

135445

United States General Accounting Office

GAO

Report to the Chairman, Committee on  
Interior and Insular Affairs, House of  
Representatives, and the Honorable  
John Melcher, U.S. Senate

May 1988

# PERSONNEL PRACTICES

## Propriety of Selected Personnel Actions at the Bureau of Indian Affairs



135945

**RESTRICTED**—Not to be released outside the General  
Accounting Office except on the basis of the specific approval  
by the Office of Congressional Relations.

040093

RELEASED

GAO/GGD-88-81

---

---



United States  
General Accounting Office  
Washington, D.C. 20548

---

General Government Division

B-228990

May 17, 1988

The Honorable Morris K. Udall  
Chairman, Committee on Interior and  
Insular Affairs  
House of Representatives

The Honorable John Melcher  
United States Senate

Your February 10, 1987, letter requested that we review personnel practices and policies at the Department of the Interior's Bureau of Indian Affairs (BIA). You were concerned about personnel actions taken to fill key headquarters positions and BIA's overall responsibility for Indian preference because of the importance of having Indians involved in making policies affecting and delivering services to the Indian people.

You wanted us to review BIA's procedures for job classifications, vacancy announcements, reductions-in-force (RIF), training, transfers, promotions without competition, details, and reassignments. You also wanted us to review the BIA's efforts toward implementing its qualifications standards and personnel actions resulting from reorganizations within the agency. Because of work load and staffing constraints, we agreed to do a more limited review of specific personnel actions, describe the status of BIA's development of its qualifications standards, and, if necessary, do additional work at a later date addressing personnel management practices at BIA.

This report addresses our review of selected personnel actions for 19 headquarters positions involving 12 employees the Committee identified to determine the propriety of (1) a waiver of BIA rules requiring Indian preference in reassignments occurring due to a RIF, (2) details under Indian preference law and under BIA and Office of Personnel Management (OPM) rules, and (3) the noncompetitive placement of a non-Indian into a Senior Executive Service (SES) position. We also describe BIA's development of qualifications standards for each of approximately 150 occupational series.

---

## Results in Brief

Although variations exist by grade and location, Indians occupy the majority of positions in BIA, including those at higher grade levels at BIA headquarters. For 5 of the 12 employees, we found eight improper personnel actions. These were one improper waiver of the BIA rules requiring Indian preference in reassignments; one detail that violated Indian

---

preference law and five instances in which details did not comply with applicable rules; and one instance in which the unwritten policy of advertising an SES position was not adhered to before Interior filled the position with a non-Indian. We are recommending that the Secretary of the Interior take actions to prevent these problems from recurring. (See p. 7.)

---

## Objectives, Scope, and Methodology

To answer the Committee's specific concerns, we did our work at Interior and BIA headquarters in Washington, D.C. We reviewed official personnel folders and related personnel files on selected personnel actions for the 12 employees. We also reviewed applicable laws, regulations, and BIA personnel rules and procedures. We interviewed officials in BIA's personnel and program offices and officials in the Department of the Interior's personnel office to obtain information on the selected personnel actions. We also interviewed OPM officials about reviewing personnel activities at BIA headquarters.

We did not attempt to assess the propriety of every personnel action taken with respect to each of the 19 positions. The actions we reviewed were not scientifically selected; therefore, the problems we found are not statistically projectable across the entire agency.

Our work was done between April 1987 and March 1988 in accordance with generally accepted government auditing standards. We did not make an in-depth assessment of the adequacy of BIA's personnel management controls. However, we reviewed a 1986 OPM report assessing BIA headquarters personnel activities. Additionally, we reviewed the Secretary of the Interior's annual reports on internal controls for fiscal years 1984 through 1987 required by the Federal Managers' Financial Integrity Act of 1982. We also reviewed BIA's administrative review report for its Eastern Area Office that was done in 1986.

---

## Most BIA Employees Are Indians

BIA's objectives are to give Indians a greater participation in their own self-government, to further the government's trust obligations toward the Indian tribes, and to reduce the effect of having non-Indians administer matters that affect tribal life. One of the primary means to foster self-government and make BIA more responsive is to increase Indian participation in BIA operations.

The majority of BIA's 15,000 employees are Indians, and the percentage of Indian employees to total employees has steadily been increasing.

Between the end of fiscal year 1980 and March 31, 1987, Indians as a percent of total employment increased from 77 to 82 percent. This percentage varies by grade level and location. For example, on March 31, 1987, Indians represented 96 percent of BIA's employees in grades 1 through 7 compared to 65 percent in grades 13 through SES. Also, 72 percent of BIA's Central Office employees were Indians compared to 82 percent at BIA's area offices.

Indians also constitute the majority of BIA employees occupying key positions.<sup>1</sup> In December 1987, 177 Indian employees, or 84 percent, occupied key positions in BIA, including 8 on details. Non-Indian employees occupied 33 key positions; 18 were appointed as best qualified with no qualified Indians available, 7 were selected based on a tribe granting a waiver of Indian preference, 5 were reassigned due to a RIF, and 3 were detailed. Indians held 17, or 52 percent, of 33 key positions occupied in BIA's Central Office and 160, or 90 percent, of 177 key positions occupied in BIA's area offices. BIA officials attribute the higher percentage of Indians in BIA's area offices, in part, to the area offices' close proximity to the Indian reservations.

The Department of the Interior must approve appointments and details of employees into certain BIA key positions, generally at the grade 15 level and above.

## Improper Personnel Actions for 5 of 12 BIA Employees

For 7 of the 12 employees, we found no instances of problems in the areas in which the Committee had expressed an interest. However, for 5 of the 12 employees we found eight improper personnel actions.

We believe that the Assistant Secretary of the Interior for Indian Affairs acted without authority in waiving a BIA rule prohibiting the reassignment of a non-Indian during a RIF to an advertised vacancy. The Assistant Secretary waived the rule to allow Interior to place a non-Indian into an advertised vacancy for which a qualified Indian had been located. BIA, although not obligated by statute to do so, adopted a rule limiting non-Indian reassignments to unadvertised positions. Although the statute authorizes reassignment of non-Indians during a RIF (see p.

<sup>1</sup>BIA defines key positions as all deputies to the Assistant Secretary of the Interior for Indian Affairs and officials at the grade 15 level or above reporting directly to the Assistant Secretary or his deputies and all Central Office deputy and assistant directors and division chiefs. They also include area directors and their deputies and assistants and those positions responsible for separate field installations who report to the area directors, personnel officers, area office education program administrators, and agency superintendents for education including their deputies.

---

13), the Assistant Secretary did not have discretion to deny the qualified Indian preference for appointment to the advertised position because BIA rules contain no language authorizing the waiver of this requirement. According to BIA officials, however, they are now in the process of revising the rules to permit waivers.

In one instance Interior detailed a non-Indian employee to fill a vacant BIA position and thus violated Indian preference law. In addition, we identified three instances in which details did not adhere to BIA rules, and thus competitive procedures were not applied, and two instances where OPM requirements were not followed and thus approvals were not obtained for details over a year. These instances indicate that use of details in BIA should be examined. As discussed below, an in-depth review of personnel management activities at BIA headquarters has not been done in recent years.

In another case Interior placed a non-Indian into an SES position in BIA, but the availability of qualified Indians had not been sufficiently determined. The position was not advertised even though Interior's Director of Personnel said such positions should be advertised before they are filled by non-Indians. This requirement to advertise is not contained in BIA's rules.

The improper waiver of BIA rules requiring Indian preference in reassignments to advertised positions during a RIF occurred because the Assistant Secretary of the Interior for Indian Affairs incorrectly determined he had waiver authority. Interior's and/or BIA's lack of adherence to the Indian preference law and OPM's and BIA's rules and procedures indicates a possible problem with personnel management controls.

In accordance with the Federal Managers' Financial Integrity Act of 1982, the Secretary of the Interior issued a fiscal year 1984 annual report on internal controls. This report identified internal control weaknesses within BIA's personnel management. The self-identified internal control weaknesses included BIA personnel offices' noncompliance with its internal rules and procedures, and BIA's failure to routinely conduct personnel management evaluations in its area offices. According to the Secretary's report, proposed corrective actions included issuing memorandums and taking other actions to assure compliance with internal rules and procedures, and initiating additional on-site reviews or alternative monitoring procedures in the event on-site reviews are not possible. The Secretary's fiscal year 1985 and 1986 reports identified one or more of the personnel management weaknesses included in the fiscal

year 1984 report; however, no control weaknesses were identified in BIA's personnel management in the Secretary's fiscal year 1987 report. The Secretary's reports did not specifically discuss the use of details.

BIA personnel management evaluations—reviews of personnel activities—can be done by Interior, BIA, or OPM. According to BIA personnel officials, 1976 was the last time an in-depth personnel management evaluation was done at BIA headquarters. OPM conducted that evaluation. Since the beginning of fiscal year 1985, OPM has made 11 installation assessment visits at BIA's area offices. Installation assessment visits are not in-depth reviews; instead, they are used to assess key indicators of the personnel program. In May 1986, OPM conducted an installation assessment visit at BIA headquarters. OPM suggested to BIA headquarters that since a personnel management evaluation had not been done at BIA recently, such an evaluation would be a useful tool in analyzing the state of personnel management at BIA headquarters. As of March 31, 1988, an evaluation had not been done. According to Interior and BIA officials, there are no plans to do an evaluation.

According to an Interior official, responsibility has been delegated for personnel management evaluations to the bureau level, including BIA, because of a lack of staff and funds at the department level. BIA has not done any personnel management evaluations, according to BIA officials, because they also lack staff and funds. BIA officials told us that instead they reviewed personnel management activities as part of their broader administrative reviews. BIA conducted an administrative review of its Eastern Area Office<sup>2</sup> in June 1986. The resulting report disclosed weaknesses such as the failure to promptly make revisions to the personnel manuals and to document the need for management committees to monitor training and review award recommendations. The report did not address the type of problems we found in our review of personnel actions at BIA headquarters.

## Status of BIA's Qualification Standards

Under the Indian Reorganization Act of 1934, Interior must establish standards for evaluating the qualifications of Indians for employment. In 1984, Interior approved qualification standards, generally excluding testing requirements, developed by OPM for use by federal agencies for 130 of BIA's occupational series. Standards for 20 series had already been approved by Interior. BIA then prepared a plan to review each of the standards. It formed three task forces, each of which reviewed the

<sup>2</sup>BIA's headquarters personnel office provided personnel support services to the Eastern Area Office.

---

standard for one occupational series. After the task force reviews, BIA determined that no changes were needed to the standards for two of those series, and only minor changes were needed for the third. On September 28, 1987, BIA awarded a contract to review the standard for another occupational series and later amended the contract to cover three different occupational series.

During the period we were doing our work, a lawsuit was pending concerning the legality of BIA's use of OPM standards as its qualification standards. In Edwards v. Secretary of the Interior, No. 87-1342 (D.D.C. filed May 19, 1987), a grade 14 BIA Indian employee, whose application for a grade 15 position was rejected, alleged that the Bureau had improperly evaluated his qualifications using the OPM standards. The plaintiff argued that BIA is obligated by Indian preference law to establish standards separate and independent from the OPM standards for evaluating the qualifications of Indian applicants and that its continuing use of the OPM standards constitutes a violation of the law.

The parties in Edwards recently settled the case, and the district court dismissed the suit by order of April 7, 1988. Because of the settlement, the court did not resolve whether BIA's use of OPM standards for evaluating the qualifications of Indian applicants violates Indian preference law.

---

## Conclusions

The eight improper personnel actions, including one violation of Indian preference law and seven instances of not following applicable personnel rules and procedures, do not by themselves demonstrate extensive problems. However, those specific problems need to be addressed to prevent future recurrence of the improprieties we found. Moreover, the conditions allowing these to occur make BIA vulnerable to more widespread or recurring problems. Thus, an assessment of such internal controls in the areas where we found improprieties is warranted.

We believe that a personnel management evaluation, as suggested by OPM, would be useful in identifying the types of problems we found in our review as well as other types of problems that our review did not address.



---

## Recommendations to the Secretary of the Interior

We recommend that the Secretary

- prohibit the Assistant Secretary for Indian Affairs from waiving BIA's rule requiring Indian preference in reassignments to advertised positions during a RIF unless or until the rule is amended to authorize waivers and describe the standards that will be applied in effecting waivers and
- specify in writing the policy to advertise SES positions before filling them with non-Indians and institute internal control procedures for ensuring adherence to the policy.

---

As the Committee requested, we did not obtain official comments from the Department of the Interior on this report. However, we discussed the issues addressed with Interior and BIA officials and they generally agreed with our findings. They provided technical clarifications and additional information on some of the facts presented, and changes have been made as appropriate.

We discussed our findings and the need for a personnel management review at BIA with OPM officials. They agreed to do such a review immediately. Their review will be done on BIA's staffing practices. These practices involve hiring, promotions, details, reassignments, and other personnel actions associated with filling positions. Because OPM has agreed to examine these practices, including use of details, we are not recommending that Interior assess the adequacy of personnel management controls for details.

Appendixes I through IV provide a more detailed discussion of Indian preference law, our analysis of the eight instances of noncompliance with Indian preference law or personnel rules and procedures, the status of BIA's qualification standards, and a breakdown of Indian and non-Indian employees by grade and location at BIA in March 1987.

As arranged with the Committee, we plan no further distribution of this report until 14 days after the date of issuance, unless you publicly

---

announce its contents earlier. At that time, we will send it to interested parties and make copies available to others upon request.



Richard L. Fogel  
Assistant Comptroller General



---

# Contents

---

Letter	1
Appendix I Evolution of Indian Preference Law	12
Appendix II Analysis of Selected Personnel Actions at BIA	15
Appendix III Status of Qualification Standards for BIA Occupational Series	24
Appendix IV Number and Percentages of Indian and Non-Indian Employees by Grades and Locations, March 31, 1987	28

---

## Abbreviations

BIA	Bureau of Indian Affairs
BIAM	Bureau of Indian Affairs Manual
FPM	Federal Personnel Manual
IHS	Indian Health Service
OPM	Office of Personnel Management
RIF	Reduction-in-Force
SES	Senior Executive Service



# Evolution of Indian Preference Law

The principal Indian preference statute, section 12 of the Indian Reorganization Act of 1934, and the case law interpreting that statute have established a preference for the employment of qualified Indians in the Bureau of Indian Affairs (BIA) and the Department of Health and Human Service's Indian Health Service (IHS). The statute provides that:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions." [Underscoring added.]

For a number of years following the 1934 enactment of this provision, codified as amended at 25 U.S.C. § 472, BIA narrowly construed the statutory language requiring that it accord Indians preference for "appointment to vacancies" as obligating it to accord preference only with respect to initial hirings. In 1974 the U.S. Court of Appeals for the District of Columbia Circuit disagreed with this interpretation, upholding a district court declaratory judgment that "all initial hirings, promotions, lateral transfers and reassignments in the Bureau of Indian Affairs as well as any other personnel movement therein intended to fill vacancies in the agency, however created, . . . [are] governed by 25 U.S.C. Sec. 472." (*Freeman v. Morton*, 499 F.2d 494, 496 (D.C. Cir. 1974).) The appellate court in *Freeman* construed the statutory phrase "appointment to vacancies" expansively, stating that the term "appointment" is different from the term as used in the context of civil service laws and that an "appointment" to a "vacancy" covers virtually any personnel action that moves an employee into a position that is vacant and susceptible of being filled (499 F.2d at 499). The court explained that its broad interpretation of 25 U.S.C. § 472 furthered the congressional objective underlying that statute, which was to "actively and positively . . . establish, through an orderly process, Indian control of Indian services." (499 F.2d at 499.) However, the court stressed that the Indian preference law applies only to appointments to vacancies, and, therefore, "readjustments in assignments or tasks not involving the creation of, or appointment to, vacancies are unaffected, unless of course these personnel adjustments are used as mere subterfuge to avoid the statute as interpreted here." (499 F.2d at 498.)

The Freeman principles were cited with approval by the Supreme Court in Morton v. Mancari, 417 U.S. 535, 545 (1974), which rejected a challenge to the Indian preference law based on the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, as extended to federal employees by the Equal Employment Opportunity Act of 1972, and the Due Process Clause of the Fifth Amendment. The U.S. District Court for the District of Columbia followed Freeman in a 1977 decision, Tyndall v. United States, No. 77-0004, slip op. (D.D.C. April 22, 1977), holding that the IHS was required to accord Indians preference in filling all vacancies through initial hirings, reassignments, lateral transfers, promotions, and any other personnel action. The broad effect which Freeman and these subsequent court cases accorded to the Indian preference law was recognized by Congress when, in 1979, it amended the law to afford certain rights and protections to non-Indians employed in BIA and IHS whose future careers had been curtailed as a result of the courts' broad construction of the Indian preference law. (See P.L. 96-135, § 2, 93 Stat. 1056, December 5, 1979, codified at 25 U.S.C. § 472a.)<sup>1</sup>

In accordance with the provisions of the Bureau of Indian Affairs Manual (BIAM), 44 BIAM 335.1.2, a determination as to the availability of qualified Indian candidates must be made and documented before a non-Indian may be reassigned, transferred, or appointed to any position, including an SES position.

The provisions of 25 U.S.C. § 472a(b)(1) authorize three exceptions to Indian preference in the filling of vacant positions at BIA, as follows:

"... Indian preference ... shall not apply in the case of any reassignment within the Bureau of Indian Affairs or within the Indian Health Service (other than to a position in a higher grade) of an employee not entitled to Indian preference if it is determined that under the circumstances such reassignment is necessary —

(A) to assure the health or safety of the employee or of any member of the employee's household;

(B) in the course of a reduction in force; or

(C) because the employee's working relationship with a tribe has so deteriorated that the employee cannot provide effective service for such tribe or the Federal Government."<sup>2</sup>

<sup>1</sup>For example, 25 U.S.C. § 472a(e) authorizes agencies to assist non-Indians in transferring to other federal agencies.

<sup>2</sup>Section 472a(b)(1) was enacted as part of a 1979 amendment to the Indian Preference law, Public Law No. 96-135, 93 Stat. 1056, December 5, 1979.

Additionally, non-Indians may be appointed to positions within BIA without regard to Indian preference if a tribe recommends the selection of a non-Indian and grants a written waiver of the preference (25 U.S.C. § 472a(c)).

Indian employees who allege that BIA is not complying with the requirements of Indian preference may seek internal agency review. However, those Indians who are excepted service employees are not entitled to file a claim for enforcement of the preference with the Merit Systems Protection Board.<sup>3</sup>

---

<sup>3</sup>Under the statutes governing the Board's appellate procedures, an individual may appeal a personnel action to the Board only if he or she is an "employee" (5 U.S.C. § 7701(a)). The definition of "employee" for purposes of 5 U.S.C. § 7701(a) includes only tenured employees in the competitive service and those employees in the excepted service who are preference eligibles (generally armed services veterans and specified relatives but not those eligible for Indian preference) (5 U.S.C. § 7511(a)).



# Analysis of Selected Personnel Actions at BIA

---

Our review of selected personnel actions for 19 positions involving 12 employees at BIA disclosed eight instances for 5 employees in which Indian preference law was violated or applicable personnel rules and procedures were not followed. As discussed below, these instances involve (1) one improper waiver of BIA rules requiring Indian preference in reassignments to advertised positions during a RIF; (2) one violation of Indian preference law with respect to a detail; (3) three instances in which details did not comply with BIA rules and thus competitive procedures were not followed, and two instances where OPM requirements were not followed and thus approvals were not obtained for details over a year; and (4) one failure to comply with the unwritten policy of advertising an SES position before filling it with a non-Indian.

---

## Improper Waiver of BIA Rules

In our review of personnel actions at BIA, we found that the Assistant Secretary of the Interior for Indian Affairs in November 1986 improperly waived a BIAM requirement during a RIF. The waiver was made to allow Interior to reassign a non-Indian to an SES position in BIA that had been advertised and for which a qualified Indian had been located. While the waiver was made in writing, no reasons were given for it. BIA officials later explained that the BIAM provision was an internal personnel rule and, therefore, there was no legal barrier to waiving the rule.

As indicated previously, 25 U.S.C. § 472a(b)(1)(B) provides that in the event of a RIF at BIA, non-Indians may be reassigned without consideration of Indian preference. Under 25 U.S.C. § 472a(b)(2), the authority to determine whether a non-Indian should be reassigned within BIA without regard to Indian preference during a RIF is vested in the Secretary of the Interior. The Secretary may delegate this authority to the Under Secretary or the Assistant Secretary of the Interior for Indian Affairs.

In a series of memorandums issued within the Department of the Interior, agency officials adopted a policy of reassigning non-Indians to vacant positions without regard to Indian preference under the authority of 25 U.S.C. § 472a(b)(1)(B) only if the positions have not previously been advertised. In a memorandum dated July 2, 1981, the Acting Associate Solicitor, Internal Affairs, said that, “[a]lthough we do not think the decision to limit such reassignments to unadvertised positions is required by [25 U.S.C. § 472a(b)], we think it good administration to do so and certainly not a violation of the law.”

The policy limiting non-Indian reassignments to unadvertised positions was eventually incorporated into BIA’s internal requirements on July 20,

1982. The BIAM provision, 44 BIAM 335,2.1, says that non-Indians may be reassigned pursuant to a RIF and under the additional circumstances listed in 25 U.S.C. § 472a(b)(1), but

“Reassignments of qualified individuals due to any one of the[se] . . . conditions may only be made to a vacant position prior to advertising the position. If a vacancy has been advertised and there are applicants entitled to Indian preference, the non-Indian preference individuals may not be reassigned under the provisions of the law.”

The BIAM does not authorize the waiver of this requirement.

The BIAM provision in question was not published in the Federal Register or in the Code of Federal Regulations, and, as an internal personnel rule, it was specifically exempt from the rulemaking requirements of the Administrative Procedure Act. (See 5 U.S.C. § 553(a)(2).) However, the fact that an agency’s policy has not been promulgated as a regulation does not mean that the agency is free to disregard it. In Morton v. Ruiz, 415 U.S. 199 (1974), the Supreme Court held that BIA improperly failed to follow a BIAM provision requiring formal publication of substantive policies affecting the public when it did not publish a policy restricting Indians’ eligibility for welfare benefits. Although the Court accepted BIA’s characterization of the BIAM as an “internal-operations brochure,” the Court held that

“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.” (415 U.S. at 235.)

In support of its holding in Morton v. Ruiz, the Court cited several of its earlier decisions, including Service v. Dulles, 354 U.S. 363 (1957). In Service v. Dulles, the Court had invalidated the Secretary of State’s summary dismissal of an employee because, even though the governing statute vested the Secretary with absolute discretion to terminate employees, the Secretary had curtailed this discretion by issuing rigorous procedural and substantive standards for employee dismissals. The Court said that although “the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so . . . and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.” (354 U.S. at 388.)

---

The U.S. Court of Appeals for the Eighth Circuit invoked Morton v. Ruiz to hold that BIA erred in implementing a personnel action affecting a certain Indian tribe without first consulting the tribe because BIA's internal guidelines required such prior consultation. In Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979) the Court said that:

"[W]here the Bureau has established a policy requiring prior consultation with a tribe, and thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded. Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking . . . [articulated in Morton v. Ruiz], but also violates 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" (603 F.2d at 721.) [Citations omitted.]

Based on these court cases, we believe it was improper for the Assistant Secretary of the Interior for Indian Affairs to waive the BIAM provision prohibiting the reassignment of non-Indians to advertised vacancies in order to allow the Department to place a RIFed non-Indian into an advertised SES vacancy for which a qualified Indian had been located. The Department was obligated to comply with the BIAM provision and accord the qualified Indian preference for the vacancy because, as stated in Morton v. Ruiz, it is incumbent upon an agency to follow its own procedures when the rights of individuals are affected. Although the Department was not statutorily required to accord Indians preference in this RIF-reassignment situation, it curtailed its discretion to deny the preference by issuing the BIAM provision.

---

## Violation of Indian Preference Law

Of the 12 employees whose cases we examined, 3 non-Indians were temporarily promoted and/or detailed to unadvertised vacant positions at BIA. We reviewed the three employees' cases to determine whether there was evidence that temporary assignments had been used to fill BIA vacancies in violation of Indian preference law. We found that Indian preference law was violated in one case based on evidence that a position was not advertised and filled competitively in an attempt to keep the non-Indian who had been noncompetitively assigned to that position during 1987. In the second case, the temporary assignments were made between 1979 and 1981, and there is no evidence currently available which would permit us to determine whether BIA had violated the Indian preference law. In the third case, the detail in 1986 was of short duration and BIA with Department approval advertised the position as soon as the detail was terminated, leading us to conclude that no violation of

Indian preference law took place. A description of the relevant law and our findings in these cases follows.

As recognized in Freeman v. Morton, discussed previously, an agency may make “personnel adjustments” and reallocate tasks and duties without regard to Indian preference as long as these actions do not involve the filling of a vacant position. (See Freeman, cited previously, 499 F.2d at 498.) Therefore, details are not necessarily subject to Indian preference law because details may serve a number of legitimate purposes other than the filling of a vacant position. However, if a detail involves movement of a non-Indian into a vacant position, the underlying circumstances of the detail must be examined in order to determine whether the detail was used as a device for filling a vacancy in circumvention of Indian preference law.

In the 1984 decision Moore v. McCabe,<sup>1</sup> the U.S. District Court for the District of New Mexico found that BIA had used a detail as a device for filling a vacant position with a non-Indian in violation of the Indian preference law. In Moore, BIA had notified its employees at the Southwest Indian Polytechnic Institute of a vacancy in its administrative office. Before advertising the position permanently, the President of the Institute sought applications from Institute employees for a temporary promotion to the position. An Indian applied and was rated qualified by the area personnel office. She did not receive the position, however, despite the fact that she was the only qualified Indian applicant. After selecting a non-Indian to fill the position, the Institute was advised to detail the selected individual to the position for up to 120 days; such action would not require competition under BIA’s merit promotion plan, discussed below, and therefore would avoid application of Indian preference. After the detail was made, and plans were made to permanently promote the detailee to the position, the Indian filed an action against BIA claiming a violation of Indian preference law.

Based on the facts of the case, namely that (1) a qualified Indian applied for the temporary promotion; (2) BIA selected a non-Indian to fill the position despite the fact that a qualified Indian applied; and (3) BIA reclassified the position as a detail so that it could fill the position noncompetitively, the district court determined that BIA improperly avoided applying Indian preference in the job assignment. It said that “[c]hanging the name of the personnel action to a ‘detail’ does not by itself render the position noncompetitive and allow the defendants to

---

<sup>1</sup>No. 83-867-M (D.N.M. July 10, 1984), 11 Indian Law Reporter 3068 (August 1984).

circumvent the Indian Preference Act.” (Moore 11 Indian Law Reporter at 3069.)

The first assignment in BIA that we reviewed involved a grade 15 non-Indian member of the Department of the Interior’s Budget Execution Staff who received a noncompetitive assignment in January 1987 to BIA as Acting Chief, Division of Program Development and Implementation. The Division Chief is a grade 15 position. The assignment was made under a renewable reimbursement agreement through which BIA was to pay Interior for the employee’s services. The assignment was not formally processed as a detail.

Department of the Interior officials told us that they view the assignment as an extension of the employee’s duties at Interior, and that they construe her position description as allowing her to assist BIA in managing its budget operations. However, several factors indicate that the employee was in effect detailed to a BIA position. First, while the individual’s assignment to BIA may not have been formally processed as a detail, it operates as such by virtue of BIA’s payment for the employee’s services under its agreement with Interior. Furthermore, evidence relating to the employee’s service at BIA indicates that she is acting as BIA’s Chief, Division of Program Development and Implementation. While in this position, the employee signed, as Acting Chief, a division reorganization chart issued May 5, 1987. She also is listed as Acting Chief in a listing of key positions at BIA and in BIA’s telephone and mailing directory. Finally, the employee’s supervisor at BIA, the Director of Administration, told us that the employee is acting as Division Chief.

As noted previously, this employee received her assignment to BIA in January 1987. The Division Chief position, while unoccupied at that time because of the incumbent’s detail elsewhere, did not officially become vacant until April 1987 when the incumbent retired. The employee’s supervisor said she did not initiate action to advertise and fill the vacancy competitively in 1987 after the incumbent retired because she was pleased with the individual who was acting in the position. She said the employee brought to the Bureau unique and valuable budget experience that the office needed in order to get its job done and add credibility to its operations. The supervisor added that she did not believe that Indian preference applies to the personnel action involved in this case. In her view the preference only applies to formal appointments to positions in BIA, not to details or other temporary assignments. On March 7, 1988, BIA began the process of advertising the Division Chief position.

The supervisor's interpretation of Indian preference law as not applying to details and other temporary assignments is unsupported by the case law. Under the case law discussed previously, Indian preference must be applied to all personnel actions, including details, that fill vacant positions. The facts of this case and the rationale that BIA and Interior offered in support of Interior's filling a position with a detail reveal that the position was filled without applying Indian preference in violation of the law.

In the second case we reviewed, a non-Indian employee received a non-competitive temporary promotion in August 1979 and a second in April 1980 to the grade 14 position of Special Assistant to the Deputy Commissioner. A month after termination of the second temporary promotion, the employee received a noncompetitive detail to a grade 13 position, with promotion potential, as Regional Representative in the Office of the Commissioner. These assignments took place between 1979 and 1981. We could not determine why the assignments were made or why BIA did not fill the positions competitively because BIA officials responsible for authorizing the assignments have since left the Bureau and sufficient documentation explaining the circumstances of the detail was not available. Consequently, although these assignments could have been used to fill vacancies in violation of Indian preference law, insufficient information is available to support a determination that violations of law did occur. However, we did determine that a violation of BIA rules occurred in this case as discussed on page 21.

In the third case, a non-Indian was detailed in October 1986 to the grade 15 position of Acting Chief, Division of Real Estate Services, soon after it had become vacant. The detail was at the same grade as the employee's permanent position and lasted over 6 months. Immediately upon termination of the detail, a vacancy announcement was issued. In view of the short duration of the detail and the fact that the position was immediately advertised when the detail ended, it appears that the Department approved the detail for the legitimate purpose of temporarily filling the position until an announcement could be issued. Therefore, we found no violation of Indian preference law in this case.

---

## Violations of BIA Rules and OPM Regulations

In reviewing selected personnel actions for the 12 employees at BIA, we found three instances in which BIA rules were not followed and thus competitive procedures were not applied. Additionally, we found that OPM requirements were violated when two employees were detailed for over a year without prior approval from OPM.

Apart from the requirements of Indian preference law, BIA details are subject to internal restrictions. Under the Bureau's merit promotion plan outlined in 44 BIAM 335, competitive procedures, including Indian preference, must be applied to certain details and temporary promotions in the Bureau. Specifically, 44 BIAM 335,1.7A requires competitive procedures to be applied to details to higher grade positions or positions with known promotion potential lasting over 120 days and to temporary promotions lasting over 120 days.<sup>2</sup> The BIAM provision specifically states that its requirements may not be circumvented by a series of short-term temporary assignments. In this vein, the BIAM provides that competitive procedures will apply if, after completing a (1) detail to a higher grade position or a position with promotion potential or (2) temporary promotion, an employee will have exceeded 120 days, including any prior service in details and temporary promotions during the previous 12-month period.

The three instances in which 44 BIAM 335,1.7A was not followed are discussed below.

- A grade 15 Indian employee received a noncompetitive detail in April 1983 to an SES position as Director, Office of Indian Education Programs. The detail was extended 8 times for a total period of more than 2 years, with no competition.
- A grade 14 non-Indian employee received a noncompetitive detail in September 1986 to a grade 15 position of Acting Chief, Contracting and Grants, Office of Administration. The detail lasted for almost a year.
- A grade 13 non-Indian employee received two noncompetitive temporary promotions in August 1979 and April 1980 to the grade 14 position of Special Assistant to the Deputy Commissioner within a 12-month period that cumulatively lasted for over 120 days. A month after termination of the second temporary promotion, the employee received a noncompetitive detail in September 1980 to a position with promotion potential as Regional Representative in the Office of the Commissioner that lasted for over 120 days.

In addition to the BIAM, the FPM sets forth general guidelines that address the permissible purposes and proper duration of details. With respect to the duration of details, FPM ch. 300, 8-3 provides that:

---

<sup>2</sup>The Federal Personnel Manual (FPM) contains the same restriction as a guideline for the proper use of noncompetitive details and temporary promotions governmentwide. (See FPM ch. 300, 8-4 and FPM ch. 335, 1-5.)

"[D]etails will be confined to an initial period of 120 days with extension(s) in 120-day increments up to a maximum total detail of:

- 120 days for details to unclassified positions. (A position is considered classified for this purpose if it has a written statement of duties to which a grade level has been assigned by an appropriate classification authority, even if the position has not been officially established);
- 1 year for details to higher graded position during a major reorganization as determined by the agency. However, agencies are encouraged, whenever possible, to make temporary promotions if an employee's services are needed (in the higher grade position) for more than brief periods. . . ;
- 240 days for all other details to higher grade positions;
- 1 year for all other details.

Extensions beyond the limits prescribed above will require the prior approval of the Office of Personnel Management. . . ."

We found that two employees were detailed for over a year without prior approval from OPM. In the first case, discussed previously as an instance in which competitive procedures were required but not applied, a grade 15 Indian employee received a noncompetitive detail to the SES position of Director, Office of Indian Education Programs. The detail which began in April 1983 was extended 8 times for a total period of more than 2 years, without OPM approval. In the second case, discussed previously as a violation of Indian preference law, a grade 15 non-Indian member of the Department of the Interior's Budget Execution Staff received a noncompetitive assignment in January 1987 to the BIA grade 15 position of Acting Chief, Division of Program Development and Implementation. The assignment, which was still in effect as of March 31, 1988, was not formally processed as a detail but operates as such by virtue of a reimbursement agreement under which BIA pays Interior for the employee's services. The assignment has lasted for over a year without OPM approval.

---

### Application of Indian Preference to the Filling of Senior Executive Service Positions

Indian preference applies to the filling of SES positions at BIA just as it applies to the filling of other vacancies within the Bureau. Therefore, before an SES position is filled by a non-Indian at BIA, a determination must be made that there are no qualified Indians available for the position.

Interior, rather than BIA, appoints persons to SES positions within BIA. According to Interior's Director of Personnel, SES positions at BIA should be advertised to determine whether a qualified Indian is available



---

**Appendix II  
Analysis of Selected Personnel Actions  
at BIA**

---

before a non-Indian is selected. However, BIA rules do not specify that SES positions must be advertised before they can be filled with non-Indians.

In one case we reviewed, a non-Indian SES employee in Interior's Office of Technical Assistance, Territorial and International Affairs received a noncompetitive reassignment in January 1983 to the SES position of Deputy Director, Office of Indian Education Programs (Comptroller) in BIA. The Deputy Assistant Secretary for Indian Affairs (Operations) determined that there were no qualified Indians available for the position solely on the basis of an informal search without advertising the position.

Documentation explaining the selection of the non-Indian states that qualified Indians within BIA were contacted but refused relocation to Washington, D.C. Such information as the names of those Indians who were contacted and the dates of contacts was not stated. Additionally, it appears that no effort was made to look outside BIA for a qualified Indian even though the non-Indian selected was from outside BIA.

# Status of Qualification Standards for BIA Occupational Series

As noted previously, section 12 of the Indian Reorganization Act of 1934 (25 U.S.C. §472 as amended) directed the Secretary of the Interior to establish standards for evaluating the qualification of Indians for employment in BIA, without regard to civil service laws. This law also applies to the Secretary of Health and Human Services requiring the Secretary to establish standards for positions in IHS.

On June 7, 1984, the United States Court of Appeals for the Ninth Circuit rendered a decision addressing the requirement for establishing qualification standards for Indian applicants at IHS under the Indian preference statute (Preston V. Heckler, 734 F.2d 1359). Specifically, the court in Preston held that the Secretary of Health and Human Services was required to adopt separate and independent standards for evaluating the qualifications of Indians for employment in IHS. The court noted that the Secretary may consider OPM standards, along with all other information, when formulating employment criteria for Indians. The court further said that, “[i]f, after giving full weight to the unique experience and background of Indians . . . the Secretary concludes that the only proper qualifications for a particular position are those that have already been adopted as part of the civil service regulations, [the Secretary’s] separate and independent adoption of the same standards would not be unlawful.” (Preston, 734 F.2d at 1372.) The court’s decision also applies to BIA by virtue of its coverage under the Indian preference statute.

BIA has approximately 150<sup>1</sup> occupational series that require separate and independent qualification standards for Indians. Before the 1984 Preston decision, independent standards for 20 series had been approved by the Department of the Interior. These included series for lower grade positions, such as clerks, computer operators, and interpreters. According to a memorandum from the former Deputy Assistant Secretary for Indian Affairs (Operations), BIA’s practice was to use OPM standards whenever they were appropriate to the needs of the Indian service, allowed sufficient weight to be given to the uniqueness of BIA positions and cultural barriers, and assured that high quality services would be provided to the Indian people.

In response to the Preston decision, BIA, in a July 16, 1984, memorandum requested the Department of the Interior to approve BIA’s use of OPM qualification standards, generally without the OPM requirement for a

<sup>1</sup>According to BIA’s Chief, Division of Personnel Management, the number of general schedule occupational series currently varies around 150.

---

**Appendix III  
Status of Qualification Standards for BIA  
Occupational Series**

---

written test, as BIA qualification standards for the remaining occupational series. In July and August 1984, Interior approved the standards.

BIA then began developing plans to institute an ongoing review of qualification standards for all of its occupational series. In October 1984, a plan for the review and subsequent development of separate independent qualification standards was distributed to BIA's Central Office and area office managers. The plan's objective was, in part, to determine which occupational series had the greatest need for new or different standards. The plan also required BIA to work with IHS in the review and development of qualification standards in series common to both agencies.

Upon the recommendation of its Central Office and area office managers, BIA organized task forces in November 1984 to review the qualification standards for three occupational series (forester, social worker, and realty specialist) to determine if changes in the standards were needed in order to comply with the requirements of Preston. The plan called for the involvement of tribes, Indian organizations, professional groups associated with the occupational series, BIA employee unions, BIA management, and area office personnel staff in the review process.

In April 1986, Interior's Office of Personnel approved the use of the OPM standards for the realty specialist series with minor changes as recommended by the task force. The forester task force recommended no changes to the OPM forester standard, and none was made. The social worker task force recommended two major changes, requiring social workers to meet state licensing requirements and instituting continuing education requirements. The recommended changes were rejected by BIA as being unnecessary, and no changes were made to the OPM standard. The task forces were not able to identify experiences or backgrounds unique to Indians that would cause them to recommend changes to these standards.

Based on its experiences with the three task forces, BIA considered alternative methods of reviewing the qualification standards for other occupational series. The task forces' members had cited problems in completing the project, including lack of time, inadequate training, lack of support from local level management officials, and lack of travel funds. The alternatives considered by BIA included contracting for reviews of selected occupational series, establishing a separate office to conduct the standards review, and assigning specific occupational series to different offices for review. In light of budget constraints, cuts in

staff and the results of the studies, the task force approach was not recommended for future reviews. Instead, the recommended approach involved distributing questionnaires among the tribes, BIA management, and professional organizations to determine if changes needed to be made to the qualification standards of occupational series and to provide up to \$60,000 to contract for the study of one occupational series—the tribal operations series. The acting Deputy Assistant Secretary for Indian Affairs (Operations) approved this approach on September 21, 1985.

There are no separate standards for the tribal operations series; rather, the standards are those for the miscellaneous administrative and program series, GS-301, a general series primarily for administrative positions.

BIA's fiscal year 1987 budget plan that was prepared in 1985 proposed that \$76,000 be awarded to a contractor to develop the questionnaire (\$10,000), review the tribal operations series (\$50,000), and begin studies of other occupational series "vital to the protection and preservation of the assets of the Indian people" (\$16,000).

At the request of BIA's Director of Administration, the Chief of the Division of Personnel Management subsequently submitted an alternative proposal in January 1987 on how the \$76,000 should be used during fiscal year 1987 for the standards review. The Personnel Chief proposed establishing two permanent and one to three temporary positions in the Personnel Office's Branch of Staffing and Manpower specifically for the purpose of studying standards. The Personnel Chief projected that, beginning in fiscal year 1988, the standards for 12 to 32 occupational series could be reviewed annually depending on staffing levels. However, in February 1987 the Director of Administration decided that the contracting approach outlined in the budget plan was more appropriate for developing qualification standards for the tribal operations series.

On September 28, 1987, BIA awarded a contract for \$42,800 to Scheig and Associates, Inc., to develop qualification standards for the tribal operations series. Work began on October 1, 1987, and the project was to be completed no later than June 30, 1988. The contract required on-site visits to the 12 BIA area offices and called for the contractor to meet with BIA Area Directors, Superintendents, Tribal Operations, and personnel officials and local tribal officials in developing the standards. The contract did not include the questionnaire and studies of other occupational series "vital to the protection and preservation of the assets of the

---

**Appendix III  
Status of Qualification Standards for BIA  
Occupational Series**

---

Indian people” and we could not determine why they were excluded from available documentation.

On February 1, 1988, the contract was amended at the direction of the Deputy Assistant Secretary for Indian Affairs (Tribal Services) to change the occupational series for which qualification standards will be developed. Documentation was not available to determine why the Deputy Assistant Secretary made this change. Standards will now be developed for three law enforcement occupational series (criminal investigator, police officer, and guard) instead of the tribal operations series. Because of this change, the contractor requested an amendment to the contract. The contract cost was increased by \$10,860, raising the total cost to \$53,660. The parties also extended the completion date to January 30, 1989.

The Director of Administration also directed the Personnel Office to begin contracting for a study of the qualification standards for the engineering occupational series in fiscal year 1988.

# Number and Percentages of Indian and Non-Indian Employees by Grades and Locations, March 31, 1987

Grades	Area offices			
	Indians		Non-Indians	
	Number	Percent	Number	Percent
GS-1 through GS-7	4,434	96.1	179	3.9
GS-8 through GS-12	1,625	62.5	974	37.5
GS-13 through SES	238	70.6	99	29.4
Other <sup>a</sup>	4,960	80.8	1,177	19.2
<b>Totals</b>	<b>11,257</b>	<b>82.3</b>	<b>2,429</b>	<b>17.7</b>

**Appendix IV  
Number and Percentages of Indian and Non-  
Indian Employees by Grades and Locations,  
March 31, 1987**

<b>Central Office</b>				<b>Post secondary schools</b>				<b>Totals</b>			
<b>Indians</b>		<b>Non-Indians</b>		<b>Indians</b>		<b>Non-Indians</b>		<b>Indians</b>		<b>Non-Indians</b>	
<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>
210	87.1	31	12.9	124	96.9	4	3.1	4,768	95.7	214	4.3
130	72.2	50	27.8	99	61.5	62	38.5	1,854	63.1	1,086	36.9
137	56.4	106	43.6	4	100.0	0	0.0	379	64.9	205	35.1
1	50.0	1	50.0	56	98.2	1	1.8	5,017	81.0	1,179	19.0
<b>478</b>	<b>71.8</b>	<b>188</b>	<b>28.2</b>	<b>283</b>	<b>80.9</b>	<b>67</b>	<b>19.1</b>	<b>12,018</b>	<b>81.7</b>	<b>2,684</b>	<b>18.3</b>

<sup>a)</sup>Includes wage system and calendar year employees.





---

Requests for copies of GAO reports should be sent to:

U.S. General Accounting Office  
Post Office Box 6015  
Gaithersburg, Maryland 20877

Telephone 202-275-6241

The first five copies of each report are free. Additional copies are \$2.00 each.

There is a 25% discount on orders for 100 or more copies mailed to a single address.

Orders must be prepaid by cash or by check or money order made out to the Superintendent of Documents.

---

United States  
General Accounting Office  
Washington, D.C. 20548

Official Business  
Penalty for Private Use \$300

First-Class Mail  
Postage & Fees Paid  
GAO  
Permit No. G100

---