



Department of Veterans Affairs Office of Inspector General

Administrative Investigation of Conflict of Interest, Nepotism, and False Statements within the VA Office of General Counsel

Washington, DC



DEPARTMENT OF VETERANS AFFAIRS
Office of Inspector General
Washington, DC 20420

TO: VA Deputy Secretary

SUBJECT: Administrative Investigation of Conflict of Interest, Nepotism, and False Statements within the VA Office of General Counsel, Washington, DC (2017-03324-IQ-0103)

Summary

The VA Office of Inspector General (OIG) Administrative Investigations Division received an allegation that Mr. Robert Fleck (SES), Chief Counsel of the Procurement Law Group (PLG) within the Office of General Counsel (OGC), actively and openly solicited, during a conference call with other Senior Executive Service (SES) employees, that the OGC hire his wife, Ms. KW (GS-14).¹ One of the SES employees who participated in the conference call hired Ms. KW. The OIG found that Mr. Fleck had a conflict of interest and engaged in nepotism when he used his position as an SES manager in OGC's Contract Operations to advocate for the employment of his wife and help establish for her a GS-14 e-Discovery attorney position on OGC's Contract Litigation Team, a team that he managed.

The OIG determined Mr. Fleck shared VA sensitive information with his wife while she was being vetted for the VA position, and he and Ms. KW made false statements when questioned about it during their respective interviews. The OIG referred the conflict of interest and false statements matters to the U.S. Attorney's Office, which declined prosecution due, in part, to available administrative remedies.

Introduction

To assess the allegations, the OIG interviewed Mr. Fleck, Ms. KW, senior OGC leaders, and other OGC attorneys. The OIG also reviewed email, telephone, personnel, and recruitment records; OGC organizational documents; federal laws and regulations; and VA policy.

¹ The OIG has not listed the names of individuals who held positions below a GS-15 level (or its equivalent).

Background

Mr. Robert Fleck

Robert (Bob) Fleck is the husband of Ms. KW. Mr. Fleck is an SES who began his employment with VA on May 1, 2016, and is the Chief Counsel for the Procurement Law Group (PLG). PLG is one component of OGC's Contract Operations, which also includes OGC's Real Property Law Group (RPLG) and District Contracting National Practice Group (DCNPG). Mr. Fleck's duties include ensuring VA procurements within his areas of responsibility are conducted in a legally sound manner, as well as collaborating with the Chief Counsels of Contract Operations on matters of common interest.

Mr. Fleck is also the senior member of OGC's Contract Litigation Team and manages its day-to-day operations. The Contract Litigation Team is composed of attorneys from Contract Operations and is dedicated to litigating matters before the Civilian Board of Contract Appeals, the General Accountability Office, and the federal courts. Mr. Fleck directs the team in litigation strategy, has the authority to assign attorneys to matters without regard to which component of Contract Operations they are from, and can provide feedback and reports to the attorneys' respective supervisors.

Prior to his VA employment, Mr. Fleck worked as an attorney with the U.S. Department of the Army. From 2006 to 2016, Mr. Fleck worked at the U.S. Army Communications-Electronics Command (CECOM) and served in various positions including General Attorney, Contracts Attorney-Advisor, Supervisory Attorney, Deputy Chief Counsel, Special Assistant Chief Counsel, and Acting Chief Counsel AMC Legal Center. From 1991 to 2004, Mr. Fleck was a self-employed attorney with his own private law practice (the Law Office of Robert Fleck).

Ms. KW

Ms. KW is married to Robert Fleck. Ms. KW is a GS-14 VA virtual employee who began her VA employment on January 8, 2017. Her VA position was established to support the Contract Litigation Team. She is an e-Discovery Coordinator Attorney on the Contract Litigation Team. Prior to her employment at VA, Ms. KW worked as an attorney with the U.S. Department of the Army CECOM from 2008 to 2017 and served as a General Attorney and a Contracts Attorney Advisor. From 2003 to 2006, Ms. KW was a self-employed attorney, and from 1993 to 2003, she worked as an attorney for the Law Office of Robert Fleck.

Contract Litigation Team

The Contract Litigation Team handles contract litigation matters for VA. As mentioned, Mr. Fleck is the senior member of the Contract Litigation Team and manages its

operations. Ms. KW is the e-Discovery Coordinator attorney assigned to support the Contract Litigation Team. Attorneys that support the Contract Litigation Team are drawn from “Contract Operations Group” and maintain their chain of command from their respective law groups. However, Mr. Fleck has the authority to assign attorneys to matters as necessary without regard to their law group, as well as provide feedback and reports to the attorneys’ respective supervisors.

Contract Operations

Contract Operations attorneys work together on contracting related matters for VA. Contract Operations is made up of three law groups: the Procurement Law Group (PLG), managed by Chief Counsel Mr. Robert Fleck; The Real Property Group (RPLG), managed by Chief Counsel Mr. Cameron Gore (SES); and the District Contracting National Practice Group (DCNPG), managed by Chief Counsel Mr. Michael Hughes (SES). Contract Operations is under the authority of Mr. Richard Hipolit (SES), the Deputy General Counsel for Legal Policy (DGCLP). Mr. Hipolit is the senior SES in charge of all law groups, including Contract Operations.

Mr. Fleck’s Role Planning and Managing the Contract Litigation Team

In May 2016, Mr. Fleck was charged by then General Counsel Leigh Bradley to bring the Contract Litigation Team together and be its lead. Mr. Fleck sets, directs, and coordinates national strategy for the Contract Litigation Team, serves as its senior member, and manages its operations. Between May and November of 2016, Mr. Fleck conducted preliminary inquiries regarding establishing a litigation team; performed analyses to determine the number of FTEs required for the team; participated in developing the organization and staffing of the team; announced the team to OGC staff, including his position on the team; and promoted recruitment for the team, including advocating for his wife as an e-Discovery Coordinator.

Mr. Fleck and Ms. KW’s Prior Employment Together

Mr. Fleck and his wife have a history of working together within the same organizational component, both inside and outside the federal government. In this prior work history, Mr. Fleck was typically a senior member of an organization while Ms. KW was a staff-level member of the same organization. From 1993 to 2003, Ms. KW was employed by Mr. Fleck as an attorney within Mr. Fleck’s private practice law firm. From 2008 to 2016, Mr. Fleck and Ms. KW were both employed by the same Army CECOM Legal Office. During this time at Army CECOM, Mr. Fleck held positions such as Supervisory Attorney, Deputy Chief Counsel, Special Assistant to Chief Counsel, as well as a detail to an Acting Chief Counsel position, while Ms. KW held the position of General Attorney and Attorney-Advisor. Additionally, while they were both employed at Army CECOM, they both served on the Army Logistics Modernization Program (LMP) Litigation Team,

where Mr. Fleck served as CECOM Lead Attorney and Ms. KW served as Litigation Support Team Lead Attorney.

Contract Operation's Leadership Ethics Training

Mr. Fleck, Mr. Hipolit, and Mr. Gore all received ethics training. This training explained the conflict of interest statute by stating, "As a Federal employee, you may not participate in official VA matters involving your spouse, children, member of your household, relatives with whom you have a close relationship." The training also stated, "If you think you are facing an ethical dilemma related to Government ethics, do not participate in the matter and seek the advice of an ethics official in the Office of General Counsel (OGC)." No evidence was found indicating that Mr. Fleck, Mr. Gore, or Mr. Hipolit sought ethics advice related to the hiring of Ms. KW.

Relevant Legal Authority

Federal laws 5 USC §§ 3110(b) and 3110(c) state, "A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual." Additionally, "An individual appointed, employed, promoted, or advanced in violation of this section is not entitled to pay, and money may not be paid from the Treasury as pay to an individual so appointed, employed, promoted, or advanced."

The Merit Systems Protection Board (MSPB) precedential decisions state that "a public official who recommends a relative, or refers a relative for consideration by a public official standing lower in the chain of command, for appointment, employment, promotion, or advancement is deemed to have advocated the appointment, employment, promotion, or advancement of the relative."²

VA Office of General Counsel (OGC) Advisory VAOPGCADV 1-2002 states, "The anti-nepotism statutes and regulations prohibit a public official from appointing, employing, promoting, or advancing a relative, or advocating such an action in favor of the relative. 5 USC § 3110(b); 5 CFR § 310.103. These provisions also preclude such an action if the related public official has advocated it. *Id.* 'Advocating' includes making a recommendation for one of the listed actions in favor of the relative, or referring the

² 24 MSPR 621.

relative for consideration to a subordinate public official (with or without a recommendation). 5 CFR § 310.103(c).” It further states, “Laws and regulations applicable to the employment of relatives, however, generally require each spouse to recuse him or herself from participation in any matter that may influence or affect the other spouse's employment status or particular financial interests. These statutes and regulations apply with respect to any position in the agency in which the public official is serving, or over which he exercises jurisdiction or control. 5 USC § 3110(b); 18 USC § 208. Thus for a public official in VA, these standards apply to relatives in, or under consideration for, any position in VA.”

Federal law 18 USC § 208 states, “Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government...participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—Shall be subject to the penalties set forth in section 216 of this title.”

Federal law 18 USC § 1001 states, “Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years...”

Federal law 38 USC § 5723(f) states that users of Department information and information systems are responsible for the following:

- Complying with all Department information security program policies, procedures, and practices.
- Attending security awareness training on at least an annual basis.

- Reporting all security incidents immediately to the Information Security Officer of the system or facility and to their immediate supervisor.
- Complying with orders from the Assistant Secretary for Information and Technology directing specific activities when a security incident occurs.
- Signing an acknowledgment that they have read, understand, and agree to abide by the VA National Rules of Behavior on an annual basis.

VA Policy defines “users” as Department personnel or employees...who have been authorized by VA to access VA information or information systems.³ “VA sensitive data” is defined by 38 USC§ 5727(23) as all Department data, on any storage media or in any form or format, which requires protection due to the risk of harm that could result from inadvertent or deliberate disclosure, alteration, or destruction of the information and includes information whose improper use or disclosure could adversely affect the ability of an agency to accomplish its mission, proprietary information, and records about individuals requiring protection under applicable confidentiality provisions.

Investigative Findings

Mr. Fleck Had a Conflict of Interest, Engaged in Nepotism, Improperly Shared VA Sensitive Data, and Made False Statements

Mr. Fleck Recommended His Wife for the e-Discovery Position

In early June 2016, during a Contract Operations teleconference regarding whether the Contract Litigation Team should have an e-Discovery Coordinator, Mr. Fleck advocated for the employment of his wife when he discussed her e-Discovery qualifications and expertise and stated that she was a qualified candidate for the position. According to Mr. Hipolit, the Chief Counsels of Contract Operations as well as their Deputies were present for these types of meetings. Mr. Cameron Gore, the Chief Counsel of the RPLG who ultimately hired Mr. Fleck’s wife, was present at the meeting, but at the time was a GS-15 Deputy Chief Counsel. During an OIG interview, Mr. Michael Hughes, the Chief Counsel of the DCNPG, expressed concern that Mr. Fleck discussed his wife’s e-Discovery qualifications in front of his boss, Mr. Hipolit, when the topic at hand was the need to hire someone to do e-Discovery work. He stated that Mr. Fleck’s comments “could be taken wrong.” Mr. Hipolit discussed with Mr. Fleck his wife being a candidate for the position, to include matching the position’s salary level to her current salary level. In an email from Mr. Hipolit to Mr. (Bob) Fleck dated June 10, 2016, Mr. Hipolit stated,

³ VA Handbook 6500, Appendix A (March 10, 2015).

Bob, this is the draft policy on salaries for new attorneys that I mentioned. It is going to be circulated to the Chief Counsels for comment before it is finalized, but if we can make a good case for our **e-Discovery expert under these factors**, we should be in good shape. If you can **get me a resume**, we can think this through and move forward. (**Emphasis added.**)

Attached to this email was a document titled, *Salaries for New Attorneys who are Outside Candidates.*” In an OIG interview, Mr. Hipolit indicated that the “e-Discovery expert” mentioned in the email was Mr. Fleck’s wife. After receiving this email, Mr. Fleck forwarded it to his personal email account. A week later, Mr. Fleck emailed his wife’s résumé to Mr. Hipolit and stated, “Resume as we discussed.”

When the OIG questioned Mr. Fleck regarding the meeting in which he advocated for the employment of his wife, he said that it was another attorney who brought up hiring his wife for the e-Discovery position, but others may recall it coming up through him. Mr. Fleck said that, when asked, he would say that his wife did e-Discovery for five years, was good at it, and could do the job. However, he denied that those comments were a recommendation, because “it’s not saying bring her in and hire her.”

All Contract Operations senior leaders recalled Mr. Fleck speaking about his wife in regards to the e-Discovery position, with no mention of another attorney:

- Mr. Richard Hipolit, the Deputy General Counsel for Legal Policy, stated, “So, I believe, at the meeting that you’re referring to the issue came up about the litigation team and whether we should have an e-Discovery Coordinator there... And we’re talking about this. As I recall, if this is the meeting I’m thinking about, Mr. Fleck had raised a possibility to — he had mentioned that his wife has experience in e-Discovery, and so that she might possibly be a candidate for, you know, a position we might have and, as an e-Discovery Coordinator.” Mr. Hipolit also said, “But the gist of what I recall is him saying that she would be, you know, a qualified candidate.”
- When the OIG questioned Mr. Cameron Gore, who became an SES and the Chief Counsel of the RPLG on June 26, 2016, about when he first knew Mr. Fleck was married to Ms. KW, Mr. Gore said, “I think it was when he said he knew of a candidate we could consider for the e-Discovery position.”
- Mr. Michael Hughes, the Chief Counsel of the DCNPG, stated, “I do recall a meeting, and — where we were discussing the need within our practice group, the three contract practice groups, for some e-Discovery expertise. We were discussing the need to have dedicated e-Discovery expertise. I know that we had a need for our group, and there was a need for the other groups as well. As part of that conversation, I recall that Bob mentioned that his wife [had] experience in

that particular area. He described what her background and experience was...I recall he just talked about how she was — she was an expert in that area, and that she had qualifications in that particular field of practice.”

Mr. Fleck’s Role in Designing and Announcing the e-Discovery Position

After it was determined that the Contract Litigation Team should have an e-Discovery Coordinator, and after the discussion regarding Ms. KW’s expertise and current salary level, the process was started for designing and establishing the position. At that time, the only candidate who had submitted a résumé for the yet-to-be-established position was Ms. KW.

As all attorneys on the Contract Litigation Team were drawn from Contract Operations, the e-Discovery position was to be hired into one of the three components of Contract Operations.

- In an OIG interview with the Chief Counsel DCNPG, Mr. Hughes said, “I don’t remember who threw out the idea [that Ms. KW] could work for my group or Cam’s group, but I thought I don’t want to be in that position. It would just make me uncomfortable to have someone who I have to work with as a peer, have their wife work for me.”
- Mr. Gore reported that Mr. Fleck was transparent in that his wife could not work for him in the Procurement Law Group. Mr. Gore said, “I think [Mr. Fleck] was up front and said, look, she can’t work for me. She can’t work for me. But if she’s qualified and you feel that she’s qualified, she can do the job.”

Consequently, the e-Discovery position was established within the RPLG. Between June and October of 2016, Mr. Gore and an RPLG General Attorney designed, announced, and hired the e-Discovery position within that group.

However, an analysis of Mr. Fleck’s emails indicated that he had a role in designing and announcing the e-Discovery position he advocated for his wife to fill and for which she applied. The following emails were sent by an RPLG General Attorney:

- On August 2, 2016, an email directly to Mr. [Bob] Fleck stated, “Bob: Hi. Please see attached.” In this email were attachments containing documents related to an e-Discovery position description. These documents were later used as criteria for applicant screening by the Best Qualified Analysis Review Panel.
- On August 4, 2016, an email sent to OGC’s HR Representative, with Mr. Fleck copied, stated that the Real Property Law Group wanted to change a current vacancy announcement from a general staff attorney to an e-Discovery attorney.

- On August 10, 2016, an email forwarded directly to Mr. Fleck said, “Hi Bob, I sent this request to [OGC HR Representative] on August 4th. I believe she may be in training this week. Hopefully, we can get this vacancy announced quickly.”
- On August 11, 2016, an email to Mr. Gore and Mr. Fleck stated, “Good Morning, Attached are two examples of vacancy announcements for an e-Discovery position. Would it be beneficial to send these examples to [OGC HR Representative] to assist in the development of VA’s vacancy announcement?” The same day Mr. Fleck responded to this email and said, “My thought: we should send her one recommended announcement.”

On August 11, 2016, Mr. Gore sent an email directly to Mr. Fleck and said,

- Bob: Hi. As a follow-up to our chat just now – I just spoke with [OGC HR Representative] then [Deputy Executive Directors, OGC Management, Planning and Analysis for review]. See status of a few notable OGC HR items below. – Cam” Number three of those items said, “E-Discovery attorney for PLG and RPLG – [OGC Human Resources Representative] sent the draft PD [Position Description] to the [Deputy Executive Directors] of OGC Management, Planning and Analysis for review. They might need to discuss it with us relative to the PDs for the ILG.”

When the OIG questioned the RPLG General Attorney about Mr. Fleck’s involvement in establishing and announcing the position, the General Attorney said that the position was a Real Property Law Group position and there was no reason for Mr. Fleck to be involved. When asked about the specific emails that indicated Mr. Fleck’s involvement, the General Attorney could not recall why he shared information regarding the e-Discovery position with Mr. Fleck.

However, Mr. Gore indicated that, except for selecting a candidate, Mr. Fleck was involved in every step of establishing the position.

- When asked about the August 2 email in which an RPLG General Attorney sent an email directly to Mr. Fleck containing documents related to an e-Discovery position description (PD), Mr. Gore said that Mr. Fleck had as much input as he did on the PD and that they were working together and collaborating on the e-Discovery PD as well as other PDs.
- When asked about the August 4 and August 10 emails in which an RPLG General Attorney informed the OGC HR representative that the RPLG wanted to change a current vacancy announcement from a general staff attorney to an e-Discovery attorney, Mr. Gore said that Mr. Fleck was going to be leading the Contract Litigation Team and that the RPLG General Attorney was keeping Mr. Fleck

informed. When asked specifically if Mr. Fleck was involved in the discussion to change the position, Mr. Gore said that he was involved, and that there was a collective discussion about which of the FTEs were going to be allotted to each of the contracting groups, and which positions they were going to fill. Additionally, Mr. Gore said that the email was probably keeping Mr. Fleck aware that they were making progress on completing an announcement for his wife to compete.

- When questioned about the August 11 email in which the RPLG General Attorney asked Mr. Gore and Mr. Fleck if it would be beneficial to send vacancy examples to OGC HR to assist in the development of VA's vacancy announcement for the e-Discovery position, Mr. Gore said they were coordinating with Mr. Fleck, because he had a lot of experience.
- When asked about the August 11 email in which Mr. Gore details the status of OGC HR items, which included the status of the e-Discovery position, Mr. Gore indicated that he sent this to Mr. Fleck because they, and other Contract Operations personnel, worked on the e-Discovery PD.

In an OIG interview, Mr. Fleck denied working on the PD, and could not recall any involvement in allocating an FTE for the position, or any involvement in announcing the position, despite being shown the email in which he makes a recommendation on how the position should be announced.

Mr. Hipolit was also questioned regarding Mr. Fleck's involvement in designing the position, and evidence was presented indicating Mr. Fleck's involvement in designing the position. Mr. Hipolit said he wanted Contract Operation leadership involved in designing the Contract Litigation Team, because the team would affect all operations. Mr. Hipolit also said it was natural for Mr. Fleck to be involved in discussions of the position, because he would be one of the people utilizing the services of the Contract Litigation Team. Mr. Hughes, Chief Counsel of DCNPG, stated during questioning that he had no knowledge of any involvement by Mr. Fleck.

Hiring for the e-Discovery Position

Although OGC attorneys are excepted service and can be noncompetitively appointed, it was OGC's policy to compete attorney positions. The e-Discovery position was announced internally on OGC's SharePoint site on August 12, 2016. The announcement stated, "The hiring manager may choose to consider applicants from outside of OGC, however those applications cannot be submitted here, they must be submitted directly to the hiring manager." On August 16, two current OGC attorneys applied for the position. Also, on August 16, Mr. Fleck emailed his wife, Ms. KW, the internal announcement, and on August 18, Ms. KW emailed her résumé, cover letter, and last two performance appraisals to Mr. Gore.

On September 30, 2016, Mr. Fleck sent Ms. KW the VA sensitive data that was originally shared with Mr. Fleck by the General Attorney within RPLG on May 5, 2016. The email containing the sensitive attachments was specifically marked “This message is not to be forwarded to anyone outside of the U.S. Department of Veterans Affairs (“VA”) or to anyone within the VA that does not have direct involvement/interest with this matter.” The attachments included a written consolidation of current e-Discovery-related matters within VA, to include a synopsis of the matter, the legal venue, named parties and costs of the matter, and specific VA system failures related to e-Discovery.

On October 4, 2016, as per OGC policy, a Best Qualified Analysis Review Panel (BQ Panel) convened to determine the most qualified applicant out of the three who applied for the e-Discovery position. To determine this, the panel utilized e-Discovery criteria that came directly from the documents sent to Mr. Fleck by the General Attorney on August 2. On October 4, the General Attorney sent an email to Mr. Gore stating that the panel had recommended Ms. KW as the only candidate to consider for the position. Upon receiving the recommendation, Mr. Gore, without personally meeting or interviewing Ms. KW, sent an email to the HR division of OGC selecting Ms. KW for the position.

Emails and testimony reflected that Mr. Gore initially intended to conduct interviews for the e-Discovery position on October 3, the day before the BQ Panel made its recommendation. However, Mr. Gore did not interview Ms. KW before selecting her, nor had he ever met Ms. KW. His rationale for not conducting an interview with Ms. KW was that Ms. KW’s résumé was far better than any other candidates’ and that he trusted Mr. Fleck and trusted that his wife’s résumé was legitimate. He said,

“And it could have been – there could have been some, you know, I trust – Bob has a big resume, DOD. I’m trusting that this resume is legit, that this woman, I’ve heard that she’s very, very good.”

On October 5, 2016, OGC’s HR contacted Ms. KW to inform her she was selected for the position.

On November 28, 2016, Mr. Michael Hogan (SES), the Executive Director of OGC’s Management, Planning, and Analysis, the OGC arm that oversees HR matters, sent an email to Melinda Perittano (SES), then the Chief Counsel of the Information Law Group, and, speaking of Ms. KW, said,

“She and Bob Fleck are married. I am re-thinking Cam’s hiring of her because of the frequent overlap between Cam’s group and Bob Fleck’s group, especially with the creation of a [contract] litigation team which Bob will have some responsibility for leading.”

OIG investigators questioned Mr. Hogan about what was done to satisfy the concerns he expressed in the email, as the condition he described in the email did in fact exist; Mr. Fleck's and Mr. Gore's groups did frequently overlap, and Mr. Fleck did lead the Contract Litigation Team. Mr. Hogan said,

“I decided to allow the hiring action after speaking with Mr. Gore and receiving his assurance that he understood the sensitive issues involved and would take steps to prevent Mr. Fleck's involvement in his supervision of [Ms. KW].”

On January 8, 2017, Ms. KW began her employment at VA.

False Statements Regarding the Sharing of VA Sensitive Data

As Mr. Gore originally intended to interview applicants who applied to the e-Discovery position on October 3, 2016, and Mr. Fleck shared VA sensitive data with Ms. KW on September 30, 2016, the OIG asked Mr. Fleck and Ms. KW if the data was shared to help Ms. KW for her upcoming interview. They both said that VA data was not shared to help Ms. KW on her interview, and the data was not shared until *after* she was selected for the position by Mr. Gore via a telephone call in “mid-September.”

- Mr. Fleck said, “What I did send her, **after she got selected**, she got a call from Cam Gore, it was mid-September, I think, and he said you got the job, this is your interview, you got the job. **After that**, on **September 30th**, I sent her what [the General Attorney] had sent me.” (**Emphasis added.**)

Ms. KW had similar statements:

- When asked if Mr. Fleck had provided anything to help her prepare for her potential interview, Ms. KW said, “No. After I was hired, I mean **after I was told I had the job, but nothing ever before.**” (**Emphasis added.**)
- When asked what was provided, Ms. KW said, “I think it was summations about the problems, but nothing – like **after I got on** I think he gave me something, **but not before.**” (**Emphasis added.**)

These statements by Mr. Fleck and Ms. KW raised a serious question, as the hiring panel did not recommend Ms. KW to Mr. Gore until October 4, 2016, yet Mr. Fleck and his wife claimed that Ms. KW was already selected for the position when Mr. Fleck shared the VA sensitive data with her on September 30.

Based on Mr. Fleck's and Ms. KW's statements, Mr. Gore was re-interviewed, and he denied selecting Ms. KW before the hiring panel made its recommendation. OIG

investigators then asked Mr. Fleck's and Ms. KW's attorney for any phone numbers that Mr. Gore allegedly called. Their attorney complied, and the OIG then subpoenaed the records associated with those numbers. Investigators also obtained records associated with Mr. Gore's VA desk and cellular telephones, as well as requested Mr. Gore provide his personal cellular number. The analysis of all of the telephone records resulted in a determination that Mr. Gore did not call Ms. KW, or any other number provided by her attorney, until after the hiring panel made its recommendation on October 4, 2016; therefore, Mr. Gore did not select Ms. KW before the hiring panel's recommendation. After determining that Mr. Fleck and Ms. KW made false statements as to when Ms. KW was notified of her selection for the position in an effort to mitigate any consequences related to Mr. Fleck sharing VA sensitive data with a non-VA employee, the OIG referred the false statements matter to the U.S. Attorney's Office for the District of Columbia. They reviewed the case and declined prosecution due to available administrative remedies.

Mr. Fleck and Ms. KW's Positions on the Contract Litigation Team

Ms. KW began her employment at VA on January 8, 2017. Ms. KW is the e-Discovery attorney for the Contract Litigation Team. Her husband, Mr. Fleck, is the senior member of OGC's Contract Litigation Team, and has the ability to direct and assign his wife to litigation matters, as well as the ability to provide feedback and reports regarding her performance.

Mr. Gore was questioned regarding Mr. Fleck's ability to influence Ms. KW's performance. Mr. Gore agreed that Ms. KW was hired for the Contract Litigation Team; that she works on the Contract Litigation Team; and that Mr. Fleck provided reports and recommendations regarding attorneys assigned to the Contract Litigation Team. When investigators stated that it looked like Mr. Fleck could have direct influence on Ms. KW's performance, Mr. Gore said, "Okay. Well, I guess we'll leave it there."

Additionally, Mr. Hipolit was questioned on the potential problem regarding Mr. Fleck's and Ms. KW's positions on the team and Mr. Fleck's ability to influence Ms. KW's performance, Mr. Hipolit said,

"Yeah, I mean, there is potential, I think, there for that...I don't know that that would be an issue because I, uh, for one, I think Mr. Fleck, as I said, is a man of integrity. I don't think he would do something to influence or — or give any inaccurate information."

Conclusion

The OIG concluded that Mr. Fleck engaged in nepotism and acts affecting his personal financial interest when he used his position to advocate for the employment of his wife

and participated in establishing for her a GS-14 e-Discovery attorney position on a team that he would ultimately lead. Mr. Fleck shared VA sensitive data with his wife before she was a VA employee and then made false statements when questioned about it. The OIG also concluded that the hiring process within OGC was exclusive in regards to the hiring of Ms. KW.

Advocating for the Employment of Ms. KW

Mr. Fleck, by recommending his wife for the position of e-Discovery Coordinator, advocated for his wife's employment. Additionally, Mr. Fleck, as a Chief Counsel in Contract Operations, referred her to Mr. Gore, who ultimately hired his wife, and who, at the time, was a GS-15 Deputy Chief Counsel. There is a direct connection between Mr. Fleck referring his wife to Mr. Gore, and Mr. Gore being influenced by that referral. Mr. Gore reported that he trusted Mr. Fleck to refer someone who was very good for the position.

Acts Affecting His Personal Financial Interest

Mr. Fleck, as the Chief Counsel in charge of bringing the Contract Litigation Team together, participated personally and substantially in a particular matter in which he and his spouse had a financial interest. Mr. Fleck and Ms. KW both had a financial interest in the matter, as the position was a virtual GS-14 earning \$141,555 per year. Mr. Fleck participated in the following ways:

- Being involved in the conversation regarding the team having an e-Discovery Coordinator
- Advocating for his wife's employment as the e-Discovery Coordinator
- Participating in a discussion regarding pay
- Participating in announcing the position
- Sending his wife VA sensitive data regarding e-Discovery matters that were not available to other candidates.

Contract Operations Ethics Training

Mr. Fleck, Mr. Hipolit, and Mr. Gore all received ethics training which explained the conflict of interest statute by stating, "As a Federal employee, you may not participate in official VA matters involving: Your spouse, children, member of your household, relatives with whom you have a close relationship." The training also stated, "If you think you are facing an ethical dilemma related to Government ethics, do not participate in the matter and seek the advice of an ethics official in the Office of General Counsel (OGC)."

Despite receiving this training, no evidence was found indicating that Mr. Fleck, Mr. Gore, or Mr. Hipolit sought ethics advice related to the hiring of Ms. KW.

Sharing VA Sensitive Data and False Statements by Ms. KW and Mr. Fleck

OIG's investigation determined that Mr. Fleck and Ms. KW made false statements when questioned about sharing VA sensitive data. Mr. Fleck and Ms. KW stated that nothing was shared before she was selected for the position. Investigators subpoenaed phone records associated with the alleged "mid-September" call and found no record of Mr. Gore calling Ms. KW prior to October 4. Additionally, Mr. Gore denied calling her about the position until October 4, 2016. The statements from Mr. Fleck and Ms. KW are not simple lapses in memory or confusion regarding dates, as they both repeatedly testified that nothing was shared with Ms. KW until after she was selected for the position. Mr. Fleck shared VA sensitive data with Ms. KW before she was selected. The investigation determined that Mr. Fleck and Ms. KW made false statements about when Ms. KW was selected for the e-Discovery position to lessen the potential consequences of Mr. Fleck having shared VA sensitive data with a non-VA employee.

OGC Hiring Process

The OGC hiring process was exclusive in regards to the hiring of Ms. KW. When Contract Operations first mentioned having an e-Discovery Coordinator, Ms. KW's name was brought up. When Mr. Hipolit discussed the position's salary with Mr. Fleck, Ms. KW was the one being referenced as "our e-Discovery expert." An RPLG General Attorney shared documents with Mr. Fleck that were ultimately used to determine the best qualified candidate. When Mr. Fleck made the recommendation regarding announcing the position, his wife was the only candidate. Further, Mr. Fleck was repeatedly included in conversations regarding the e-Discovery position while his wife was the only candidate. In the announcement of the position, Mr. Gore said they were making progress on completing an announcement for his wife to compete; however, the position was announced internally, with an exception made for outside candidates who contacted Mr. Gore directly.

Recommendation 1. The VA Deputy Secretary confers with the Offices of General Counsel and Human Resources to determine the appropriate administrative action to take, if any, against Mr. Fleck.

Recommendation 2. The VA Deputy Secretary confers with the Offices of General Counsel and Human Resources to determine the appropriate administrative action to take, if any, against Ms. KW.

Recommendation 3. The VA Deputy Secretary confers with the Offices of General Counsel and Human Resources to determine the total amount of funds unlawfully expended to pay for Ms. KW's salary since her initial VA appointment on January 8, 2017, and ensures that a bill of collection is issued to Ms. KW in that amount.

Recommendation 4. The VA Deputy Secretary confers with the Offices of General Counsel and Human Resources to determine the appropriate corrective action to take concerning Ms. KW's VA appointment and takes such action.

Recommendation 5. The VA Deputy Secretary confers with VA's Designated Agency Ethics Official to ensure Deputy General Counsel for Legal Policy staff members receive appropriate ethics training as related to our findings in this report.

Comments

The VA Deputy Secretary comments are located within Appendix A. The OIG will follow up to ensure that recommendations are fully implemented.



JEFFERY G. HUGHES
Assistant Inspector General for
Investigations

**Department of
Veterans Affairs**

Memorandum

Date: February 9, 2018

From: VA Deputy Secretary

Subject: **OIG Report 2017-03324-IQ-0103; VA Office of General Counsel, Washington, DC**

To: Assistant Inspector General for Investigations (51)

1. I have reviewed and concur with the findings and recommendations in the OIG report, 2017-03324-IQ-0103; VA Office of General Counsel, Washington, DC.
2. The Department is actively working to comply with each of the five recommendations.

Recommendation 1. The VA Deputy Secretary confers with the Offices of General Counsel and Human Resources to determine the appropriate administrative action to take, if any, against Mr. Fleck.

Comment: The Department agrees and is working with the Office of Accountability and Whistleblower Protection (OAWP) and the Office of General Counsel (OGC) regarding the appropriate administrative action.

Recommendation 2. The VA Deputy Secretary confers with the Offices of General Counsel and Human Resources to determine the appropriate administrative action to take, if any, against Ms. [KW].

Comment: The Department agrees and is working with the OAWP and OGC regarding the appropriate administrative action.

Recommendation 3. The VA Deputy Secretary confers with the Offices of General Counsel and Human Resources to determine the total amount of funds unlawfully expended to pay for Ms. [KW]'s salary since her initial VA appointment on January 8, 2017, and ensures that a bill of collection is issued to Ms. [KW] in that amount.

Comment: The Department agrees and is working with the OGC and Human Resources and Administration (HR&A) to determine the necessary collection actions.

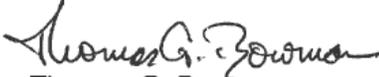
Recommendation 4. The VA Deputy Secretary confers with the Offices of General Counsel and Human Resources to determine the appropriate corrective action to take concerning Ms. [KW]'s VA appointment and takes such action.

Comment: The Department agrees and is working with the OAWP, OGC and HR&A to determine the appropriate administrative action.

Recommendation 5. The VA Deputy Secretary confers with VA's Designated Agency Ethics Official (DAEO) to ensure Deputy General Counsel for Legal Policy staff members receive appropriate ethics training as related to our findings in this report.

Comment: The Department agrees and is working with the OGC DAEO to deliver the appropriate training.

3. If you have any questions, please contact Peter O'Rourke, Executive Director, Office of Accountability and Whistleblower Protection, by phone at 202-461-4868 or email at peter.ourourke@va.gov.


Thomas G. Bowman

OIG Contact and Staff Acknowledgments

OIG Contact	For more information about this report, please contact the Office of Inspector General at (202) 461-4720.
Acknowledgments	Linda Fournier, Director Jason James, Administrative Investigator Clifford Stoddard, Attorney Advisor

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