No._____

In the

Supreme Court of the United States

AISHA TRIMBLE,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

AISHA TRIMBLE,
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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. When federal agencies take adverse actions causing denial of initial appointment, and purposefully use software settings and hiring processes that undermine and violate veterans preference laws relative to initial employment, are their willful infringements of a qualified veteran's rights motivated by hatred of military service?
2. Does Congress require an initial appointment to be granted to a qualified preference eligible after a federal agency violates that veteran's preference rights, denies them initial appointment and illegally steals the job from that veteran to appoint, promote, transfer, reassign or reinstate a non-preference eligible or non-veteran under the vacancy due to hostility against military service that inspired legislation for veterans' preference?
3. When federal employees adjudicate veterans preference and initial employment discrimination matters, and ignore hiring misconduct to rule in favor of the law violators, do their decided actions prove hostility towards military service and an intent to work in the best interest of the violators?

PARTIES TO THE PROCEEDING

The Petitioner is Aisha Trimble, and she acts Pro Se under this matter. The Respondent is the Department of Veterans Affairs, a federal agency.

CORPORATE DISCLOSURE STATEMENT

The Petitioner is not a corporation under this matter; therefore, a corporate disclosure statement isn't required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

The following proceedings are directly related to this matter:

1) *Trimble v. DVA,* No. 23-192, U.S. Supreme Court. Petition for Writ of Certiorari docketed August 29, 2023.

2) *Trimble v. DVA,* No. 23-1306, U.S. Court of Appeals Federal Circuit. Opinion and Judgment entered June 30, 2023.

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U.S. Court of Appeals for the Federal Circuit ("Fed. Cir.") Judgment and Opinion recorded at 23-1307 and reproduced at Appendices A and B. Merit Systems Protection Board ("MSPB" or "Board") Decision recorded at DA-4324-22-0350-I-1 and reproduced at Appendix C.

JURISDICTION

Fed. Cir. jurisdiction granted under 5 USC 7703(b(1)(A) and 28 USC 1295(a)(9), after MSPB Final Decision dated Dec. 20, 2022. Fed. Cir. Opinion and Judgment issued Jun. 30, 2023. Petitioner never submitted a Petition for USERRA Rehearing to Fed. Cir.

Per 28 USC 1254(1), U.S. Const. ArtII.S3.3.1, Rules 10(a)-(c) and 13.3, Supreme Court holds jurisdiction.

CONSTITUTIONAL LAWS INVOLVED

U.S. Const. Amend. 1 and ArtII.S3.3.1

FEDERAL STATUTES INVOLVED

5 USC §§ 2108, 2302, 3304, 3309, 3311, 3313, 3317, 3318, and 7703

18 USC §§ 241, 242

28 USC 1254, 1295

38 USC §§ 4214, 4301 and 4311

FEDERAL REGULATIONS INVOLVED

5 CFR § 1201

STATEMENT OF THE CASE

Hiring misconduct is out of control and widespread at federal agencies. Animus and blatant disregard for veterans preference laws associated with military service dominate the federal hiring culture. This brazen, illegal and unchecked activity caused an adverse hiring decision against the Petitioner under this matter and its ("related proceeding"), *Trimble v. DVA, No. 23-192*, U.S. Supreme Court (2023).

This matter pertains to denial of initial employment and discrimination against military service under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), codified at 38 U.S.C. §§ 4301-4333. There is no USERRA without military service. Federal jobs are unique in that Congress has written specific legal instructions to hire and initially appoint qualified veterans. [*"...it is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter..."]* - 38 USC § 4301(b).

I am the Petitioner, Aisha Trimble. I'm a preference eligible per 5 USC § 2108(1)a(3)(a)(c). I earned statutory preference for initial appointment through performance of honorable military service. My performance of military service grants me statutory hiring preference as it pertains to right to compete[2], ranking and scoring[3], advance notice[4], objection to passover[5] and initial hiring[6] under federal jobs.

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[2] 5 USC § 3304(f)(1)
[3] 5 USC § 3313(1),(2)(a)
[4] 5 USC § 3317(b)
[5] 5 USC 3318(a)(c)(1-2)
[6] "...if a veteran has the highest rating on the list, the agency **must appoint** that individual, unless the agency seeks and receives written authority to appoint someone ranking below.." – *Joseph v. FTC* 2007-3073, Fed. Cir. (2007)

DVA did not act as a model employer[7] of veterans under this matter. DVA willfully violated my rights under veterans preference laws due to hatred for the military service that grants such preference.

On Nov. 16, 2021, I sought initial appointment under Dept. of Veterans Affairs ("DVA") vacancy, CARX-11288119-22-KB[8]. [*"...veterans' pref. applies to initial employment..."] - Brown v. DVA,* No. 247, Fed. Cir. f.3d 1222 (2001).

The announcement solicited Executive Assistants who had experience supporting Senior Executives in quasi-judicial work environments. At the time of application, I disclosed my veteran status and exercised my rights under 38 USC § 4311.

As a preference eligible with over 15 years of Executive Assistant experience, including six years of experience in quasi-judicial work environments, the announcement was **open** to me to apply as a veteran who has **never** been appointed to a federal job. My resume reflects quasi-judicial experience at McGlinchey Stafford law firm and Ryan, LLC tax consulting firm.

Ryan heavily represents global business clients before taxing authorities, e.g., equalization Boards and enforcers at state, federal and local jurisdictional levels[9].

This was explained to the DVA under my reconsideration emails, as evidenced by Bonham's confirmation that I was a qualified candidate[10].

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[7] 38 USC § 4214(a)(1)
[8] See usajobs.gov/Job/622150700 & *Trimble v. DVA 23-1306* Fed. Cir. 2023, Entry 5, Tab 11, p.102
[9] See https://ryan.com/about-ryan/
[10] See *Trimble v. DVA* 23-1307 Fed. Cir. 2023, Entry 8, Tab 25, p 32

On December 10, 2021, Kenneth Bixler (disabled veteran) instructed the Hiring Managers to access the Certificates he had issued. Bixler has never been in a supervisory hiring position at DVA, and he doesn't write hiring policy.

Under this matter, Bixler failed to report non-compliance with veterans preference laws. As evidenced by his Hearing testimony, Bixler follows the illegal status quo that keeps quiet about theft of federal jobs from veterans seeking initial appointment.

The Certificates contained anti-military, non-statutory wording, *"Exclude Veterans Points*[11]*"* at the top of each page! Direct evidence proves the software used to create Certificates is programmed to violate veterans preference laws. The software is set to illegally[12] rank candidates *alphabetically* and omit additional statutory points for applicable veterans. I received evidence showing this same anti-military activity on Certificates after taking legal action against other federal agencies. Violating veterans' preference laws is the norm amongst federal agencies.

During the Hearing, Bixler confirmed that his "supervisor" approved his work. Bixler nor the Hiring Managers testified to programming the Certificate's ranking settings, and they never spoke up to ensure my rights were not being violated under USERRA or the laws detailed under the related proceeding that are relevant to this one.

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[11] See *Trimble v. DVA* 23-1306 Fed. Cir. 2023, Entry 5, Tab 11, pp 57-100
[12] 5 USC § 3313(1),(2)(a)

The six Hiring Managers (Supervisors) were Christopher Santoro and Silas Darden (non-disabled veterans); Tamia Gordon and Thomas Rodrigues (disabled veterans); and Nina Tann and Robert Scharnberger (non-veterans). They were the only DVA employees authorized to **hire** anyone under the announcement.

On December 28, 2021, Santoro emailed the other Hiring Managers providing my name as "*Maybe*" for an interview, in violation of 5 USC § 3304(f)(1). The other Hiring Managers never mentioned my name and failed to consider and select me from the Certificate. Via email, Santoro provided the names of non-veterans, Carolyn Colley and Carly Wright and lesser-qualified candidate, Maria Braswell as his top choices, irrespective of any future interviews.

On December 30, 2021, Tann emailed the Hiring Managers providing the names of non-veterans, Carolyn Colley and Carly Wright and lesser-qualified candidate, Maria Braswell as her top choices, irrespective of any future interviews.

DVA hired the following federal employees to fill the opportunities under the announcement: Carolyn Colley (non-veteran); Maria Braswell (veteran); Deborah Moutinho (non-veteran); Carly Wright (non-veteran); and Voncell James (veteran)[13].

Under the announcement, statutory preference was **unauthorized** for all Selectees. [*"..veterans' preference only applies to initial employment... not to an employee moving from one job to another within an agency."] - Brown v. DVA,* No. 247, Fed. Cir. f. 3d 1222 (2001)

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[13] See *Trimble v. DVA* 23-1306 Fed. Cir. 2023, Doc. 9-2, p 59 **and** *Trimble v. DVA* 23-1307 Fed. Cir. 2023, Entry 8, Tab 25, pp 15, 18, 19 & 21

On February 9, 2022, I received a non-selection email from DVA. I immediately emailed their Human Resources Office to request reconsideration for initial employment. On March 17, 2022, Lesley Bonham (non-veteran) emailed Patrick Dallas (veteran) and confirmed that I qualified for the job[14].

On March 10, 2022, Bonham emailed George Waddington (non-veteran) regarding my reconsideration request, instead of contacting the six Hiring Managers. On March 11 and 15, 2022, Waddington sent emails to Bonham regarding my reconsideration request and the Agency's denial of initial employment to me. One of the six openings was unfilled at that time, and my reconsideration was still denied. I filed grievance with the MSPB.

DVA never interviewed me to allow me to elaborate on my experience, and the Hiring Managers definitely ignored the details of the creditable experience on my resume.

Six positions were available under the open competition announcement. Evidence proves that I can't currently apply to a merit promotion announcement. What would I be promoted from?

DVA failed to hire any veterans seeking initial appointment. DVA selected and hired five federal employees whose combined Executive Assistant experience was less than my total years of Executive Assistant experience[15].

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[14] See *Trimble v. DVA* 23-1307 Fed. Cir. 2023, Entry 8, Tab 25, p 32

[15] See Trimble v. DVA 23-1306, Fed. Cir. (2023), Entry 5, Tab 27, Pgs. 23-28, 40-43, 50-55, 59-63 and 66-70; and Tab 11, Pgs. 13-18

Three of them are not veterans as confirmed by DVA employee, Lesley Bonham when she provided selection information to the Department of Labor on March 24, 2022[16].

On July 1, 2022, a USERRA Appeal centered on denial of initial employment was docketed by the Board. The Board unethically ignored the fact that I sought initial appointment by denying a Hearing under the related proceeding.

On Oct. 19, 2022, a USERRA Hearing was held. During the Hearing, I asked Bixler why I was illegally ranked in alphabetical order and denied additional[17] statutory points on my rating. Bixler stated, *"..that's the way it's always been done..."*

On November 15, 2022, MSPB issued a Decision that denied corrective action, failing to hold DVA liable for USERRA violations. While the USERRA Appeal centered on denial of **initial appointment**, MSPB Admin. Judge Chung's Decision irrelevantly and erroneously states, *"..the announcement was a Title 5 merit promotion..."* Chung knows that I've never been a federal employee. *See* Appendix C

Instead of protecting the integrity of the merit systems formed against veterans preference laws, Chung chose to abuse her discretion by issuing a Decision in defense of DVA wrongdoing and ignoring DVA's illegal actions and liability under USERRA. After MSPB's Decision became final, I petitioned Fed. Cir. for review of the Board's Decision. In the face of evidence showing DVA's direct actions that illegally denied

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[16] See *Trimble v. DVA* 23-1306 Fed. Cir. 2023, Doc. 9-2, p 59
[17] 5 USC 3309(1)

initial appointment to me, Fed. Cir. affirmed MSPB's Decision and wrote its Opinion as a defense for DVA's wrongdoing and Chung's errors. *See* Appendix B

Under the Fed. Cir. Opinion, a false statement is made regarding me not informing the Board that DVA employees accessed my medical records, stating [*"...this argument is forfeited because it was not raised before the Board..."*].

This is a false statement because Record evidence shows I informed the Board of my concerns. I provided this evidence[18] to Fed. Cir., and Fed. Cir. took notice of the evidence that listed the names of Board of Veterans Appeals employees and the dates and times they illegally accessed my medical records after I applied to the vacancy[19].

Those DVA employees had no justifiable reason to view my records, and evidence shows 14 employees accessing my records after I applied to the job, during a time when I did not have a pending/open VA claim, even after normal business hours late at night!! [*"...Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious. Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors..."*] - *Sheehan v. Department of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001)

Fed. Cir. makes another false statement under its Opinion stating, [*"..Ms. Trimble's resume did not reflect the preferred type of experience.."*] Really? The Lower Court fails to mention the quasi-judicial experience reflected on my resume, and it surely ignores Bonham's email that confirmed I was a qualified candidate. There is

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[18] See *Trimble v. DVA* 23-1307 Fed. Cir. 2023, Doc. 10-2, p 21
[19] See *Trimble v. DVA* 23-1307 Fed. Cir. 2023, Doc. 10-2, p 23-26

zero language under the vacancy announcement stating DVA would *only* hire applicants who had supported Senior Executives *in* the federal sector.

ARGUMENT

I exercise my rights under the US Const., 1st Amend. to reveal this non-frivolous matter, with no intent for contumacious conduct. I pray the Supreme Court will exercise its judicial arm to put an end to hiring corruption within the federal government.

The amount of illegal foolishness and unethical deception under this matter and the related proceeding is unbelievable, and the Dept. of Labor, MSPB, Office of the Special Counsel and Fed. Cir. have demonstrated that they DO NOT CARE!

Evidence leads the Petitioner to strongly believe that the Dept. of Labor, MSPB, Office of the Special Counsel and Fed. Cir. constantly neglect their public duties and weaponize their positions to act as a defense to federal agency wrongdoing. After receiving direct evidence of initial employment discrimination and violations of prohibited personnel practices pertaining to veterans preference laws and accessing a job applicant's medical records, these governing bodies have turned a blind eye to federal hiring misconduct, so federal agency wrongdoing will be protected and unchecked. This has been going on for a long time!

I am able to provide evidence to the Supreme Court showing I contacted Office of the Special Counsel regarding violations of my rights under 5 USC § 2302(b)(14).

Special Counsel employee, Angela Rush never replied to the evidence. I provided it to her on Dec. 11, 2022.

DVA willfully denied my right to appointment by refusing to comply with 5 USC § 3318(a),(c)(1-2). DVA has failed to provide a legal reason for their direct actions that caused an adverse effect of denial of initial employment to me.

I. Conflicts with Supreme Court Rulings

1) Conflicts with Staub v. Proctor[20] -

Under *Staub*, a USERRA termination matter, Justice Scalia held:

> *["...if supervisor performs act motivated by antimilitary animus.. intended to cause adverse action, and if that act is proximate cause of ultimate employment action, employer is liable under USERRA... We consider circumstances... based on discriminatory animus of an employee who influenced, but did not make, the ultimate decision. The biased supervisor and the ultimate decisionmaker acted as agents of the entity; each of them...exercised it in the interest of their employer.."]*

Under this matter, Fed. Cir. Opinion conflicts with the *Staub* ruling. Fed. Cir. ignored evidence proving DVA supervisors performed non-selection acts against me that circumvented veterans preference laws, due to animus against military service that influenced such legislation.

The hateful words, ***'exclude veterans points'*** are plain as day at the top of the certificates and show the best interest of DVA! Adverse actions were taken to deny initial appointment to me. DVA ignored my qualifying experience,[21] denied my right

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[20] *Staub v. Proctor Hosp.*, 562 U.S. 411. 131 S.Ct. 1186, U.S. Supreme Court (2011)
[21] 5 USC 3311(2)

to object to passover[22] and illegally ranked me in alphabetical order and omitted additional points from my rating[23]. DVA refused to provide me advance notice[24].

The supervised hiring process encouraged discrimination against the statutory preference granted through my military service, and ultimately caused denial of initial employment to me. Regarding motivating factors, under *Staub* the Supreme Court states,

> *["...The problem we confront arises when that official has no discriminatory ani-mus but is influenced by previous company action that is the product of a like animus in someone else. Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it ...when discrimination is a motivating factor in his doing so, it is a "motivating factor in the employ-er's action... We hold that if a supervisor performs an act motivated by antimilitary animus intended to cause an adverse employment action... if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA...]*

2) Conflicts with Woodard v. NY Health Hospitals Corp.[25]

Under *Woodard*, a USERRA reemployment case, the Supreme Court held: [*"...Discriminatory motivation may be proven through direct evidence, including... inconsistencies between the proffered reason and other actions of the employer... expressed hostility towards members protected by the statute...."]*

Under this matter, Fed. Cir. ignores direct evidence showing inconsistencies with Bonham's statement confirming me being qualified, Bonham's statement to the Dept.

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[22] 5 USC 3318(a),(c)(1-2)
[23] 5 USC § 3313(1),(2)(a)
[24] 5 USC § 3317(b)
[25] *Woodard v. New York Health Hospitals Corp.*, 554 F.Supp.2d 329, 348-49 (E.D.N.Y. 2008)

of Labor[26] that omitted any legal reason to deny initial employment to me and the rehearsed, contradictory USERRA Hearing statements of Santoro and Gordon pretending that my private-sector, quasi-judicial experience and physical location were disqualifying. Pursuant to 5 USC § 3318(a),(c)(1-2), DVA was required to grant initial employment to six (6) qualified veterans under the announcement.

DVA was able to deny initial employment to me by purposefully violating my rights under this law, and the other veterans preference laws stated herein and under the related proceeding.

In the absence of my miliary service, it would have been impossible for DVA to be non-compliant and violate my rights under veterans preference laws[27]. In the absence of military service, I would have been prohibited from applying to the announcement.

I. Undecided Questions of Federal Law

The Supreme Court has never issued Opinions settling the initial employment discrimination questions presented herein, and Fed. Cir. never submitted Certified Questions requesting the Supreme Court's supervisory assistance for this USERRA matter. Due to the lack of Supreme Court cases rulings relevant to USERRA initial appointment, and the intent Congress holds under USERRA, these important, unanswered questions of law must be settled by this Court.

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[26] See *Trimble v. DVA* 23-1306 Fed. Cir. 2023, Doc. 9-2, p 59

[27] 38 USC 4311(C)(1) – "....(c)An employer shall be considered to have engaged in actions prohibited—(1)under subsection (a), if the person's.. 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 service..."

II. Matter of National Significance

Stealing federal jobs from qualified veterans is a present problem and big American secret. A large percentage of veterans are unaware!

If veterans ever learn and understand what's going on, it will cause a lot of anger in this country, and the Dept. of Labor, MSPB, Office of the Special Counsel and Fed. Cir. will be inundated with grievance filings. When will the misconduct stop?

The merits and outcome of this matter impacts millions of employable veterans. It is imperative to prohibit initial employment discrimination in the federal sector and stop the willful disregard for the laws that grant veterans preference for jobs.

Many Americans are familiar with the saying, ***"It's who you know to get a federal job."*** This is a popular statement in America for a reason! Verifiably, thousands of non-veterans work for the federal government, and they have been appointed, promoted, transferred, reinstated and/or reassigned under federal job announcements that qualified veterans sought initial appointment under.

This illegal conduct has gone unchecked for decades. Since the inception of USERRA in 1994, thousands of federal jobs have been stolen from qualified veterans seeking initial employment! This is verifiable, public information; thousands of non-veteran federal employees are currently working, or were formerly employed, with the federal government. I can provide evidence to the Supreme Court showing another federal agency illegally promoted a non-veteran under an open competition announcement that I qualified and interviewed for, in 2022!

Since the year 2000, I have applied to over 100 federal jobs as a qualified veteran, and to date, I have never realized initial appointment to any of those jobs. Many thousands of qualified veterans share my same experience as it relates to denial of initial employment with federal agencies.

Like many employable veterans, I have been homeless and unemployed. Since USERRA's inception, I have visited the VA Homeless Outreach Office while homeless with my children, and the VA never told me that USERRA existed with a purpose for the federal government to be a model employer of veterans!! The VA referred me to a housing waiting list and local homeless shelter and sent me on my way. I have proof!

Every fiscal year, Congress approves funding for the federal jobs posted on USAJobs.gov. Their Facebook[28] posting reveals millions of Americans apply for federal jobs on a monthly basis saying, *"In January, we had **2,204,840** applications pass through USAJOBS alone!"*

Every day, federal jobs are published to USAJobs.gov, and veterans seeking initial employment view those jobs in hopes of attaining initial employment.

A discriminatory, unchecked hiring culture runs rampant across the federal government due to the vast majority of veterans having little to no knowledge of their statutory right to preference.

The vast majority of veterans are unaware of the legal actions available to them when facing initial employment discrimination and violations of their preference

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[28] https://www.facebook.com/USAJOBS/posts/have-you-ever-wondered-just-how-many-people-apply-to-federal-jobs-in-january-we-/10150126547419721/

rights after applying as qualified applicants. I learned of USERRA and the rights detailed in the related proceeding via Google, in 2021!

III. Judiciary Abuse of Power Encouraging Illegal Hiring Culture

Under this matter, and its related proceeding, Fed. Cir. describes the facts and deceives the public about my candidacy in a light most favorable to DVA. Fed. Cir. dishonors applicable laws, abuses its judicial position, neglects its public duties and weaponizes the bench to encourage the rampant, unchecked hiring misconduct in the federal sector.

Under this matter, Fed. Cir. positions its power to prohibit DVA liability for USERRA violations and deny my right to corrective action under 5 USC § 7703(c) and 5 CFR, Section 1201.202(a)(c)(d). *See* Appendix B

Under its Opinion, Fed. Cir. weaponized and misused their public positions to ignore evidence and intimidate and burden my non-frivolous pursuit for justice and corrective action. I petitioned the Lower Court to prevent the rights of future veterans from being violated under laws relative to this matter and the related proceeding!

The Lower Court Judges are not legal novices like me, so what justification can they present to explain their violations of my rights under 5 USC § 7703(c)?

Fed. Cir.'s Opinion is strewn with language that purposefully evades my legal right to veterans preference as a qualified candidate seeking initial appointment. This must be immediately reversed to prevent future citation and harm to veterans bringing similar grievance. Fed. Cir. focused on a defense for DVA's wrongdoing.

Does Fed. Cir. also hold animus against military service that influenced veterans preference legislation? Are the deceptive and biased actions of Fed. Cir. above the law? Does Fed. Cir. operate to **protect** federal hiring misconduct and oppress my pursuit for justice with hopes that the Supreme Court will deny my Petitions and ultimately cause the illegal hiring culture within federal agencies to continue "*as it always has...*"

Under the MSPB Decision, Chung abuses her discretion by looking at person as opposed to evidence and law. She has the nerve to quote, *["...USERRA does not provide that veterans will be treated better than non-veterans..."] - Gaston v. Peace Corps*, 100 M.S.P.R. 411, ¶ 7 (2005)].

Veterans preference laws stem from honorable military service!

Does Chung hate those **laws** and *negatively* view them as a means to grant a better chance for federal employment to veterans as opposed to non-veterans? Did she serve in the military and sacrifice her mental or physical health while in service? Does she prep for work every day and wear a wig to cover PTSD hair loss? Was Chung's federal job stolen from a veteran? Do Chung's Decisions under my Appeals stand to demonstrate her hate for veterans? Will she be disciplined for demonstrating bias and denial of my rights under my Appeals? Why did she act so pompous, rude and unprofessional under my Appeals? What is her problem?

I'm legally and justifiably angry. Chung insulted me and took oppressive actions under my related proceeding. She abuses her public position to demonstrate her hate for veterans! Will her conduct go unchecked? Why did Fed. Cir. affirm MSPB errors and wrongdoing? Substantial evidence shows two of the six selectees were veterans, and Fed Cir. failed to set aside the Board's decision which was abusive and driven to capricious emotions to view me as being treated better than non-veterans.

Chung used potentially false DD-214's to conclude Wright, Colley and Moutinho are veterans. SF-50's reflect DD-214 records. If a DD-214 isn't presented to prove military service, a federal employee's SF-50 record will reflect "no veterans preference". Such is the case with Colley, Wright and Moutinho[29]. Santoro stated under oath that he knew Moutinho before she applied. I'm sure they are good friends! He gave her a non-statutory advantage over me when he selected and hired Moutinho. Chung's Decision used language to suggest I sought *promotion* under the vacancy. This action was an abuse of discretion, deceptive, arbitrary and unsupported by substantial evidence. Evidence proves I've never been appointed to a federal job. Fed. Cir. follows MSPB's deception stating, [*"...We affirm the Board's decision denying Ms. Trimble's USERRA claim.... An* ***employee*** *who makes a claim under USERRA bears the initial burden of showing... evidence that [their] military service was a motivating factor in the adverse employment action.]* See Appendix B

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[29] See *Trimble v. DVA* 23-1306 Fed. Cir. 2023, Doc. 9-2, p 59 **and** *Trimble v. DVA* 23-1307 Fed. Cir. 2023, Entry 8, Tab 25, pp 15, 18, 19 & 21

Fed. Cir. couldn't help itself under this matter, in the same way it attempts to deceive the public and Supreme Court under the related proceeding with this falsity of me seeking "*promotion*". Fed. Cir. abandons integrity under its Opinion stating, *[...Ms. Trimble also argues that she was entitled to veterans' preference. But "while USERRA prevents the denial of a* ***promotion*** *on the basis of military service, it does not itself provide a remedy to veterans who are not given preferences in employment decisions."]*

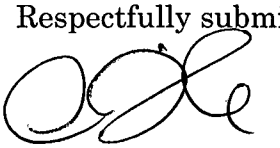
Why is the Lower Court doing this? Why are they using this *promotion* lie as a defense to delay, deny and prevent justice under this matter and the related case?

The Lower Court is counting on the Supreme Court to view this wording as an erroneous fact of law; however, Fed. Cir. is making a mockery of my non-frivolous pursuit for justice and abusing the bench to conspire against my rights to remedy and corrective action. I pray this Court acknowledges the truth and punishes them in accordance with 18 USC §§ 241 and 242.

CONCLUSION

I declare under penalty of perjury that the foregoing is true and correct. I prayerfully request the Supreme Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,



/s
Aisha Trimble, Pro Se

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Appendix A

United States Court of Appeals for the Federal Circuit

AISHA TRIMBLE,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2023-1307

Petition for review of the Merit Systems Protection Board in No. DA-4324-22-0350-I-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

June 30, 2023
Date

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Acting Clerk of Court

Appendix B

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

AISHA TRIMBLE,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2023-1307

Petition for review of the Merit Systems Protection Board in No. DA-4324-22-0350-I-1.

Decided: June 30, 2023

AISHA TRIMBLE, Dallas, TX, pro se.

DANIEL FALKNOR, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, FRANKLIN E. WHITE, JR.

Before HUGHES, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

Ms. Aisha Trimble appeals a decision from the Merit Systems Protection Board (MSPB) denying her request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Because the Board's conclusion is supported by substantial evidence, we affirm.

I

Ms. Trimble is a veteran who has service-connected disabilities rated at 30% or greater. In November 2021, she applied for an Executive Assistant position with the Board of Veterans Appeals (the agency). On November 16, 2021, the agency notified Ms. Trimble that it would "assess [her] qualifications based upon [her] resume, the responses [she] provided in the questionnaire, as well as all other materials requested in the job opportunity announcement." SAppx3.[1] On December 10, 2021, the agency notified Ms. Trimble that she had been referred to the hiring manager.

After accepting applications, the agency identified around 500 candidates, including about 92 individuals who were 30% or more disabled veterans. Six executives acted as the selecting officials and reviewed certificates of eligible candidates and applications. The selecting officials rated candidates as either meriting or not meriting an interview based on the candidates' ability or experience in four areas: (1) supporting a senior executive (or equivalent) in the Federal service; (2) overseeing or leading tasks or programs involving compliance with deadlines or organizational change; (3) working collaboratively with executives, peers, and subordinates; and (4) supporting operations in a judicial or quasi-judicial environment. One of the selecting officials listed Ms. Trimble as a "maybe" for an interview,

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[1] We use "SAppx" to refer to the appendix attached to the government's response brief, and "Appx" to refer to the appendix attached to Ms. Trimble's opening brief.

but she was not one of the 26 individuals ultimately interviewed.

Ms. Trimble was notified that she had not been selected for an Executive Assistant position on February 9, 2022. Of the six individuals given offers, this record indicates that four are veterans or have prior military service, and two of those veterans have service-connected disability ratings of at least 30%.

II

This is the second of two related appeals from Ms. Trimble. On March 17, 2022, Ms. Trimble filed a complaint with the Department of Labor alleging a violation of her right to compete as a preference-eligible veteran. After the agency denied her claim, she filed two appeals with the Merit Systems Protection Board. The first sought corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). *See Trimble v. Dep't of Veterans Affs.*, 23-1306, slip op. (Fed. Cir. June 30, 2023) (per curiam). The second, which led to the current appeal, sought corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

In the USERRA appeal, the Board held an evidentiary hearing over two days on October 19, 2022 and October 24, 2022. During the hearing, all six selecting officials testified for the agency. The Board summarized the relevant testimony in its final decision as follows:

> All the panelists testified the review process for the appellant was the same as the process for other candidates, including the selectee[s]. They all expressed favorable views of veterans in the workforce. Four of the panelists are veterans, two are disabled veterans, and both Human Resources personnel involved in this action are disabled veterans. Four of the selectees are veterans, and three are disabled veterans. Two of the selectees have

> the same service-connected disability rating as the appellant.

Appx15. The Board found that the agency witnesses were credible "in their explanations of their selection decisions and denials of discriminatory animus." Appx15. The Board also credited at least five of the witness' testimony that they were looking for a candidate who had experience working at the agency or had experience supporting executives in the Federal Government. Based on the evidence developed at the hearing, the Board concluded that there was no direct or circumstantial evidence that Ms. Trimble's military service was a motivating factor for non-selection.

Ms. Trimble appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

III

We set aside the Board's decision only if it 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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *McLaughlin v. Off. of Pers. Mgmt.*, 353 F.3d 1363, 1369 (Fed. Cir. 2004).

IV

We affirm the Board's decision denying Ms. Trimble's USERRA claim because substantial evidence supports that Ms. Trimble's military service was not a motivating factor in her non-selection.

> An employee who makes a discrimination claim under USERRA bears the initial burden of showing by a preponderance of the evidence that [their] military service was a substantial or motivating factor in the adverse employment action. If the employee

> makes that prima facie showing, the employer can avoid liability by demonstrating, as an affirmative defense, that it would have taken the same action without regard to the employee's military service.

Erickson v. U.S. Postal Serv., 571 F.3d 1364, 1368 (Fed. Cir. 2009). Here, the Board concluded that Ms. Trimble had not made a prima facie showing that her military service was a motivating factor in her non-selection. To reach that conclusion, the Board credited the selecting officials' testimony that they hold favorable views of veterans in the workforce, they applied the same review process to all applicants, and they were generally looking for candidates who had experience working at the agency or had experience supporting executives in the Federal Government or a judicial support role. The Board also credited one selecting official's testimony that, while he listed her as a "maybe" for an interview, he ultimately did not interview Ms. Trimble because her resume reflected no Federal experience and no judicial support experience. Also relevant to showing a lack of discrimination was the evidence that four of the selecting officials were veterans (and two of those were disabled veterans), both HR specialists involved in hiring for this role are disabled veterans, and multiple of the selectees were veterans, including a veteran with the same disability rating as Ms. Trimble. This evidence—including the selecting officers' testimony, the HR specialists' testimony, and the Board's credibility determinations—constitutes substantial evidence to support the Board's conclusion.

Ms. Trimble argues that the selection of at least one non-veteran shows at least one selecting official "did not want to hire a veteran or honor laws that grant veterans preferences for federal jobs." Pet. Br. 4–5. Not only is this speculation belied by the evidence discussed above, but "claimants must show evidence of discrimination other than the fact of non-selection and membership in the protected class." *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1015

(Fed. Cir. 2001). The mere fact that at least one of the selectees is not a member of the protected class cannot make out a prima facie case of discrimination.

Ms. Trimble also argues that the agency discriminated against her because it preselected candidates and hired individuals with less experience than her. But the Board in a USERRA appeal is not tasked with determining who is best qualified for a position. Rather, the question for the Board is whether Ms. Trimble's military service was a motivating factor in her non-selection. *See Becker v. Dep't of Veterans Affs.*, 474 F. App'x 761, 762 (Fed. Cir. 2012) ("[R]egardless of how the facts were evaluated as to the respective qualifications of the candidates, Becker needed to show that his military service was a substantial factor in his non-selection to establish his USERRA claim."). The Board credited testimony that the selecting officials were looking for a specific type of experience: supporting executives in the Federal government or a supporting role in a judicial context. Although Ms. Trimble may have more years of one type of experience, Ms. Trimble's resume did not reflect the preferred type of experience. This is substantial evidence that Ms. Trimble's military service was not a motivating factor in her non-selection.

Ms. Trimble also argues that she was entitled to veterans' preference. But "while USERRA prevents the denial of a promotion on the basis of military service, it does not itself provide a remedy to veterans who are not given preferences in employment decisions." *Wilborn v. Dep't of Just.*, 230 F.3d 1383 (Fed. Cir. 2000) (unpublished table decision). The proper statutory hook for this argument is the VEOA, which is addressed in our related opinion issued today. *Trimble v. Dep't of Veterans Affs.*, 23-1306, slip op. (Fed. Cir. June 30, 2023) (per curiam).

Ms. Trimble also argues that the Board did not produce evidence showing the hearing was not rehearsed, asserts without evidence that documents were falsified, and

speculates about bias. But it was Ms. Trimble who had the burden of proof. At best, Ms. Trimble's accusations reflect her own opinions and are not part of the record. As discussed above, substantial evidence supports the Board's conclusion that her military service was not a motivating factor for non-selection.

Finally, Ms. Trimble alleges that one or more of the selecting officials illegally accessed her medical records or VA claim files. First, this argument is forfeited because it was not raised before the Board. *Bosley v. Merit. Sys. Prot. Bd.*, 162 F.3d 665, 668 (Fed. Cir. 1998). Second, even if not forfeited, there is no evidence that any of the officials accessed her medical records or claim file. Ms. Trimble placed a FOIA request seeking the names of individuals who accessed her records. None of the names identified through this request match the names of the selecting officials. Moreover, one of the selecting officials testified that he did not access her medical records or claim file, and Ms. Trimble concedes that she forgot to ask the other officials about this issue. Thus, no evidence supports Ms. Trimble's subjective belief that a selecting official accessed this information.

V

We have considered Ms. Trimble's remaining arguments and do not find them persuasive. Because substantial evidence supports the Board's conclusion that Ms. Trimble's military service was not a motivating factor for non-selection, we affirm.

AFFIRMED

No costs.

Appendix C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

AISHA TRIMBLE,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
DA-4324-22-0350-I-1

DATE: November 15, 2022

Aisha Trimble, Dallas, Texas, pro se.

Joan M. Green, Esquire, Oklahoma City, Oklahoma, and Tijuana D. Griffin, North Little Rock, Arkansas, for the agency.

BEFORE
Theresa J. Chung
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed an appeal alleging the agency violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) in not selecting her for an Executive Assistant position.[1] Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this appeal. *See* 38 U.S.C. § 3424(b). I held a hearing in this appeal by

[1] The appellant's appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) regarding the same nonselection is being separately adjudicated under MSPB Docket No. DA-3330-22-0254-I-1.

videoconference on October 19, 2022, and October 24, 2022, and the record closed at the conclusion of the hearing. IAF, Tab 33, Hearing Recording (HR).

For the reasons set forth below, the appellant's request for corrective action under USERRA is DENIED.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed. The appellant served on active duty in the United States Army from August 1996 through June 2000. IAF, Tab 10 at 12. She was honorably discharged. *Id.* She has a service-connected disability rated at 30% or greater. *Id.* at 19; IAF, Tab 27 at 5 (stipulated fact 2).

In or around November 2021, the appellant applied for the position of Executive Assistant, with the Department of Veterans Affairs, Board of Veterans' Appeals (BVA), under Announcement number CARX-11288119-22KB. IAF, Tab 10 at 25-37, 39. The BVA is a major component of the agency, and its mission is to conduct hearings and to issue timely and quality decisions for veterans and other individuals. *Id.* at 25. Executive Assistants directly support a Senior Executive at the BVA and serve as key advisors to members of the BVA. *Id.* at 25. The position had a promotion potential of GS-14. *Id.* at 26. There were 6 vacancies, and the location was negotiable after selection. *Id.* at 25-26.

There were three certificates generated for the position. *Id.* at 57-100. The six executives at the BVA reviewed the certificates and the applications of the 521 eligible candidates and selected individuals to interview. *Id.* at 116-17; Tab 33 (Testimony of Nina Tann, Robert Scharnberger, Tamia Gordon, Thomas Rodrigues, Silas Darden, and Christopher Santoro). The panelists prepared a memorandum listing the 26 individuals who were offered interviews. IAF, Tab 10 at 116-17. The appellant was not selected for an interview, although Santoro listed the appellant as a possible interview candidate. IAF, Tab 25 at 26. After conducting the interviews, the six executives decided to select the following

individuals: Carly Wright, Maria Braswell, Deborah Moutinho, Carolyn Colley, Voncelle James, and Natasha Anderson. IAF, Tab 10 at 57, 58, 80, 86, 94, and 119; Tab 33 (Testimony of Tann, Scharnberger, Gordon, Rodrigues, Darden, and Santoro). Darden left the agency for another position in February 2022, and his selectee, Natasha Anderson, withdrew from consideration.[2] HR (Testimony of Tann, Darden); IAF, Tab 10 at 57.

On February 3, 2022, the agency extended tentative offers of employment to the five remaining selectees. IAF, Tab 26 at 177-86. On February 9, 2022, the agency notified the appellant of her non-selection. IAF, Tab 10 at 45. The agency extended final offers of employment to the selectees. HR (Testimony of Rozier). Of the individuals who were given offers, four are veterans or have prior military service (Braswell[3], Colley[4], James[5], and Moutinho[6]).[7] Three are

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[2] It is unclear if Anderson declined the position or withdrew from consideration. IAF, Tab 10 at 57, 121; HR (Testimony of Tann, Darden). Regardless of the exact status of her application, it is undisputed Anderson was not hired for the position of Executive Assistant to Darden, who left the agency for another agency in February 2022. HR (Testimony of Tann, Darden). Moreover, resolution of this factual issue does not affect the outcome of this USERRA appeal.

[3] *See* IAF, Tab 26 at 13-14 (DD Form 214 reflecting service from 1984 to 2004 as a Telecommunications Operations Chief and Administrative Specialist with the U.S. Army); *id.* at 15.

[4] *See* IAF, Tab 26 at 23 (DD Form 214 reflecting service from 2001 to 2005 as a Slavic Crypto Linguist-Russain for the Air Force); *id.* at 32.

[5] *See* IAF, Tab 26 at 40-41 (DD Form 214 reflecting service from 1996 to 2005 for the Air Force as an Information Manager); *id.* at 42; Tab 10 at 94 (listing James' initials as J.V.M.).

[6] *See* IAF, Tab 26 at 58 (DD Form 214 reflecting service for the Air Force from 1990 to 2005 as a Chaplain Assistant).

[7] The agency records in this regard are inconsistent. The agency initially stated that two veterans were selected. IAF, Tab 10 at 53, Tab 15 at 13. The agency later revised its position to state that four selectees were veterans. IAF, Tab 16 at 5. The undisputed records reflect that four of the selectees were veterans or had prior military service.

disabled veterans, and two have a service-connected disability rating of at least 30 percent or more disabling.[8]

This appeal followed. IAF, Tab 1.

Applicable Law

Under 38 U.S.C. § 4311(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. USERRA does not provide that veterans will be treated better than non-veterans; rather, it protects veterans from being discriminated against based on their military service. *See Gaston v. Peace Corps*, 100 M.S.P.R. 411, ¶ 7 (2005); *Fahrenbacher v. Department of the Navy*, 85 M.S.P.R. 500, ¶ 18 (2000), *aff'd sub nom. Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001). The Board's role in a USERRA case is not to determine whether the appellant should have been selected for the position in question, but to determine whether the agency's decision not to select her was based on discrimination because of her military service. *Fedder v. Department of the Interior*, 103 M.S.P.R. 221, ¶ 8 (2006).

Also, while I understand the appellant's confusion, I do not credit the appellant's argument or suggestion that Colley and Moutinho lacked military service due to the veterans preference code in Block 23 of their SF-50s; that veterans preference code is not dispositive as to their prior military service, and I place greater weight on the DD-Form 214s and other official documentation for these two individuals, which are in the record as part of their application materials, and not disputed. HR (Testimony of Leslie Bonham); IAF, Tab 26 at 23 (DD-214), 32, 58 (DD-214).

[8] IAF, Tab 26 at 15, 32, 42.

In USERRA actions, the appellant must first prove by preponderant evidence that her military status was at least a motivating or substantial factor in the agency action, upon which the agency must then prove, by preponderant evidence, the action would have been taken for a valid reason despite the protected status. *Lazard v. U.S. Postal Service*, 93 M.S.P.R. 337, ¶ 9 (2003). Preponderant evidence 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). 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 that service. *Erickson v. U.S. Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009).

The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *Sheehan*, 240 F.3d at 1014. Circumstantial evidence will often be a factor in these cases, because discrimination is seldom open or notorious. *Id.* Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain individuals compared to other similarly situated individuals. *Id.* In determining whether the appellant has proven that her protected status was part of the motivation for the agency's conduct, all record evidence may be considered, including the agency's explanation for the actions taken. *Id.*

The appellant failed to establish by preponderant evidence that her military service was a substantial or motivating factor in her nonselection.

In her response to the Board's Jurisdiction Order, the appellant explained she believes the agency "didn't want to hire the Appellant because she is a veteran being vocal about her grievances with the Agency's non-selection decision." IAF, Tab 8 at 4. She alleges that the agency made comments to her on a phone call, on March 17, 2022, reflecting their hostility towards veterans. *Id.* She stated the certificates were "erroneously drafted" and show the "Agency's disdain for 40% or more disabled, preference eligibles." *Id.* at 5. She further stated the agency "pre-selected the military veterans and non-veterans ... to give the illusion that the Agency was in full compliance with USERRA." *Id.*

The six hiring officials and human resources personnel testified at the hearing. Nina Tann, Executive Director for the Office of Appellate Support, attested that she was one of the six selecting officials for the position. HR (Testimony of Tann). She attested that the panel received the three certificates, listing a total of 521 applicants. She reviewed all the 521 resumes and selected individuals for interviews. IAF, Tab 25 at 28. She listed those individuals in a table, which Christopher Santoro may have created. HR (Testimony of Tann). Tann expressed that she wanted to interview all internal candidates for the position. *Id.* After the interviews, each of the six officials chose their own Executive Assistant. *Id.* Tann testified they prepared and signed a memorandum with the names of the selectees. *Id.* The memo went to Human Resources (HR) Max, which initiated the hiring action. *Id.* Tann selected Carly Wright, who is not a veteran, because of her experience working at the BVA and her prior federal service working as an Executive Assistant.[9] *Id.* Tann attested that other offers

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[9] Wright's resume reflects that she held the position of Program Specialist, Training, GS-0301-13 for the agency's Professional Development Division. IAF, Tab 26 at 66. She also held the positions of Staff Assistant, BVA, Office of the Chairman, and Project Manager and Analyst and Administrative Specialist for the U.S. Department of

were extended to Braswell, Moutinho, Colley, and James. *Id.* Anderson declined the position or withdrew. *Id.* Tann attested that, to her knowledge, Braswell, James, and Colley are veterans, and Montinho had veteran's preference. *Id.* She attested that she knew Wright, Braswell, Colley, and James from prior positions at the agency. *Id.* She denied having any bias against veterans or those with military service. *Id.* To her knowledge, no notification was required if they were passing over veterans. *Id.* Also, she attested that listing the candidates in alphabetical order on the certificates was not illegal. *Id.* Further, she stated that she did not consider internal applicants before external applicants, but looked across all candidates to determine her selection. *Id.*

Robert Scharnberger, Deputy Vice Chair and Chief Law Judge, attested to conducting a similar process to Tann, describing that the panel interviewed around 25 people. HR (Testimony of Scharnberger). He attested the panelists worked together to decide who to interview, and then to make the specific selections for each position. *Id.* He selected Braswell, who had previously reported to him in a role where she supervised paralegals who support Veterans Law Judges.[10] *Id.* He attested that he knew Braswell is a veteran. *Id.* Scharnberger attested he was looking for someone with experience supporting federal executives, working in an environment with deadlines in a quasi-judicial environment, and the ability to work with others. *Id.* He attested that listing the

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Treasury. *Id.* at 68-69. Although the agency completely redacted the names on the selectees' resumes, their names are apparent from the order of the documentation and the accompanying military documentation, which contains the initials of the selectees.

[10] Braswell's resume reflects that she held the position of Supervisory Administrative Services Manager, GS-301-14, for the BVA, where she managed the day-to-day operations and support for 102 Veteran Law Judges, 1,000 attorneys, and various administrative offices. IAF, Tab 26 at 16. She previously held the position of Supervisory Administrative Services Manager for the BVA from 2009 to 2019. *Id.* at 17-18. Braswell's resume also lists service as the Operations/Training/Administrative Officer for the U.S. Army, Fort Hood, from 2000 to 2004. *Id.* at 20.

candidates in alphabetical order on the certificates was not incorrect, and that the alphabetical order had nothing to do with people's qualifications. *Id.*' He stated he knew Wright and Colley prior the interviews. *Id.* He stated there are around 40-50 veterans who work for him, and he has approximately 10 direct reports who are veterans. *Id.* To his knowledge, the agency complied with legal requirements in the selection process and was not required to notify OPM when passing over disabled veterans. *Id.*

Tamia Gordon, Deputy Vice Chair and Veterans Law Judge, attested that she is a disabled veteran, with a service connected disability rating of 30% or more. HR (Testimony of Gordon). Gordon attested to conducting a similar process to Tann. She attested that she reviewed the 521 applications, and ranked them based on who she wanted to consider for interviews, using her own selection criteria. *Id.* The other five panelists did not influence her interview selections, and they each sent out a list of who they recommended for interviews. *Id.* She stated that she wanted someone with federal experience, and that she ultimately selected James, who has worked for the agency before. *Id.* Gordon attested that she valued James' prior agency experience because Gordon was new to the agency.[11] *Id.* She also stated that James lives in the Washington, D.C. area, and that Gordon wanted someone who could come into the office several times a week. *Id.* She explained the vacancy announcement said the location for the position was "negotiable" because Scharnberger lives outside the D.C. area, but that she wanted someone who lives in Washington, D.C. *Id.* She attested she

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[11] James' resume reflects that James held the position of Supervisory Program Analyst for the Veterans Benefits Administration (VBA), Office of Field Operations, in which James advised 56 VBA regional offices, four district offices, various business lines, and multiple program offices. IAF, Tab 26 at 43. James previously was a Supervisory Program Analyst for the VBA, Office of Client Relations and Chief, Procedures and Program Development. *Id.* at 44-45. James also previously held the position of Executive Assistant to the VBA Compensation Service. *Id.* at 46. James' resume also lists military service for the U.S. Air Force, Honorable Discharge, in 2005. *Id.* at 48, 56.

wanted someone who could support her across a number of multiple projects. *Id.* Gordon was aware that James is a veteran. In describing her decision with regard to the appellant, Gordon opined the appellant's resume had "more quantity than quality" and that she wanted someone with more federal experience, including specific experience supporting a federal executive. *Id.*

Thomas Rodrigues, Deputy Vice Chairman, attested that he is a disabled veteran. HR (Testimony of Rodrigues). Rodrigues reviewed the 521 resumes and selected individuals to interview, putting them into categories of those he definitely wanted to interview, those he might want to interview, and then a separate column for internal candidates. *Id.* After the interviews, he selected Colley, who has prior military service with the Air Force as a linguist for four years, for the position. *Id.* He attested that he was new to the BVA, and wanted someone who could help to orient him. *Id.* Colley had prior experience with the BVA and the agency.[12] *Id.* To his knowledge, the agency complied with legal requirements in making this selection, and was not required to making notifications in passing over disabled veterans. *Id.*

Christopher Santoro, Supervisor Veterans Law Judge, Senior Deputy Vice Chairman, is a veteran. HR (Testimony of Santoro). Santoro listed the appellant in his chart as a "Maybe" for interviews. *Id.;* IAF, Tab 25 at 26. However, he attested that, after reviewing the appellant's resume, he decided not to interview her. HR (Testimony of Santoro). He explained his decision not to ultimately interview the appellant, noting that, while the appellant had legal experience, her resume reflected no federal experience and no judicial support experience. *Id.*

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[12] Colley's resume reflects that she was on a detail as the Acting Executive Assistant in support of Executive Order 13861 and the inter-agency Veteran Wellness, Empowerment, and Suicide Prevention Task Force. IAF, Tab 26 at 33. Before this detail, she held the position of Associate Counsel for the Board of Veterans Appeals. *Id.* at 24-31, 34. Colley's resume also lists her military service as a Russian Cryptologist/Linguist from 2001 to 2005 with the U.S. Air Force. *Id.* at 36.

He stated that the position required supporting judges who were SES equivalent, and so he valued judicial support experience in a candidate. *Id.* He opined that Moutinho, who he selected, had effectively served in a very similar role, supporting immigration judges.[13] *Id.* He was aware that Moutinho is a veteran. *Id.* Moutinho had worked in a similar position for immigration judges at another organization, and also had previously worked for Santoro when he was Chief Immigration Judge. *Id.* Santoro denied "pre-selecting" Moutinho and stated he considered other candidates. *Id.* Santoro attested that he did not apply veteran's preference, or rank the candidates in accordance with their veteran's preference. *Id.*

Silas Darden, Chief of Staff, U.S. Marshall's Service, attested that he previously held the position of Deputy Vice Chair and Veterans Law Judge at the agency. HR (Testimony of Darden). Darden, who is a veteran, attested that he followed a similar process to the other panelists, reviewing all the applications for the position. *Id.* Darden attested the panelists conducted joint interviews, and then held a final meeting to ensure they did not offer the position to the same person. *Id.* Darden attested that he selected Anderson, who he thought was the spouse of a service member. *Id.* Anderson declined the offer in order to take another position. *Id.* Darden stated that he did not make another selection because he left the agency for another position. *Id.* Darden attested he wanted to select someone who had legal experience and who had experience with veterans' matters, and that he did not specifically recall the appellant's resume. *Id.*

Kenneth Bixler, HR Specialist, attested that he is a disabled veteran, with a service connected disability rating of 30% or more. HR (Testimony of Bixler). He attested that there were three certificates generated from the announcement,

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[13] Moutinho's resume reflects she held the position of Staff Assistant, U.S. Department of Justice, Executive Office of Immigration Review, Office of the Director, prior to which she held the position of Staff Assistant, Office of the Chief Immigration Judge. IAF, Tab 26 at 59-63.

which used merit promotion: (1) a Ranking list, including applicants that are 30% or more disabled, Schedule A, or military spouse; (2) a Merit Referral list, containing applicants who are current federal employees; and (3) a Competitive Merit Promotion list, reflecting current federal employees who are eligible for promotion to a GS-14 position. *Id.*; *see also* IAF, Tab 10 at 57-100. No one was ranked according to experience or whether they were best qualified, because category rating was not used. HR (Testimony of Bixler). Applicants were listed in alphabetical order as automatically generated by the system. *Id.* According to Bixler, there was no requirement to notify OPM of pass over of preference eligible veterans.[14] *Id.* Bixler attested that Denise Flemings acted as liaison between the BVA and HR, and that she was delegated the authority to input the selection decisions into the system. *Id.*

Jessica Rozier, a disabled veteran, was the Human Resources Specialist who assisted with this vacancy announcement after Bixler initially posted the announcement. HR (Testimony of Rozier). Bixler left for a different agency position, and, as a result, Rozier finished the process that Bixler started. *Id.* Rozier attested that the hiring officials made selections on a website. *Id.* In this instance, Flemings, the agency's HR liaison, inputted the selection decisions into the computerized system. *Id.* After receiving the certificates back, on February 3, 2022, Rozier notified applicants for their selection and made offers. *Id.* Rozier attested she received an email from the appellant, requesting reconsideration of her application, and that she forwarded the email to her supervisor, Lesley Bonham. *Id.*; *see also* IAF, Tab 25 at 30. Rozier attested that the pass over rules did not apply because the announcement was a Title 5, merit

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[14] He attested that pass over applies only if the position was posted to the public, which was not the case here. *Id.*; *see also* HR (Testimony of Lesley Bonham). Rozier's supervisor, Bonham, attested the appellant received full consideration, she was placed on the certificate, her application was reviewed, but she was not selected. HR (Testimony of Bonham).

promotion, not a Title 38 position open to all U.S. citizens. *Id.* Thus, she believed the agency was not required to notify OPM of pass over of any veterans. *Id.*

During her closing argument at hearing, the appellant argued that Tann assumed she did not want to relocate to Washington, D.C., but that she has more experience than Tann's selectee. HR. She also argued the vacancy announcement did not specify the panelists were looking for federal experience. *Id.* The appellant also noted the agency failed to provide emails to or from Flemings in response to her discovery requests, and further contended the agency did not provide emails from each of the six panelists in response to her discovery requests. *Id.*

All the panelists testified the review process for the appellant was the same as the process for the other candidates, including the selectee. They all expressed favorable views of veterans in the workforce. Four of the panelists are veterans, two are disabled veterans, and both Human Resources personnel involved in this action are disabled veterans. Four of the selectees are veterans, and three are disabled veterans. Two of the selectees have the same service-connected disability rating as the appellant. I credit the panelists' testimony that they each made selection decisions based on the individual qualifications of the selectees, and not because of the appellant's prior military service. Their testimony was consistent with contemporaneous records from the selection process. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 459-60 (1987) (explaining the factors relevant to assessing credibility). I also observed the demeanor of the witnesses and found them to be credible in their explanations of their selection decisions and denials of discriminatory animus. *See Hillen*, 35 M.S.P.R. at 458. Each was straightforward and sincere and answered questions directly. I discerned no evidence of discriminatory animus in any of the panelists' testimony.

In sum, the appellant presented no direct evidence her military service was a motivating factor for the non-selection action, and I find the record lacks circumstantial evidence sufficient to show discriminatory motivation. I considered that the agency ultimately selected some individuals who were not veterans for the position. However, without more, I do not find this constitutes preponderant evidence that the appellant's military service was a substantial or motivating factor in her non-selection.[15]

Based on the foregoing, I find the appellant has failed to meet her burden of proof in this appeal. Therefore, her request for correction action must be denied.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/
Theresa J. Chung
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **December 20, 2022**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after

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[15] The appellant appeared to argue the agency preselected certain individuals. In cases arising under USERRA, the Board may not consider claims of discrimination or prohibited personnel practices arising under other statutes. *Bodus v. Department of the Air Force*, 82 M.S.P.R. 508, ¶¶ 14-17 (1999). With regard to documents the appellant argues she failed to receive in discovery, the appellant has failed to demonstrate that this would compel a different result with regard to her USERRA appeal. Moreover, discovery concluded at the time of the telephonic prehearing conference, and thus, any request to reopen the discovery period is denied.

Appendix D

Constitutional Laws Involved

U.S. Const. Art. II, S3.3.1 - he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. Const. Amend. 1 - Congress shall make no law abridging the freedom of speech and to petition the Government for a redress of grievances.

Federal Statutes Involved

5 USC § 2108(1)a(3)(a)(c) - 1) "veteran" means an individual who— (A)served on active duty in the armed forces during... a campaign or expedition for which a campaign badge has been authorized; (3) "preference eligible" means, except as provided in paragraph (4) of this section or section 2108a(c)—
(A)a veteran as defined by paragraph (1)(A) of this section; (C)a disabled veteran;

5 USC § 2302(b)(14) - Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—discriminate for or against any applicant for employment—or (14)access the medical record of an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).

5 USC § 3304(f)(1) - Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

5 USC § 3309(1) - A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating, as follows— (1)a preference eligible under section 2108(3)(C)–(G) of this title—10 points;

5 USC § 3311(2) - In examinations for the competitive service in which experience is an element of qualification, a preference eligible is entitled to credit for all experience material to the position for which examined, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether he received pay therefor.

5 USC § 3313(1)(2)(a) - the names of applicants who have qualified in examinations for the competitive service shall be entered on appropriate registers or lists of eligibles in the following order — (1) for scientific and professional positions in GS–9 or higher, in the order of their ratings, including points added under section 3309 of this title; and (2) for all other positions — (A)disabled veterans who have a compensable service-connected disability of 10 percent or more, in order of their ratings, including points added under section 3309 of this title;

5 USC § 3317(b) - When an appointing authority, for reasons considered sufficient by the Office, has three times considered and passed over a preference eligible who was certified from a register, certification of the preference eligible for appointment may be discontinued. However, the preference eligible is entitled to advance notice of discontinuance of certification.

5 USC § 3318(a) - The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a) of this title, unless objection to one or more of the individuals certified is made to, and sustained by, the Office of Personnel Management for proper and adequate reason under regulations prescribed by the Office.

5 USC § 3318(c)(1-2) - if an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office for passing over the preference eligible. The Office shall make the reasons presented by the appointing authority part of the record of the preference eligible and may require the submission of more detailed information from the appointing authority in support of the passing over of the preference eligible. The Office shall determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference eligible under paragraph (2) of this subsection. When the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office. In the case of a preference eligible described in section 2108(3)(C) of this title who has a compensable service-connected disability of 30 percent or more, the appointing authority shall at the same time it notifies the Office under paragraph (1) of this subsection, notify the preference eligible of the proposed passover, of the reasons therefor, and of his right to respond to such reasons to the Office within 15 days of the date of such notification. The Office shall, before completing its review under paragraph (1) of this subsection, require a demonstration by the appointing authority that the passover notification was timely sent to the preference eligible's last known address.

5 USC § 7703(b)(1)(a) - Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

5 USC § 7703(c)(1-3) - in any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be - (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;

18 USC § 241 - If two or more persons conspire to... oppress or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; They shall be fined under this title or imprisoned not more than ten years, or both;

18 USC § 242 - Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, shall be fined under this title or imprisoned not more than one year, or both.

28 USC § 1254(1) - 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;

28 USC § 1295(a)(9) - The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

38 USC § 4214(a)(1) - The United States has an obligation to assist veterans of the Armed Forces in readjusting to civilian life. The Federal Government is also continuously concerned with building an effective work force, and veterans constitute a uniquely qualified recruiting source. It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified covered veterans (as defined in paragraph (2)(B)) who are qualified for such employment and advancement.

38 USC § 4301(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 USC § 4311 – (a) a person who has performed, in a uniformed service shall not be denied **initial employment**, by an employer on the basis of that performance of service... **(c)(1)** An employer shall be considered to have engaged in actions prohibited— (1)under subsection (a), if the person's 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 service...

Federal Regulations Involved

5 CFR 1201.202(a)(c)(d) – (a) Awards of attorney fees (plus costs... and litigation expenses, where applicable). The Board is authorized by various statutes to order payment of attorney fees and, where applicable, costs, and litigation expenses. (c) The Board may order payment of compensatory damages, as authorized by section 102 of the Civil Rights Act of 1991 (42 U.S.C. 1981a), based on a finding of unlawful intentional discrimination (5 U.S.C. 1221(g)) also authorizes an award of compensatory damages in cases where the Board orders corrective action. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.(d) The Board may award an amount equal to back pay as liquidated damages under 5 U.S.C. 3330c when it determines that an agency willfully violated an appellant's veterans' preference rights.