



WHITE PAPER

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**The Dangers of Overriding
Veterans' Preference by
HR Specialists**

*The Agency Is at Risk and the Applicant's
Standing Is Adversely Affected*

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Herbert Russell, a U.S. Army veteran from Charlotte, N.C., served his country honorably and upon discharge received compensation for service-related disabilities at 30 percent, and with it a 10-point veterans' preference when applying for most federal positions.

In October 2010, Russell noticed a job vacancy with the Department of Health and Human Services and applied through the agency's QuickHire system, which required applicants to fax any supporting documents to the agency. QuickHire seemed reliable. It created a separate coversheet for each document faxed, and each coversheet held a barcode specific to the applicant, the job vacancy and document type. The faxes were received by QuickHire and filed electronically.

Russell knew as a 30-percent compensable disability veteran he was entitled to the 10-point veterans' preference and dutifully faxed the required letter and documentation from the Department of Veterans Affairs.

What Russell was not told, either by the QuickHire system or HHS, was that sending an additional fax with the same barcode would erase his initial fax, the DD Form 214 from the VA — a "Certificate of Release or Discharge from Active Duty". His second fax, a copy of the federal Standard Form (SF) 50-B detailing his previous work for the federal government as a 30-percent disabled veteran, overwrote the DD Form 214.

Here begins the cautionary tale of the hazards of overriding veterans' preference.

A Nation's Promise

Veterans' preference, a requirement of the federal government to give preference to returning war veterans when making new hires as recognition of their service to their country, has roots dating to the Revolutionary War. It was first covered by an act of Congress following the Civil War, reaffirmed by the Veterans' Preference Act of 1944, and most recently by the Veteran Employment Opportunities Act of 1998. It is covered by areas of Title 5 of the U.S. Code.

If the rule of law isn't enough, President Obama has prioritized the hiring of veterans, creating the Veterans Employment Initiative, the Veterans Opportunity to Work to Hire Heroes Act of 2011, and most recently unveiling a \$5 billion veterans jobs plan.

In the U.S., veterans' preference is not a privilege. It's a right — part of the fulfillment of the promise that this country makes to members of its armed forces when they agree to risk their lives in service of country.

Russell, whose service qualifications and scoring would have made him the top candidate for the position at HHS, had his application "ignored" (in the words of the U.S. Merit Systems

Protection Board) by the agency's human resource specialist because of the flaw in the QuickHire system — a flaw the agency knew about but does not communicate to applicants.

In disturbingly cold manner, Russell was not contacted by HHS to inform him of the missing VA letter. Russell would have rated the top applicant for the position with a 10-point veterans' preference, and with a five-point veterans' preference he did not rate among the top three candidates. HHS ended up selecting a candidate who was not preference eligible.

Russell filed a veterans' preference complaint with the Department of Labor, which closed its investigation and denied relief. After an appeal to the MSRB, an administrative judge ruled that Russell was solely responsible for not receiving the 10-point veterans' preference, which the full Board reversed and ordered corrective action.

The MSRB rightly found that the agency was responsible for the appellant not receiving his entitled 10-point veterans' preference. HHS was ordered to "reconstruct the selection process."

The Board held, **"An agency may not deprive an applicant of his veterans' preference rights merely because the applicant has made a minor technical mistake in submitting his application."**

The percentage of veterans in the Federal agency workforce is 26.3 percent, well over the percentage of veterans in the civilian workforce, at 8 percent. HHS is the only Federal agency with a percentage of veteran workforce below the civilian number, at 6.2 percent.

That number begs the question of whether or not HHS is following veterans' preference, and it illustrates the hazard in having human resource specialists overriding or making determinations on veterans' preference — something best validated the hiring manager.

But this problem isn't limited to HHS. Human resources specialists at every federal agency continue to override veterans' preference and turn away thousands of qualified veterans each year. According to recent numbers from one agency, 557 veterans out of a pool of 1,200 applicants for a position (46 percent) were tossed out by HR practitioners.

The act in and of itself is illegal and violates the due process rights of veterans.

The issue in *Russell v. Department of Health and Human Services* — as well as in *Kirkendall v. Department of Army (2009)* and *Marshall v. Department of Health and Human Services (2009)* — is at what point in the application process supporting document should be provided to an agency. There are two places in the OPM DEU Handbook that address supporting documentation. Chapter 4, Section A, Incomplete Applications, states that an application can be rated as incomplete if the applicant "does not submit a required form or other material, as

specified in the job announcement,” or fails to respond to questions that must be answered, or if there is “insufficient information concerning education or experience.”

But handling veterans' preference does not fall under Section A.

According to Chapter 4, Section B, Reviewing Applications, of the OPM DEU Handbook, there are only three situations when proof of veterans' preference is required:

- “When such status is used as a basis for accepting an application after the closing date;
- When positions are restricted to preference eligible (i.e., custodian, elevator operator, guard, and messenger positions (see 5 U.S.C. 3110); or
- **Prior to final selection if the veteran was selected over other eligibles based on his or her eligibility for veterans' preference.”**

Veterans Should Opt In; They Should Not Be Opted Out

Veterans should always be given benefit of doubt. Agency human resource specialists who override veterans' preference create a fundamental paradigm of hiring that is at odds with U.S. law and the current administration's executive order. The Federal government should choose to have the greatest number of candidates for any position rather than opt for having the fewest or most convenient number. But why are so many veterans tossed out of the system?

This happens, in large part, because of the amount of work needed by a human resources specialist to process an applicant's DD Form 214. It becomes easier to toss out the application — much less contact a qualified 30-point compensable disability veteran with full 10-point veterans' preference when documentation seems to be missing. It's an unethical practice, and illegal, which is why the MSRB ruled in favor of Russell and took HHS and its human resources specialist to task:

“Even assuming that the appellant erred by reusing the coversheet, he was never warned — and had no reason to suspect — that doing so would erase his earlier fax, and the QuickHire system did not allow him to check whether the agency in fact had the VA letter.

Moreover, the agency knew, or at least should have known, that the appellant might be entitled to a 10-point preference. Even though it was missing the VA letter, the agency's file contained the appellant's application for a 10-point preference as well as his SF 50-B stating that he was entitled to that preference. The agency could have tentatively granted the appellant a 10-point preference and sought documentation in the event the preference mattered to the selection process, or it could have followed up with him immediately to determine if he had submitted the VA letter. Yet the agency made no effort to notify the appellant that his was missing the key document or to determine from the rest of the file whether he was entitled to a 10-point preference.”

Whether apathy, ignorance of the law or failure to follow proper procedures, these actions put the agency at risk and disrespect the sacrificed made by our military servicemen and women. They deserve benefit of doubt, an email or a phone call, and the relatively simple act of granting tentative preference until an accurate determination can be made.

An understated but principal concern is the need to keep veterans in the employ of the Federal Government. In a 1996 hearing on veterans' preference reform, Congressman Stephen E. Buyer of Indiana said of veterans, "the Federal Government has an investment in individuals. These are individuals, men and women, who have a great decision making process, the ability to make sound judgments under great emotional stress. These are very balanced individuals who have a very good sense of duty, honor, country, knowledge of sacrifices and knowledge of what's worth living for and what's worth dying for. And I think that's extremely important to retain those types of individuals in the Government" (Veterans Preference, 1996).

Avue Risk Mitigation Measures

Avue is the only system that requires the DD Form 214 to be attached directly to the application, and has provided assistance to agencies through the recruitment and examining processes in the Avue Recruitment, Retention, and Staffing (RRS) Module, by inserting "risk assessment messages" to alert managers and HR specialists about actions that, if taken, have the potential to violate veterans' preference rights. Avue's system-generated messages are shown below, as well as information on the circumstances under which they are automatically generated:

OVERRIDE OF CLAIMED VETERANS PREFERENCE: "Veterans' preference is an entitlement under law (5 U.S.C. 1302). You are attempting to change the preference claimed by a preference eligible. Be sure your documentation is accurate and complete as it becomes part of the case file and is subject to scrutiny during an audit or program review." This message is automatically generated in Avue when, as part of the candidate review process, an override would change a veterans' preference from what the applicant had indicated, such as changing preference from a 10-Point 30-Percent Compensable Disability Preference (CPS) to a 5-Point Preference (TP), as happened in *Russell v. Health and Human Services*. **Avue also provides a periodic Override Report that includes information on the number and type of Basic Qualification and other staffing overrides performed by your HR staff. It is provided to assist in assessing your agency's risk for violation of preference eligibles' rights.**

OVERRIDE OF VETERANS QUALIFICATIONS: "Veterans preference is an entitlement under law (5 U.S.C. 1302). You are attempting to change the qualifications claimed by a preference eligible. Be sure your documentation is accurate and complete as it becomes part of the case file and is subject to scrutiny during an audit or program review." This message is automatically generated in Avue when, as part of the candidate review process, a user changes a veterans' status from basically qualified to "no" or "cannot determine".

SELECTION OF A NON-PREFERENCE ELIGIBLE CANDIDATE OVER A PREFERENCE

ELIGIBLE CANDIDATE: "You have selected a non-preference eligible candidate when a preference eligible (veteran) is available. You must select a preference eligible unless you formally request an exception from your Human Resources Specialist. Please contact your Human Resources Specialist prior to completing this selection process." This message is automatically generated in Avue after a manager selects a non-preference candidate over a preference candidate, and clicks on "Selections Complete". This message is automatically generated in situations where the vacancy is being filled with candidates from outside the agency following the Title 5 competitive process.

SELECTION OF A NON-PREFERENCE ELIGIBLE CANDIDATE OVER A PREFERENCE

ELIGIBLE CANDIDATE: "You have allowed the selection of a non-preference eligible candidate when a preference eligible (veteran) is available. The Selecting Official must select a preference eligible unless an exception is formally requested. Please consult 5 USC§3318(b)(2) or the Delegated Examining Operations Handbook Chapter 6, Section C, for further information on the approval process. This message is automatically generated in Avue when an HR specialist completes the selection audit process in the system. Again, this is a reminder to HR that an objection or pass-over of a veteran must be appropriately documented.

Tens of thousands of veterans have been successfully placed in positions with Federal agencies, but there are tens of thousands more who are illegally denied their veterans' preference rights by human resources specialists during the application process.

Disqualifying a preference eligible or reducing or removing preference entitlements because the application lacks proof documents, such as DD Form 214, prematurely removes veterans' preference which adversely impacts the applicants' standing and placement on referral lists, strips veterans of their legal entitlement to veterans' preference, and introduces a high risk and vulnerability to the award of compensatory damages.

U.S. veteran servicemen and women deserve better.

Works Cited

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