

## LAW REVIEW 16107<sup>1</sup>

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### OSC Takes Action To Enforce Veterans' Preference

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

Update on Sam Wright

#### 8.0—Veterans' Preference

On October 5, 2016, the United States Office of Special Counsel (OSC)<sup>3</sup> sent out a press release about its actions to prevent the United States Department of Justice (DOJ) from flouting the federal law that accords veterans a preference in obtaining federal civilian employment by pressuring preference-eligible veterans to withdraw their employment applications so that DOJ supervisors can hire their preferred applicants. The OSC press release is copied at the end of this article.

During World War II, Congress enacted several important laws to show our nation's gratitude to those who were serving or would in the future serve our country in the military and to assist veterans in their transition from active service to civilian life. One of those World War II era

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

<sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. Although I am no longer employed by ROA, I have continued writing new "Law Review" articles as a volunteer and ROA member. I am available by e-mail at [SWright@roa.org](mailto:SWright@roa.org) or by telephone at (800) 809-9448, extension 730.

<sup>3</sup> OSC is an independent federal investigative and prosecutorial agency. Its basic authorities come from four federal statutes: The Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment and Reemployment Rights Act. OSC's primary mission is to safeguard the merit system by protecting federal employees from prohibited personnel practices. OSC is headed by the Special Counsel of the United States, who is appointed by the President with Senate confirmation for a five-year term. The current Special Counsel is the Honorable Carolyn Lerner, and she has held the office since June 2011. President Obama nominated her for a second term, but the Senate has not yet confirmed her. The statute provides for the Special Counsel to remain in office for up to one year, after the expiration of the five-year term, or until the reappointment is confirmed by the Senate or a new Special Counsel is appointed and confirmed. Carolyn Lerner is still in office under this holdover provision. I urge the Senate to act promptly to confirm her appointment for a second five-year term.

laws is the Veterans' Preference Act (VPA). Under the VPA, a veteran of wartime<sup>4</sup> military service qualifies for a five-point veterans' preference, and a disabled veteran qualifies for ten points. The VPA is based on a model of federal employment that is rare today. When Congress enacted the VPA in 1944, the usual way of getting a federal job was by taking a written examination, with a numerical score, to which five points or ten points could be easily added. Today, such examinations are unusual, and federal agencies routinely flout the VPA and usually get away with it.

Congress enacted the Veterans Employment Opportunities Act (VEOA) to provide an enforcement mechanism for VPA claims. If you believe that a federal agency has violated your VPA rights, with respect to initial hiring or a promotion opportunity, you must file a written complaint within 60 days with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency is required to investigate your complaint. If DOL-VETS finds your complaint to have merit, it is required to make "reasonable efforts" (whatever that means) to get the federal agency to comply. But the DOL-VETS determination is not binding on the agency. Federal agencies can and usually do tell DOL-VETS to "pound sand." If DOL-VETS fails to resolve your VPA complaint, you must then bring your own action in the Merit Systems Protection Board (MSPB). The DOL-VETS determination in your favor is not binding and not even admissible. You must prove your case, without reference to the DOL-VETS findings. Yes, this is a screwy enforcement mechanism, but this is what Congress has enacted in the VEOA.

Because the VEOA enforcement mechanism for the VPA is cumbersome and ineffective, action by OSC to make federal agencies comply is most welcome. Here is the OSC press release:

#### **OSC Stays Hiring in Veterans-Preference Case**

#### **FOR IMMEDIATE RELEASE**

CONTACT: Nick Schwellenbach, (202) 254-3631; [nschwellenbach@osc.gov](mailto:nschwellenbach@osc.gov)

WASHINGTON, D.C./October 5, 2016 –

Last week, the U.S. Office of Special Counsel (OSC) obtained a 45-day stay from the Merit Systems Protection Board (MSPB) that puts a hold on the Justice Department's selection of candidates for two supervisory positions while OSC investigates allegations from two preference-eligible veterans. Those veterans filed complaints with OSC alleging that the Justice

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<sup>4</sup> For purposes of the VPA, we as a nation have been considered to be in "wartime" since August 2, 1990, when President George H.W. Bush declared a national emergency, based on the Iraqi invasion and occupation of Kuwait. That national emergency has not been terminated by any subsequent President, but it will be terminated someday. When our nation is at "peace" a veteran must serve in a campaign or expedition to qualify for the five point veterans' preference.

Department encouraged them to withdraw from competition<sup>5</sup> on for these positions so that the Justice Department could hire its preferred non-veteran candidate. This is the first time that OSC has sought a stay for a non-retaliation-related prohibited personnel practice case.

OSC sought the stay because it has a reasonable belief that the Justice Department's International Criminal Investigative Training Assistance Program may have violated 5 U.S.C. § 2302(b)(6), which bars agency officials from giving applicants an improper preference or advantage for employment for the purpose of improving or injuring the prospects of any particular person.

OSC may request a stay from the MSPB when OSC has a reasonable belief that the personnel action taken or to be taken is the result of a prohibited personnel practice. Such a request by OSC shall be granted unless, under the facts and circumstances, such a stay would not be appropriate. A grant of a stay request is not a finding on the merits of the claim.

The MSPB's stay order, which contains further details, can be found [here](#).