

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
ADMINISTRATIVE LAW JUDGE**

SPECIAL COUNSEL,  
Petitioner,

DOCKET NUMBER  
CB-1215-14-0012-T-1

v.

KATHERINE COFFMAN,  
Respondent.

October 6, 2015

**INITIAL DECISION**

**Hon. Bruce Tucker Smith  
United States Administrative Law Judge**

**Appearances:**

**On Behalf of the Office of Special Counsel**

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Clarissa Pinheiro, Esq.  
Rachel Venier, Esq.  
Mariama Liverpool, Esq.

**On Behalf of Respondent**

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## **I. STATEMENT OF THE CASE**

Katherine Coffman (Respondent) serves as the Assistant Commissioner for Human Resources Management (HRM) with the U.S. Customs and Border Protection (CBP). (Tr. Vol. IV at 35).<sup>1</sup> In that capacity, she exercises personnel action authority over applicants for jobs with CBP in the federal competitive and excepted services. (*Id.* at 35 – 44). On April 8, 2014, the Office of Special Counsel (OSC) filed a Complaint<sup>2</sup> with the Merit Systems Protection Board (Board) against Respondent. OSC's Complaint alleges Respondent discriminated in favor of, or granted unauthorized preferences for, three political appointees (Bruggeman, Rohrbaugh and Albert) who worked on the 2008 presidential election campaign of Barack Obama.

The Complaint alleges Respondent approved and certified the results of three competitive civil service "examinations"<sup>3</sup> with knowledge that these actions were intended to improperly convert non-career political appointees to career appointments. The Complaint specifies eight counts of prohibited personnel practices, in violation of federal statutory and regulatory law. Counts 1, 3, 5 and 7 allege Respondent committed impermissible political discrimination in violation of 5 U.S.C. §2302(b)(1). Counts 2, 4, 6 and 8 allege Respondent otherwise granted illegal preferences and advantages to the individuals that were not authorized by law, rule or regulation, in violation of 5 U.S.C.

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<sup>1</sup>To ensure clarity and consistency, citations to the transcribed testimony are referenced as, "Tr. Vol. I, II, III", etc. OSC exhibits are referenced as, "OSC Ex. 1, 2, 3", etc. Respondent's exhibits are referenced as "Resp. Ex. A, B, C," etc. Evidence separately admitted by the undersigned Administrative Law Judge is referenced as "ALJ Ex. I, II, and III," etc.

<sup>2</sup>5 U.S.C. §1214(a)(1)(A).

<sup>3</sup>"Examination" is a term that appears frequently in the Complaint and in the various witnesses' testimonies. The term is an antiquated one, which originally described an actual written test administered to applicants for federal employment. Apparently, the phrase is currently used in federal human resources parlance to describe the general evaluation of an applicant's qualifications. In this case, there is no evidence that an actual test, or examination, was ever administered to the three applicants.

§2302(b)(6).

OSC bears the burden of proving its case by a preponderance of the evidence, which is defined as “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. §1201.56(c)(2). If any or all of the allegations in the Complaint are found proved, the Board is empowered to impose an appropriate sanction, including: removal, reduction in grade, debarment from federal employment for a period not to exceed five years, suspension, reprimand, or the assessment of a civil penalty not to exceed \$1,000.00, or any combination thereof. 5 U.S.C. §1215(a)(3)(A)(i – iii). Interestingly, OSC’s Complaint does not include a proposed sanction.

A six-day hearing commenced on March 31, 2015, in Washington, DC. Both parties presented their respective cases via testimony and documentary evidence. Again, interestingly, at the conclusion of the hearing, OSC did not articulate a proposed sanction. (Tr. Vol. VI at 152). On May 7, 2015, OSC finally proposed a sanction and requested Respondent’s removal from federal employment.

After receiving the parties’ respective post-hearing briefs, the undersigned Administrative Law Judge closed the administrative record on August 28, 2015, to deliberate whether the allegations in the Complaint were proved and, if so, what appropriate sanction ought to be imposed upon Respondent. Having considered the entire record,<sup>4</sup> including the documentary evidence, witness testimony and arguments of

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<sup>4</sup> Although not all items of documentary evidence are cited in this Initial Decision, each and every such item was reviewed by the undersigned Administrative Law Judge.

counsel, the undersigned Administrative Law Judge finds the Complaint **NOT PROVED**. Hence, no sanction ought to be imposed upon Respondent.

## **II. FINDINGS OF FACT**

Pursuant to the obligations set forth in 5 C.F.R. §1201.111, the undersigned Administrative Law Judge has undertaken a thorough and careful analysis of the documentary evidence, the testimony and credibility of witnesses, and the entire administrative record as a whole, and makes the following Findings of Fact:

### **The Principal Actors**

1. **Alan Bersin:** From April 2009 until March 2010, Bersin served as the Presidentially-appointed Assistant Secretary for International Affairs and Special Representative for Border Affairs (informally known as the “Border Czar”) with the Department of Homeland Security (DHS). (Tr. Vol. II at 83 – 84; OSC Ex. 1). In that position, Bersin worked with three politically-appointed members of his DHS staff: Nate Bruggeman, Ben Rohrbaugh and Brian Albert. (Tr. Vol. II at 86). On March 30, 2010, President Obama made a “recess appointment”<sup>5</sup> of Bersin to serve as the Acting Commissioner of U.S. Customs and Border Protection (CBP). (Tr. Vol. II at 96 – 97; OSC Ex. 154).
2. **Nate Bruggeman, Ben Rohrbaugh and Brian Albert:** Political appointees on Bersin’s Border Coordination Team (BCT) at DHS. (Tr. Vol. II at 82, 85, 87, 97). All three had previously worked on the 2008 Obama presidential campaign. (Tr. Vol. II at 83 – 86, 96 – 97).
3. **Michele Burton:** Director of Executive Services in CBP’s Office of Human Resource Management (HRM). (Tr. Vol. I at 212 - 213). She reported to Assistant Commissioner Christine Gaugler. (Tr. Vol. I at 214; OSC Ex. 2).
4. **Christine Gaugler:** Assistant Commissioner (AC) for HRM at CBP at the time Bersin assumed his duties in March 2010. (Tr. Vol. V at 174). In that capacity, Gaugler reported directly to Bersin. (OSC Ex. 2). She served as AC, HRM from 2008 until her retirement on September 3, 2011. (Tr. Vol. IV at 37; Vol. V at 175).

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<sup>5</sup> The President of the United States is empowered to “fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session,” (sic) without the traditional “advice and consent” of the Senate. U.S. Const. Art. II, § 2.

5. **Jeff Neal:** At all times relevant to this litigation, served as Chief Human Capital Officer, DHS. (Tr. Vol. IV at 156).

#### **Respondent's Position and Duties at CBP**

6. CBP is a component of DHS, an Executive Branch agency. (Tr. Vol. II at 84 – 85; Tr. Vol. V at 174).
7. Respondent served as Deputy Assistant Commissioner (DAC) for HRM at CBP between August 2009 and September 10, 2011. (Tr. Vol. IV at 35 – 37).
8. The DAC is a Senior Executive Service (SES) position. (Tr. Vol. V at 176).
9. On September 11, 2011, Respondent was appointed Assistant Commissioner, HRM, CBP; the position she currently holds. (Tr. Vol. IV at 35 – 37).
10. Respondent was responsible for the day to day management of a variety of functions within HRM, including safety, assessment and organizational design and development. (Tr. Vol. IV at 35 – 37; Vol. V at 187 – 188).
11. Before her appointment to the DAC position, Respondent worked over 23 years in various human resources positions in the federal government. (Tr. Vol. IV at 42 – 44; Vol. V at 177 – 179; OSC Ex. 120, 133).

#### **Commissioner Bersin Wanted Bruggeman, Albert and Rohrbaugh**

12. Prior to becoming CBP Commissioner, Bersin worked at DHS where he served as the Special Representative for Border Affairs, i.e., the “Border Czar,” and as the Assistant Secretary for International Affairs. (Tr. Vol. II at 84).
13. Bruggeman, Rohrbaugh and Albert worked for Bersin at DHS after serving on the 2008 “Obama for President” campaign, wherein Bruggeman served as a Deputy Voter Protection Coordinator for the campaign, Rohrbaugh served as the campaign’s “Get Out the Vote” Director for Colorado, and Albert served as a field organizer for the campaign. (Tr. Vol. I at 153, 157, 187–88, 191; Tr. Vol. III at 11 – 13, 15; OSC Ex. 26, 56, 71).
14. In late March 2010, Bersin arrived as the Acting Commissioner of CBP. (Tr. Vol. II at 96 – 98). At that time he instructed CBP Deputy Commissioner David Aguilar to arrange transfers of Bruggeman, Rohrbaugh and Albert (the DHS Border Coordination Team or “BCT”) to CBP. (Tr. Vol. II at 96 – 98).
15. At or near the time Bersin told Aguilar he wanted to bring Bruggeman, Albert and Rohrbaugh to CBP, Bersin also met with Gaugler to discuss hiring the trio because Bersin had identified them as having skills needed to strengthen CBP’s border security policy. (Tr. Vol. V at 191 – 193).

16. Bersin told Gaugler he wanted to bring these three individuals to CBP as long as it was “legal and ethical, I would like to have them over here.” (Tr. Vol. II at 106).
17. Respondent was not present at the meeting when Bersin told Gaugler he wanted to hire Bruggeman, Rohrbaugh and Albert. (Tr. Vol. V at 192 – 193).
18. Gaugler then shared Bersin’s request with Lorraine Phillips and Michele Burton. (Tr. Vol. V at 193 – 194, 196 – 197; OSC Ex. 4).
19. When Gaugler met with Phillips to discuss hiring Bersin’s requested trio, Phillips was already aware of the trio from her interactions with Chappell Lawson in the Commissioner’s Office of Policy and Planning (OPP).<sup>6</sup> (Tr. Vol. V at 198).
20. Bersin had no involvement in the creation of the vacancy announcements and no involvement in the conduct of the competitive process for these three jobs. (Tr. Vol. II at 111 – 112).
21. All of Bersin’s direct interactions with HRM officials regarding his hiring requests were with Gaugler or Burton. (Tr. Vol. II at 100 – 120).
22. Chappell Lawson was the Executive Director of Office of Policy and Planning and was also interested in hiring Bruggeman, Rohrbaugh and Albert because of the skills they possessed and the staffing needs in his office. (Tr. Vol. I at 100 – 102).

#### **Processing the Three Competitive Vacancy Announcements**

23. Lorraine Phillips was the Executive Director of Human Resources Office of Policy and Planning (HROPP), which had a number of component offices, including the Indianapolis Hiring Center (IHC) and the Office of Staffing Policy. (Tr. Vol. V at 181 – 182, 201; ALJ Ex. 2, 3).
24. Phillips reported directly to Gaugler, who was her rating official and assigned supervisor. (Tr. Vol. V at 182 – 83).
25. IHC was responsible for processing hiring actions for CBP Headquarters, including positions in the Office of the Commissioner. (Tr. Vol. V at 201).
26. Annie Herbert, a GS–15 employee, was a Supervisory HR Specialist and Director of the IHC. (Tr. Vol. III at 30, 118).

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<sup>6</sup> The CBP Office of the Commissioner, Office of Policy and Planning (OPP) is a distinct office from Human Resources, Office of Policy and Planning (HROPP).



27. Herbert's immediate supervisor was Phillips, Executive Director of HROPP. (Tr. Vol. III at 88, 118).
28. Tamika Milburn was an HR Specialist working in IHC. (Tr. Vol. II at 194; Tr. Vol. III at 31, 63 – 66, 89 - 90).
29. Milburn was responsible for drafting and publishing the vacancy announcements for the three positions in question, for determining whether candidates were qualified after the announcements closed, for creating the certificate of eligible list and for processing the selections once made. (Tr. Vol. II at 194; Tr. Vol. III at 31, 63 – 66, 89 - 90).
30. Herbert was Milburn's supervisor. (Tr. Vol. III at 31).
31. Sandy Manuel worked as a management and program analyst in the Office of the Commissioner, OPP. (Tr. Vol. III at 122 – 125, 126).
32. Manuel created position descriptions for vacancies in OPP; and she also obtained resumes and worked with HRM to get applications completed. (Tr. Vol. III at 123 – 124, 158 – 161).
33. In March and April 2010, Lawson directed Manuel to obtain Bruggeman's, Albert's and Rohrbaugh's resumes in order to create applications tailored to each of these individuals for the purpose of appointing them to vacant positions in OPP. (Tr. Vol. III at 127 – 128, 159 – 161).
34. On March 31, 2010, per Lawson's direction, Manuel sent an email to Bruggeman, Albert and Rohrbaugh requesting their resumes and current grade levels so that Lawson could tailor vacancy announcements to their resumes. (Tr. Vol. I at 207 – 208; Tr. Vol. III at 18 – 19, 127 – 128; Resp. Ex. B).
35. Albert and Rohrbaugh forwarded their respective resumes. (Tr. Vol. I at 207 – 208; Tr. Vol. III at 18 – 19, 127 – 128; Resp. Ex. B).
36. On or about April 1, 2010, Lawson developed a staffing plan outlining the anticipated positions for Bruggeman, Rohrbaugh and Albert in OPP. (Resp. Ex. D).
37. Manuel provided Albert's and Rohrbaugh's resumes to Lawson, who, in turn, produced the selective placement factors for the two vacancy announcements which were tailored for a particular person rather than for a particular skill set. (Tr. Vol. III at 128 – 131).
38. Burton obtained Bruggeman's resume from Marco Lopez on April 1, 2010. (OSC Ex. 3).

39. The Albert and Rohrbaugh packages were processed in early April, separate from the Bruggeman package, because the Bruggeman vacancy announcement was not finalized until the end of April. (Resp. Ex. K.)
40. Manuel worked with Herbert at IHC to finalize the vacancy announcements for each of these three positions, and forwarded the assessment templates used in developing the vacancy announcement from IHC to Lawson. (Tr. Vol. III at 89, 134 – 136; Resp. Ex. D at Bates No. 004127 – 4160; Resp. Ex. K).
41. Chappell Lawson provided the selective placement factors and addendums to the position descriptions utilized in the vacancy announcements for each of the three competitive examinations to Herbert. (Tr. Vol. III at 51 – 59, 128 – 132).
42. Selective placement factors are criteria included in a vacancy announcement and are used to screen out unqualified candidates. (Tr. Vol. II at 200).
43. Selective placement factors require the candidate to possess the specific skills or qualifications set forth in the selection factors. (Tr. Vol. II at 200).
44. The use of selective placement factors to tailor vacancy announcements for specific skills and experience was undertaken regularly at CBP during the time the three vacancy announcements were being developed, and were used to tailor the generic position descriptions CBP was using at the time to meet the particular needs of CBP. (Tr. Vol. II at 267, 271 – 272; Vol. III at 90).
45. In each instance, the draft vacancy announcement in question was identified by the intended candidate when each was forwarded to Lawson by Manuel.<sup>7</sup> (Resp. Ex. D, K).
46. The three vacancy announcements were tailored to Bruggeman's, Rohrbaugh's and Albert's resumes by Lawson's staff. (Tr. Vol. III at 131).
47. Manuel believed the process of developing vacancy announcements that resulted in Lawson's selections of Bruggeman, Albert and Rohrbaugh was illegal. (Tr. Vol. III at 136, 150).
48. Despite Manuel's belief that the process of creating the three vacancy announcements was illegal, she did not report her concerns to anyone within CBP or to OSC. (Tr. Vol. III at 150 – 151).
49. Manuel did not communicate with Respondent regarding these three competitive vacancy announcements; Manuel did not inform Respondent she believed the process was illegal. (Tr. Vol. III at 149, 164).

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<sup>7</sup> Vacancy Announcement No. IHC-335517-TM-DE was the announcement to which Rohrbaugh applied. Vacancy Announcement No. IHC-335548-TM-DE was the announcement to which Albert applied, and Vacancy Announcement No. IHC-44300-TM-DE was the announcement to which Bruggeman applied.

50. Manuel forwarded the posted vacancy announcement links to Bruggeman, Albert and Rohrbaugh and followed up with a reminder to each to make sure their applications were submitted and complete. (Tr. Vol. I at 206; Vol. III at 146 – 147; Resp. Ex. J).
51. Albert and Rohrbaugh both submitted applications in response to the vacancy announcements forwarded by Manuel in April. (Tr. Vol. I at 197 – 198; Vol. III at 25).
52. Neither Albert nor Rohrbaugh had any contact or communication with Respondent regarding the competitive process and neither had ever met her. (Tr. Vol. I at 211; Vol. III at 26).
53. At the time Manuel was assisting with the preparation of the vacancy announcements for these three appointments, she did not know Respondent, and had no interactions with her, either directly or indirectly. (Tr. Vol. III at 148 – 149).
54. Manuel did not provide Respondent updates and had no communications with her regarding the three competitive hiring actions. (Vol. III at 148 – 149).
55. At IHC, Herbert assigned Milburn to draft and post the vacancy announcements, process the applications and the selection information and issue the certificate lists. (Tr. Vol. II at 194, 266).
56. Herbert provided Milburn with the draft vacancy announcements, which had been written in conjunction with Manuel in OPP. (Tr. Vol. II at 266 – 269; Resp. Ex. I).
57. Milburn was also given selective placement factors drafted by Lawson that she used when creating the vacancy announcements. (Tr. Vol. II at 274).
58. Milburn did not have any contact with Respondent regarding the selective placement factors utilized in each of the three vacancy announcements at issue, and had no reason to believe Respondent was involved in any way in the drafting, editing or approving of the selective placement factors. (Tr. Vol. II at 280).
59. Milburn did not have any contact with Respondent regarding the decisions made on Rohrbaugh's qualifications, and had no reason to believe Respondent was involved in the decision to place Rohrbaugh's name on the certificate of eligible applicants. (Tr. Vol. II at 289 – 290).

60. Throughout her entire involvement with the three vacancy announcements in question, Herbert never had any communication, directly or indirectly, with Respondent. (Tr. Vol. III at 118).
61. All of the guidance Herbert received while processing the three competitive vacancy announcements came from Phillips, her supervisor. (Tr. Vol. III at 118).

#### **The Albert and Rohrbaugh Competitive Packages**

62. Milburn determined Rohrbaugh was not qualified for the position and transmitted an email to Herbert explaining same. (Tr. Vol. III at 31, 97 – 98; Resp. Ex. L).
63. Because Rohrbaugh was a by-name request, Herbert reported to her supervisor, Phillips, that Milburn determined Rohrbaugh was not qualified for Vacancy Announcement No. IHC-335517-TM-DE. (Tr. Vol. III at 97).
64. Herbert also reported to Ann Williams in the Office of Staffing Policy, HROPP, regarding Rohrbaugh's lack of qualifications. (Tr. Vol. III at 99; Resp. Ex. L).
65. Williams and Herbert agreed with Milburn that Rohrbaugh was not qualified for Vacancy Announcement No. IHC-335517-TM-DE. (Tr. Vol. II at 284; Vol. III at 69 – 70, 100 – 101, 173).
66. Phillips overruled her subordinates (Williams, Herbert and Milburn) and directed that Rohrbaugh be determined "qualified" for the position and placed on a certificate list of eligible applicants. (Tr. Vol. III at 69 – 70, 101).
67. Williams indicated that although she disagreed with Phillips' assessment, she did not tell Respondent that Rohrbaugh was not qualified. (Tr. Vol. III at 173 – 174).
68. Milburn documented the decision in the case file, and placed Rohrbaugh's name on the certificate list as directed by Phillips. (Tr. Vol. II at 281 – 282; Resp. Ex. N).
69. Milburn then deemed Albert qualified for the job for which he had applied; placed his name on the certificate list and, thereafter, Lawson selected Albert for the position. (Tr. Vol. II at 291; OSC Ex. 58).
70. Lawson then selected Rohrbaugh for the position. (Tr. Vol. II at 286; OSC Ex. 28).

71. On the morning of April 23, 2010, Respondent received, for the first time, the proposed selection packages for Rohrbaugh and Albert for signature. (Tr. Vol. IV at 58).
72. Prior to receiving the Rohrbaugh and Albert packages on April 23, 2010, Respondent was unfamiliar with the contents and requirements of a package involving a political appointee being proposed for conversion to a career position which required approval by OPM. (Tr. Vol. IV at 98).
73. On April 23, 2010, Gaugler was on vacation in Colorado. (Tr. Vol. VII at 22).
74. At about 8:30 a.m. on April 23, 2010, Respondent was handed the Rohrbaugh and Albert competitive application packages, with the two cover letters on top; both application packages were in complete disarray. (Tr. Vol. VII at 25).
75. The Rohrbaugh and Albert competitive application packages contained routing sheet indicating who in HR had processed/reviewed the applications. (Tr. Vol. IV at 64 – 65; Vol. VII at 25).
76. The routing sheet indicated Williams, Smith and Phillips had reviewed the staff work. (Tr. Vol. IV at 64 – 65; Vol. VII at 25).
77. Respondent immediately returned the disorganized Rohrbaugh and Albert packages to HROPP, the internal agency from whence the packages had come. (Tr. Vol. VII at 25).
78. Respondent received the reorganized versions of the two application packages at around 2:00 p.m. on the same day from Williams and another subordinate staff member, Denise Adams. (Tr. Vol. VII at 26).
79. Respondent told Williams and Adams that she was surprised to receive such large packages without having any advance knowledge that the packages were destined for the DHS Director of HR, without prior indication that they were going to be coming. (Tr. Vol. VII at 26).
80. Prior to April 23, 2010, Respondent had never seen a draft of the Rohrbaugh or Albert competitive application packages. (Tr. Vol. IV at 61 – 62).
81. After Respondent received the newly and correctly compiled Rohrbaugh and Albert application packages, she reviewed them with Williams against an OPM checklist to ensure the documents met the OPM requirements. (Tr. Vol. IV at 65 – 66).
82. In reviewing the Rohrbaugh and Albert packages, Respondent relied on the HRM staff's expertise and years of experience. (Tr. Vol. IV at 68).

83. Williams did not disclose her reservations to Respondent about Rohrbaugh's qualifications on April 23, 2010, because Williams had raised her concerns with her chain of command and had been overruled. (Tr. Vol. III at 233 – 234).
84. Respondent had full faith and confidence in HRM staff, as the subject matter experts, that the application packages complied with the certification she signed. (Tr. Vol. IV at 95, 118 – 119, 152 – 153).
85. The first time Respondent learned of Williams' reservations regarding Albert's and Rohrbaugh's qualifications was after Respondent's June 3, 2010, meeting with Jeff Neal, Director of HR for DHS. (Tr. Vol. IV at 81 – 82).

#### **The Bruggeman Competitive Package**

86. When Bruggeman applied for a competitive position with CBP, he believed that Lawson and Bersin wanted him to continue working on the border security issues he had been working on while at DHS. (Tr. Vol. I at 175 – 178).
87. No one within CBP ever discussed Bruggeman's political affiliation with him in connection with a job application or position with CBP. (Tr. Vol. I at 178 – 179).
88. Bruggeman did not have any interactions with Respondent regarding his application for employment with CBP. (Tr. Vol. I at 178 – 179).
89. Milburn was the staffing specialist who worked on the vacancy announcement to which Bruggeman applied. (Tr. Vol. II at 291 – 292).
90. After processing the application, Milburn determined that Bruggeman had rated himself ineligible for the position. (Tr. Vol. II at 291 – 292).
91. Because Bruggeman was a by-name request from the Commissioner's Office, Milburn told her supervisor, Herbert, that Bruggeman had rated himself ineligible. (Tr. Vol. II at 293 – 294; Resp. Ex. U, V).
92. Herbert directed Milburn to again review Bruggeman's application. (Tr. Vol. II at 295).
93. After Milburn's review, Milburn told Herbert that Bruggeman was now eligible. (Tr. Vol. II at 295).
94. Herbert directed Milburn to change Bruggeman's initial self-responses and, thereafter, placed his name on the certificate list of eligibles. (Tr. Vol. II at 295).

95. Lawson, the selecting official for the Bruggeman vacancy announcement, then selected Bruggeman for the position. (Tr. Vol. II at 296; OSC Ex. 74).
96. Milburn did not have any communications with Respondent about processing Bruggeman's application or his placement on the certificate list, nor did she have any reason to believe Respondent was involved in the decision-making process to place Bruggeman's name on the certificate list. (Tr. Vol. II at 298 – 300).
97. Milburn did not raise her concerns regarding the process by which Bruggeman's name was placed on the certificate list with Respondent; she only raised her concerns with her supervisors within IHC. (Tr. Vol. II at 298 – 300).
98. Milburn had no reason to believe that Respondent was involved in the creation, editing, approval, posting or processing to any of the three competitive announcements at issue. (Tr. Vol. II at 300 – 301).
99. On May 19, 2010, Gaugler was out of the office on sick leave. (Tr. Vol. V at 83).
100. Before signing the Bruggeman cover letter on Gaugler's behalf on May 19, 2010, Respondent requested a table of contents be prepared for the application package, thus reflecting the documents required by the OPM checklist. (Tr. Vol. V at 80 – 81).
101. After performing a review of Bruggeman's competitive application package on May 19, 2010, Respondent signed the cover letter for that package, transmitting it to DHS for further review. (Resp. Ex. LL).
102. At the times Respondent signed the cover letters for each of the three competitive application packages, she believed that the process for each competitive vacancy announcement, and subsequent proposed selection, was in fact in compliance with the governing laws and regulations. (Tr. Vol. IV at 95, 99).
103. OPM retained the ultimate authority to approve the competitive selections of Bruggeman, Albert and Rohrbaugh. (Tr. Vol. IV at 132 – 133).

#### **The DHS HR Response**

104. At all relevant times, Jeff Neal was the Chief Human Capital Officer for the DHS. (Tr. Vol. IV at 155 – 157).
105. Neal was a thirty-three year veteran of federal service; virtually all of that time spent in human resources. (Tr. Vol. IV at 155 – 157).

106. Neal served as the senior advisor to the Secretary of DHS on all human resources matters and was responsible for oversight of all human resources departments at all DHS-component's. (Tr. Vol. IV at 156).
107. Neal had direct personal and professional experience working with Respondent's supervisor, Assistant Commissioner Gaugler. (Tr. Vol. IV at 278; OSC Ex. 12).
108. Gaugler was a member of the DHS Human Capital Council, a group comprised of all of the HR directors from the constituent components within DHS. (Tr. Vol. IV at 278).
109. Neal required that the Bruggeman, Rohrbaugh and Albert competitive application packages had to come through Neal's office at DHS first, before going forward to OPM for a final decision. (Tr. Vol. IV at 164 – 165).
110. When Neal received the three application packages for review, his reaction was one of anger. (Tr. Vol. IV at 165 – 166).
111. Neal believed that the job descriptions in the application packages had all been modified on the same day and the selective placement factors were added to the job descriptions on the same day. (Tr. Vol. IV at 166 – 167).
112. Neal regarded this as clear evidence someone had manipulated the paperwork in order to ensure the trio were placed into the career track of the competitive service. (Tr. Vol. IV at 166 – 167).
113. Neal believed that two candidates, Albert and Rohrbaugh, were not qualified for the positions. (Tr. Vol. IV at 166).
114. On May 27, 2010, Neal returned the Rohrbaugh and Albert application packages to Gaugler, not Respondent, because Gaugler was the head of HRM for CBP. (Tr. Vol. IV at 169 – 170; Resp. Ex. HH).
115. On June 3, 2010, Neal convened a meeting in his office with Gaugler and Respondent to discuss his displeasure at the attempts to hire Albert, Rohrbaugh and Bruggeman into career, competitive positions. (Tr. Vol. IV at 172).
116. At that meeting, Neal specifically expressed his displeasure with the way the three competitive packages had been created and forwarded and admonished Gaugler and Respondent that he did not want to see something like that again. (Tr. Vol. IV at 172 – 174).
117. Respondent's reaction to Neal's criticism was one of severe embarrassment. (Tr. Vol. IV at 174 – 175).



118. Neal believes Gaugler intentionally and conveniently absented herself on April 23 and May 19, 2010, to ensure Respondent – and not Gaugler – signed the application packages letters. (Tr. Vol. IV at 176 – 177).
119. Neal believes Gaugler is untrustworthy. (Tr. Vol. IV at 280).
120. Neal does not believe Respondent had anything material to do with the creation or processing of the three competitive application packages at issue. (Tr. Vol. IV at 270 – 273).

#### **The Bruggeman Schedule A Package**

121. CBP has a unique, limited Schedule A Law Enforcement Policy Oversight Authority that allows CBP to fill “ten positions for oversight, policy and direction for sensitive law enforcement activities” without using competitive procedures. (Tr. Vol. I at 217, 222; OSC Ex. 14).
122. On approximately April 1, 2010, Gaugler asked Michele Burton, the Director of Executive Services, whether CBP could appoint Bruggeman to a permanent position using Schedule A hiring authority. (Tr. Vol. I at 212 – 213, 223 – 225; OSC Ex. 5, 6, 7, 8, 9).
123. Burton, who had been responsible for processing appointments under the Schedule A authority since 1998, opposed pursuing the Schedule A appointment for Bruggeman, but she sought a second opinion from DHS and OPM. (Tr. Vol. I at 216, 226, 231).
124. Throughout April and May 2010, Burton conveyed, principally, frequently and primarily to Gaugler, her concerns about using a Schedule A appointment for Bruggeman, to include concerns that Bruggeman had previously worked at DHS and had reported to Bersin; that using the Schedule A authority under these circumstances could constitute political burrowing; that such an appointment would not be viewed favorably by OPM; would likely trigger OSC, OPM and OIG investigations; and generate negative press. (Tr. Vol. I at 224, 226; Tr. Vol. II at 25 – 26).
125. Burton’s concern about political burrowing stemmed from the fact that Bruggeman was a political appointee at DHS who had worked for Bersin and therefore had a direct political connection to him; that Bersin now wanted to appoint Bruggeman to a position on his staff at CBP; and that CBP wanted to appoint Bruggeman using the Schedule A authority, an avenue that “virtually had no hurdles . . . .” (Tr. Vol. II at 73–74).
126. Burton principally, frequently and primarily warned Gaugler that the Government Accounting Office, along with OPM, had issued stern warnings against using the Schedule A hiring authority to hire political appointees

because it could constitute improper political burrowing. (Tr. Vol. I at 242 – 243; Tr. Vol. II at 18 – 20, 25).

127. Around May 7, 2010, Burton learned that CBP management was also trying to hire Bruggeman through the competitive process using a public vacancy announcement and she principally, frequently and primarily warned Gaugler against using different recruitment vehicles to target their desired candidate and told them that if they tried the competitive process first and failed, the Schedule A appointment would not be an option. (Tr. Vol. I at 239 – 40; OSC Ex. 9, pp. 1, 2–5).
128. After CBP was unable to hire Bruggeman under competitive authority, Burton told Respondent that appointing Bruggeman using Schedule A authority could constitute political burrowing; that such an appointment could lead to an investigation or a news article; that she “respectfully decline[d] to handle Mr. Bruggeman’s action;” and that she was “not touching Mr. Bruggeman’s case.” (Tr. Vol. II at 28, 70).
129. Burton believed Respondent would repeat those concerns to Gaugler. (Tr. Vol. II at 28, 70).
130. On June 21, 2010, after Burton told Respondent she would not process Bruggeman’s appointment, Respondent issued a memorandum transferring the Schedule A authority from Burton to HROPP. (Tr. Vol. I at 216; Tr. Vol. II at 32 – 34; Tr. Vol. III at 203; OSC Ex. 92).
131. After OSC began its investigation into the attempted appointments of Bruggeman, Rohrbaugh, and Albert, Respondent told Burton she wished she had listened to her advice. (Tr. Vol. II at 34 – 35).
132. Immediately after the Schedule A Authority was transferred to HROPP, that department began working on a request to convert Bruggeman to a Border Security Specialist position under Schedule A. (Tr. Vol. III at 202 – 212; OSC Ex. 92, 93, 94, 97).
133. Respondent provided a cursory review of various drafts of a memorandum CBP HRM addressed to Neal requesting approval for Bruggeman’s appointment to a Schedule A position, as well as a memorandum that CBP HRM prepared for Neal to forward Bruggeman’s appointment to OPM. (Tr. Vol. V at 87 – 98, 102 – 04; OSC Ex. 94, pp. 14 – 32, 34 – 35; OSC Ex. 96).
134. The Bruggeman Schedule A appointment memorandum, which CBP HRM prepared for Neal, was principally edited by Gaugler. (OSC Ex. 94 at 30 – 32).
135. The Bruggeman appointment memorandum stated the incumbent “must possess an in-depth working knowledge of policy issues” and “senior-level knowledge and experience . . . related to border security,” “extensive

knowledge” of law enforcement organizations, and that Bruggeman possessed “a unique set of skills and experiences.” (OSC Ex. 94 at 30 – 32).

136. During the June 3, 2010, meeting with Neal, Gaugler suggested hiring Bruggeman under a Schedule A appointment rather than a competitive service appointment; Neal indicated that CBP HRM should follow the appropriate procedures for such appointments. (Tr. Vol. IV at 172 – 173, 250 – 251).
137. Gaugler did not tell Neal that Burton had previously explored the use of the Schedule A Authority and determined that it was not an appropriate hiring authority for hiring Bruggeman. (Tr. Vol. IV at 171 – 80, 248 – 49).
138. On June 28, 2010, eight days after the Schedule A Authority was transferred away from Burton to HROPP, CBP submitted Bruggeman’s Schedule A selection documents to Neal at DHS for approval. (Tr. Vol. IV at 184; Resp. Ex. CCC).
139. Gaugler signed the Bruggeman Schedule A forwarding letter/memorandum and transmitted it to Neal. (Tr. Vol. IV at 184; Resp. Ex. CCC).
140. Neal believed Bruggeman met the qualification requirements for the position and, thereafter, approved the Schedule A appointment and forwarded the selection documents to OPM for final approval. (Tr. Vol. IV at 182; OSC Ex. 110).

### **III. PRINCIPLES OF LAW**

#### **A. Merit Systems Principles and Practice**

It is a general principle of the United States government that the majority of its employees will be hired on the basis of open, fair and competitive criteria.<sup>8</sup> (Tr. Vol. I at 47 – 49). Hence the phrase: the “competitive service.” However, special circumstances create exceptions to that general principle. Those special exceptions are contained in 5 C.F.R. §213 Schedules A, B and C. Hirings made in accord with those Schedules are referred to as the “excepted service.” (*Id.* at 39). Nevertheless, people hired into the excepted service must still possess the appropriate qualifications necessary for the

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<sup>8</sup> 5 U.S.C. §2102; 5 C.F.R. §212.

position and “merit principles” typically apply to the selection of those candidates. (Tr. Vol. I at 38).

The excepted service regulations grant Schedule A, B or C hiring authority to agencies to fill special jobs or to fill any job in unusual or special circumstances. 5 C.F.R. Part 213. The excepted service regulations allow agencies to hire when it is not feasible or practical to use traditional competitive hiring procedures. Schedules A, B and C describe different kinds of positions that may be filled in the excepted service.

Agencies may use excepted service authority under Schedule A to fill positions that are not of a confidential or policy-determining character. *See* 5 C.F.R. §213.3101. By contrast, Schedule C appointments are primarily political appointments. (Tr. Vol. I at 38 – 39). The number of political appointments allotted to each government agency across the federal sector is restricted. (*Id.* at 35 – 39). Political appointments are not career positions and not governed by the same appointment rules as those that govern career or other excepted service appointments under Schedules A and B. (*Id.*) A political appointee is permitted to apply competitively for career positions within the federal sector. (*Id.* at 47). However, career positions must be filled through a competitive or excepted service selection process. (*Id.* at 35 – 36). To obtain a career position, the candidate must be qualified for the position. (Tr. Vol. IV at 210 – 211).

**B. The “Berry Memo” and OPM Policy**

In November 2009, the Office of Personnel Management (OPM) issued a written mandate, known as the “Berry Memo,” requiring federal agencies to obtain OPM approval before appointing a current political appointee to a competitive or excepted service position at any level under the provisions of Title 5 of United States Code. (OSC

Ex. 12, 13). This action was to ensure, at least in part, that hirings made under the excepted service authority must still abide by the merit system requirements of open, fair and competitive procedure. (Tr. Vol. I at 39 – 40).

Jeffrey Sumberg, former Assistant Director for Merit Systems Accountability and Compliance at OPM, had, at all times relevant to the case at bar, oversight responsibility for human resource issues within OPM's jurisdiction. (Tr. Vol. I at 32). Sumberg testified that the importance of the "Berry Memo" requirement "was to safeguard against partisan politics playing a role in hiring." (*Id.* at 47). Sumberg further explained that attempted transfers of political appointees to career positions were so scrutinized that all agency HR directors were required to have direct, personal involvement and responsibility for the requested transfer, before sending that request forward to OPM for approval. (*Id.* at 52 – 53) (emphasis added). At all times relevant to the instant litigation, Christine Gaugler was the HRM Director for CBP

Respondent had read, and was familiar with, the "Berry Memo" issued by OPM in 2009. (Tr. Vol. IV at 48 – 49; OSC Ex. 12). She explained the "Berry Memo" instructs that "OPM retained the authority to prevent conversion to federal employment" by political appointees. (Tr. Vol. IV at 50). OSC alleges Respondent violated the "Berry Memo" by intentionally ignoring competitive hiring practices when attempting to convert the three political appointees to career positions in CBP. (Such practice is referred to by some HR professionals as "burrowing.") (Tr. Vol. I at 46; Vol. IV at 209).

The undersigned Administrative Law Judge agrees with OSC that the "Berry Memo" can constitute a "rule" for the purposes of 5 U.S.C. §2302(b)(1)(E).

**C. The Relevant Statute and Regulations**

The Complaint alleges Respondent committed prohibited personnel practices, in violation of 5 U.S.C. §2302 and 5 C.F.R. §§4.2, 7.1 and 720.901. The alleged practices involve both the improper creation and processing of three competitive vacancy announcements/applications and the subsequent processing of one application under Schedule A. (Tr. Vol. I at 223 – 224; Tr. Vol. III at 124 – 125).<sup>9</sup>

The undersigned Administrative Law Judge specifically notes that, as pled, the eight Counts raise questions of an unreasonable multiplication of charges and an unreasonable duplication of charges. Those issues need not be resolved in detail, however, given the undersigned's decision in this case.

Counts 1, 3, 5, and 7 of the Complaint allege Respondent violated 5 U.S.C. §2302(b)(1)(E), which provides:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation.

(Emphasis added).

Counts 2, 4, 6 and 8 allege Respondent violated 5 U.S.C. §2302(b)(6), which provides:

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<sup>9</sup> The political appointees, Rohrbaugh, Albert and Bruggeman, had been appointed noncompetitively to their DHS positions under Schedule C of the excepted service and were exempt from the merit-based rules that govern appointments within the permanent civil service. By law, only positions that are “policy-determining or involve a close and confidential working relationship with the head of an agency or other key appointed officials” may qualify for political appointment. 5 C.F.R. §123.3301(a).

(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;

(Emphasis added).

Counts 1, 5 and 7 also allege Respondent violated 5 C.F.R. §§4.2, 7.1, and 720.901. Title 5 C.F.R. §4.2 provides:

No person employed in the executive branch of the Federal Government who has authority to take or recommend any personnel action with respect to any person who is an employee in the competitive service or any eligible or applicant for a position in the competitive service shall make any inquiry concerning the race, political affiliation, or religious beliefs of any such employee, eligible, or applicant. All disclosures concerning such matters shall be ignored, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, political affiliation, or religious beliefs, except as may be authorized or required by law.

(Emphasis added).

Title 5 C.F.R. §7.1 provides:

In his discretion, an appointing officer may fill any position in the competitive service either by competitive appointment from a civil service register or by noncompetitive selection of a present or former Federal employee, in accordance with the Civil Service Regulations. He shall exercise his discretion in all personnel actions solely on the basis of merit and fitness and without regard to political or religious affiliations, marital status, or race.

(Emphasis added).

Title 5 C.F.R. §720.901 provides:

(a) In appointments and position changes. In determining the merit and fitness of a person for competitive appointment or appointment by noncompetitive action to a position in the competitive service, an appointing officer shall not discriminate on the basis of the person's political affiliations, except when required by statute, or on the basis of marital status

(Emphasis added).

**D. The Requisite Mental State**

Neither the charged statute, nor the charged regulations, specify the scienter, *mens rea*, or state of mind that OSC must prove in order to establish the prohibited actions described in either the statute or the regulations. In its Complaint, however, OSC variously alleged Respondent acted intentionally, negligently or that she was strictly liable for the actions of her subordinates. In Counts 1, 5 and 7, OSC alleged Respondent “knew” her actions were intended to facilitate a prohibited personnel practice; thus suggesting an intentional act. Conversely, in Counts 2, 6, and 8, OSC alleged Respondent “knew or should have known,” thus suggesting a negligence standard. In Count 3, OSC appears to allege a strict liability standard. The same confusion appears in OSC’s Post Hearing brief.<sup>10</sup>

Case law specifies the requisite mental state and imposes an obligation upon OSC to prove Respondent acted with intent in relation to all eight Counts. For instance in *Special Counsel v. Lee*, 114 M.S.P.R. 57 (2010), the Board specifically ruled, “[t]o establish a violation of 5 U.S.C. §2302(b)(6), Board case law requires that the Special Counsel establish an intentional or purposeful taking of a personnel action in such a way as to give a preference to a particular individual . . . .” *Id.*

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<sup>10</sup> OSC’s Post Hearing Brief seems to argue Respondent breached a duty of reasonableness, hence, “negligence,” (*Id.* at 43, 54) and/or that Respondent “knew or should have known” her actions violated law, once again, suggestive of a “negligence” standard. (*Id.* at 44). Conversely, OSC also seems to argue Respondent a strict liability for the actions of CBP HRM staffers. (*Id.* at 54).



Likewise, in *Special Counsel v. Byrd*, 59 M.S.P.R. 561 (1993), *aff'd*, 39 F. 3d 1196, 1994 WL 541593 (Fed. Cir. 1994) (Table), the Board said, “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.’” *Id.* at 570 citing *Baum v. Dep’t of Treasury*, 14 M.S.P.R. 392, 395 (1983), *aff’d*, 272 F. 2d 1117 (Fed.Cir. 1983). *See also*, *Beatrez v. Merit Systems Protection Bd.*, 413 Fed. Appx. 298 (2011) (tacit recognition that intent is a required element of proof in an action arising under 5 U.S.C. §2302(b)(6)).

Absent authority to the contrary, the undersigned Administrative Law Judge presumes that OSC must prove Respondent acted intentionally to commit some improper or unauthorized personnel act on the basis of political affiliation or for the purpose of improving the prospects of the applicants, as alleged in the Complaint.

**E. Personnel Authority**

Despite her argument to the contrary, Respondent had personnel action authority and is a proper subject of the case at bar. The undersigned Administrative Law Judge agrees with OSC that 5 U.S.C. §2302(b) accurately describes Respondent as an employee who has authority “to take, direct others to take, recommend, or approve any personnel action,” and shall not commit prohibited personnel practices. 5 U.S.C. §2302(b). *See also*, *Acting Special Counsel v. Sullivan*, 6 M.S.P.R. 526, 545 (1981).

Likewise, the undersigned Administrative Law Judge agrees with OSC that Respondent is an “appointing official” for the purposes of 5 C.F.R. §§7.1 and 720.901(a). The evidence strongly suggests Respondent believed that she served as an “appointing official” when she certified the Rohrbaugh, Albert and Bruggeman competitive

application packages, saying: “I certify that the proposed actions meet all merit and fitness requirements in Title 5 United States Code 2301 and 2302 and Civil Service Rules 4.2 and 7.1.” (*See* OSC Ex.12, 33, 63, 83).

#### **IV. SALIENT EVENTS**

The focus of OSC’s case is twofold: 1) Respondent’s April 23 and May 19, 2010, signatures on three cover letters forwarding three proposed competitive hiring actions of Bruggeman, Rohrbaugh and Albert to Jeff Neal, DHS head of human resources; and 2) Respondent’s role in a subsequent effort by CBP HRM to hire Bruggeman using Schedule A authority. (Ex. LL).

Prior to March 2010, candidates Nate Bruggeman, Ben Rohrbaugh and Brian Albert were all serving as political appointees working at DHS on US-Mexican border issues, under the direction and supervision of Alan Bersin. The circumstances giving rise to this case arose when the three applied for service at CBP to perform essentially the same jobs they had performed at DHS. Their applications were all originally processed as competitive service applicants. After those applications were rejected by DHS, candidate Bruggeman’s application was then processed under Schedule A hiring authority, as discussed below. Respondent’s involvement with both the three competitive applications and with the one Schedule A application is the genesis of this case.

OSC alleges that none of the three candidates were qualified for either a competitive or Schedule A management and policy analyst job at CBP, because none of the three demonstrated the requisite experience for those positions.<sup>11</sup> OSC alleges that

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<sup>11</sup> For instance, Rohrbaugh’s resume showed he had only about 9 months of the 12 months specialized experienced required by the vacancy announcement qualification. (Tr. Vol. II at 199, 201, 282, 284; Tr. Vol. III at 68-69; Tr. Vol. IV at 166-167; Tr. Vol. VI at 69-70).

Respondent intentionally committed some improper or unauthorized personnel act, on the basis of political affiliation or for the purpose of improving the employment prospects of the three.

**A. Alan Bersin Requests Bruggeman, Rohrbaugh, Albert**

Alan Bersin was appointed as the Acting Commissioner of CBP in late March, 2010. (Tr. Vol. II at 83 – 84; OSC Ex.1). At that time, he instructed Deputy Commissioner David Aguilar to arrange transfers of three members of the “BCT” (Bruggeman, Rohrbaugh and Albert) from their politically-appointed positions at DHS to new jobs at CBP. (Tr. Vol. II at 96 – 100). Bersin, who appeared as an OSC witness, testified he never considered or knew of the political affiliations of Bruggeman, Albert or Rohrbaugh, but, rather, wanted to move each of them from DHS to CBP to continue working on border control initiatives. (*Id.* at 129 – 132). Bersin testified that his primary interest was not where the three came from, but how they performed. (*Id.*). Bersin also testified that each had proven their knowledge and skill and trustworthiness in their earlier work, and further explained that he wanted that continuity and expertise and did not want to have to get people up to speed at CBP on border issues. (*Id.*).

Aguilar, in turn, also communicated Bersin’s wishes to Christine Gaugler, then the Assistant Commissioner for HRM. (Tr. Vol. IV at 37; Tr. Vol. V at 174). In that capacity, Gaugler reported directly to Acting Commissioner Bersin on all human resources matters, including the hiring of Bruggeman, Rohrbaugh and Albert. Bersin also testified that he personally told Gaugler (not Respondent) that he would like to bring the three to CBP as long as it was “legal and ethical” to have them there. (Tr. Vol. II at 106).

Gaugler testified that after hearing Bersin's wishes, she then met with Lorraine Phillips, Executive Director of HROPP<sup>12</sup> to begin the process. (Tr. Vol. V at 181 – 184, 196 – 197). Phillips was already aware of the hiring needs, from her prior interaction with Chappell Lawson, Executive Director of CBP, OPP, to identify and fill vacancies in that office. (*Id.* at 198). Traditionally, CBP had several Schedule C political positions available; however, at the relevant time, those positions were all filled. (Tr. Vol. II at 31 – 32).

At the time the three applied for jobs at CBP, Respondent was the Deputy Assistant Commissioner, HRM, having been newly appointed to that SES position only seven months prior, in August, 2009. (Tr. Vol. IV at 35–37; Tr. Vol. V at 176). The chain of events leading to the potential illegal hiring of Bruggeman, Rohrbaugh and Albert, reveals Respondent had no culpability whatsoever in the events described in the OSC Complaint.

Bersin's Deputy Chief of Staff, Lucas Lopez testified that Chappell Lawson repeatedly told him that Bersin wanted to hire Bruggeman, Rohrbaugh and Albert at CBP. (Tr. Vol. I at 100 – 102, 128 – 129; OSC Ex. 156). Lopez testified that the two people in the CBP hierarchy who were principally involved in the discussion to hire Bruggeman, Rohrbaugh and Albert, were Assistant Commissioner Gaugler and Michele Burton (not Respondent). (Tr. Vol. I at 105, 113 – 115, 120 – 121, 123).

OSC Exhibit 151 is clear evidence of Gaugler's personal responsibility to Chappell Lawson (and, thus, Bersin) in regard to the hiring of Bruggeman, Rohrbaugh and Albert. OSC Exhibit 151 is an e-mail string that clearly shows Lawson's May 11,

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<sup>12</sup> Human Resources, Office of Policy and Planning (HROPP): A division within the CBP HRM, headed at all relevant times by Lorraine Phillips which had a number of component offices, including the Indianapolis Hiring Center (IHC) and the Office of Staffing Policy.

2010, inquiry to Gaugler about the status of the hires. Gaugler's response is telling and suggestive of a *sub rosa* intent to hire the three. In response to Lawson's inquiry, Gaugler cryptically answered: "probably shouldn't put that in writing." (OSC Ex. 151). The undersigned Administrative Law Judge specifically notes that Respondent was neither copied on, or referenced in, the e-mail communications between Lawson and Gaugler.

Interestingly, OSC witness Lopez testified that while he knew what Respondent looked like, he had never worked with her. (Tr. Vol. I at 116). More specifically, OSC witness Lopez repeatedly admitted that, from his experience, Respondent had no involvement with either the drafting of the position descriptions, the selective placement factors, or any other part of the hiring process regarding Bruggeman, Rohrbaugh or Albert. (Tr. Vol. I at 146 – 147).

Gaugler testified that she also met with Lawson, who told her that he also wanted to bring Bruggeman, Rohrbaugh or Albert to CBP as career employees. (Tr. Vol. V at 196 – 197). But she did not "recall at that time if I shared it with the deputy assistant commissioner [Respondent], but I know I shared it with Lorraine Phillips and Michele Burton because some of them are SESs . . . because I knew Lorraine Phillips had already been working on some of those when I addressed the names to her." (*Id.*).

Applicant Nathan Bruggeman, an OSC witness, testified that he had no contact with, or personal knowledge of Respondent in regards to CBP's efforts to hire him. (Tr. Vol. I at 179). Bruggeman did testify, however, that he did have personal contact with Lawson and Lucas Lopez throughout the process. (*Id.* at 158 – 159, 176).

Benjamin Rohrbaugh testified as an OSC witness. He explained he had personal contact with Chappell Lawson about transferring to CBP. (Tr. Vol. III at 16 – 17). He also testified he had contact with Sandy Manuel, who worked in CPB's OPP, about his potential employment with the agency. (*Id.* at 18; OSC Ex. 16). However, Rohrbaugh explained he never had any contact with Respondent during his attempted transfer to CBP. (Tr. Vol. III at 26). In fact, it is unlikely Rohrbaugh ever met Respondent.

Brian Albert testified as an OSC witness. He testified he had several conversations with Bersin about employment at CBP. (Tr. Vol. I at 191 – 192). Albert also testified he talked to Lawson about working at CBP. (*Id.* at 193). Like Bruggeman, Albert testified that he never met or worked with Respondent in any capacity. (*Id.* at 210).

At all relevant times herein, Sandy Manuel worked as a management and program analyst with CBP's OPP, under the direction of Chappell Lawson. (Tr. Vol. III at 122–125, 126). Her duties included assisting with the creation of positions description for vacancies in Lawson's OPP, obtaining resumes and working with the HRM staff to get applications completed. (*Id.* at 123 – 124, 158 – 159; OSC Ex. 36). In March and April 2010, Lawson directed Manuel to obtain Bruggeman's, Rohrbaugh's and Albert's resumes in order to create applications tailored to each of these individuals for the purpose of appointing each to vacant positions in OPP. (Tr. Vol. I at 207 – 208; Tr. Vol. III at 127 – 128, 159 – 161, OSC Ex. 16, 36).

**B. The Three Competitive Applications Are Assembled**

OSC did not present a coherent explanation, by way of evidence or testimony, how the three application packages were actually physically created or assembled, where

or by whom. Rather, that information came from Respondent herself, who generally explained that:

[T]he policy team, Ann Williams and her team, receive[d] that package from . . . [t]he Indianapolis Hiring Center, [which] of course, is offsite . . . . And the Hiring Center . . . [T]hose documents had to be transmitted somehow from Indianapolis to here in D.C. So those documents — I don't know . . . who first accumulated those documents and sent them to D.C. I don't know what level of effort they put into putting this order. I don't know if they had the OPM checklist or not. But I know that the Policy team was the one responsible for making sure that those documents were — it was complete and that it was in order.

(Tr. Vol. VII at 27).

The undersigned Administrative Law Judge regards as crucial OSC's failure to adequately prove each step of the application package assembly process, or, more particularly, its failure to associate Respondent with any material step taken by any department or staff member in the package creation or assembly process. The undersigned Administrative Law Judge specifically notes OSC's failure to offer into evidence the three complete, corporeal, and organized competitive service application packages as they existed on the days Respondent forwarded them to DHS for approval, see below. (*Id.* at 22 – 32).

Tamkia Milburn testified as an OSC witness that from March – May 2010, she worked as a human resources specialist with CBP's Indianapolis Hiring Center, but was based in Atlanta, Georgia. (Tr. Vol. II at 189 – 191). Milburn testified that she was the person who drafted and issued the vacancy announcements for the positions that Bruggeman, Rohrbaugh and Albert eventually applied for. (*Id.* at 194). Milburn also made the qualification determinations of the applicants relative to the vacancy announcements, otherwise known as a certification. (*Id.* at 191 – 199, OSC Ex. 22, 24, 25, 28, 29, 30). She testified that the three hirings were “priority” issues with the

Commissioner's office. (*Id.* at 193 – 194). Most importantly, Milburn testified that as she performed her duties, she reported directly to Annie Herbert, Director of IHC. (*Id.* at 194 – 195, Vol. III at 31). During the course of her work, Milburn determined that Rohrbaugh and Bruggeman were not qualified for the positions they applied for, despite the fact that her superiors, Annie Herbert and John Kappel, essentially directed her to find them qualified. (*Id.* at 227 – 230, 240 – 241, 284; OSC Ex. 38, 39, 52, 57, 58, 72, 73, 75, 77, 78).

Milburn admitted that she had no knowledge of the political affiliations of either Bruggeman, Rohrbaugh or Albert. (*Id.* at 270 – 271). Milburn did, however, testify that Chappell Lawson had personally written the selective placement factors included in the three vacancy announcements. (*Id.* at 274).

Most importantly, however, was Milburn's testimony that Respondent had no involvement whatsoever in the creation of the selective placement factors or the three vacancy announcements. (Tr. Vol. II at 275 – 276, 293 – 296). Nor did Milburn ever speak with Respondent regarding the processing of the three applications. (*Id.* at 285 – 290).

Milburn's supervisor at IHC was Annie Herbert. (Tr. Vol. III at 31). Herbert testified that her supervisor, Lorraine Phillips, described the applications as "priority action items" and that she, Herbert, was obliged to provide "weekly" status reports to Phillips on the processing of the three applications. (*Id.* at 31 – 33; OSC Ex. 16, 36, 37, 38). Herbert candidly testified that the vacancy announcement and the selective placement factors for the Bruggeman application had been "narrowly tailored to fit" Bruggeman's resume. (Tr. Vol. III at 42 – 43; OSC Ex. 70). The sum and substance of



Herbert's testimony was that Bruggeman's and Rohrbaugh's applications and all of the paperwork (vacancy announcement, position description, etc.) associated therewith were clearly manipulated and massaged by someone (probably Chappell Lawson) who wanted Bruggeman hired – all in probable violation of merit systems procedures and values. (Tr. Vol. III at 43 – 72; OSC Ex. 25, 35, 37, 39, 40, 41, 55, 65, 76). Likewise, there is no question that people in CBP's Commissioner's Office pushed IHC to complete all three application packages and sought regular updates from Herbert on the status of each. (Tr. Vol. III at 78, 88 – 89; OSC Ex. 43, 79). Strikingly, there was no evidence or testimony that any of that pressure came from Respondent.

It is equally clear that functionaries like Milburn and Herbert were under immense pressure to achieve CBP's headquarters' desires, as repeatedly articulated by Lorraine Phillips and others. (Tr. Vol. III at 92, 100, 107; OSC Ex. 36, 75 –79; Resp. Ex. G, L). Herbert, a prior co-respondent in this case, was charged with committing prohibited personnel practices and ultimately entered into a settlement agreement with OSC.<sup>13</sup> Upon direct inquiry from the undersigned Administrative Law Judge, Herbert provided enlightening insight:

Q: What was it you did wrong?

# # #

A: Well, I—what did I do wrong? I didn't report it, I guess.

Q: Didn't report what?

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<sup>13</sup> OSC Exhibit 132 is exceptionally illuminating; a nineteen-page "Joint Settlement Agreement," doubtless drafted by OSC counsel which described Herbert's conduct in the attempts to Bruggeman, Rohrbaugh and Albert. Absent from the Settlement Agreement is any reference to Respondent Coffman's involvement. However, the document does describe Gaugler's direction and control of the personnel practices at issue, here. Gaugler is repeatedly quoted as complimenting Hebert for her efforts to hire the trio.

A: The fact that they were trying to hire these people and we were using information tailored directly to them. So, it looked like we were giving them an unfair advantage.

Q: Okay, and who is the “we”? Who told you to do all this stuff that you didn’t report?

A: Lorraine. She was the SES, the senior executive.

Q: Did you ever, in this entire transaction regarding the three gentlemen – Bruggeman, Albert and Rohrbaugh – did you ever have any communication directly or indirectly with Ms. Coffman?

A: No.

Q: So all of your guidance in this case came from Lorraine Phillips?

A: Yes, sir.

(Tr. Vol. III at 117 – 118).

Startlingly absent from Herbert’s testimony is any substantive or probative evidence that Respondent was involved in any way in the handling of the three competitive applications at issue. Numerous OSC Exhibits (*i.e.*, 31 – 46) reveal extensive communications within CBP HRM regarding Bruggeman, Rohrbaugh and Albert. Almost without exception, Respondent was never copied on, or referenced in, those communications. In those instances where Respondent was referenced, it is clear she was simply seeking information for and at the direction of her boss, Assistant Commissioner Gaugler. (*See* OSC Ex. 46). OSC’s documentary evidence reveals Gaugler was always in direct, personal control of the effort to hire the three. (OSC Ex. 47, 48).

OSC also called Sandy Manuel as a witness. At the times relevant to the instant litigation, Manuel served as a management and program analyst who reported directly to Chappell Lawson’s OPP. (Tr. Vol. III at 122 – 123). Manuel testified that she was

tasked to obtain resumes from Bruggeman, Rohrbaugh and Albert “so [Lawson] can tailor the applications in accordance to their resumes.” (*Id.* at 128; OSC Ex. 17, 18). Manuel further testified that “Mr. Lawson told me that once I get the resumes to pass them on to him . . . and then, they’ll work on the selective placement factors . . . [b]ecause you can look at the resumes and that was his whole purpose of getting the resumes to tailor their selective placement factors.” (Tr. Vol. III at 128 – 129, 158 – 164; OSC Ex. 16, 17, 19, 150).

Manuel’s testimony described what was, perhaps, a prohibited personnel practice. (Tr. Vol. III at 158 – 164). However, absent from Manuel’s testimony, is any substantive or probative evidence that Respondent was involved in any manner in the handling of the three applications at issue.

Respondent’s Exhibit LL<sup>14</sup> is the documentary “crux” of this case and is comprised of three cover letters, signed by Respondent, “for” her supervisor, Christine Gaugler; forwarding the Bruggeman, Rohrbaugh, and Albert applications to DHS for review and approval. OSC essentially argues that by signing these three letters, Respondent committed the violations contained in six of the eight Counts in the Complaint.

The cover letters for candidates Rohrbaugh and Albert were presented to Respondent for signature on April 23, 2010. The cover letter for candidate Bruggeman was presented to Respondent for signature on May 19, 2010. In both instances, the letters had been prepared for Gaugler’s signature – and in both instances, on both days, Gaugler was absent from her office.

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<sup>14</sup> Similarly, OSC Exhibit 33 is the Rohrbaugh cover letter; OSC Exhibit 63 is the Albert cover letter; OSC Exhibit 83 is the Bruggeman cover letter.

As discussed below, however, the events surrounding the two dates on which the three letters were signed not only disprove Respondent's culpability, but rather suggest others within CBP engineered the hiring effort and then attempted to distance themselves from the three applications and to avoid personal involvement in the process.

**C. Michele Burton Objects to The Use of Schedule A Authority**

Burton testified that from 1998 until 2010, she handled CBP hirings using Schedule A authority to fill positions involving policy oversight and the direction of sensitive law enforcement positions. (Tr. Vol. I at 216). Accordingly, she was personally and professionally familiar with all Schedule A hirings in CBP, up to and including the time Bruggeman, Rohrbaugh and Albert applied to work at CBP as competitive employees.

Burton testified that during the time CBP was trying to hire the trio, she recalled "having a discussion with Assistant Commissioner Gaugler," about using Schedule A authority to hire candidate Bruggeman. (*Id.* at 223). Thereafter, Burton explained how she eventually received her guidance concerning Bruggeman's application directly from Assistant Commissioner Gaugler. (*Id.* at 224 – 225). Respondent's Exhibit PP, for instance, reveals Gaugler's personal involvement with Burton and Lorraine Philips in discussions concerning Schedule A and competitive appointees in early April 2010, just after Bersin's arrival at CBP. Importantly, Respondent was not included in that e-mail discussion. However, in early April 2010, Burton received Bruggeman's resume from CBP Chief of Staff, Marco Lopez. (Tr. Vol. II at 51).

So concerned was Burton over the impropriety of the use of Schedule A hiring authority, that she eventually confided in Respondent, telling her that she would no

longer be part of the Schedule A hiring process. (*Id.* at 28 – 29). Respondent then relayed Burton’s refusal to Assistant Commissioner Gaugler. (*Id.*). The undersigned Administrative Law Judge specifically notes that Burton’s objections were in regard to the use of Schedule A hiring authority; not the competitive hiring process. Burton’s refusal then prompted a meeting with Assistant Commissioner Gaugler. (*Id.* at 28 – 30). At that meeting, Burton expressed her concern to Gaugler that CBP was trying to improperly convert Bruggeman, to a Schedule A appointee at CBP. (*Id.*). Burton suggested to Gaugler that they solicit an informal opinion from OPM regarding the propriety of the hiring, but that “Ms. Gaugler was not happy with my answer.” (*Id.* at 56 – 58).

Burton further testified:

It was a tense meeting and at one point Ms Gaugler had asked me, what do you expect me to do? What do you want me to do? And I told her, say no. Say that I won’t do it. And so it was quite tense. She was not happy with me at the meeting. . . I told her that it was not a good idea to consider the Schedule A . . . . What stands out in my mind as the body language. She was not happy with me and the fact that I pointed out that I didn’t recommend the Schedule A appointing authority . . . .

(*Id.* at 29 – 31).

Thereafter, Burton did contact HRM personnel within DHS to address the issue. Respondent’s Exhibit RR reveals than on or about April 1, 2010, Burton contacted Jeff Neal’s subordinate at DHS, Robin Urkums, regarding the proper use of the Schedule A hiring authority. Urkums then contacted her counterpart at OPM, Marlene Lightburn, to discuss the issue.

In March 2010, Lightburn worked at OPM as a HR program advisor. (*Id.* at 162 – 164). Her duties included the evaluation of the various federal HR programs (including CBP’s) and the review of political conversion requests. (*Id.*).

On April 7, 2010, Burton sent a copy of Bruggeman’s resume to DHS, and thereafter to OPM, for review *vis a vis* a potential Schedule A hiring. (OSC Ex. 6). Respondent’s Exhibit SS reveals a series of e-mail communications – from April 7 to April 27, 2010 – between Burton at CBP, Urkums at DHS and Lightburn at OPM, concerning the propriety and mechanics of excepted service appointments under the Schedule A hiring authority. (Tr. Vol. II at 58 – 64; OSC Ex. 7, 8). Lightburn likewise testified regarding her review of Bruggeman’s resume and her communications with Urkums and Burton. (Tr. Vol. II at 163 – 175).

What is exceptionally probative about these communications is not that they occurred, but, rather, that Respondent was neither referenced, nor included, in those discussions.

**D. April 23, 2010 – Respondent Signs the Albert and Rohrbaugh Cover Letters**

Gaugler was on vacation in Colorado on April 23, 2010, the day Respondent signed the Albert and Rohrbaugh cover letters. (Tr. Vol. VII at 22). Respondent testified that at about 8:30 am on the morning of April 23, 2010, she was handed the two application packages, with the two cover letters on top. (*Id.* at 25). Yet the two packages she was handed were in “disarray . . . it was a bunch of papers . . . there wasn’t a table of contents or order.” (*Id.*). Respondent testified, “[t]hat was the day—that’s the first day and only day that I have reviewed the package.” (Tr. Vol. IV at 58). Respondent then explained she then directed her subordinates to put the packages in proper order, with a

table of contents. “I had no idea what the—well, what the request was about, why it was coming in for signature. I was not familiar with that package. It was a mess. It was in disarray.” (*Id.* at 59 – 60). The application packages did contain “routing slips” indicating who in HR had processed/reviewed the applications. (Tr. Vol. VII at 25). Respondent testified that the routing slips indicated Ann Williams,<sup>15</sup> Lynn Smith and Lorraine Phillips had “signed off” on the staff work. Nevertheless, Respondent immediately returned the disorganized piles of paper to HROPP, the internal agency from whence the packages had come. (*Id.*).

Respondent testified that she later received the organized versions of the two application packages at around 2:00 pm on the same day from Ann Williams and another subordinate staff member, Denise Adams. (*Id.* at 26). Respondent testified that she told Williams and Adams that she was surprised to receive such large packages “without having any up-front knowledge . . . or advance warning that [these packages were] going to [DHS] and just to have [them] dropped in my inbox without some sort of prior indication that [they were] going to be coming.” (*Id.* at 26). She further explained the extensive staff work that should have preceded her review of the packages. (Tr. Vol. IV at 61 – 62). The undersigned Administrative Law Judge regards as highly probative the fact that Respondent had never seen a draft of the packages prior to April 23, 2010.

After the HRM staff organized and correctly prepared the packages, Respondent sat down with Ann Williams with the Rohrbaugh and Albert packages and:

[W]e pulled out the checklist and made sure that the documents that we were submitting to the department, to go to OPM, met the requirements of the OPM. Because I had not been familiar with the package and I had no

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<sup>15</sup> Ophelia Ann Williams: Former director of Staffing and Policy within CBP’s HROPP and subordinate to Lorraine Phillips. (Tr. Vol. III at 167; VII at 11).

idea what had -- why this package was coming forward, I sat down with Ann and I asked her, what is this about? Why are we doing this? And she explained to me that Mr. Rohrbaugh was on a political appointment, that he had applied through the delegated examining unit for this position. So she explained that the announcement had been handled by the Indianapolis Hiring Center, that the rating and ranking was done. The package had come to her office through the policy office. There was a review. Her office put the package together, and Glenn Smith and Lorraine Phillips had been involved in the hiring process. From there I just looked to see that -- make sure the job description was there, the resume were there, the information that was required by the OPM checklist from the John Berry memo and the DHS checklist, which is basically the same. Most of it was in compliance. I did not review the resumes to see if the applicants were qualified or not qualified. I did not read the job descriptions to see if it accurately described the job at DHS. I did not review and read the applications or the screenshots or the notices or ratings to the applicants, though all that information was contained in the file. I did not read each and every document.

(Tr. Vol. IV at 65 – 67).

Respondent continued, noting that the packages were “substantial.” (*Id.* at 68).

She explained that she understood the applications had been staffed with an appropriate HR specialist and that that person’s work had been reviewed by a supervisor. (*Id.*).

Respondent explained:

That it went through Annie Herbert’s review as the head of the Indianapolis hiring center as a GS-15. That it had gone through Ann Williams’ shop and Ann Williams was a GS-15. Denise Adams is a -- was GS-15 at that time, an expert in staffing policy, as well is Nancy Bagley. And it had gone through the review of the deputy of Human Resource Operation, Policy, and Planning, Glenn Smith and then Executive Director, Lorraine Phillips.

(*Id.* at 68).

Respondent testified that she, “relied on their expertise and their years of experience. So when that package came to me I had full faith and confidence in the employees within HROPP that they did their job.” (*Id.* at 68). Respondent reiterated, “I did not return this package because I believed I had the subject matter experts’ signature



and the confirmation that in their view, confirmation that they provided to me was in compliance with the regulations of the Office of Personnel Management.” (*Id.* at 100). Respondent also noted that Lorraine Phillips had signed off on the packages. (*Id.* at 99). Even Gaugler testified that Respondent’s review of such a package did not require a “critical analysis,” but, rather, would anticipate Respondent would make inquiry of the subordinate staff, “if there were questions raised as a result of looking at the supporting documentation.” (Tr. Vol. V at 228).

The undersigned Administrative Law Judge finds Respondent highly credible in her testimony that as CBP grew from 44,000 to 58,000 employees, Annie Herbert’s office at the IHC and Lorraine Phillips were responsible for hiring thousands of employees. (Tr. Vol. IV at 118). “There’s no reason for me to have expected that this one announcement was not going to be in compliance when they have successfully completed thousands of hirings over a short period of time.” (*Id.* at 118 – 119). Respondent testified that before she signed and forwarded the Rohrbaugh and Albert application packages to DHS, she read and complied, to the best of her ability, with the “Berry Memo” and a pre-appointment checklist appropriate to such potential appointments. (*Id.* at 54 – 56; OSC Ex. 12).

**E. May 19, 2010 – Respondent Signs the Bruggeman Cover Letter**

Respondent testified that on May 19, 2010, Gaugler was again absent from the CBP headquarters; this time on sick leave. (Tr. Vol. VII at 21). Respondent testified that on that day, she received the Bruggeman package from Williams at around 2:00 pm that afternoon. (*Id.* at 10). Respondent described that the application package contained “a

couple hundred” pages, including the vacancy announcement, the position description and a one–page addendum concerning selective placement factors. (*Id.* at 32).

Respondent testified that she reviewed the Bruggeman application package, using an appropriate checklist, together with Ann Williams and Denise Adams to ensure the package was complete. (*Id.* at 18). She explained that she “did not read every page . . . because the staffing specialists in Indianapolis Hiring Center . . . had made a qualifications determination.” (*Id.* at 19 – 20). Following her review with Williams and Adams, Respondent regarded the Bruggeman application package as “a completed package of a Merit Staffing Delegated Examining Unit package. And there was no indication to me that there was anything incomplete.” (*Id.* at 20). She further testified that it appeared that subordinate agencies within CBP HRM, including the Personnel Research and Assessment staff, had completed their tasks. (*Id.*). Respondent then signed the Bruggeman application package.

At all times relevant to this litigation, Jeff Neal served as Chief Human Capital Officer, DHS. (Tr. Vol. IV at 156). He testified extensively in this case regarding Respondent’s role in the purported improper hiring actions. In regard to Respondent’s review of the three competitive applications, Neal testified he was not surprised that Respondent did not conduct a thorough review of the packages for substance and compliance with federal staffing rules. (*Id.* at 233). Rather, Neal pointedly observed, “[s]o, I don’t expect somebody in [Respondent’s] role to be an expert in everything in their organization. That’s why they have, I think at CBP, probably 700 people in HR who are supposed to be experts in that.” (*Id.* at 234).

OSC produced no evidence that Respondent was motivated by any political factor when she signed either the Bruggeman, Rohrbaugh or Albert letters. Neither did OSC produce any evidence that by so signing, Respondent attempted to take or direct others to take, recommend, or approve any personnel action, which discriminated for or against any employee or applicant for employment on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation. *See* 5 U.S.C. §2302.

Likewise, OSC produced no evidence that by so signing, Respondent attempted to take, direct others to take, recommend, or approve any personnel action, 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. *See Id.* §2302.

The undersigned Administrative Law Judge notes with particularity that OSC called Respondent as its witness in support of its case. In fact, lead counsel for OSC was so dependent upon Respondent's testimony in support of the OSC case against her, that he exclaimed, "I can't win my case without putting Ms. Coffman on the stand, so." (Tr. Vol. III at 259). However, in its post-hearing brief, OSC devotes nearly seven pages to impugning Respondent's credibility. (OSC Post Hr'g Br. at 34 – 41).

Because OSC called Respondent as part of its case-in-chief, her statements have particular and direct bearing on whether OSC met its burden of proof. Not only did Respondent not establish an intentional violation of the cited statute and regulations – she virtually disproved any such violations. She clearly established that she played no role, either directly or indirectly, in either the creation of the three vacancy announcements,

position descriptions, resumes, and/or the competitive or Schedule A application packages of either Bruggeman, Rohrbaugh and/or Albert. Moreover, she established her good faith reliance upon professionals within HRM to provide completed staff work and further refuted any notion that her actions in this case, albeit miniscule, had nothing to do with either politics or a desire to grant an unlawful preference to anyone. The undersigned Administrative Law Judge specifically agrees with Neal that it was reasonable for Respondent to rely upon subordinate HRM personnel to correctly assemble and present the three competitive employment application packages for review and signature.

OSC asserts that Respondent “participated in a scheme involving multiple government employees” in the creation and processing of the three competitive packages and the Bruggeman Schedule A package. However, Burton testified regarding a May 27, 2010, 11:30 am, conference convened in Assistant Commissioner Gaugler’s office to discuss the creation and processing of the Bruggeman, Schedule A package. (Tr. Vol. II at 32 – 33). OSC Exhibit 130 plainly reveals that the conference, called by Gaugler, did not include Respondent as a participant. (*Id.* at 33). That Respondent was not included in a meeting of this significance to the issue at hand is highly probative. Thus OSC’s assertion that Respondent “participated in a scheme involving multiple government employees at various levels of an agency” is simply unfounded.

**F. DHS HR Reacts to the Three Competitive Packages**

DHS Chief Human Capital Officer Neal explained that when he received the three packages for review, “[m]y reaction was, I got fairly loud and probably muttered some obscenities and told them I thought they were - - the packages were a joke.” (Tr. Vol. IV

at 166). Neal highlighted the fact that the job descriptions in the packages had all been modified on the same day, and that the announcements included selective placement factors that had been added to the job descriptions on the same day – clear evidence someone had manipulated the paperwork in order to ensure the trio were placed into the career track of the competitive service. (Tr. Vol. IV at 166). Neal was emphatic that two of the candidates, Albert and Rohrbaugh, were “not qualified for the positions.” (*Id.* at 166). He added, “this is just a bad joke. And I told them to call CBP and tell them that we were sending [the three packages] back, that they were stinking up my office. That was my reaction.” (*Id.* at 167).

On May 27, 2010, Neal returned Rohrbaugh’s and Albert’ packages to Gaugler, not Respondent because, “Ms. Coffman wasn’t the head of HR for CBP, and the memo in [Resp. Ex.] LL, you’ll note, is actually prepared for Christine Gaugler’s signature and it was signed, ‘Katherine Coffman for Christine Gaugler,’ and I sent it back to Chris Gaugler.” (Tr. Vol. IV at 170; Resp. Ex. HH).

Thereafter, Neal convened a June 3, 2010, meeting in his office with Gaugler and Respondent to discuss the attempts to convert Bruggeman, Rohrbaugh and Albert into career, competitive positions. “It’s what’s known in this vernacular as, [a] ‘come to Jesus meeting.’” (Tr. Vol. IV at 172). Neal specifically recalled that at that meeting, he expressed his displeasure with the way the packages had been created and that, “I didn’t want to see something like that again . . . I wanted to come across knowing that I was very unhappy about what they did, and I did not want to see it again.” (*Id.* at 175).

Neal described Respondent’s reaction as “[m]ortified is probably a good way to put it. I think she was very upset about the discussion . . .” (*Id.* at 175). Conversely,

Gaugler's response was entirely different. Neal observed, "[i]t's very hard to tell a reaction from Chris Gaugler. She's a bit of a game player, and she wasn't – she didn't appear to be the least bit upset." (*Id.* at 175 – 176).

Of the April 23 and May 19, 2010, cover letters signed by Respondent for Gaugler, Neal testified, "I was not surprised that Katherine Coffman signed the letter[s], and the reason was I thought Chris conveniently made certain she wasn't in the office when it was signed so she could deny that she was the one who signed it . . . [t]o protect herself . . . from the blowback on something that appeared to be a smelly action." (*Id.* at 177).

Neal was pointed in his observations about Gaugler: "my personal exposure to Chris was that I very quickly concluded I couldn't trust her. I just could not trust the woman. She was the only HR director in DHS that I couldn't trust. I mean, I didn't think a couple of the others were great HR directors, but I didn't have any reason to believe they were not trustworthy, but Chris kind of distinguished herself with respect to that, as somebody that I just didn't trust at all." (*Id.* at 280).

Neal further explained:

I think there was an attempt to do something that probably shouldn't have been done. I don't see any real evidence other than signing a document that she may or may not have even read before she signed it. I didn't see a lot of evidence that Ms. Coffman was the mastermind of this thing. . . . Chris has a little team of people who worked directly for her and that those were the folks who did stuff like this, you know, when you need something from the Commissioner's office, Chris has her little team of people go off and do it. And my understanding was that Ms. Coffman wasn't one of those people. There was this little group of Chris' people and I don't know who they all were. My belief, my perceptions is that Chris had those folks go out and do all this stuff and then she arranged to not be there on the day that a letter would come to me so she would have to sign it and then she could say – and I think I recall her at some point saying she really didn't know what was going on with these things, and

that was so not credible to me that I just couldn't believe that she would have work going on to try to get three people who worked for the Commissioner in his former role, that would be going on, that it would be going on for a couple of months, and she would know nothing about it. That just stretches – it's too big of a stretch. I can't imagine that would have happened for that kind of length of time and that she would never be aware of it and that this was some plot by Katherine Coffman. I just don't see that as believable. Not even close.

(*Id.* at 272 – 273) (emphasis added).

**G. The Bruggeman Schedule A Application**

After Neal rejected the three competitive applications, Gaugler then directed her department to process candidate Bruggeman as a Schedule A applicant. As discussed above, the evidence reflects that Michele Burton was directly involved in the effort to hire Bruggeman using Schedule A authority. (OSC Ex. 5, 6, 7, 8, 9). What is remarkable about OSC's evidence is that there is no indication Respondent was materially involved, or even significantly referenced, in the Schedule A discussions among Gaugler and the HRM staff.

On June 21, 2010, Burton told Respondent she would not process Bruggeman's Schedule A appointment. Thereafter, Schedule A processing responsibility was transferred from Burton to HROPP, an office that had never handled such appointments. (Tr. Vol. I at 216; Tr. Vol. II at 32 – 34, 70 – 75; Tr. Vol. III at 203; OSC Ex. 92). Ann Williams established that the decision to remove Burton's authority was made by Assistant Commissioner Gaugler, "please be mindful that Chris Gaugler realigned this appointment authority to HROPP effective July 2010." (Resp. Ex. DDDD). Certainly the timing of that memorandum is coincidental with Burton's refusal to process Bruggeman's Schedule A application.

While it is true that Respondent signed the memorandum removing Schedule A Authority from Burton, the undersigned Administrative Law Judge regards that action as consistent with Gaugler's overarching control of such matters within her department.<sup>16</sup> Moreover, the undersigned Administrative Law Judge accepts Neal's personal assessment of Respondent as "a bit timid and not real assertive . . ." (Tr. Vol. IV at 215).

OSC overstates Respondent's involvement in the processing of Bruggeman's Schedule A application when it suggests she "reviewed and edited various drafts" of the package eventually destined for Neal at DHS. (OSC Proposed Finding of Fact 97, 98). In reality, Respondent's role in the process was limited to the ministerial; advising subordinate staff not to include attachments in e-mails to Assistant Commissioner Gaugler and asking staff to "review for format, grammar, *et cetera* . . ." (Tr. Vol. V at 91, 95). OSC Exhibit 94 is a collection of e-mails and documents which, apparently, constitute the bulk of the Bruggeman Schedule A application. Page 1 of that Exhibit clearly reveals that Gaugler was in complete charge of the Bruggeman effort. Although Respondent was, naturally, included in e-mail on the subject, it is clear that her role was only informational and ministerial. Nothing in OSC Exhibit 94, nor any other document, even suggests Respondent engaged in any activity proscribed by the statute or regulations as described in Counts Three and Four of the Complaint.

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<sup>16</sup> The undersigned Administrative Law Judge assigns great weight to the credibility and insights provided by the former head of DHS Human Resources, Jeff Neal. Neal was exceptionally clear in his observations of how Gaugler controlled her department. He described Gaugler's managerial style as "[v]ery tightly controlling" and that in any business situation when Gaugler and her subordinates were present, "[a]nd when here was a group of people from CBP in a meeting, Chris appeared to do all of the talking for CBP. She didn't – it didn't appear that other people felt like they should be talking." (Tr. Vol. IV at 180 – 81). From this, and other observations made by Neal, the undersigned Administrative Law Judge believes that Gaugler made the decision to remove Burton from Schedule A processing responsibilities in the Bruggeman matter, just as Gaugler controlled every step of the attempted hirings of all three candidates at issue in this case.



Thereafter, Gaugler signed the Bruggeman Schedule A application and forwarded same to Neal. (OSC Ex. 94). The undersigned Administrative Law Judge notes with particularity that Neal agreed with Gaugler's assessment of Bruggeman's qualifications. (Tr. Vol. IV at 182; OSC Ex. 110). This is important, given Neal's stated distrust of Gaugler. He certainly had no reason to "cover" for her. Thus, his endorsement of Gaugler's effort to hire Bruggeman using Schedule A authority removes whatever taint of impropriety might exist. Nevertheless, OPM subsequently denied the request because Bruggeman's "resume [did] not reflect any of the type of experience that [CBP] said was so critical to the position they were trying to fill" and because CBP had not complied with the provisions of 5 C.F.R. Part 302. (Tr. Vol. II at 170 – 175; OSC Ex. 115).

Neither Bruggeman, Rohrbaugh nor Albert were hired by CBP.

## **V. ANALYSIS**

Inasmuch as all eight Counts arise out of identical transactions, it is well to analyze those events in the aggregate. Thus, for each of the eight Counts, OSC must essentially prove by a preponderance of the evidence that:

1. Respondent acted intentionally,
2. To commit some improper or unauthorized personnel act, and
3. On the basis of political affiliation or for the purpose of improving the prospects of the applicant.

### **A. OSC Failed to Prove Respondent Acted Intentionally**

The only evidence of Respondent's personal involvement with the Bruggeman, Rohrbaugh and/or Albert competitive and Schedule A packages is that she signed the competitive package cover letters for each on April 23, 2010 and on May 19, 2010 for her supervisor, Christine Gaugler. (Tr. Vol. IV at 230; Resp. Ex. LL).

Yet OSC's Post Hearing brief claims:

[Respondent] participated in a scheme involving multiple government employees at various levels of an agency, all of whom were paid with taxpayer money to spend months circumventing federal laws, rules and regulations in an attempt to hire three relatively inexperienced, junior political appointees for permanent government positions that should have been filled by the most deserving, qualified candidates. (emphasis added).

(OSC Post Hr'g Br. at 4).

Curiously, however, in its Post Hearing Brief, OSC pays little attention to the behaviors and actions of the "multiple government employees" whose actions actually resulted in the putative, attempted illegal hirings – in favor of casting Respondent as the sole actor in this story. Despite OSC's characterization of the evidence, startlingly absent from any of its proof was any probative evidence that Respondent physically constructed or manipulated the position descriptions, vacancy announcements or application packages relative to the three candidates discussed herein. Nor was there any evidence that Respondent gave orders to construct or manipulate those position descriptions, vacancy announcements or application packages. Most importantly, there was no evidence, beyond conjecture, that Respondent was personally involved in any aspect of the planning, execution, or creation of the position descriptions, vacancy announcements or applications for any of the jobs contemplated by OSC in its Complaint. For instance, OSC witness Sumberg<sup>17</sup> admitted he had no reason to believe Respondent had taken action to either embellish Bruggeman's qualifications to grant an unlawful preference or because of political affiliation. (Tr. Vol. I at 88 – 91). Nor could Sumberg recall any instance where Respondent had failed to abide by agency operating procedures in regard

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<sup>17</sup> See page 21, above.

to Bruggeman's attempting hiring. (Tr. Vol. I at 89 – 90). Neal's personal assessment of Respondent's involvement (or lack thereof) was identical to Sumberg's.

Likewise, there was no proof whatsoever that Respondent was motivated by any political consideration or a desire to confer an undue advantage on any of the three applicants. OSC errantly conflates Respondent's ministerial action of signing HRM staff work with an improper intent. Her signatures simply do not prove what OSC alleges.

**B. OSC Failed to Prove the Commission of an Improper Personnel Action**

The only direct evidence of Respondent's participation in the attempted competitive hiring of Bruggeman, Rohrbaugh and Albert by CBP was her April 23 and May 19, 2010, signatures on the three cover letters forwarding those nomination packages to Jeff Neal, Chief Human Capital Officer at DHS. (Resp. Ex. LL). While it is true that those letters, "certify that the proposed actions all meet merit and fitness requirements in Title 5 United States Code 2301 and 2302 and Civil Service Rules 4.2 and 7.1," the evidence reveals Respondent signed those letters for her supervisor, Christine Gaugler, and that she did so after relying upon the work subordinate HRM staff, which both Neal and Gaugler described as reasonable for a person in Respondent's position. There is no evidence, nor an inference to be drawn from any evidence, that Respondent intentionally committed an improper personnel action as each such action is specified in each of the Counts or as defined in the statute or regulations. The undersigned Administrative Law Judge notes with particularity that OSC did not offer into evidence the three corporeal, complete, competitive application packages covered by the three referenced letters as they appeared on the relevant dates. Therefore, the undersigned Administrative Law judge cannot see what, exactly, Respondent saw on the

days she signed the forwarding memoranda. Hence, OSC's assertion that Respondent "reviewed the files that contained obvious evidence of favoritism" is not supported by the documentary evidence. (*See* OSC Post Hr'g Br. at 32).

OSC produced scant evidence of Respondent's involvement with the subsequent attempt to hire candidate Bruggeman using Schedule A hiring authority. In fact, it was Gaugler who signed the Bruggeman Schedule A forwarding letter/memorandum and sent it to Neal. (Tr. Vol. IV at 184; Resp. Ex. CCC). There was no testimony or documentary evidence of any material involvement by Respondent in the Schedule A application by Respondent. There is simply no credible evidence that supports OSC's assertion that Respondent "worked to hire Bruggeman" under the Schedule A authority. (*See* OSC Post Hr'g Br. at 32).

The most compelling and credible testimony of the six-day hearing was that provided by Jeff Neal, former Chief Human Capital Officer for DHS. Neal is a thirty-three year veteran of federal service; virtually all of that time spent in human resources. (Tr. Vol. IV at 155 – 157). Neal explained that in his position as Chief Human Capital Officer, he served as the advisor to the Secretary of DHS on all HR matters. Moreover, he was responsible for oversight of all HR departments at all DHS-component agencies, including CBP. In his own words, Neal was "the Senior HR guy" in DHS at all times relevant to this litigation. (*Id.* at 156).

Neal explained that he had direct personal and professional experience working with Respondent's supervisor, Assistant Commissioner Christine Gaugler. Gaugler was the certifying official, the person in CBP accountable for political transfers, as per the

testimony of Sumberg and the intent of the “Berry Memo.” (Tr. Vol. I at 54; OSC Ex. 12).

Neal explained that Gaugler sat as a member of the DHS Human Capital Council, a group comprised of all of the HR directors from the constituent agencies within DHS. (Tr. Vol. IV at 278). Neal even had the ability to “provide performance input . . . in the form of my comments to the [CBP] commissioner or deputy commissioner” regarding Gaugler’s performance evaluations. (*Id.* at 218 - 219).

Thus, the undersigned Administrative Law Judge assigns particular credibility to Neal’s testimony concerning Gaugler, based upon the undersigned Administrative Law Judge’s observation of Neal’s demeanor during testimony; his lengthy experience in federal HR management; his position as the senior HR officer in DHS at the relevant times; the fact that he had no particular personal or professional stake in the outcome of the personnel actions at issue; and his unique personal and professional perspective from which he could judge the actions and motivations of the actors, specifically including Gaugler. *See Leatherbury v. Dep’t of Army*, 524 F.3d 1293, 1304 – 05 (Fed. Cir. 2008).

Neal explained how special cases – like, Bruggeman’s, Rohrbaugh’s and Albert’s – were to be handled. “The Obama Administration, through John Berry, who was the Director of the Office of Personnel Management at the time, put out a policy saying that if any political appointee was going to be converted to a permanent position, that it had to be approved by OPM first.” (Tr. Vol. IV at 165). Neal explained that the Bruggeman, Rohrbaugh and Albert packages had to come through Neal’s office at DHS prior to going to OPM for a final decision. (*Id.* at 164 – 165).

Respondent's Exhibit LL consists of the three cover letters attached to the Bruggeman , Rohrbaugh and Albert packages. The evidentiary significance of these letters is that each bears Respondent's signature "for" CBP HMR director Gaugler. The undersigned Administrative Law Judge finds it exceptionally noteworthy that on the two days the letters were signed – April 23 and May 19, 2010 – Gaugler was coincidentally out of the office on either sick leave or vacation; odd, given the importance of the three packages and (as Neal described her) Gaugler's propensity to control every detail of HRM's operations.

Neal's observations about Gaugler's managerial style suggest that important employment recommendations of obvious import to the CBP Commissioner would not escape her purview. Neal further described Gaugler as "[v]ery tightly controlling." (Tr. Vol. IV at 180). Regarding the creation and processing of the three application packages at issue, Neal pointedly observed "I would be amazed if Ms. Coffman had been the one leading this on a day-to-day effort since Chris seemed to let - - to make certain that anything that involved the commissioner's office, she was involved in." (*Id.* at 230).

The undersigned Administrative Law Judge finds Neal's testimony highly persuasive that Assistant Commissioner Gaugler did, either personally or through others (exclusive of Respondent), engineer the three competitive application packages and the Bruggeman Schedule A package and that she was fully aware of the manipulation of those documents toward Commissioner Bersin's stated objectives. The undersigned Administrative Law Judge recalls Sumberg's testimony that he would have anticipated an component's head of HR, in this case, Gaugler, to have been personally involved in the request to transfer a political appointee to a career position. (Tr. Vol. I at 52 – 54). Thus

it is unlikely that Gaugler did not know of or fail to involve herself with every step of the application process for the three candidates. Moreover, Burton's description of her "tense meeting" with Gaugler, wherein Burton refused to participate in what she deemed to be an improper use of Schedule A authority, underscores the clear probability Gaugler "engineered" all three applications and conveniently made herself absent on the days the forwarding letters were signed by Respondent. (Tr. Vol. II at 29 – 31).

After the June 3, 2010, meeting with Jeff Neal at DHS, Respondent approached her subordinates and Williams and asked if they had any concerns about any of the nomination packages. In response, Williams told Respondent that she, indeed, had concerns about Rohrbaugh and his qualifications. Respondent then asked Williams "[w]hy didn't you tell me?" (Tr. Vol. IV at 81 – 82). Williams responded that she had raised her concerns to her supervisor, Lorraine Phillips. (*Id.*) Apparently, Lorraine Phillips had overridden Williams' complaints and concerns. Respondent then "asked her why she did not tell that to me at that meeting when I signed that package. And she said because she had followed her chain of command and her chain of command had failed her." (*Id.*). Williams apparently notified the OSC of that very conversation in September, 2011. (*Id.* at 81).

The undersigned Administrative Law Judge notes with particularity that by informing supervisor Lorraine Phillips, Williams also notified Assistant Commissioner Christine Gaugler, inasmuch as Lorraine Phillips was Gaugler's direct report. (*Id.* at 82). Once again it is clear that Respondent was kept "out of the loop" in all crucial communications related to the processing of the three application packages. Only at the

last moment, when her signature was needed, was Respondent exposed to these transactions.

Although Respondent's office is located in Washington, DC, the HRM operating office is located in Indianapolis, Indiana. That office is where the three job descriptions, vacancy announcements, and advertisements were created and published. (*Id.* at 229 – 231). OSC produced no evidence – either testimonial or documentary – that proved or even suggested Respondent participated in any way in the creation of the job descriptions, vacancy announcements, advertising, or analysis or evaluation of the three applications at issue. At the time of the events described herein, CBP had approximately 700 people in human resources with expertise in staffing issues. (*Id.* at 234). OSC produced no evidence that Respondent directed, controlled, supervised, or influenced any of those professionals in their handling of the three applications at issue.

CBP later reconfigured Bruggeman's package as a Schedule A candidate and sent the same to DHS for review and forwarding to OPM under Gaugler's signature. (*Id.* at 181 – 184; Resp. Ex. CCC). OPM subsequently denied that application because, among other factors, OPM believed CBP had not followed its own, internal hiring practice guidelines. (Tr. Vol. I at 66 – 67; Vol. IV at 199 – 204; Resp. Ex. CCC at 2382 – 2384; PPP).

In regard to the Bruggeman Schedule A package, the undersigned Administrative Law Judge specifically reiterates that on June 28, 2010, Gaugler submitted Bruggeman's Schedule A selection documents to Neal at DHS for approval. (Tr. Vol. IV at 184; Resp. Ex. CCC). It is vital to note that Gaugler, not Respondent, signed the Bruggeman Schedule A forwarding letter/memorandum and sent it to Neal. (*Id.* at 184; Resp. Ex.



CCC). It is equally crucial to note that Jeff Neal, the then head of Human Resources for all of DHS, believed Bruggeman met the qualification requirements for the position and, thereafter, approved the Schedule A appointment and forwarded the selection documents to OPM for final approval. (Tr. Vol. IV at 182; OSC Ex. 110). Neal said that Bruggeman “met the minimum qualification requirements, that he was qualified for the appointment. . . that’s why they call it ‘qualified’. . . you’re qualified.” (Tr. Vol. IV at 208 – 209). It is noteworthy that Neal agreed with CPB’s attempt to hire Bruggeman as a Schedule A appointment, even though he was later overruled by OPM. (*Id.* at 200 – 204).

Respondent’s actual, personal involvement in Bruggeman Schedule A action was almost non-existent. Nevertheless, the proposed Schedule A action was endorsed by Neal; strongly suggestive that the proposed hiring did not run afoul of either the statute or regulations at issue, here.

The evidence reveals that Neal had no reason to be protective of Gaulger or her efforts. That Neal’s opinion differed radically from OPM’s about the Bruggeman hiring highlights an important aspect of the instant case: professional judgments frequently differ. Thus, even if the evidence substantiated Respondent’s intent to forward the three competitive and/or the Bruggeman Schedule A packages to DHS and OPM, her actions might easily be characterized as simply a difference of professional opinion; just as Neal’s differed from OPM’s. (*Id.* at 209 – 211).

**C. OSC Failed to Prove Any Intentional Acts on the Basis of Political Affiliation**

The third crucial element asks whether the Respondent had the requisite intent to discriminate in favor of the three applicants on the basis of the applicants’ political affiliation. OSC theorizes that Bersin intended to hire the trio because of their political

affiliation – and that Bersin’s intent was, essentially, transferred through his subordinate chain-of-command down to Respondent who, it is alleged, shared the same intent. Unfortunately for the OSC, there is neither direct evidence, nor clear circumstantial evidence, of any such intent.

The evidence established that Bersin did not personally engage in the hiring process of either Bruggeman, Rohrbaugh or Albert. In fact, Bersin testified credibly: “I made clear, and it was always known, that the law and ethics were central to this. And that was typically the way I would put it, which is so long as it’s legal and ethical, I would like to have them over here. And I think actually that was said in words or substance.” (Tr. Vol. II at 104).

Neal bluntly described his view of Bersin’s desire to hire Bruggeman, Rohrbaugh, Albert:

I believed . . . that Alan Bersin wanted to hire these folks. I have no basis for believing that he wanted to hire them because of political affiliation. . . And my view was that he wanted to hire people that he knew and trusted. So, the fact that he knew them and trusted them, I believe, is the reason he said he’d like to hire these guys. . . So, I didn’t assume that it was because of [party] affiliation. Frankly, if he was trying to put people on his staff solely because of political affiliation, he was an idiot, because that’s not going to help him get anything done. He needs people who can get things done.

(Tr. Vol. IV at 237 – 238).

The undersigned Administrative Law Judge finds Neal’s assessment compelling. Clearly, Bersin is an extremely well-educated, experienced and qualified professional. In his role as DHS “Border Czar,” and then as Acting CBP Commissioner, he was routinely exposed to intense political and media scrutiny. He served in a position where he simply

could not afford to put people in crucial, highly-visible policy jobs because of their political affiliations, particularly on an issue as publicly and politically contentious as that of the southern United States border. Hence, the undersigned Administrative Law Judge finds it unlikely that Bersin wanted the trio transferred to CBP because of their political affiliations. Bersin testified that he wanted the trio at CBP because of the work they had performed at DHS. Thus, if Bersin (a political appointee, who had served in both Republican and Democrat executive branches of government) did not intend to transfer the trio because of their political affiliations, it is even less likely that Respondent (a career civil servant) did either.

Moreover, there is no evidence, nor any reasonable inference that can be drawn from the evidence, that Respondent was either motivated by political reasons or that she intentionally acted because of political reasons in her signature on the forwarding letters. OSC's Post Hearing Brief is replete with baseless conclusions that Respondent was actively engaged in an ongoing process to improperly select the trio; all without reference to any direct evidence which thusly implicates her. The most OSC can conjure is that Respondent "would have," hypothetically acted in a manner consistent with OSC's theory of the case. (*E.g.*, OSC Post Hr'g Br. at 43 – 45). Moreover, OSC attempts to prove Respondent's culpability, not through her in-court testimony, but, rather from the transcripts of two "interviews" conducted by OSC counsel before this case was charged. (OSC Ex. 133). The undersigned Administrative Law Judge gives more weight to Respondent's in-court testimony than to the transcripts at OSC Exhibit 133 because, at the hearing, Respondent had the benefit of legal counsel and the fruits of pre-hearing discovery from which she could prepare herself. By contrast, on one occasion when OSC

counsel “interviewed” Respondent, she lacked the benefit of legal counsel and on neither occasion did she have the benefit of discovery.

**D. The Individual Counts as Charged**

Given the gravity of the exhaustive litigation process and hearing, the undersigned Administrative Law Judge believes it important to discuss the absence of proof in regard to each Count alleged.

**1. Count One**

This count alleges Respondent violated 5 U.S.C. §2302(b)(1)(E); 5 C.F.R. §§4.2, 7.1 and 720.901, in that she committed a prohibited personnel practice when she discriminated in favor of applicant Nathan Bruggeman and against all other applicants on the basis of partisan political affiliation. Count One alleges Respondent approved the results of a competitive examination of Bruggeman’s competitive application, which she knew was intended to facilitate Bruggeman’s conversion from a political appointment position to a career appointment in CBP . . . all because of Bruggeman’s political affiliation and his service to the Obama presidential campaign.<sup>18</sup>

OSC presented no probative evidence to substantiate any of the allegations in Count 1. OSC presented no evidence that Respondent committed a prohibited personnel practice: Respondent simply signed a forwarding memorandum on May 19, 2010, based upon her reliance upon the work of subordinate HRM staff. OSC presented no evidence of Respondent’s direct or indirect involvement with either the creation of the vacancy announcement or the creation or assembly of Bruggeman’s competitive application. OSC presented no evidence that Respondent discriminated in favor of Bruggeman and against

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<sup>18</sup> Count One may be multiplicitious with Count Two. Count One may also be duplicitous because the regulatory violation would seem to warrant a harsher punishment than the statutory violation; based upon rank and the potential for abuse thereof.

all other applicants on the basis of partisan political affiliation. No witness testified that Respondent was even aware of Bruggeman's political affiliation, much less her motivation to act in accord therewith. OSC did not even produce the complete, corporeal, coherent, assembled competitive Bruggeman package covered by the forwarding letter Respondent signed on May 19, 2010. (Resp. Ex. LL).

Assuming, for the sake of argument, that Respondent should have undertaken a more detailed review of the Bruggeman competitive package, then OSC has proven, at most, that Respondent was negligent in her duties. OSC presented no evidence that Respondent's signature constituted an intentional action to advance Bruggeman's application because of his political affiliation.

## **2. Count Two**

This count alleges Respondent violated 5 U.S.C. §2302(b)(6) in that she committed a prohibited personnel practice when she granted a preference or advantage not authorized by law, rule or regulation to Bruggeman, by approving the results of a competitive examination that she knew or should have known had been improperly manipulated.<sup>19</sup>

Laying aside the fact that Count Two alleges a negligence standard, OSC nevertheless produced no testimony or evidence that Respondent "knew or should have known" the Bruggeman competitive application package had been improperly manipulated. (The OSC Post Hearing Brief does not identify any improper manipulation of the package, much less by whom.) The evidence reveals that Respondent's only active

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<sup>19</sup> Count Two may be multiplicitious with Count 1.

involvement with the Bruggeman competitive application package was on May 19, 2010, when she reviewed and signed the materials after review with subordinate HRM staff.

### **3. Count Three**

This count alleges Respondent violated 5 U.S.C. §2302(b)(1)(E), in that she committed a prohibited personnel practice when she discriminated in favor of applicant Nathan Bruggeman and against all other applicants when she acted to advance Bruggeman's conversion through the use of the noncompetitive Schedule A appointment authority because of Bruggeman's political affiliation and his service to the Obama presidential campaign.<sup>20</sup>

OSC produced no evidence that Respondent was directly or indirectly involved in the assembly, creation or forwarding of Bruggeman's Schedule A application. The facts reveal that it was Gaugler, not Respondent, who signed and forwarded that Schedule A package to Jeff Neal at DHS. (Tr. Vol. IV at 184; Resp. Ex. CCC).

The evidence reveals Neal believed Bruggeman met the qualification requirements for the position and, thereafter, approved the Schedule A appointment and forwarded the selection documents to OPM for final approval. (Tr. Vol. IV at 182; OSC Ex. 110). Apparently, Neal did not believe that CPB, Gaugler . . . or even Respondent had discriminated for Bruggeman and against all other applicants because of Bruggeman's political affiliation.

### **4. Count Four**

This Count alleges Respondent violated 5 U.S.C. §2302(b)(6), in that she committed a prohibited personnel practice when she granted a preference or advantage

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<sup>20</sup> Count Three may be multiplicitious with Count Four.

not authorized by law, rule or regulation to Nathan Bruggeman, when she acted to advance Bruggeman's conversion through the use of the noncompetitive Schedule A appointment authority, and failed to comply with her agency's own notice requirement as required by 5 C.F.R. §302.301, and embellished Bruggeman's qualifications for the position. OSC witness Sumberg admitted that he had no reason to believe Respondent had taken action to either embellish Bruggeman's qualifications to grant an unlawful preference or because of political affiliation. (Tr. Vol. I at 88 – 91).<sup>21</sup>

OSC produced no testimony or evidence that Respondent "embellished Bruggeman's qualifications." OSC produced no evidence that Respondent was directly or indirectly involved in the assembly, creation or forwarding of Bruggeman's Schedule A application. The facts reveal that it was Gaugler, not Respondent, who signed and forwarded that Schedule A package to Jeff Neal at DHS. (Tr. Vol. IV at 184; Resp. Ex. CCC).

The evidence reveals Neal believed Bruggeman met the qualification requirements for the position and, thereafter, approved the Schedule A appointment and forwarded the selection documents to OPM for final approval. (Tr. Vol. IV at 182; OSC Ex. 110). Apparently, Neal did not believe that anyone at CPB, Gaugler ...or even Respondent had "embellished" Bruggeman's qualifications or that anyone had granted a preference or advantage against all other applicants because of Bruggeman's political affiliation.

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<sup>21</sup> Count Four may be multiplicitious with Count Three.

## **5. Count Five**

This count alleges Respondent violated 5 U.S.C. §2302(b)(1)(E), 5 C.F.R. §§4.2; 7.1, and 720.901, in that she committed a prohibited personnel practice when she discriminated in favor of applicant Benjamin Rohrbaugh and against all other applicants on the basis of partisan political affiliation. This Count alleges Respondent approved the results of a competitive examination that she knew was intended to facilitate Rohrbaugh's conversion from a political appointment position to a career appointment in CBP . . . all because of Rohrbaugh's political affiliation and his service to the Obama presidential campaign.<sup>22</sup>

OSC presented no probative evidence to substantiate any of the allegations in Count One. OSC presented no evidence that Respondent committed a prohibited personnel practice: she simply signed a forwarding memorandum on April 23, 2010, based upon her reliance upon the work of subordinate HRM staff. OSC presented no evidence of Respondent's direct or indirect involvement with either the creation of the vacancy announcement or the creation or assembly of Rohrbaugh's competitive application. OSC presented no evidence that Respondent discriminated in favor of Rohrbaugh and against all other applicants on the basis of partisan political affiliation. No witness testified that Respondent was even aware of Rohrbaugh's political affiliation, much less her motivation to act in accord therewith. OSC did not even produce Rohrbaugh's complete, corporeal, coherent, and assembled competitive package covered by the forwarding letter Respondent signed on April 23, 2010. (Resp. Ex. LL).

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<sup>22</sup> Count Five may be multiplicitious with Count Six. Count Five may also be duplicitous because the regulatory violation would seem to warrant a harsher punishment than the statutory violation; based upon rank and the potential for abuse thereof.



Assuming for the sake of argument that Respondent should have undertaken a more detailed review of the Rohrbaugh competitive package, then OSC has proven, at most, that Respondent was only negligent in her duties. OSC presented no evidence that Respondent's signature constituted an intentional action to advance Rohrbaugh's application because of his political affiliation.

#### **6. Count Six**

This count alleges Respondent violated 5 U.S.C. § 2302(b)(6), in that she committed a prohibited personnel practice when she granted a preference or advantage not authorized by law, rule or regulation to Rohrbaugh, by approving the results of a competitive examination that she knew or should have known had been improperly manipulated.<sup>23</sup>

Laying aside the fact that OSC alleged a negligence standard in this Count, it produced no testimony or evidence that Respondent how or why "knew or should have known" the Rohrbaugh competitive application package had been improperly manipulated. (OSC's Post Hearing Brief does not identify any improper manipulation of the package, much less by whom.) The evidence reveals that Respondent's only active involvement with the Rohrbaugh competitive application package was on April 23, 2010, when she reviewed and signed the materials after consultation with subordinate HRM staff.

#### **7. Count Seven**

This count alleges Respondent violated 5 U.S.C. §2302(b)(1)(E); 5 C.F.R. §§4.2, 7.1, and 720.901, in that she committed a prohibited personnel practice when she

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<sup>23</sup> Count Six may be multiplicitious with Count Five.

discriminated in favor of applicant Albert and against all other applicants on the basis of partisan political affiliation. This Count alleges Respondent approved the results of a competitive examination that she knew was intended to facilitate Albert's conversion from a political appointment position to a career appointment in CBP . . . all because of Albert's political affiliation and his service to the Obama presidential campaign.<sup>24</sup>

OSC presented no evidence that Respondent committed a prohibited personnel practice: [S]he simply signed a forwarding memorandum on April 23, 2010, based upon her reliance upon the work of subordinate HRM staff. OSC presented no evidence of Respondent's direct or indirect involvement with either the creation of the vacancy announcement or the creation or assembly of Albert's competitive application. OSC presented no evidence that Respondent discriminated in favor of Albert and against all other applicants on the basis of partisan political affiliation. No witness testified that Respondent was even aware of Albert's political affiliation, much less her motivation to act in accord therewith. OSC did not even produce Albert's complete, corporeal, coherent, and assembled competitive package covered by the forwarding letter signed by Respondent on April 23, 2010. (Resp. Ex. LL). Hence, it is impossible for the undersigned Administrative Law Judge to determine whether the package contained "obvious evidence of favoritism." (*See* OSC Post Hr'g Br.)

Assuming for the sake of argument that Respondent should have undertaken a more detailed review of the Albert competitive package, then OSC has proven, at most, that Respondent was only negligent in her duties. OSC presented no evidence that

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<sup>24</sup>Count Seven may be multiplicitious with Count Eight. Count Seven may also be duplicitous because the regulatory violation would seem to warrant a harsher punishment than the statutory violation; based upon rank and the potential for abuse thereof.

Respondent's signature constituted an intentional action to advance Albert's application because of his political affiliation.

### **8. Count Eight**

This count alleges Respondent violated 5 U.S.C. §2302(b)(6), in that she committed a prohibited personnel practice when she granted a preference or advantage not authorized by law, rule or regulation to Albert by approving the results of a competitive examination that she knew or should have known had been improperly manipulated.<sup>25</sup>

Once again, laying aside the fact that OSC alleged a negligence standard in this Count, it nevertheless produced no testimony or evidence that Respondent "knew or should have known" the Albert competitive application package had been improperly manipulated. (The OSC's Post Hearing Brief does not identify any improper manipulation of the package, much less by whom.) The evidence reveals that Respondent's only active involvement with the Albert competitive application package was her April 23, 2010, review and signature after revieweign the materials with subordinate HRM staff.

## **VI. CONCLUSION**

OSC did not prove by credible and preponderant evidence any of the Counts alleged in the Complaint. Neither documentary, nor testimonial, evidence provide evidence of Respondent's direct involvement in any material aspect of the events alleged in the Complaint. OSC did not prove Respondent engaged in political discrimination in regard to the three competitive applications or in regard to the Bruggeman Schedule A

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<sup>25</sup> Count Eight may be multiplicitious with Count Seven.

application. Nor did OSC prove Respondent granted an unauthorized preference or advantage in the three proposed competitive selections or in the Bruggeman Schedule A application. The only evidence of Respondent's participation in these events were her ministerial signatures on the letters dated April 23, 2010 and May 19, 2010, forwarding the Bruggeman, Rohrbaugh, or Albert and applications, on days when Christine Gaugler was conspicuously absent from her office. OSC produced no credible testimony or evidence that Respondent was involved in any meaningful way in the assembly or forwarding of the Bruggeman Schedule A package. (A package deemed sufficient, incidentally, by DHS HR head Jeff Neal.)

Rather, OSC's case is built entirely on conjecture and speculation that Respondent was a participant in, or that she "knew or should have known" of the events which resulted in the attempted hiring of the three applicants. If, indeed, improper hiring actions were attempted . . . then, most certainly, they were directed and accomplished by persons other than Respondent and those, apparently beyond the reach of OSC or the Board's jurisdiction. The undersigned Administrative Law Judge is left with the unmistakable impression that Respondent was charged solely because she was the last woman standing. The evidence and testimony supports no other conclusion.

## **VII. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent Katherine Coffman is a career employee of the U.S. Customs and Border Protection. She was, at all relevant times, a supervisor with personnel action authority (including authority as an "appointing official") over covered positions in the competitive service.
2. The U.S. Department of Homeland Security and its component, U.S. Customs and Border Protection fall within the enforcement jurisdiction of the Office of Special Counsel.
3. The Merit Systems Protection Board has jurisdiction to adjudicate this matter.

4. Respondent did not discriminate for or against any employee or applicant for employment on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation.
5. Respondent did not 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.
6. Respondent did not, with respect to any person who is an employee in the competitive service or any eligible or applicant for a position in the competitive service, make any inquiry concerning the race, political affiliation, or religious beliefs of any such employee, eligible, or applicant. Neither did Respondent discriminate or threaten, or promise against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive.
7. Although Respondent's involvement with the Schedule A applications and competitive appointment described herein were ministerial, she exercised her discretion in all personnel actions solely on the basis of merit and fitness and without regard to political or religious affiliations, marital status, or race.
8. Respondent did not discriminate on the basis of any person's political affiliation.

### **VIII. INITIAL DECISION**

OSC did not prove by preponderant evidence the allegations contained in Counts One through Eight of the Complaint. Therefore, no sanction against Respondent is appropriate.

### **IX. ORDER**

**IT IS HEREBY ORDERED** the Office of Special Counsel's proposed removal of Respondent is **DENIED**.

**PLEASE TAKE NOTICE** that under 5 C.F.R. §1201.111(b)(5), this decision will become final on November 10, 2015, 35 days from the date of this decision unless a party files a petition on or before that date or the Board reopens the case on its own motion.

**PLEASE TAKE FURTHER NOTICE** that any party may file a petition for review with the Merit System Protection Board in accordance with the procedures set forth in Attachment B.

**FOR THE BOARD**



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**HON. BRUCE T. SMITH**  
**ADMINISTRATIVE LAW JUDGE**

## ATTACHMENT A – EXHIBIT LIST

### OSC Exhibits

OSC Ex. 1	Not Offered
OSC Ex. 2	CBP Human Resources Management (HRM) Organizational Chart
OSC Ex. 3	April 1, 2010 email between Marco Lopez and Michele Burton
OSC Ex. 4	Not Offered
OSC Ex. 5	April 1, 2010 email between Robin Urkums and Linda Oakey
OSC Ex. 6	April 7, 2010 emails between Burton and Urkums
OSC Ex. 7	April 7, 2010 email from Urkums to Marlene Lightburn
OSC Ex. 8	April 7 through 15, 2010 emails between Urkums and Lightburn
OSC Ex. 9	April 21 through May 7, 2010 emails between Urkums and Oakey
OSC Ex. 10	April 15 through 27, 2010 emails between Urkums, Burton and Lightburn
OSC Ex. 11	May 6 through 7, 2010 emails between Urkums, Shawn Flinn and Oakey
OSC Ex. 12	2009 Office of Personnel Management (OPM) memorandum regarding political conversions
OSC Ex. 13	Department of Homeland Security (DHS) memorandum regarding political conversions
OSC Ex. 14	Schedule A authority
OSC Ex. 15	Offered, Not Admitted
OSC Ex. 16	March 31 through April 2, 2010 Sandy Manuel emails

OSC Ex. 17	April 2, 2010 emails between Manuel, Annie Herbert, Chappell Lawson and Ariana Raines
OSC Ex. 18	April 2, 2010 emails between Manuel, Herbert and Lawson
OSC Ex. 19	April 2, 2010 emails between Manuel, Herbert, Raines and Lawson
OSC Ex. 20	April 4, 2010 email from Tamika Milburn to Herbert
OSC Ex. 21	April 20, 2010 emails between Karen Heinrich, Nathan Bruggeman, Brian Albert and Benjamin Rohrbaugh
OSC Ex. 22	Rohrbaugh Management and Program Analyst Vacancy Announcement
OSC Ex. 23	Not Offered
OSC Ex. 24	Rohrbaugh Management and Program Analyst position description
OSC Ex. 25	Addendum to the Rohrbaugh Management and Program Analyst position description
OSC Ex. 26	Rohrbaugh Application
OSC Ex. 27	Jason McCutcheon Application
OSC Ex. 28	Rohrbaugh Certificate of Eligible Candidates
OSC Ex. 29	Indianapolis Hiring Center (IHC) notations of applicant qualifications
OSC Ex. 30	Rating Summary Report and letters to applicants
OSC Ex. 31	Rohrbaugh competitive position description
OSC Ex. 32	Pre-appointment Checklist for Rohrbaugh
OSC Ex. 33	Cover letter for Rohrbaugh competitive package



OSC Ex. 34	Transmittal and routing sheets, Rohrbaugh and Albert packages
OSC Ex. 35	April 8 through 14, 2010 emails between Herbert and Manuel
OSC Ex. 36	April 14, 2010 email from Manuel to Albert and Rohrbaugh
OSC Ex. 37	April 15, 2010 emails between Herbert, Ann Williams and Phillips
OSC Ex. 38	April 15 through 16, 2010 emails between Milburn, Herbert, <i>et al.</i>
OSC Ex. 39	April 15 through 16, 2010 email between Herbert and Milburn
OSC Ex. 40	April 19, 2010 emails between Christine Gaugler, Katherine Coffman, Herbert <i>et al.</i>
OSC Ex. 41	April 22, 2010 email from Herbert to Nancy Bagley and Milburn
OSC Ex. 42	May 3, 2010 email from Coffman
OSC Ex. 43	May 4, 2010 emails between Herbert and Bagley
OSC Ex. 44	May 10, 2010 email from Lynne Smith
OSC Ex. 45	May 10, 2010 email from Coffman to self
OSC Ex. 46	May 3 and 11, 2010 emails from Coffman
OSC Ex. 47	May 11, 2010 emails between Coffman, Phillips, <i>et al.</i>
OSC Ex. 48	May 14 through 16, 2010 emails between CBP and DHS
OSC Ex. 49	May 13 through 18, 2010 emails between Gaugler, Smith, Coffman, <i>et al.</i>
OSC Ex. 50	May 18, 2010 email from Smith to Gaugler and Coffman

OSC Ex. 51	May 19, 2010 email from Smith to Gaugler and Coffman
OSC Ex. 52	Albert Management and Program Analyst Vacancy Announcement
OSC Ex. 53	Not Offered
OSC Ex. 54	Albert Management and Program Analyst position description
OSC Ex. 55	Albert Management and Program Analyst position description addendum
OSC Ex. 56	Albert Application
OSC Ex. 57	Thomas Bishop's Application
OSC Ex. 58	Albert Certificate of Eligible Candidates
OSC Ex. 59	IHC notations of applicant qualifications
OSC Ex. 60	Not Offered
OSC Ex. 61	Not Offered
OSC Ex. 62	Pre-appointment Checklist for Albert
OSC Ex. 63	Cover letter for Albert competitive package
OSC Ex. 64	Not Offered
OSC Ex. 65	May 6 through 10, 2010 emails between Bagley, Herbert, Urkums, <i>et al.</i>
OSC Ex. 66	Bruggeman Management and Program Analyst Vacancy Announcement
OSC Ex. 67	Not Offered
OSC Ex. 68	Not Offered
OSC Ex. 69	Bruggeman Management and Program Analyst position description

OSC Ex. 70	Bruggeman Management and Program Analyst position description addendum
OSC Ex. 71	Bruggeman Application for Management and Program Analyst position
OSC Ex. 72	Andreas Karellas's Application
OSC Ex. 73	IHC notations of applicant qualifications
OSC Ex. 74	Bruggeman Certificate of Eligible Candidates
OSC Ex. 75	Bruggeman Competitive Position Description
OSC Ex. 76	April 30, 2010 emails between Herbert, Milburn and Rachelle Ferrante
OSC Ex. 77	May 11, 2010 emails between Milburn and Herbert
OSC Ex. 78	May 12, 2010 emails between Milburn and Ferrante
OSC Ex. 79	May 13, 2010 emails between Herbert, Williams and Milburn
OSC Ex. 80	May 19, 2010 email from Denise Adams to Bagley and Williams
OSC Ex. 81	May 19, 2010 emails between Gaugler and Coffman
OSC Ex. 82	Pre-appointment Checklist for Bruggeman Management and Program Analyst position
OSC Ex. 83	Cover letter for Bruggeman competitive package
OSC Ex. 84	Offered, Not Admitted
OSC Ex. 85	Not Offered
OSC Ex. 86	May 27, 2010 memorandum from Jeff Neal regarding Rohrbaugh and Albert packages
OSC Ex. 87	June 2, 2010 email from Coffman to Gaugler
OSC Ex. 88	DHS Concurrence Sheet and Memo concerning Bruggeman Management and Program Analyst position

OSC Ex. 89	June 3, 2010 emails between Gaugler and Luke Lopez
OSC Ex. 90	June 7, 2010 emails from Coffman
OSC Ex. 91	June 8, 2010 emails between Williams, Adams, Herbert, <i>et al.</i>
OSC Ex. 92	June 21, 2010 memorandum from Coffman regarding Schedule A hiring authority
OSC Ex. 93	Not Admitted.
OSC Ex. 94	June 24 through 28, 2010 emails between Coffman, Gaugler, Williams, Randall McLin, Joyce Turnquist, <i>et al.</i>
OSC Ex. 95	June 27, 2010 email from Coffman to self
OSC Ex. 96	June 28, 2010 Schedule A package cover letter from CBP to DHS
OSC Ex. 97	June 29, 2010 Schedule A package from CBP to DHS
OSC Ex. 98	CBP Operating Procedures for Filling Excepted Service Positions
OSC Ex. 99	July 1, 2010 emails between Coffman, McLin, <i>et al.</i>
OSC Ex. 100	July 8, 2010 email from McLin to Coffman, Gaugler and Smith
OSC Ex. 101	July 9 through 13, 2010 emails between Coffman, Luke Lopez, Gaugler, <i>et al.</i>
OSC Ex. 102	Not Offered
OSC Ex. 103	Not Offered
OSC Ex. 104	July 16, 2010 emails between Gaugler, Williams, Coffman, <i>et al.</i>
OSC Ex. 105	July 26, 2010 emails between Coffman, Gaugler, McLin, <i>et al.</i>

OSC Ex. 106	July 26 through August 2, 2010 emails between Williams, Coffman, Gaugler, <i>et al.</i>
OSC Ex. 107	August 2, 2010 email from Williams to Coffman, Gaugler, Herbert, <i>et al.</i>
OSC Ex. 108	August 1 through 2, 2010 emails between Marco Lopez, Gaugler, <i>et al.</i>
OSC Ex. 109	August 4, 2010 emails between Gaugler, Adams, Coffman, <i>et al.</i>
OSC Ex. 110	Schedule A Package from DHS to OPM
OSC Ex. 111	OPM Checklist
OSC Ex. 112	August 11 through 20, 2010 emails between Kathleen Caton, Williams, Adams, Cindy Westray, <i>et al.</i>
OSC Ex. 113	August 11 through 24, 2010 emails between Williams, Coffman, Westray, Adams, Caton, <i>et al.</i>
OSC Ex. 114	August 27, 2010 emails between Coffman, Gaugler and McLin
OSC Ex. 115	August 31, 2010 letter from Jeffrey Sumberg to Neal regarding Schedule A appointment
OSC Ex. 116	August 31 through September 1, 2010 emails between Coffman, Smith, Gaugler, <i>et al.</i>
OSC Ex. 117	September 1, 2010 email from Gaugler to Bersin, <i>et al.</i>
OSC Ex. 118	August 19 through 20, 2010 emails between Smith, Coffman, McLin, <i>et al.</i>
OSC Ex. 119	June 18 through August 17, 2010 emails from Coffman to self and McLin
OSC Ex. 120	Coffman resume
OSC Ex. 121	Coffman's 2010-11 performance appraisal

OSC Ex. 122	Coffman's 2011-2012 performance appraisal
OSC Ex. 123	CBP Deputy Assistant Commissioner for Human Resources Management position description
OSC Ex. 124	CBP Assistant Commissioner for Human Resources Management position description
OSC Ex. 125	Not Offered
OSC Ex. 126	Not Offered
OSC Ex. 127	Routing Sheet-Bruggeman
OSC Ex. 128	Not Offered
OSC Ex. 129	Not Offered
OSC Ex. 130	May 2010 meeting invitations
OSC Ex. 131	January 4 through 6 emails between Coffman, Burton, Gaugler, <i>et al.</i>
OSC Ex. 132	Not Offered
OSC Ex. 133	OSC Interview Transcripts and Recordings for Katherine Coffman
OSC Ex. 134 – Ex. 147	Not Offered
OSC Ex. 148	Coffman's Bonuses
OSC Ex. 149	Not Offered
OSC Ex. 150	April 29 through 30, 2010 emails between Manuel, Lawson, <i>et al.</i>
OSC Ex. 151	Not Offered
OSC Ex. 152	June 4, 2010 emails between Williams, Adams, <i>et al.</i>
OSC Ex. 153	Not offered
OSC Ex. 154	DHS and CBP Press Releases

OSC Ex. 155	Not Offered
OSC Ex. 156	April 1, 2010 email from Lawson to Anne-Marie Stacey
OSC Ex. 157	DHS Plan, Form 307
OSC Ex. 158	Michele Burton's leave May – June 2010

### **Respondent's Exhibits**

- |    |   |
|----|---|
| A. | Not offered   |
| B. | Emails between Albert to Manuel re: resumes: OSC Bates Stamped 005966-005970  |
| C. | Not offered   |
| D. | Emails from Lawson to various staff re: Staffing and Draft Vacancy Announcements: OSC Bates Stamped 004114-004161         |
| E. | Email Herbert, Manuel, Lawson re: draft announcement: OSC Initial Disclosures (hereinafter "OSC ID") Bates Stamped 001283 |
| F. | Not offered   |
| G. | Emails between Manuel and Herbert re: SPF: OSC 006968-006969  |
| H. | Emails between Manuel and Herbert re: SPF and Vacancy Announcements: OSC ID 002539-002556                                 |
| I. | Email chain Lawson, Manuel, Herbert re: SPF: OSC 003416-003418, 003830-003835   |
| J. | Emails from Manuel to candidates re: job postings: OSC 004171-004172  |
| K. | Email Lawson to staff re: OPP Announcements and hiring Bruggeman: OSC 004369-004372                                       |

L.	Email Herbert to Williams re: Rohrbaugh qualifications: OSC 004173-004174
M.	Not offered
N.	Herbert Email to staff re: OPP vacancies: OSC 004496-004506
O.	Not offered
P.	Not offered
Q.	Email Gaugler to Phillips re: Status of OPP actions OSC 004197-004198
R.	Not offered
S.	Not offered
T.	Not offered
U.	Email Milburn to Herbert re: Bruggeman ineligibility: OSC 004378-004380
V.	Email Chain re: Bruggeman eligibility issue: OSC 006019-006020, 006025-006026, 006029, 006035-006039, 006047-006053
W.	Email Gaugler to Heinrich re: Status of Personnel Actions: OSC 003211
X.	Not offered
Y.	Email Chain Gaugler & Lawson re: OPP staffing: OSC 005064-005065
Z.	Not offered
AA.	Not offered
BB.	Not offered
CC.	Not offered
DD.	Not offered
EE.	Not offered



FF.	Coffman emails re: Bruggeman competitive package and Bruggeman Schedule A package: OSC 002735-002737, 002783- 002784, 002805-002806
GG.	Not offered
HH.	Neal Memo to Gaugler dated May 27, 2010 denying Rohrbaugh and Albert Packages: OSC 001276
II.	Email Chain regarding Albert and Rohrbaugh denial: OSC 006125-006131
JJ.	Email Herbert to Manuel re: withdrawal of job offers: OSC ID 001293-001294
KK.	Gaugler email to Lopez, M. re: 3 Competitive hirings: OSC 003197, 003199
LL.	Three transmittal Memos to Neal for 3 Competitive Announcements signed by Katherine Coffman: OSC 002397- 002399
MM.	Not offered
NN.	Not offered
OO.	Not offered
PP.	Email Phillips to Burton to Gaugler re: Schedule C & Schedule A: OSC ID 000689
QQ.	Not offered
RR.	Not offered
SS.	Michele Burton Emails re: Initial Schedule A: OSC 000679- 000698
TT.	Urkums Emails re: initial Schedule A: OSC ID 002380-002414
UU.	Not offered
VV.	Urkum Emails regarding initial Bruggeman Schedule A: OSC 002325-002527 only

WW.	Michele Burton Email to Lopez and Gaugler re: Schedule A: OSC 000702-000704
XX.	Urkum Email Chains on Bruggeman initial Schedule A: OSC 002448 – 002449 only
YY.	Email Gaugler to Lopez, L. re: status of Bruggeman selection certificate: OSC 004007
ZZ.	Not offered
AAA.	Not offered
BBB.	CBP Document Routing Form with Schedule A package dated June 28, 2010
CCC.	Bruggeman Schedule A Pre-Appointment Review Checklist and Package signed by C. Gaugler OSC 002354-002391
DDD.	McEachron Email re: Neal questions on Bruggeman 2 <sup>nd</sup> Schedule A: OSC 001074
EEE.	Not offered
FFF.	Not offered
GGG.	Not offered
HHH.	Not offered
III.	McEachron email chains re: 2 <sup>nd</sup> Schedule A – only pages 1435, 1490, 1491, 1498, & 1499
JJJ.	Not offered
KKK.	Not offered
LLL.	Not offered
MMM.	Not offered
NNN.	Not offered
OOO.	Jeffrey Sumberg email to Neal re: Bruggeman decision: OSC 001146

PPP.	Jeffrey Sumberg Letter to DHS dated August 31, 2010, denying Bruggeman Schedule A Appointment: OSC 004517-004522
QQQ.	Not offered
RRR.	Not offered
SSS.	Not offered
TTT.	Bersin emails to Gaugler re: Bruggeman MOU
UUU.	Not offered
VVV.	Not offered
WWW.	Not offered
XXX.	Not offered
YYY.	Email Gaugler's Commissioner status report: OSC 004042-004094
ZZZ.	Not offered
AAAA.	Denise Adams emails to Gaugler re: status of OPM review of Schedule A package: OSC 002998
BBBB.	Email Gaugler to Coffman re: status report: OSC 002827-002830, 002837-002838
CCCC.	Not offered
DDDD.	Williams email to Landrau re: OPM referral to OSC, January 2011: OSC 002926-002928
EEEE.	CBP IHC Delegated Examining Team SOP dated 11-19-2009: OSC 006968-007024
FFFF.	Not offered
GGGG.	Not offered
HHHH.	Not offered
IIII.	CBP Schedule A appointments prior to Bruggeman's Schedule A: OSC 000709-000740

JJJJ.	Not offered
KKKK.	Position Description – Executive Director, HR Programs and Operations: CB000038-CBP000041
LLLL.	Email from Adams to Bagley re: Bruggeman Table of Contents dated May 19, 2010
MMMM. – WWW.	Not offered
XXXX.	Respondent Coffman’s Questions and Responses to OSC’s First Set of Discovery Requests 56 - 73, 92 – 110, & 74 – 91

#### ALJ Exhibits

Three ALJ Exhibits were entered into evidence during the hearing.

ALJ I. CBP HRM chain of command

ALJ II. CBP Office of the Commissioner chain of command

ALJ III. OPM HR chain of command

## **ATTACHMENT B – APPEAL RIGHTS**

### **NOTICE TO RESPONDENT**

This initial decision will become final on November 10, 2015, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

### **BOARD REVIEW**

You may request Board review of this initial decision by filing a petition for review. If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW.  
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

#### **Criteria for Granting a Petition or Cross Petition for Review**

Pursuant to 5 C.F.R. § 1201.115 (eff. Nov. 13, 2012), the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give

deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h) (eff. Nov. 13, 2012), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

### **JUDICIAL REVIEW**

If you are dissatisfied with the Board's final decision, you may file a petition with:

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

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.ca9c.uscourts.gov](http://www.ca9c.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

### **NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.