NOTE: This disposition is nonprecedential.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.