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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

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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NOTE: This disposition is nonprecedential.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.

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TRIMBLE v. DVA

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,

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

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TRIMBLE v. DVA

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

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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.

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Appendix C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

AISHA TRIMBLE,
Appellant,

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

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

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 (Braswell³, Colley⁴, James⁵, and Moutinho⁶).⁷ Three are

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

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

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

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.*

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,

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

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

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.

23a
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.