No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BROADEN, Petitioner

v.

DEPARTMENT OF TRANSPORTATION, Respondent

On Petition for Writ of a Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether federal agencies can 1) formulate job position qualifications that violate federal laws that prohibit military status discrimination per the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. § 4311) and/or 2) refuse to credit equivalent and specialized work experience gained while serving in the U.S. Armed Forces with regard to position eligibility determination that violate USERRA, 38. U.S.C. § 4311.

LIST OF PARTIES

Petitioner is Michael G. Broaden, *pro se.*

Respondent is the Department of Transportation:

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RELATED PROCEEDINGS

United States Court of Appeals (Federal Circuit):
Michael Broaden v. Department of Transportation, No. 2021-2000 (Nov. 17, 2021)

United States Merit Systems Protection Board (MSPB):
Michael Broaden v. Department of Transportation, No. DE-4324-20-0168-I-2 (Feb. 26, 2021)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Broaden, a U.S. military veteran, respectfully requests the issuance of writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit No. 2021-2000 or in the alternative, a summary reversal or a remand to the MSPB for corrective action.

OPINIONS BELOW

The November 17, 2021 decision of the United States Court of Appeals for the Federal Circuit in No. 2021-2000 is not published but is reproduced at App. 1a-8a. The February 26, 2021 decision of the Merit Systems Protection Board in No. DE-4324-20-0168-I-2 is not published but is reproduced at App. 9a-17a.

JURISDICTION

The judgement of the court of appeals was entered on November 17, 2021. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254 - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

38 U.S.C. §4301 – Veterans' Benefits, USERRA; Purposes; sense of Congress

(a) The purposes of this chapter are—

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their

communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

38 U.S.C. § 4311 - Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 U.S.C. § 4327 - Noncompliance of Federal officials with deadlines; inapplicability of statutes of limitations

(b) Inapplicability of Statutes of Limitations.—
If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.

STATEMENT OF THE CASE

Starting Nov 15, 2011, the petitioner has submitted numerous applications for an Air Traffic Control (ATC) Support Specialist (U.S. OPM 2152 series) position with the Federal Aviation Administration (FAA, an agency under the Department of Transportation). After each application review, the petitioner was deemed ineligible as the FAA would not credit his listed 138 weeks of FAA-certified ATC experience since it was obtained while he was serving in the U.S. military. Of the three (3) qualifications for the position, only one needs to be met. One of the qualifications states, "Must have been facility rated or area certified for at least 1 year (52 weeks) in an air traffic services facility." The Petitioner asserts this qualification is written in a discriminatory manner against veterans as "air traffic services facility" is self-defined by the FAA to be only inclusive of FAA air traffic services facilities and exclusive of military air traffic services facilities. The Petitioner is seeking corrective action pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, 38 U.S.C. § 4311. USERRA has no statutes of limitation per 38 U.S.C. § 4327 (b).

In its decision, the MSPB denied corrective action. The U.S. Court of Appeals for the Federal Circuit affirmed the MSPB's decision. The petitioner now seeks a writ of certiorari from the Supreme Court.

REASONS FOR GRANTING THE WRIT

This Court should grant review in this case to provide guidance on how to apply USERRA; a federal statute that has confounded, and will continue to confound, lower courts. Protecting our veterans is of national interest and deserves appropriate attention. Correct application of USERRA law is critical. Properly understood, USERRA sets forth that veterans shall not be denied promotion or any benefit of employment by an employer on the basis of veteran status. 38 U.S.C. § 4311. With no change, lower courts, to include the MSPB and the U.S. Court of Appeals for the Federal Circuit, are systematically not properly applying the law and unwittingly endorsing military status discrimination. In this case, military status discrimination is via the FAA's use of the oblique term "air traffic services facility" used in position qualifications. Shockingly, "air traffic services facility" is self-defined by the FAA to *only* be inclusive of FAA ATC facilities and *exclusive* of military ATC facilities. This is despite that FAA Airman Certificates for Control Tower Operators are the same, produced on the same FAA form number, and equivalent for both military and civilian FAA facilities as shown by the Petitioner's own certificates (App. 18a). A side-by-side review of Petitioner's certificates for Control Tower Operator, *both* issued by the FAA, is substantial evidence and a powerful reveal that military status discrimination is clear and present. On the left is an FAA issued Airman Certificate

for Control Tower Operator earned while the Petitioner was in the military. On the right is an FAA issued Airman Certificate for Control Tower Operator earned while the Petitioner was a civilian in the FAA. The certificate on the right has a checked box that states, "THIS IS A REISSUANCE OF **THIS GRADE OF CERTIFICATE**". It does not indicate "military grade" or "civilian grade". It indicates "**THIS GRADE**". The certificate on the right also lists a "DATE OF SUPERSEDED AIRMAN CERTIFICATE" as Dec 2, 1999 which is the referenced date of issuance of the Petitioner's certificate on the left earned while in the military. These matched dates inextricably tie the certificates together in their equivalency. Here, inclusive of the collective record and under common sense, is indication of "evidence that a reasonable mind may take as sufficient to establish a conclusion." *Grover v. Office of Pers. Mgmt.*, 828 F.3d 1378, 1383 (Fed. Cir. 2016).

The FAA denied and continues to deny the Petitioner eligibility for promotion to the ATC support specialist position conditioned with the motivating factor and on the basis that the Petitioner's equivalent ATC experience was obtained while serving in the military. If the FAA simply credited its own FAA-issued certificate that the Petitioner obtained while serving in the military, the Petitioner would then be deemed eligible. In addition, the Petitioner would have been selected from a list of eligible candidates per testimony of a former FAA air traffic hiring manager with +30 years of FAA ATC experience if the FAA had placed the Petitioner on an eligible candidate list.

Both military and civilian ATC controllers perform the exact same function

(separate aircraft and issue safety alerts) to a combination of both military and civilian aircraft at the same airport or within the same airspace sector. Furthermore, military controllers routinely control civilian aircraft and civilian FAA controllers routinely control military aircraft. While some military *aircraft* can differ in function and mission compared to civilian *aircraft*, ATC *rules and procedures* for military and civilian controllers are the same by necessary design. A single FAA-provided witness testified that there are "functional differences" between military ATC and FAA ATC (Pet'r's Br. at 15). This proffered claim of "functional differences" is false and leads to serious injustice. In direct opposition to this single FAA-provided witness, three (3) current FAA employees with over 90 years of combined military ATC and civilian FAA ATC experience testified in support of the Petitioner that military ATC experience and civilian FAA ATC experience are equivalent and there are no functional differences between the two (Pet'r's Reply Br. at 10-11 and DE200168I2_2021-01-14_03DUNN202011161014.mp3, 5:07-7:16). The proven operational and flexible design of our country's common military-civilian ATC system has a foundation of meaningful and necessary equivalents in knowledge, training, function, material, and experience for *both* FAA and military controllers. Because lower courts have not properly applied USERRA law in this case, this Court's timely review is warranted.

I. This Case has National Importance as it has Significant Consequence to U.S. Servicemembers, the FAA, and Users of the National Airspace System (NAS)

There is a critical need for safe air travel in the United States to sustain

economic and national defense interests. By design and also to prevent the recurrence of military-civilian aircraft catastrophes of the past, a common military-civilian system of rules, regulations, and procedures known as the National Airspace System (NAS) has been established. In the order that prescribes ATC procedures and phraseology for use by "persons" (military or civilian) providing ATC services, FAA Joint Order (JO) 7110.65 Air Traffic Control, the NAS is defined as "The common network of U.S. airspace; air navigation facilities, equipment and services, airports or landing areas; aeronautical charts, information and services; rules, regulations and procedures, technical information, and manpower and material. Included are system components shared jointly with the military." Today, the importance of a common military-civilian NAS is as critical as ever. Military and civilian FAA controllers have common rules, regulations, coordination procedures, and equivalent ATC certificates that make this possible to ensure the safety of all air passengers. Both military and FAA civilian controllers use the same +650-page FAA JO 7110.65 Air Traffic Control procedure document that outlines the duty priorities of separating aircraft and issuing safety alerts as well as providing support to national security and homeland defense activities. This is true for *all* controllers, military and civilian. Any attempt to classify the purpose of ATC, ATC duty priorities, or equivalent ATC experience gained thereof as only applicable to the Department of Transportation (DOT) or only applicable to the Department of Defense (DOD) weakens the NAS and degrades its intended common purpose, lessens air safety, and impedes collaborative improvement. Redundancy in air safety, system efficiency, transport of personnel and

cargo, airborne emergencies, airborne firefighting, search and rescue, natural disaster recovery, numerous joint-use airports (both military and civilian based aircraft), readiness against air attacks on the U.S., and any necessary military-civilian coordinated air security response are just some examples that exhibit a clear need for a common military-civilian ATC system.

The U.S. Office of Personnel Management (OPM) Position Classification Standard for Air Traffic Control Series 2152 states, "Whether located at a civilian airport, a military base, or a joint military/civilian airport, all (air traffic control) terminals perform similar functions...". Furthermore, the OPM defines specialized experience in its occupational requirements of the 2152 series as "experience in a military or civilian air traffic facility". The U.S. OPM does not distinguish the difference of specialized ATC experience between military and civilian ATC experience because no substantial, material, or functional difference exist between the two. Assuming arguendo that somehow material or functional differences between military controllers and civilian controllers existed, a reasonable person might wonder if passengers in a civilian aircraft being controlled by military controllers should be given an FAA warning about any added risk. Fortunately, and by design of the NAS, a warning of this type does not exist, nor is it necessary to exist as military and civilian controllers perform the same service of separating aircraft and issuing safety alerts.

In C.F.R. Title 14. Aeronautics and Space, Chapter I. FEDERAL AVIATION ADMINISTRATION DEPARTMENT OF TRANSPORTATION, Subchapter D.

AIRMEN, Part 65. CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS, Subpart B. ATC Tower Operators; commonality and equivalent specialized experience that apply to both civilian and military controllers is also made clear. As there exists a need for a common military-civilian system, there is notably no qualification or experience distinction made between civilian and military controllers with respect to the requirements of C.F.R. Title 14 Chapter I Subchapter D. Part 65 Subpart B. ATC Tower Operators. This includes, but is not limited to subsections with titles: § 65.31 Required credentials, certificates, and ratings or qualifications; § 65.33 Eligibility requirements: General; § 65.35 Knowledge requirements; § 65.37 Skill requirements: Operating positions; § 65.39 Practical experience requirements: Facility rating; § 65.41 Skill requirements: Facility ratings; and § 65.45 Performance of duties. Even more notably, 14 C.F.R. § 65.39 titled "Practical experience requirements: Facility rating" specifically states,

> "Each applicant for a facility rating at any ATC tower must have satisfactorily served - (a) As an ATC tower operator at that control tower without a facility rating for at least 6 months; or (b) As an ATC tower operator with a facility rating at a different control tower for at least 6 months before the date he applies for the rating. However, an applicant who is a member of an Armed Force of the United States meets the requirements of this section if he has satisfactorily served as an ATC tower operator for at least 6 months."

The Petitioner held an *FAA-issued* ATC tower operator certificate for 138 weeks (2.65 years) while a member of an Armed Force of the United States, a time far beyond any 6-month or 52-week benchmark.

A single FAA-provided witness for the Respondent asserts there are functional differences between FAA and military ATC facilities. At best, over reliance on this

overly broad statement given without context is both incorrect and a myopic view of the NAS and symbiotic missions of the DOD (to provide the military forces needed to deter war and ensure our nation's security) and DOT (to ensure America has the safest, most efficient and modern transportation system in the world). At worst, the FAA witness' assertion is disheartening to any military controller holding an FAA-issued certificate, promotes a breeding ground for military status discrimination, hinders efficiency, and erodes trust to ensure the safest and most secure aviation system in the world. There is no opportunity for a safe NAS without national security just as there is no opportunity for national security without a safe NAS. In the simplest of terms, the DOD and DOT air traffic controllers need each other to ensure both the vitality and the defense of our country. This is underscored by the FAA's JO 7110.65 Air Traffic Control common military-civilian procedures, by the design of our NAS, by the OPM, and by applicable C.F.R.s in Title 14 – Aeronautics and Space. In the DOT, DOD, or in any U.S. Department for that matter; military status discrimination simply should have no home.

While the need for a common military-civilian NAS is as strong as ever today, the stability of the NAS has been put in jeopardy in the past. In 1981, civilian FAA controllers engaged in a strike that had the potential to affect safe travel of millions of Americans and the safe flight of military aircraft. Filling in for these striking civilian FAA controllers were military controllers that kept the nation's airways safe and operational. These military controllers were deployed to over 75 civilian FAA air traffic service facilities during this timeframe. The military-civilian ATC experience

equivalency is exhibited in an official report titled, "Air Force Communications Command (AFCC) and the Aftermath of the Air Traffic Controllers Strike 1981-1983". In this report, Colonel Derrel L. Dempsey wrote, "It (FAA civilian controller strike) also demonstrated that AFCC controllers (military controllers), working in new and often stressful environments, were equal to their FAA counterparts in ensuring the safe and smooth operation of the nation's air traffic control system." (App. 28a). Information on Colonel Derrel L. Dempsey, a Command Pilot, can be found on the Smithsonian National Air and Space Museum Wall of Honor, https://airandspace.si.edu/support/wall-of-honor/derrel-l-dempsey, "Highest rank held was Colonel and distinguished himself with service as the Deputy Chief of Staff for Air Traffic Services, Air Force Communications Command 1979-1984. During that assignment, he deployed more than 612 combat ready Air Force Air Traffic Controllers in support of National Objectives to more than 75 FAA facilities during the 1981-1983 FAA Air Traffic Controller Strike. Due to his legendary service, the United States Air Force Air Traffic Control Manager of the Year Award, was named after him." (App. 28a).

The Board abuses its discretion when any of these conditions are met: "its decision (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact findings; or (4) follows from a record that contains no evidence on which the [Board] could rationally base its decision." *Mayers v. Merit Sys. Prot. Bd.*, 693 F. App1 x 902, 903 (Fed. Cir. 2017) (citing Sterling Fed. Sys., Inc. v. Goldin, 16 F.3d 1177, 1182 (Fed. Cir. 1994)). In the

case of the Petitioner, inclusive of the record, and revealing lower court error is the Petitioner's FY2018 performance report signed by his FAA supervisor and FAA manager, "In addition to his duties in his assigned specific functional area, Mr. Broaden (Petitioner) has taken on all the same tasks and responsibilities as a (ATC) Support Specialist in the Airspace and Procedures Office at Denver TRACON." (App. 24a). This excerpt is from a report section titled "Critical Element 1: FAA Goal: Make Aviation Safer and Smarter" where the Petitioner was rated "Significantly Exceeds" (highest rating available). The Petitioner's FY2018 performance report directly reflects that the Petitioner is qualified and capable of performing support specialist duties at a high level while relying on his equivalent specialized experienced gained while in the military and holding an FAA-issued certificate for over **138 weeks**.

Ultimately, our military and how we treat our veterans is a reflection of our country and of ourselves. Increasing the diversity of employees within the FAA, to include military status diversity, serves to enhance the depth and breadth of knowledge necessary for continuous improvement and readiness of the NAS. The missions of both national defense and transportation safety thrive in an environment built on trust, diversity, equity, and inclusion. Anything less is intolerable.

Honest and hardworking members of our military aspiring to improve their lives deserve to be treated with equality under the law. This is the overarching purpose of USERRA, which pays homage to all our military servicemembers who, day in and out, help to strengthen the backbone of our country through their countless contributions. Moving to credit equivalent military ATC experience will then align

with USERRA law and the goals of aviation safety. This, in turn, will allow FAA selecting officials to review and consider a more complete list of eligible candidates and ultimately make best-fit selections. In the case of the Petitioner, he was never allowed to compete on merit; denied opportunities to be on selection lists; and denied subsequent selection. The importance of this case goes beyond particular facts and the parties involved. Here, the judiciary has a chance to stand as a beacon of hope to ensure that justice, the values, and the principles that form the bedrock of democracy do not become a mere afterthought.

II. 38 U.S. Code § 4311 is Clear to Prohibit Discrimination Against Persons Because of Their Service in the Uniformed Services

The text of USERRA identifies three core purposes: (1) "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service" ; (2) "to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service," and (3) "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a).

Congress expanded substantive protections to prohibit employment discrimination on the basis of military service-discrimination that by the 1960s had "become an increasing problem." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 557 (quoting S. Rep. No. 1477, 90th Cong., 2d Sess., at 1-2 (1968)). In the wake of the

Persian Gulf War, Congress enacted USERRA to "restate past amendments in a clearer manner and to incorporate important court decisions interpreting the law" while correcting judicial misinterpretations. 137 Cong. Rec. S6035, S6058 (May 16, 1991) (statement of Sen. Cranston). USERRA aimed to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." 137 Cong. Rec. H2972-80, H2978 (May 14, 1991) (statement of Rep. Penny). Hard work over a three-year period by an interagency task force comprised of representatives of the Departments of Labor, Defense, and Justice, and of the Office of Personnel Management made USERRA possible. Congress has long recognized that when someone puts on a uniform to serve in our military, we owe them certain obligations in return. One obligation is the assurance, through laws, that veterans will be free from any discrimination with regard to initial employment, reemployment, retention in employment, promotion, or any benefit of employment. To the individual citizen-soldier, the men and women on whom this Nation has proudly relied in times of crisis, these rights are critical.

An individual's commitment and obligation to perform air traffic control (ATC) duties under an FAA-issued certificate while in the uniformed services ought not to diminish the significant contributions or deny credit of the experience of that person's service of performing ATC duties in the armed forces for the benefit of the NAS. Equivalent specialized experience gained in ATC as a servicemember does not warrant discrimination when the uniform is no longer worn. This is significant in light that discrimination under USERRA includes that based on military service. In

the FAA's own Air Traffic Controller Workforce Plan, it specifically states, "over 10,800 military controllers provide air traffic services for the NAS." (App. 27a).

In addition and with respect to the U.S. Constitution, the Fifth Amendment has an explicit requirement that the Federal Government not deprive individuals of "life, liberty, or property," without due process of the law and an implicit guarantee that each person receive equal protection of the laws. The Fourteenth Amendment, Section 1 explicitly prohibits violation of an individual's rights of due process and equal protection. Equal protection limits Federal governments' power to discriminate in their employment practices by treating employees, former employees, or job applicants unequally because of membership in a group. This concept is explicitly stated for ATC support specialist positions and others in the Equal Employment Opportunity Policy on USAJOBS.GOV, "The United States Government does not discriminate in employment on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, political affiliation, sexual orientation, marital status, disability, genetic information, age, membership in an employee organization, retaliation, parental status, military service, or other non-merit factor." (App. 28a). While the Petitioner fully supports agencies being able to determine their own needs to meet mission requirements and to set necessary position qualifications, qualifications cannot and should not be exclusionary and/or discriminatory towards veterans with equivalent specialized experience.

III. Even if 38 U.S.C. § 4311 is Ambiguous, Supreme Court Precedent Requires USERRA be Liberally Construed in Favor of Servicemembers

Assuming arguendo that 38 U.S.C. § 4311 is somehow unclear; it must be liberally interpreted in favor of servicemembers. The Seventh Circuit held that "USERRA is to be liberally construed in favor of those who served their country." *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998). This canon of construction does not simply serve as a tiebreaker between a pair of plausible arguments, rather, the Supreme Court has made clear, any "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This canon applies broadly, including to the interpretation and reconciliation of separate subsections of veterans' rights statutes, and it "remains in full force and effect" under USERRA, as Congress explicitly stated in enacting the law. H.R. Rep. No. 103-65, at 19. Military status discrimination will continue until this Court intervenes. Denying USERRA protections to veterans not only precludes them from vindicating their rights, it effectively sanctions the discrimination that servicemembers and veterans frequently encounter in the civilian workforce as a price for serving their country. Unchecked, this trend will reduce the number of Americans willing to join the Armed Services and thus threatens the nation's readiness for real-world events– the very outcome Congress sought to avoid when enacting USERRA. 38 U.S.C. § 4301.

By continually misinterpreting USERRA and restricting veterans' rights to be fully and freely applied, lower courts have lost sight of both the principle and the purpose of USERRA. 38 U.S.C. §4301(a). The lower courts' rulings do not make good sense nor support good policy. In this case and in support of all similarly situated veterans, this Court should grant timely review to bring justice to balance.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Honorable Court issue a writ of certiorari, or in the alternative, a summary reversal or a remand to the MSPB for corrective action.

DATED January 31, 2022.

Respectfully submitted,

/s/ Michael G. Broaden
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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHAEL BROADEN,
Petitioner

v.

DEPARTMENT OF TRANSPORTATION,
Respondent

2021-2000

Petition for review of the Merit Systems Protection Board in No. DE-4324-20-0168-I-2.

Decided: November 17, 2021

MICHAEL BROADEN, Denver, CO, pro se.

MATTHEW PAUL ROCHE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., FRANKLIN E. WHITE, JR.

Before REYNA, CLEVENGER, and HUGHES, *Circuit Judges*.

PER CURIAM.

Petitioner, Michael Broaden, an Air Force veteran, appearing pro se, appeals a final decision of the Merit Systems Protection Board denying corrective action with respect to his unsuccessful application for employment as an Air Traffic Control Specialist with the Federal Aviation Administration. Because the MSPB's decision was supported by substantial evidence, and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, we affirm.

BACKGROUND

Mr. Broaden, served in the U.S. Air Force beginning in 1997 and was honorably discharged in 2002. In 2011, Mr. Broaden began working for the Federal Aviation Administration ("FAA") in a "Management and Program Analyst" position. On November 15, 2019, Mr. Broaden applied for an advertised position as an Air Traffic Control Specialist (MSS-1, Level 12), Support Specialist, at the Denver Terminal Radar Approach Control.

To be eligible for the position, Mr. Broaden needed to satisfy one of the following three requirements:

1. Must have held an FAA 2152 FG-14 or above regional or headquarters position for at least 1 year (52 weeks);
2. Must have been facility rated or area certified for at least 1 year (52 weeks) in an ATS4 facility; Note: An employee who has been facility rated or area certified for at least 1 year (52 weeks) in an ATS facility that is upgraded is considered to meet qualification requirements of the upgraded position, since he or she has been performing the higher-graded work; or
3. Must have held an MSS position for at least 1 year (52 weeks) in an ATS facility.

Mr. Broaden's application was reviewed and rejected by a Senior Human Resources Specialist with the U.S. Department of Transportation ("DOT"), Susana Meister ("Meister"). After review, Meister decided not to refer Mr. Broaden's application to the Hiring Manager because Mr. Broaden did not satisfy any of the three specified requirements.

On February 20, 2020, Mr. Broaden filed an appeal with the U.S. Merit Systems Protections Board ("MSPB" or "Board") alleging that the DOT violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. §§ 4301–4335) ("USERRA") in the process of not selecting Mr. Broaden for the Air Traffic Control Specialist position. On February 26, 2021, the MSPB issued a decision denying corrective action, finding that Mr. Broaden failed to meet his burden to show that his military service was a substantial or motivating factor in his non-selection. The MSPB also found that the agency proved Mr. Broaden did not meet the requirements for the position, and that those requirements were based on valid non-discriminatory reasons.

As to whether Mr. Broaden showed that his military service was a motivating factor in the relevant employment decision, the Administrative Law Judge ("ALJ") found that the agency did not rely on, take into account, consider, or condition the non-selection on Mr. Broaden's military service. In doing so, the ALJ credited the testimony of Meister, finding that Meister merely applied the requirements, as written, and concluded that Mr. Broaden did not qualify. The ALJ also credited the testimony of Barry Still ("Still"), a witness put forward by the FAA who has over 30 years of experience with the Air Force and FAA, in finding that Meister was correct in her determination that Mr. Broaden did not meet any of the three eligibility requirements. More specifically, the ALJ found that Mr. Broaden did not meet the first eligibility requirement because his highest level of employment was only at the developmental level of

AT-2152-EG; Mr. Broaden did not meet the second eligibility requirement because he was never a facility-rated controller at an ATS facility; and Mr. Broaden did not meet the third eligibility requirement because he never held an MSS position at an ATS facility. The ALJ further found that Mr. Broaden did not prove discriminatory motivation based on circumstantial evidence.

Mr. Broaden timely filed a petition for review. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

STANDARD OF REVIEW

We hold unlawful and set aside an MSPB decision that is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c); *see also Appleberry v. Dep't of Homeland Sec.*, 793 F.3d 1291, 1295 (Fed. Cir. 2015). "Substantial evidence is more than a mere scintilla of evidence, but less than the weight of the evidence." *Jones v. Dep't of Health & Hum. Servs.*, 834 F.3d 1361, 1366 (Fed. Cir. 2016) (internal quotation marks and citations omitted). In other words, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shapiro v. Soc. Sec. Admin.*, 800 F.3d 1332, 1336 (Fed. Cir. 2015) (quotation marks and citation omitted). The petitioner bears the burden of establishing error in the MSPB's decision. *Jenkins v. Merit Sys. Prot. Bd.*, 911 F.3d 1370, 1373 (Fed. Cir. 2019) (alteration adopted).

LEGAL BACKGROUND

USERRA affords various protections to current and former military service members with respect to their employment, and prohibits employers from discriminating against their current or prospective employees because of their military service. 38 U.S.C. § 4311(a) provides in relevant part:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, or obligation.

The individual making a USERRA discrimination claim bears the initial burden of showing, by preponderant evidence, the individual's military service was "a substantial or motivating factor" in the adverse employment action. *McMillan v. Dep't of Justice*, 812 F.3d 1364, 1372 (Fed. Cir. 2016); 38 U.S.C. § 4311(c)(1). If the employee makes the requisite showing, the employer has the opportunity to come forward with evidence to show, by preponderant evidence, the employer would have taken the adverse action anyway, for a valid reason. *Id.*

Military service is a motivating factor for an adverse employment action if the employer "relied on, took into account, considered, or conditioned its decision" on the employee's military service. *McMillan*, 812 F.3d at 1372 (quoting *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368 (Fed. Cir. 2009)). Because employers rarely concede an improper motivation for their employment actions, employees may satisfy their burden to establish that their military service or obligation was a motive in the challenged action by submitting evidence from which such a motive may be fairly inferred. *Id.* This analysis requires investigating the *Sheehan* factors: (a) proximity in time between the employee's military activity and the adverse employment action; (b) inconsistencies between the proffered reason and other actions of the employer; (c) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity; and (d) disparate treatment of certain employees compared

to other employees with similar work records or offenses. *Id.* (citing *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001)).

DISCUSSION

Mr. Broaden contends that the MSPB's decision must be set aside because "the Board's wrongful decision follows from a record that contains no evidence on which its decision could be made." Pet'r's Br. at 15; Pet'r's Reply Br. at 2. We disagree. For example, the ALJ credited the testimony of Meister and Still in finding that Mr. Broaden's military service was not considered in his employment decision, that there are material differences between the type of experience obtained by Mr. Broaden and the responsibilities of the advertised position, and that individuals within the FAA with similar experience to Mr. Broaden would also not qualify for the position. As to the *Sheehan* factors, the ALJ found that (1) the timing did not suggest discrimination because it was 17 years from the time of Mr. Broaden's service to the time of the non-selection, (2) that there were no material discrepancies in testimony that suggested discrimination, and (3) there was no evidence of expressed hostility towards military members. On appeal, Mr. Broaden does not point to a single finding that was not supported by substantial evidence. Accordingly, we determine that the Board determination finding that Mr. Broaden did not satisfy his initial burden to show that his military service was a motivating factor in the FAA's decision not to hire him as an Air Traffic Control Specialist (MSS-1, Level 12), Support Specialist is supported by substantial evidence.

Mr. Broaden also contends that the MSPB's decision must be set aside because the FAA failed to recognize and credit his professional experiences and certifications simply because they were with the Air Force, and not the FAA. Pet'r's Br. at 15–16. Mr. Broaden contends that the position requirements set forth in the advertisement were

discriminatory in that they define experience in terms that discriminate against veterans in favor of individuals who gained flight-related experience with the FAA. Pet'r's Br. at 9–12.

Generally, agencies have broad discretion to define their own needs. See, e.g., Savantage Fin. Servs., Inc. v. United States, 595 F.3d 1282, 1286 (Fed. Cir. 2010) (holding that determining an agency's minimum needs "is a matter within the broad discretion of agency officials ... and is not for [the] court to second guess" (citations omitted and alterations in the original)). Appellant is correct, however, that all employers, including agencies, should carefully evaluate whether any employment requirements are discriminatory against veterans. See 38 U.S.C. § 4311(a).

Nonetheless, we conclude that the ALJ's finding that the requirements of the advertised position are not discriminatory against veterans is supported by substantial evidence. For example, Still testified that non-veterans with similar flight-related experience with the FAA also do not meet the requirements for the advertised position. Still also testified that the requirements of the advertised position are reasonable and related to the duties of the position, independent of whether previous flight traffic experience was civilian or military.

Mr. Broaden's witnesses tried to establish that Mr. Broaden's experience was equivalent to the experience required for the relevant position. The ALJ, however, found that Still's testimony was far more authoritative and persuasive. We lack authority to re-evaluate these credibility determinations that are not inherently improbable or discredited by undisputed fact. *Pope v. United States Postal Serv.*, 114 F.3d 1144, 1149 (Fed. Cir. 1997) (citations omitted). Thus, we conclude that the MSPB determination that the qualifications of the advertised position were not discriminatory in nature is supported by substantial evidence.

CONCLUSION

We have considered Mr. Broaden's remaining arguments but find them unpersuasive. For the reasons discussed above, and based on the record before us on appeal, we conclude that the MSPB's decision, denying Mr. Broaden's request for corrective action is supported by substantial evidence and is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. Accordingly, we affirm.

AFFIRMED

COSTS

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

MICHAEL BROADEN,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
DE-4324-20-0168-I-2

DATE: February 26, 2021

Josh Entin, Esquire, Fort Lauderdale, Florida, for the appellant.

Michael Elkins, Esquire, Fort Lauderdale, Florida, for the appellant.

Lindsay M. Nakamura, Esquire, El Segundo, California, for the agency.

Mary Kate Bird, Esquire, El Segundo, California, for the agency.

BEFORE
Evan J. Roth
Administrative Judge

INITIAL DECISION

On February 20, 2020, Michael Broaden ("the appellant") timely filed an initial appeal alleging the agency violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. §§ 4301-4335) ("USERRA") (Initial Appeal File "IAF"), Tab 1). The Board has jurisdiction pursuant to 38 U.S.C. § 4324(b) (IAF, Tab 12; Jurisdiction Ruling). On November 16 and 17, 2020, I held a video-teleconference hearing (Second Appeal, Tabs 52, 54). On December 9, 2020, the record closed after the parties

provided oral closing arguments[1] (Second Appeal, Tabs 60-63). For the reasons below, I DENY corrective action.

Findings of fact[2]

On November 15, 2019, the appellant applied for a position as an Air Traffic Control Specialist (MSS-1, Level 12), Support Specialist, at the Denver Terminal Radar Approach Control[3] (IAF, Tab 17, page 28 of 51; Vacancy Announcement No. ANM-AT-20-D01-64523). Among other things, in order to qualify for the position, the appellant needed to satisfy one of the following three requirements:

1. Must have held an FAA 2152 FG-14 or above regional or headquarters position for at least 1 year (52 weeks);

2. Must have been facility rated or area certified for at least 1 year (52 weeks) in an ATS[4] facility; Note: An employee who has been facility rated or area certified for at least 1 year (52 weeks) in an

1 The only open issues were the agency's objections to appellant's Exhibits EE and MM (Second Appeal, Tab 45; agency objections) (Second Appeal, Tab 47; Order regarding exhibit objections). I exclude the exhibits as irrelevant and for lack of foundation.

2 My findings are based on preponderant evidence, which is the "degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.4(q). My findings also apply the credibility factors articulated in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), and the hearsay standards of *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981).

3 Although immaterial to the outcome, the appellant argued at the hearing that he was challenging a series of similar non-selections (Second Appeal, Tab 18, page 5 of 10, paragraph 10). I reject that argument because the appellant failed to object to the Jurisdictional Order, which was limited to the sole non-selection referenced above (IAF, Tab 12). But even if the appellant had preserved his right to challenge other non-selections, the outcome would be the same because the issues were the same.

ATS facility that is upgraded is considered to meet qualification requirements of the upgraded position, since he or she has been performing the higher-graded work; or

3. Must have held an MSS position for at least 1 year (52 weeks) in an ATS facility (see note above).

(IAF, Tab 17, page 29 of 51). In support of his application, the appellant provided his resume, together with an FAA Form 3330-43-1 (IAF, Tab 17, pages 13 & 22 of 51).

The appellant's application materials were reviewed by Human Resources Specialist Susana Meister[5] (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458. On the face of the application, it was clear the appellant did not qualify for the position because he did not meet any of the three requirements (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458. For the first requirement, the appellant fell short because his highest level employment was only at the developmental level (AT-2152-EG)[6] (IAF, Tab 17, page 22 of 51) (Meister Testimony) (Sill

4 ATS stands for Air Traffic Services (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458.

5 I credit HR Specialist Meister's testimony, which was plausible and straightforward and consistent with the record. *Hillen*, 35 M.S.P.R. at 458; *Peloquin v. U.S. Postal Service*, 51 M.S.P.R. 435, 438 (1991) (straightforward and unequivocal testimony enhances witness credibility). There was no doubt about HR Specialist Meister's expertise, which was based on more than a decade of experience reviewing hundreds of MSS applications (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458. Moreover, cross examination revealed that HR Specialist Meister's testimony was, essentially, undisputed.

6 I credit the testimony of agency witness Barry Sill, whose impressive testimony was based on more than 30 years of FAA experience (in addition to his Air Force service), including the hiring and supervision of air traffic control specialists, as well as Sill's participation on the agency committee to promote successful military hiring and placement (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458. Sill's testimony was plausible and consistent with the record (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458. Moreover, Sill's credibility was unaffected by cross examination (Sill Testimony); *Hillen*,

Testimony); *Hillen*, 35 M.S.P.R. at 458. For the second requirement, the appellant was not a facility-rated controller at an ATS facility (IAF, Tab 17, page 13 of 51) (IAF, Tab 17, page 22 of 51) (Meister Testimony) (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458. For the third requirement, the appellant never held an MSS position at an ATS facility (IAF, Tab 17, page 13 of 51) (IAF, Tab 17, page 22 of 51) (Meister Testimony) (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458. Because the appellant facially did not qualify for the position, HR Specialist Meister did not refer the appellant's application package to hiring manager Jody Dowd[7] (Meister Testimony) (Dowd Testimony); *Hillen*, 35 M.S.P.R. at 458.

This appeal followed. I reserve additional findings for below.

Burdens of proof

The employee making a USERRA discrimination claim bears the initial burden of showing, by preponderant evidence, the employee's military service was "a substantial or motivating factor" in the adverse employment action. *McMillan v. Department of Justice*, 812 F.3d 1364, 1372 (Fed. Cir. 2016); 38 U.S.C. § 4311(c)(1). If the employee makes the requisite showing, the employer has the opportunity to come forward with evidence to show, by preponderant evidence, the employer would have taken the adverse action anyway, for a valid reason. *Id.*

Here, for the reasons below, I find the appellant failed to carry his initial burden of showing his military service was a substantial or motivating factor in

35 M.S.P.R. at 458.

7 There was no dispute, and I find, the appellant did not meet any of the three requirements, as written. Indeed, during discovery, the appellant essentially admitted he did not meet any of the three requirements, although he argued his military experience should have sufficed (Second Appeal, Tab 23, page 374 of 471). As explained below, however, I find the agency's reliance on the appellant's failure to meet the three criteria, as written, did not violate USERRA.

his non-selection.[8] *Id.* Accordingly, I deny corrective action without reaching the issue of whether, for a valid reason, the agency nevertheless would have declined to select the appellant. *Id.*

The appellant failed to prove discrimination was a motivating factor

"[M]ilitary service is a motivating factor for an adverse employment action if the employer 'relied on, took into account, considered, or conditioned its decision' on the employee's military-related absence or obligation." *McMillan*, 812 F.3d at 1372 (quoting *Erickson v. U.S. Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009)). Here, I find, the agency did not rely on, take into account, consider, or condition the non-selection on the appellant's military experience. On the contrary, I credit HR Specialist Meister's testimony that she made her decision, without reference to military experience, because the appellant facially did not meet any of the three position requirements (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458. Indeed, because it was clear the appellant did not qualify, HR Specialist Meister did not look deeper into the appellant's application package to consider whether his military experience was a valid substitute for the express position requirements (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458. Instead, HR Specialist Meister applied the requirements, as written, and concluded the appellant did not qualify[9] (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458. As a result, HR Specialist Meister did not forward the appellant's application materials to the hiring official (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458.

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8 USERRA does not provide a disparate impact cause of action. *Harellson v. U.S. Postal Service*, 115 M.S.P.R. 378, 386 (2011). However, to the extent applicable, I considered the appellant's disparate impact evidence. *Id.*

9 It was undisputed, and I find, HR Specialist Meister had no authority to depart from the vacancy announcement's qualification standards (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458.

Accordingly, based on HR Specialist Meister's credible and undisputed testimony alone, I find the appellant did not prove his military experience was a motivating factor in his non-selection. *Cf. Williams v. Department of the Navy*, 89 Fed.Appx. 724, 727 (Fed. Cir. 2004) (unpublished) (mere non-selection notice based on lack of qualifications did not support military discrimination claim).

I also find the appellant failed to prove discriminatory motivation based on circumstantial evidence.[10] *McMillan*, 812 F.3d at 1372. Because employers rarely concede an improper motivation for their employment actions, employees may satisfy their burden to establish that their military service or obligation was a motive in the challenged action by submitting evidence from which such a motive may be fairly inferred. *Id.* The analysis includes the so-called *Sheehan* factors: (a) proximity in time between the employee's military activity and the adverse employment action; (b) inconsistencies between the proffered reason and other actions of the employer; (c) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity; and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses. *Id.* Here, I find none of the *Sheehan* factors weighed in the appellant's favor. I address each in turn.

First, the timing did not suggest discrimination. The appellant served in the Air Force from 1993 to 1997, and he was honorably discharged in 2002 (Broaden Testimony). At issue was the appellant's 2019 non-selection (IAF, Tab 17, page 28 of 51). I find that seventeen-year differential did not suggest discrimination. *Cf. McMillan*, 812 F.3d at 1373 (inference supported by tour extension requested two months after military leave); *cf. Savage v. Federal Express Corporation*, 856 F.3d 440, 448 (6th Cir. 2017) (despite like of concrete standards, 40 days considered sufficient to show temporal proximity).

10 Here, there was no direct evidence of discriminatory motivation.

Second, I find there were no material inconsistencies that suggested discrimination. On that issue, I credit HR Specialist Meister's testimony that she consistently applied the qualification standards to all MSS-1 applicants (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458. There was no contrary credible evidence.

Third, there was no evidence of "expressed hostility" towards military members. On the contrary, Barry Sill's testimony established the agency's institutional dedication to hiring Veterans.[11]

Finally, there was no credible evidence of disparate treatment. The gravamen of the appellant's claim was that the agency should have determined the appellant was qualified for the position based on his military experience. More specifically, the appellant argued the agency should not have imposed an ATS facility requirement, because that category does not include military facilities. I reject the appellant's argument, and I credit the agency's explanation that its ATS facility requirement was based on valid non-discriminatory reasons.

Specifically, prior to the hearing, Barry Sill provided his report to explain the agency's basis for requiring ATS facility experience for the MSS-1 position (Second Appeal, Tab 21, page 9 of 465). As Sill's report explained, the requirement was "due to the nature of the position job responsibilities" (Second Appeal, Tab 21, page 9 of 465). In particular, "[a]s a Support Specialist in a field facility, there are management responsibilities necessary to the position which require foundational training and certification as an FAA certified profession controller" (Second Appeal, Tab 21, page 9 of 465). Moreover, for the MSS-1 position at issue, "there are functional differences" in operation and implementation between FAA and military facilities" (Second Appeal, Tab 21, page 9 of 465). There are also substantive differences in training standards (Second Appeal, Tab 21, page 10 of 465).

11 Ironically, the appellant's own evidence suggested the absence of any such hostility (Second Appeal, Tab 50, paragraph 4) (Second Appeal, Tab 56).

I credit those assertions, which Sill's testimony further substantiated (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458. Moreover, Sill testified, credibly and without contradiction, there are FAA-certified controllers who do not work in ATS facilities, who likewise would not have qualified for the MSS-1 position (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458. In other words, the requirement of ATS facility experience was not targeted at the uniformed services, but instead excluded non-military applicants, such as FAA-certified controllers, as well (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458. On that issue, Sill's testimony was further supported by HR Specialist Meister, who likewise credibly explained there are civilian FAA facilities that likewise do not qualify as ATS facilities (Meister Testimony); *Hillen*, 35 M.S.P.R. at 458. There was no contrary credible evidence.

The outcome was not changed by the appellant's witnesses, who primarily validated the appellant's work credentials[12] (Martin Testimony) (Dunn Testimony) (Hudgins Testimony) (Nakata Testimony) (Dowd Testimony). To the extent those witnesses also tried to establish that non-ATS experience in the military is the equivalent of ATS experience, I was unpersuaded (Dunn Testimony) (Hudgins Testimony) (Nakata Testimony). Barry Sill's testimony was far more authoritative, and far more persuasive, particularly since the appellant's witnesses did not credibly dispute Sill's explanation for requiring ATS experience for this particular position.[13]

Conclusion

For the reasons above, I find the appellant failed to prove his military service was a substantial or motivating factor in his non-selection. On the

12 But even on that issue, the appellant did not make a persuasive presentation. Most notably, the appellant's current supervisor displayed notable hesitation when asked if he was confident assigning MSS-1 duties to the appellant (Martin Testimony). Moreover, even though it does not change the outcome here, hiring Manager Dowd credibly testified he would not have selected the appellant (Dowd Testimony); *Hillen*, 35 M.S.P.R. at 458.

contrary, I find the agency proved the appellant did not meet the requirements for the position, which were based on valid non-discriminatory reasons. Accordingly, I deny corrective action.

Decision

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/

Evan J. Roth
Administrative Judge

13 I was unpersuaded by the appellant's argument that, when applying for certain other agency positions, sometimes the agency's qualification standards were satisfied by non-ATS military experience (Broaden Testimony). At the threshold, the validity of other agency qualification standards for other positions was not at issue here. Instead, with respect to the MSS-1 position at issue, Barry Sill credibly explained why ATS experience was a valid non-discriminatory qualification standard (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458. Moreover, Sill credibly explained how the agency credits military experience when applicable (Sill Testimony); *Hillen*, 35 M.S.P.R. at 458.

Additional material from this filing is available in the Clerk's Office.