions are OSC's first complaints against management officials for political discrimination in over 30 years. The Whistleblower Protection Enhancement Act of 2012 significantly improved OSC's ability to prosecute. As a result, "OSC can be a better defender of the merit system," Lerner said.

According to OSC's complaint against the then-Deputy Assistant Commissioner, "[i]n 2010, Bersin, the new Commissioner, identified three individuals whom he wanted to hire at CBP." The candidates "were members of Bersin's confidential political team when he served as the DHS Secretary's Special Representative for Border Affairs." Those three political appointees "had worked on the 2008 campaign to elect Barack Obama and . . . [a]fter Bersin learned of his selection as CBP Commissioner, he decided to hire them to perform similar roles for him at CBP." The CBP Commissioner's Office considered each of these three favored candidates as the "solution" to fill positions.

The then-Deputy Assistant Commissioner and other CBP human resources employees knew that hiring these three candidates was a priority for Mr. Bersin, and that the then-Assistant Commissioner for Human Resources Management (no longer in federal government service) was actively monitoring these candidates' progress.

However, CBP did not at that time have any political positions into which the favored candidates could be appointed noncompetitively. According to the complaint, the CBP human resources officials "wilfully engaged in

improper tactics to manipulate the competitive examination process to select and appoint Bersin’s three political employees” to competitive career positions.

CBP officials purposefully drafted the job descriptions to closely fit the résumés of Mr. Bersin’s favored candidates. This included adding improper “selective placement factors” that were specifically designed to disqualify otherwise qualified candidates for the positions. These factors also made it less likely that military veterans applying for these positions would block the favored candidates. Despite this advantage, two of the favored candidates approved by the then-Deputy Assistant Commissioner did not even meet “the minimum qualification requirements for their respective career positions”—namely, they lacked at least one year of relevant experience. CBP Human Resources overrode one of these candidate’s answer that they did not have sufficient experience despite the statement in the vacancy announcements that “Human Resources **WILL NOT** modify or change any answers submitted by an applicant” (emphasis in original).

One high-level CBP official told the then-Deputy Assistant Commissioner and others that she was “amazed” two of the candidates were made eligible and that the CBP staff had done “[g]reat work.”

Ultimately, DHS’s Chief Human Capital Officer disapproved the actions to hire these three political employees for career service, deeming them improper. The then-Deputy Assistant Commissioner admitted they should not have tried to approve these candidates’ appointments.

Despite this rebuke from the DHS Chief Human Capital Officer, the then-Deputy Assistant Commissioner still sought a way to hire one favored candidate using “a special noncompetitive appointment authority” to convert a political appointee to a career position. A different CBP official had earlier warned the Deputy Assistant Commissioner against doing so because, as OSC described that official as saying, it “would be looked upon unfavorably by [the Office of Personnel Management] when it was reviewed” and would “be hard to defend in an Inspector General or OSC investigation.” That CBP official refused to process the appointment. Subsequently, the then-Deputy Assistant Commissioner took away the responsibility of processing the favored candidates’ appointments from that CBP official.

The then-Deputy Assistant Commissioner helped to prepare and approve this special noncompetitive appointment conversion. This conversion violated CBP’s own policy by failing to notify other potential applicants of this noncompetitive opportunity for appointment in the civil service. Under questioning from OSC, the then-Deputy Assistant Commissioner asserted CBP did not need to follow its own policy. OPM ultimately denied the conversion.

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC’s primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at www.osc.gov.