IN THE

Supreme Court of the United States

JONATHAN E. DOWLING, *Petitioner*

v.

DEPARTMENT OF THE AIR FORCE, *Respondent*

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

JONATHAN DOWLING,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2025-1703

Petition for review of the Merit Systems Protection Board in No. DE-4324-22-0298-I-1.

Decided: July 21, 2026

JONATHAN DOWLING, Omaha, NE, pro se.

JOSHUA DAVID TULLY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY, BRETT SHUMATE.

Before PROST, REYNA, and STARK, *Circuit Judges*.

PER CURIAM.

Jonathan Dowling is a non-party witness from a non-selection proceeding before the Merit Systems Protection Board. He challenges a credibility determination reached by an administrative judge and the denial of a motion to intervene in the selection proceeding. Because Mr. Dowling lacks a statutory right to seek judicial review under 5 U.S.C. § 7703(a)(1), we dismiss.

I. BACKGROUND

Mr. Dowling, a Commander in the U.S. Navy, served as the chair of a hiring panel for a GS-13 civilian attorney position with the U.S. Air Force. The other hiring panelists included Dr. Karen Miller, Command Historian, and Mark Barth, Senior Civilian Advisor.

The selecting official for the position, Colonel Laura Calese, approved eight candidates to interview for the position. James Tucker, who was serving on active duty in the Air Force, interviewed for the position but was not selected. Mr. Tucker was ranked fourth of the candidates that interviewed. The candidate eventually selected was not a service member in the uniformed services.

Mr. Dowling informed Mr. Tucker that Mr. Barth had made comments during the hiring process indicating that he had a preference for hiring civilians in possible violation of the Uniformed Services Employment and Reemployment

Rights Act of 1994 ("USERRA").[1] App'x 55, App'x 60–63.[2] Mr. Tucker appealed his non-selection to the Merit Systems Protection Board ("Board"), alleging that the Air Force's hiring process violated USERRA. *Tucker v. Dep't of Air Force*, No. DE-4324-22-0298-I-1, 2023 WL 4110663, at *1 (MSPB June 21, 2023).

Mr. Dowling testified in support of Mr. Tucker at the oral hearing before the Board. He testified that Mr. Barth had improperly expressed a preference for hiring civilians over members of the military reserves.

Mr. Barth offered competing testimony that his prior experience in active service and as a reservist demonstrates that he does not have a bias against uniformed service members, and that he consistently applies veterans' preference laws when making hiring decisions. Mr. Barth also provided reasons unrelated to uniformed service why he preferred multiple other candidates to Mr. Tucker. Ms. Calese also testified that Mr. Dowling and Mr. Barth

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[1] USERRA protects veterans from being discriminated against based on military service when, *inter alia*, applying for jobs. *See* 38 U.S.C. § 4311(a). An appellant alleging a USERRA discrimination claim bears the initial burden of demonstrating that "the employee's military service was a substantial or motivating factor" in the adverse employment action. *Adams v. Dep't of Homeland Sec.*, 3 F.4th 1375, 1377 (Fed. Cir. 2021) (internal quotations omitted). If an appellant makes that showing, the employer then "has the opportunity to come forward with evidence to show . . . that the employer would have taken the adverse action anyway, for a valid reason." *McMillan v. Dep't of Justice*, 812 F.3d 1364, 1372 (Fed. Cir. 2016).

[2] "App'x" refers to the appendix filed by Mr. Dowling at ECF No. 28.

"often had negative interactions, for which she had to intervene." App'x 22.

The administrative judge ("AJ") at the Board determined that the "only evidence suggesting that uniformed service was a negative factor was from Dowling about Barth." App'x 24. The AJ then pointed to Mr. Tucker's and Mr. Dowling's admissions that they were "friends outside the office, which may suggest a bias" on Mr. Dowling's part. *Id.* And he credited Ms. Calese's testimony that Mr. Dowling and Mr. Barth had a negative relationship, making it "likely that Dowling was primed to view Barth's actions with an unnecessarily harsh lens." *Id.* The AJ therefore determined that Mr. Barth had credibly testified that he "did not favor civilian candidates." *Id.*

The AJ further determined that, even if Mr. Tucker had proved his uniformed service was a substantial or motivating factor in how Mr. Barth ranked him, Mr. Tucker would not have been selected for the position. The AJ issued an Initial Decision holding that Mr. Tucker had not met his burden to prove a USERRA violation. Mr. Tucker petitioned the Board for review of the Initial Decision, and the full Board adopted the AJ's decision as final.

Following the AJ's Initial Decision, Mr. Dowling moved to intervene. *Tucker v. Dep't of Air Force*, 2023 WL 4110663, at *1. He argued that the AJ's credibility determination regarding his hearing testimony undermined "his ability to obtain relief in complaints he filed against his employing agency" and "negatively impacted" his career. *Id.* The Board found that Mr. Dowling's argument about inability to obtain relief in future proceedings was "mere speculation," and determined that Mr. Dowling had not shown that he would be "affected directly by the outcome of [Mr. Tucker's] proceeding," as required by 5 C.F.R. § 1201.114(i)(3). *Tucker*, 2023 WL 4110663, at *2. The Board referred to Mr. Dowling as "merely a witness

who is disappointed with the outcome of [Mr. Tucker's] appeal," and denied his motion to intervene. *Id.* Mr. Dowling filed a second motion to intervene in Mr. Tucker's petition for review reasserting the same argument, which the Board again denied in its Final Decision.

Mr. Tucker did not petition for review of the Board's Final Decision denying his USERRA claim. Mr. Dowling alone petitioned for review to this court. In response, we ordered the parties to address whether Mr. Dowling has constitutional standing and whether "Congress has afforded him [] a right to judicial review." ECF No. 13 at 2; *see also* ECF No. 22.

II. DISCUSSION

We consider whether Mr. Dowling, a non-party witness and unsuccessful intervenor to the underlying proceeding, has a statutory right to seek judicial review of the Board's Final Decision. We conclude that he does not, and therefore that we lack jurisdiction over Mr. Dowling's petition for review.[3]

Although this court generally has jurisdiction over final Board decisions, *see* 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1)(A), a petitioner seeking review of a final Board decision must show that Congress has afforded him a right to judicial review. Pursuant to 5 U.S.C. § 7703(a)(1), only a defined group of individuals has the right to seek judicial review of a final Board decision. Section 7703(a)(1) sets forth that "[a]ny *employee* or *applicant for employment* adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." 5 U.S.C. § 7703(a)(1) (emphases added). An "employee" is defined in 5 U.S.C.

[3] Because we determine that Mr. Dowling lacks a statutory right to petition for review, we do not reach the issue of constitutional standing.

§ 2105(a) as a person who is, *inter alia*, "appointed in the civil service."

Here, Mr. Dowling concedes he is not an "employee" or "applicant for employment" within the context of 5 U.S.C. § 7703(a)(1). ECF No. 18 at 1 ("Petitioner Dowling is not an employee within the meaning of the Civil Service Reform Act ("CSRA")."), 4. Mr. Tucker, not Mr. Dowling, was the "applicant for employment." Mr. Tucker has not sought judicial review of the Final Decision. Accordingly, we must dismiss Mr. Dowling's petition for review for want of jurisdiction.[4]

CONCLUSION

For the foregoing reasons, we dismiss Mr. Dowling's petition for review before this court.

DISMISSED

COSTS

No costs.

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[4] Mr. Dowling requested, if we determine we lack jurisdiction under § 7703(a)(1), that we transfer his petition for review to the United States District Court for the District of Nebraska. ECF No. 18 at 5–8. He includes a one paragraph argument that the District of Nebraska has jurisdiction to hear his case under 5 U.S.C. § 704, a different statute from that at issue here, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." *Id.* at 6; 5 U.S.C. § 704. Mr. Dowling presents no legal support as to why the district court would have jurisdiction under § 704. We find Mr. Dowling's argument to be underdeveloped and therefore abandoned. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). Thus, we deny Mr. Dowling's motion to transfer.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES TUCKER,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DE-4324-22-0298-I-1

DATE: March 17, 2025

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

James Tucker, Omaha, Nebraska, pro se

Rachel Palacios, Esquire, Ray Shackelford, and Matthew Mackey, Esquire, Joint Base Andrews, Maryland, for the agency.

BEFORE

Henry J. Kerner, Vice Chairman
Cathy A. Harris, Member

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which denied corrective action in his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (codified as amended at 38 U.S.C. §§ 4301-4335), challenging his nonselection for a GS-13

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See 5 C.F.R. § 1201.117(c).

Attorney-Advisor position.[2] Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

On review, the appellant argues, among other things, that two of the three members of the interview panel, specifically, M.B. and K.M., expressed a preference for civilian candidates and failed to properly weigh candidates' military experience. Petition for Review (PFR) File, Tab 5 at 15-24. Even assuming that this is true, a witness who testified on the appellant's behalf, Jonathan Dowling, a Commander in the Department of the Navy, was the third

[2] The appellant filed his petition for review on July 5, 2023, almost 2 months after the May 18, 2023 deadline contained in the initial decision. Initial Appeal File, Tab 30, Initial Decision at 12; Petition for Review (PFR) File, Tab 5. On review, the appellant argues that his petition for review is timely filed because, under the tolling provision of the Servicemembers Civil Relief Act of 2003 (SCRA), the deadline to file his petition for review was tolled until he was discharged from active duty, i.e., June 2, 2023, and he filed his petition for review within 35 days of that date. PFR File, Tab 5 at 5, Tab 9. The Board has held, under the SCRA, that military service automatically tolls the filing period while the appellant is on active duty, and the appellant "need not show that the circumstances of his military service actually impaired his ability to pursue his legal rights in a timely fashion." *Neighoff v. Department of Homeland Security*, 122 M.S.P.R. 86, ¶ 10 (2015), quoting *Henry v. U.S. Postal Service*, 69 M.S.P.R. 555, 558 (1996). Accordingly, we find that the appellant timely filed his petition for review.

member of the panel and did not rank the appellant as his top candidate. Initial Appeal File (IAF), Tab 6 at 28; Tab 23 (testimony of Dowling). Commander Dowling ranked the appellant as the third-best candidate, recommending that he be the second alternate choice. IAF, Tab 6 at 28, Tab 9 at 57-59. Commander Dowling also admitted that any improprieties in the selection process "did not impact . . . the [agency's number one] choice."[3] IAF, Tab 17 at 18. Accordingly, we discern no basis to disturb the findings that the appellant did not establish that his military service was a motivating factor in the agency's decision not to select him, and even if he did, the agency demonstrated that it would have made the same selection regardless. *Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997) (stating that the Board will not disturb an administrative judge's findings when she considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility); *Broughton v. Department of Health and Human Services*, 33 M.S.P.R. 357, 359 (1987) (same).

Finally, separate from the appellant's petition for review, Commander Dowling has filed a second motion to intervene, reiterating the arguments he made in his first motion to intervene, specifically, that the initial decision has a direct effect on him because it undermines his credibility,

[3] On review, the appellant submitted an email from the agency's Director of Logistics stating that, on August 2, 2022, M.B. said "[l]esson learned, do not hire reservists!" PFR File, Tab 5 at 23-24, 137. As an initial matter, the Board does not condone discrimination against individuals who served or are serving in the military. However, an email that contains unsworn, uncorroborated hearsay is entitled to little evidentiary weight. *Jones v. Department of the Interior*, 97 M.S.P.R. 282, ¶ 10 (finding that the appellant's unsworn, uncorroborated statement containing hearsay was entitled to little weight). Regardless, even assuming that M.B. made this comment, it does not impact our analysis that the appellant's military experience was not a motivating factor in the agency's decision not to select him. Accordingly, we do not find that this evidence constitutes a basis for granting the appellant's petition for review. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (explaining that the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

interferes with his ability to remain free from retaliation, and impacts his attempts to obtain relief in his own complaints.[4] *Compare* PFR File, Tab 1 at 2-5, 24-25, *with*, PFR File, Tab 5 at 7-8, 24-25. The Board has already addressed these arguments in its order denying Commander Dowling's first motion to intervene. PFR File, Tab 4 at 3-4. As Commander Dowling has offered no additional basis for granting his second motion to intervene, we discern no reason to disturb our previous ruling denying his request.

NOTICE OF APPEAL RIGHTS[5]

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

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[4] The appellant also attached to his petition for review documentation related to Commander Dowling's various complaints with components of the Department of Defense regarding claims of retaliation for reporting USERRA violations. PFR File, Tab 5 at 36-262. As an initial matter, we offer no opinion regarding the validity of Commander Dowling's complaints. Nonetheless, because the appellant has not explained how these documents are relevant to the issues on appeal, they do not serve as a basis for disturbing the initial decision. *Russo*, 3 M.S.P.R. at 349 (stating that the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

[5] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you

were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[6] The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

[6] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

Gina K. Grippando

Gina K. Grippando
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

JAMES TUCKER,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DE-4324-22-0298-I-1

DATE: April 13, 2023

Ernst Martzen, Esquire, Dallas, Texas, for the appellant.

Chief Labor Law, Joint Base Andrews, Maryland, for the agency.

Matthew John Mackey, Joint Base Andrews, Maryland, for the agency.

Rachel Palacios, Joint Base Andrews, Maryland, for the agency.

BEFORE
Glen D. Williams
Administrative Judge

INITIAL DECISION

INTRODUCTION

On September 11, 2022, the appellant filed this appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Initial Appeal File (IAF), Tab 1. He alleged that the decision to not select him for an Attorney-Advisor position was the "product of violations" of USERRA. *Id*. The Board has jurisdiction. 38 U.S.C. § 4324(b). The hearing requested by the appellant was conducted on December 19 and 20, 2022. IAF, Tabs 23-26 (Hearing Recording (HR)).

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

ANALYSIS AND FINDINGS

Background

The appellant is an active-duty member of the United States Air Force (USAF) and serves as a Lieutenant Colonel in the Judge Advocate General's (JAG) Corps in the Office of the Staff Judge Advocate (OSJA), U.S. Strategic Command (STRATCOM), at Offutt Air Force Base (AFB), Nebraska. IAF, Tab 21 at 6 (Stipulation (Stip.) 1).

Between on or about April 26, 2022, and on or about May 10, 2022, the Agency posted a job announcement for an Attorney-Advisor, GS-0905-13, position. The selected candidate for the position in question would be an Air Force civilian employee assigned duties in the OSJA at STRATCOM. The job announcement number for the position in question was 8F-AFPC11477556-606347-MRW. *Id.* (Stip. 2).

The appellant applied for the open GS-13 position in question. *Id.* at 6 (Stip. 3).

On May 13, 2022, a Certificate of Eligibles was issued identifying 15 individuals. IAF, Tab 11 at 63-64. A three-person resume panel, which included the Hiring Panel Chair, Navy Commander (CDR) Jonathan Dowling (J006CIA[1]), U.S. Navy Judge Advocate General's Corps, Chief of Operations and International Administrative Law, STRATCOM, Mr. Mark Barth, Senior Civilian Advisor, STRATCOM (J006SC) and Navy Captain (CAPT) Ron Flanders (PAO), reviewed and scored the resumes in a matrix by evaluating whether the candidates satisfied a modified version of the knowledge, skills, and abilities included in the announcement. IAF, Tab 9 at 53, 56.

[1] *See* HR, Dowling.

Based on the resume panel's recommendations, the selecting official, STRATCOM Staff Judge Advocate, Colonel Laura Calese, U.S. Army, approved the interviewing of eight candidates. IAF, Tab 21 at 7 (Stip. 5); IAF, Tab 9 at 56. In June 2022, seven candidates,[2] including the appellant, were interviewed by a three-person panel consisting of: Barth; Dowling and Dr. Karen Miller, Command Historian, Headquarters, STRATCOM (HIS). IAF, Tab 21 at 6-7 (Stips. 3-4); IAF, Tab 9 at 56.

On June 28, 2022, Dowling issued a memorandum concerning the hiring panel process and results. IAF, Tab 9 at 52-59.

Although Calese was the selecting official for the GS-13 position in question, because the position was an Air Force civilian position, her selection was subject to final approval by the Office of the Judge Advocate General, USAF. IAF, Tab 21 at 7 (Stip. 5). On July 14, 2022, Calese submitted a memorandum to HQ USAF/JAX, in which she identified J.P., J.S., and S.M. as the best-qualified, second best-qualified, and third best-qualified candidate, respectively, for the GS-13 position in question. IAF, Tabs 6 at 16-18, Tab 21 at 7 (Stip. 6). The appellant was ranked fourth overall and was not discussed in the memorandum. IAF, Tab 9 at 53.

Between July 14, 2022, and July 26, 2022, the Delegated Qualifying Authority, Colonel Tyson Kindness, Director, Professional Development Division, Headquarters, U.S. Air Force, Office of the Judge Advocate General, approved the ranking of J.P. as the top candidate, which permitted the extension of an employment offer to J.P. IAF, Tabs 6 at 12, Tab 21 at 7 (Stip. 6).

At the time of her selection, J.P. was not a servicemember in the uniformed services and she was not a person entitled to the protections of 38 U.S.C. § 4311. IAF, Tab 21 at 7 (Stip. 7).

[2] One of the eight selected for interview withdrew prior his interview. *Id.*

On or about July 26, 2022, the appellant learned of his nonselection for the GS-13 position in question. IAF, Tab 21 at 7 (Stip. 8).

The appellant timely filed this appeal on September 11, 2022. IAF, Tab 1.

Applicable law and burdens of proof

The appellant's USERRA discrimination claim is based on the contention that alleged misconduct by Barth tainted the selection process. Indeed, in his closing arguments, the appellant argued that the appropriate remedy would be to require the agency to reconstruct the hiring process, not necessarily place the appellant in the position. HR, Closings.

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. *Swidecki v. Department of Commerce*, 113 M.S.P.R. 168, ¶ 5 (2010). USERRA does not require 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 him was based on discrimination because of his military service. *Fedder v. Department of the Interior*, 103 M.S.P.R. 221, ¶ 8 (2006).

For a USERRA discrimination claim, the appellant "bear[s] the initial burden of showing by a preponderance of the evidence[3] that the employee's military service was

[3] A preponderance of the 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

'a substantial or motivating factor' in the adverse employment action." *Adams v. Department of Homeland Security*, 3 F.4th 1375, 1377 (Fed. Cir. 2021) (citing *Sheehan*, 240 F.3d at 1013); *McMillan v. Department of Justice*, 812 F.3d 1364, 1372 (Fed. Cir. 2016) (same). Once the employee makes the requisite showing, "the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason." *McMillan*, 812 F.3d at 1372 (quoting *Sheehan*, 240 F.3d at 1013).

The appellant failed to show by preponderant evidence that his uniformed service was a substantial or motivating factor in the agency's decision to not hire him.

"[A]n essential element of a [USERRA] discrimination claim is that the contested agency decision was based on an improper motivation." *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 6 (2005).

> In a traditional USERRA non-selection appeal, the Board does not consider whether the applicant was 'entitled to' or 'qualified for' the position. Rather, consistent with *Sheehan*, once jurisdiction is established, the Board analyzes whether the appellant has shown that his military service was a motivating or substantial factor in the agency's action and whether the agency has shown that it would have taken the same action despite the appellant's protected status.

Becwar v. Department of Labor, 115 M.S.P.R. 689, 693 (2011), *aff'd*, 467 F. App'x 886 (Fed. Cir. 2012); *see also Burroughs v. Department of the Army*, 254 F. App'x 814, 817 (Fed. Cir. 2007) ("[H]e is not entitled to relief simply upon showing that the selection process was flawed. Even if he could show that he was the best candidate and should have been selected but for evaluation mistakes made by the committee, his claim under USERRA would not succeed unless he could show that those errors were motivated by animus against him based on his prior military service"); and *Swidecki*, 113 M.S.P.R. at 173 ("the appellant must prove by preponderant evidence that his military status was at least a motivating or substantial factor in the agency's decision to deny him

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contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.4(q).

employment"). Here, I find that the appellant did not meet his burden of showing his military service was a substantial or motivating factor in his non-selection.

Discriminatory motivation or intent may be proven by direct or circumstantial evidence. *McMillan*, 812 F.3d at 1372 (citing *Sheehan*, 240 F.3d at 1014). Military service is a motivating factor if the employer "relied on, took into account, considered, or conditioned its decision" on it. *McMillan*, 812 F.3d at 1372 (quoting *Erickson v. U.S. Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009)). It need not be the sole motivating factor. *Erickson*, 571 F.3d at 1369 (Fed. Cir. 2009) (citing H.R. Rep. No. 103-65, at 24, reprinted in 1994 U.S.C.C.A.N. 2449, 2457)).

Because employers rarely concede an improper motivation, employees may satisfy their burden with evidence that such a motive may be fairly inferred. *McMillan*, 812 F.3d at 1372. The analysis is guided by the following four non-exclusive factors: (1) proximity in time between the employee's military activity and the adverse employment action; (2) inconsistencies between the proffered reason and other actions of the employer; (3) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity; and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses. *McGuffin v. Social Security Administration*, 942 F.3d 1099, 1108 (Fed. Cir. 2019) (citing *Sheehan*, 240 F.3d at 1014).

Dowling believed Barth expressed a preference for candidates without a history of uniform service, improperly shredded his interview notes, was improperly influenced by civilian paralegals who did not like the appellant, and improperly considered how long it might take the appellant to assume the position after transitioning out of the uniformed service. HR, Dowling.[4] Dowling both

[4] Dowling also said Barth improperly looked at candidate social media profiles, which led to an additional interview. HR, Dowling. These issues are not relevant to the appellant's USERRA discrimination claim so I do not discuss them further.

sought legal advice from a reservist attorney in the office and raised his concerns to Calese. *Id*. Dowling also summarized his concerns in emails to Barth and Miller, and then separate emails to Calese. IAF, Tab 17 at 16-23.

Barth strongly disputed Dowling's recollection of events. Barth said that he has prior experience in both the active service and the reserves, that he did not have a bias against members of the uniformed services, and that he consistently applies veterans' preference and other laws when making hiring decisions. HR, Barth. He further denied that the civilian paralegals held a bias against members of the uniformed services, but did know that one of them disliked the appellant specifically after an incident when he (the paralegal) was locked into a secured space because (according to the paralegal) the appellant had not checked to see that someone was there before locking up. *Id*. Barth said that his first choice candidate was a private litigator who had experience handling legal malpractice and other trials, and that J.P. was his second choice candidate. *Id*. As Barth recalled it, Dowling was frustrated that he did not join in ranking J.P. as the top candidate. *Id*. On the issue of notes, Barth said he jots down short notes during interviews to jog his memory later but not interrupt the flow of the interview, and then prepares full interview notes later. *Id*. He contrasted his approach with that of Dowling, who would ask candidates to pause so that he (Dowling) could complete his notes during the interview. *Id*. Barth also explained that, as he saw it, the appellant was more interested in where the position would be located than in what the position would do or what the practice would entail. *Id*. For example, he cited that the appellant was sloppy with particular terms of art (divestiture letters) in the government ethics field. *Id*. He also recalled that there were times when the appellant appeared to prefer assigning work to others. *Id*. Barth denied considering the timing of when the appellant could start, because everyone at STRATCOM needs a security clearance so there are often delays. *Id*.

Miller testified that she believed civilian background was one of many factors that may be relevant, and that Barth appeared to consider it as a stronger

factor than she did. IAF, Tab 27.[5] She understood that Dowling thought she and Barth were not going to consider military service, but that was not what they said. *Id*. She thought that J.P. was the best candidate based on resume and interview. *Id*. For example, she thought the appellant's answers lacked the detail that J.P.'s answers provided. *Id*. She also thought J.P. gave answers that indicated more willingness to get into the technical details of ethics cases, while the appellant's answers indicated he assigned work to paralegals and then reviewed and signed their work. *Id*. Miller said that J.P.'s lack of military service was not a factor at all. *Id*. Miller recalled that Barth took notes on a steno pad and then later compiled them. *Id*. She did not consider timing as related to entry on duty as a factor because that was outside of the panel's control. Miller also said that the rankings were all relatively close. *Id*.

Calese testified that Dowling raised concerns with Barth shredding notes while the interviews were happening (in June 2022), and that she later learned Dowling had concerns about a potential preference for civilians. HR, Calese. Calese recalled that there were concerns with potential veterans' preference issues, but later understood that the concerns extended to uniformed service generally. *Id*. She knew that Dowling sought internal legal advice, but she thought it was better to have formal advice from the civilian personnel office. *Id*. She understood that Dowling thought Barth and Miller were giving preference to non-veterans, but Barth and Miller thought they were evaluating whether other candidates even qualified – specifically whether the candidate Barth ranked as his first choice even qualified for consideration. *Id*. She discussed the situation with everyone involved, and everyone had widely divergent views about what was happening. *Id*. She was eventually satisfied with Barth's and Miller's analysis of the different candidates, including that they did not apply any improper preference. *Id*. With respect to notes, she understood that Dowling wanted every

[5] The parties agreed to use Miller's videotaped deposition testimony in lieu of live testimony at the hearing.

scrap of paper retained, while Barth thought that he had notes that were indecipherable to anyone but him, which he used to prepare formal notes. *Id*. Calese also understood that Barth and Dowling often had negative interactions, for which she had to intervene. *Id*. She wanted to make sure the selection process was defensible, and so discussed whether they needed to restart it. *Id*. Because J.P. was coming out at or near the top for all the panelists, Calese eventually determined that the process was defensible and forwarded the recommendation to Kindness. *Id*. When asked why she did not flag a potential issue with preference, she said that Dowling had such a strong preference for J.P. that it outweighed his other concerns. *Id*. Calese also indicated that the appellant is "not a detail-oriented ethics attorney," especially compared with other candidates like J.P., whose application packet included more specific details. *Id*.

Kindness testified that he reviewed the recommendation memorandum and resumes for the three recommended candidates (J.P. plus two alternates). HR, Kindness. He said he gave deference to the panel, especially because he did not have concerns that the recommended candidate was unqualified. *Id*. When asked to assume that Dowling's email to Calese was true, he said that he would have had some pause about the selection process, but could not decide if he would have acted differently because there were too many things he did not know. *Id*. In any event, he knew that J.P. was the highest recommended candidate. *Id*.

The appellant testified that because he had worked in the office, all of the panelists knew him, which was both good and bad. HR, Tucker. He thought that the interview process was derailed by some weird questions and thought it would have been better to have a separate panel. *Id*. He acknowledged that he thought the position was an "entry level" position. *Id*.

Looking at the *Sheehan* factors in light of the above, the appellant was a member of the uniform service at the time of the interviews and selection, and thus his uniform service was proximate in time to the adverse employment action. *Sheehan*, 240 F.3d at 1014. I do not believe that the selection of J.P. was

inconsistent with the proffered reason for selecting her over the appellant, even though I understand that Dowling had concerns. *Id.* I do not find that Barth (or Miller) expressed hostility towards members of the military, as I find expressing a preference for experience garnered in the civil sector is not analogous to hostility toward uniform service. *Id.* I do not find that the agency – and the selection panels in particular – disparately treated similarly situated employees. The scores of the panels were generally consistent. Each resume panel member rated the applicants' resumes scores as between 12 and 16 at the lowest and between 16 and 20 at the highest. IAF, Tab 9 at 53. The appellant was rated 20 (Dowling), 15 (Barth) and 18 (Flanders), and J.P. was rated 20 (Dowling), 14 (Barth) and 14 (Flanders).[6] Each interview panel member rated the applicants' interview scores as between 19 and 20 at the lowest and between 29 and 31 at the highest. *Id*. The appellant was rated 31 (Dowling), 23 (Barth) and 20 (Miller), and J.P. was rated 32 (Dowling), 29 (Barth) and 29 (Miller). Notably, Dowling scored J.P. and the appellant the same based on resume, but J.P. better on the interview. *Id.* Based on these scores, Dowling, as the Hiring Panel Chair, recommended J.P. as the best-qualified candidate,[7] "[J.P.] received the highest average score and obtained two #1 rankings from the interview panelists – CDR Dowling (#1), Mr. Barth (#2), Dr. Miller (#1). [J.P.]'s references reinforce her selection as the best-qualified candidate." *Id.* at 57. I find there was no evident disparate treatment in scoring. *Razi v. Department of the Navy*, MSPB Docket No. AT-4324-21-0470-I-1, Final Order at ¶ 15 (Feb. 6, 2023).[8]

Weighing the *Sheehan* factors and considering all of the relevant factual background, I conclude that the appellant did not meet his burden of showing that

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[6] While not on the resume panel, Miller scored the resumes of the applicants that received interviews. She scored the appellant a 15 and J.P. a 17. *Id.*

[7] Dowling testified he had "goosebumps" after her interview. HR, Dowling.

[8] This Final Order is nonprecedential; however, an Administrative Judge may cite to and follow a Board nonprecedential decision if the AJ finds its analysis persuasive.

his uniformed service was a substantial or motivating factor in the agency's decision to not select him. The only evidence suggesting that uniformed service was a negative factor was from Dowling about Barth. I found Barth credible when he testified that he did not favor civilian candidates. Barth demonstrated familiarity with various hiring laws, including those related to veterans. Moreover, Barth himself previously served in both active duty and the reserves. While it is theoretically possible that Barth might have held a bias against uniformed servicemembers despite his own prior uniformed service, the appellant has not identified any persuasive evidence that he actually did so. Rather, as both Barth and Miller testified, civilian experience was considered as one of many factors in evaluating the candidates for this position.

Moreover, both the appellant and Dowling admitted to being friends outside the office, which may suggest a bias. Calese testified that Dowling and Barth had a negative relationship, and that she often had to intervene between them. In this context, it is likely that Dowling was primed to view Barth's actions with an unnecessarily harsh lens. This conclusion is consistent with Miller's testimony, who indicated that while Barth may have had a stronger preference for a civilian candidate, they both wanted to comply with the law.

In sum, in this case, there was no credible direct evidence of uniformed service discrimination. As for circumstantial evidence, applying all four *Sheehan* Factors, and considering the evidence as a whole, I find that the appellant did not carry his burden of showing that uniformed service discrimination was a substantial or motivating factor in the appellant's nonselection.

The agency proved that it would not have selected the appellant, anyway.

Even if I were to assume that the appellant could prove that his uniformed service was a substantial or motivating factor in how Barth ranked him, the evidence does not support a finding that it would have made any difference in the ultimate recommendation of J.P. Dowling, the only source of evidence about

potential bias against uniformed service, was consistent in recommending J.P. as his first choice. IAF, Tab 9 at 57; HR, Dowling. Calese testified that she considered Dowling's strong recommendation of J.P. as outweighing other potential concerns with the selection process. HR, Calese. All other evidence underscores that J.P. was so highly regarded that the agency can prove that it would have selected her despite any potential concerns with how the appellant may have been considered.

Conclusion

For the foregoing reasons, the appellant did not meet his burden of proving a violation of USERRA.

DECISION

The appellant's request for corrective action under USERRA is DENIED.

FOR THE BOARD: _____/S/
Glen D. Williams
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **May 18, 2023**, 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 the date you

actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in

which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of

authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court

within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of

discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section

2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail — James Tucker
1606 N 137th St
Omaha, NE 68154

Appellant Representative

Electronic Mail — Ernst Martzen, Esq.
Martzen Law Firm PLLC
10440 N. Central Expressway, Suite 800
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Agency Representatives

Electronic Mail — Chief Labor Law
Department of the Air Force
AFLOA/JACL
Labor Law Field Support Center
1500 W. Perimeter Rd, Suite 1370
Joint Base Andrews, MD 20762

Electronic Mail — Major Matthew John Mackey
Electronic Mail — Rachel Palacios
Department of the Air Force
1500 West Perimeter Road, Ste 1370
Joint Base Andrews, MD 20762

April 13, 2023
(Date)

/s/
Pamela Paragas
Paralegal Specialist

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES TUCKER,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DE-4324-22-0298-I-1

DATE: June 21, 2023

THIS ORDER IS NONPRECEDENTIAL[1]

James Tucker, Omaha, Nebraska, pro se.

Matthew John Mackey and Rachel Palacios, Joint Base Andrews, Maryland, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

ORDER DENYING MR. DOWLING'S MOTION TO INTERVENE

¶1 Jonathan Dowling, a Commander in the Judge Advocate General's Corps, Department of the Navy, has moved to intervene in the above-captioned appeal for the purpose of filing a petition for review of the initial decision issued on April 13, 2023, which denied the appellant's request for corrective action under

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. §§ 4301-4335) (USERRA). For the reasons set forth below, Mr. Dowling's motion to intervene is DENIED.

BACKGROUND

¶2 The appellant filed a Board appeal, alleging that the agency violated USERRA when it failed to select him for an Attorney-Advisor position. Initial Appeal File (IAF), Tab 1. Mr. Dowling, who was the hiring panel chair for the vacancy announcement at issue, testified at the appellant's Board hearing as the appellant's witness, claiming, among other things, that another panelist, the Senior Civilian Advisor, had made statements indicating that he had a strong preference for hiring civilians over members of the military reserves. Hearing Recording (testimony of Dowling).

¶3 After considering both the written record and the hearing testimony, the administrative judge issued an initial decision finding that the appellant failed to establish his USERRA claim. IAF, Tab 30, Initial Decision (ID). First, the administrative judge explained that the only evidence suggesting that the appellant's uniformed service was a substantial or motivating factor in his nonselection was Mr. Dowling's testimony. ID at 11-12. The administrative judge credited the testimony of the Senior Civilian Advisor, noting that there was evidence Mr. Dowling may have been biased because he had a personal friendship with the appellant and a negative relationship with the Senior Civilian Advisor. ID at 11. Thus, the administrative judge concluded that there was simply "no credible direct evidence of uniformed service discrimination." *Id.* The administrative judge also found that, even if the appellant's uniformed service was a substantial or motivating factor in the Senior Civilian Advisor's rankings, the agency established that it still would have selected the same individual, given that the selectee was the top-ranked candidate and was even strongly endorsed by Mr. Dowling. ID at 12.

¶4 Mr. Dowling now seeks to intervene in this matter for purposes of filing a petition for review, asserting that the administrative judge's findings have caused him harm.[2] Motion to Intervene at 4. Among other things, Mr. Dowling argues that the initial decision undermined his credibility and judgment, which would hinder his ability to obtain relief in complaints he filed against his employing agency, and that his career had been negatively impacted because of the Board proceeding.[3] *Id.*

ANALYSIS

¶5 Pursuant to the Board's regulations, any person, organization, or agency, by motion made in a petition for review, may ask for permission to intervene. 5 C.F.R. § 1201.114(i)(3). Here, Mr. Dowling has not yet filed a petition for review, instead merely asking that the Board grant his request to file a petition for review in the future. Motion to Intervene at 2-4, 17, 25. Accordingly, he has not filed "a motion made in a petition for review," as required by 5 C.F.R. § 1201.114(i)(3).

¶6 Nevertheless, even if we were to liberally construe Mr. Dowling's filing as a petition for review, he has not met the regulatory standard for granting a request to intervene. The Board's regulations provide that a motion for permission to

[2] The agency filed an opposition to Mr. Dowling's motion to intervene on June 12, 2023. Agency Response to Motion to Intervene. Pursuant to 5 C.F.R. § 1201.55(b), any objection to a written motion must be filed within 10 days from the date of service of the motion. The certificate of service states that the motion to intervene was served by email on the agency on May, 18, 2023, and thus, accounting for a Sunday and Federal holiday, the agency's deadline to file its objection was May 30, 2023. Motion to Intervene at 26; 5 C.F.R. § 1201.23. Accordingly, the agency's response to the motion to intervene was untimely filed, and we shall not consider it.

[3] Mr. Dowling also attached two exhibits to his motion to intervene, seemingly addressing the substance of his challenges to the initial decision, including an email memorializing a statement the Senior Civilian Advisor allegedly made regarding his reluctance to hire reservists and a copy of Mr. Dowling's Freedom of Information Act request. Because Mr. Dowling has failed to establish the relevancy of these documents to his motion to intervene, we do not address them further.

intervene will be granted if the requester shows that he will be affected directly by the outcome of the proceeding. 5 C.F.R. § 1201.114(i)(3) Given that the initial decision has been issued, we are able to determine that the outcome had no direct effect on Mr. Dowling. Mr. Dowling was not named as a responsible official in this appeal, and there is no adverse finding impacting Mr. Dowling. While Mr. Dowling asserts that the administrative judge's findings may hinder his ability to obtain relief in future proceedings, such statements are mere speculation and do not warrant intervention.[4] Motion to Intervene at 4; *see Stevens v. Department of Housing and Urban Development*, 36 M.S.P.R. 170, 173 (1988) (finding that intervention was not warranted when there was no evidence beyond mere speculation that the initial decision would have any impact on the movant's future).[5]

¶7 In conclusion, Mr. Dowling is merely a witness who is disappointed with the outcome of this appeal. While the administrative judge's findings may be bothersome to him, there is no basis for granting intervention.

[4] Mr. Dowling alleges that the agency retaliated against him as a result of his internal reports and his testimony regarding the agency's alleged violations of USERRA, which is the subject of a complaint filed with the Commander of the U.S. Strategic Command and a complaint filed with the Department of Defense Office of Inspector General. Motion to Intervene at 4.

[5] Although *Stevens*, 36 M.S.P.R. at 172-73, interpreted 5 C.F.R. § 1201.34, the regulation governing intervention before an administrative judge, the language of 5 C.F.R. § 1201.114(i)(3) and 5 C.F.R. § 1201.34 are similar, including that both require that the movant show that he will be affected directly by the outcome of the proceeding. Therefore, we find the reasoning in *Stevens* to be persuasive here.

ORDER

¶8 The motion to intervene is denied. The initial decision issued on April 13, 2023, became the final decision of the Board on May 18, 2023. 5 C.F.R. § 1201.113(c). The notice of appeal rights contained within the final decision governs further review rights, including any applicable time frames for exercising those rights.

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JONATHAN DOWLING,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2025-1703

Petition for review of the Merit Systems Protection Board in No. DE-4324-22-0298-I-1.

ON MOTION

PER CURIAM.

O R D E R

Jonathan Dowling, who petitions for review of the Merit Systems Protection Board's denial of his motions to intervene in *Tucker v. Dep't of the Air Force*, No. DE-4324-22-0298-I-1, moves to compel the Board to give him access to the administrative record. We consider our jurisdiction.

James Tucker appealed to the Board from his non-selection for a civilian position with the Department of the

Air Force, arguing it violated the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Mr. Dowling, a Commander in the Judge Advocate General's Corps, Department of the Navy, and the hiring panel chair, testified in favor of Mr. Tucker.

In the initial decision, the administrative judge determined Mr. Tucker failed to show a USERRA violation. Both Mr. Tucker and Mr. Dowling sought the Board's review. The Board denied Mr. Dowling's motion to intervene, finding that he is not "affected directly by the outcome of the proceeding[s]" and instead "is merely a witness who is disappointed with the outcome of [Mr. Tucker's] appeal." *Tucker v. Dep't of the Air Force*, No. DE-4324-22-0298-I-1, 2023 WL 4110663, at *2 (MSPB June 21, 2023) (citing 5 C.F.R. § 1201.114(i)(3)). In its final decision, the Board denied Mr. Dowling's second motion to intervene and Mr. Tucker's petition. Only Mr. Dowling seeks this court's review.

Although this court generally has jurisdiction over final Board decisions, "an appellant must nevertheless supply the requisite proof of an injury in fact when it seeks review of an agency's final action in a federal court," *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1171–72 (Fed. Cir. 2017) (cleaned up). To satisfy Article III's threshold standing requirement, "[a]n appellant must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the appellee, (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 1171 (cleaned up). Separately, a petitioner seeking review of a Board decision must also show that Congress has afforded him such a right to judicial review. *See, e.g.*, 5 U.S.C. § 7703(a)(1).

Upon consideration thereof,

IT IS ORDERED THAT:

(1) Within 30 days from the date of entry of this order, the parties are directed to address whether this matter should be dismissed.

(2) Otherwise, these proceedings are stayed.

FOR THE COURT



Jarrett B. Perlow
Clerk of Court

October 23, 2025
Date

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JONATHAN DOWLING,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2025-1703

Petition for review of the Merit Systems Protection Board in No. DE-4324-22-0298-I-1.

ON MOTION

PER CURIAM.

O R D E R

The parties have filed their responses to this court's October 23, 2025 order, and Jonathan Dowling moves to transfer the matter to district court, ECF No. 18-1, for access to the administrative record, ECF No. 12, and to revise the caption to identify the Merit Systems Protection Board as the respondent, ECF No. 18-1.

As for the parties' responses and Mr. Dowling's motion to transfer, the court deems it the better course to have the parties address whether Mr. Dowling has constitutional standing and/or a cause of action in their merits briefs. As for Mr. Dowling's motion for access to the administrative record of James Tucker's appeal before the Merits Systems Protection Board, he has failed to demonstrate sufficient need to access that record to challenge the Board's denial of his motions to intervene. Nor has he sufficiently demonstrated that the Board is the proper respondent under the circumstances of this case. *See Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 684 (Fed. Cir. 1992); 5 U.S.C. § 7703(a)(2).

Accordingly,

IT IS ORDERED THAT:

(1) The motions are denied.

(2) The parties are directed to address this court's jurisdiction in their merits briefs. The opening brief is due no later than 30 days from the date of entry of this order.

FOR THE COURT



Jarrett B. Perlow
Clerk of Court

February 11, 2026
Date

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JONATHAN DOWLING, Petitioner

v.

DEPARTMENT OF THE AIR FORCE, Respondent

2025-1703

ON MOTION

PER CURIAM.

O R D E R

On August 24, 2026, Jonathan Dowling moved for leave to file a corrected petition for panel rehearing and rehearing en banc [ECF No. 43].

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied.

August 31, 2026

FOR THE COURT

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JONATHAN DOWLING,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2025-1703

Petition for review of the Merit Systems Protection Board in No. DE-4324-22-0298-I-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM.

---

[1] Circuit Judge Newman did not participate.

O R D E R

On July 31, 2026, Jonathan Dowling filed a combined petition for panel rehearing and rehearing en banc [ECF No. 40]. The petition was referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT



September 1, 2026
Date

Jarrett B. Perlow
Clerk of Court

38 U.S.C. § 4311(b)

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

38 U.S.C. § 4323(h)(1)

No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

38 U.S.C. § 4324

(a)(1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall-

(i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

(ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person-

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board shall award such person reasonable attorney fees, expert witness fees, and other litigation expenses. The Board may, in its discretion, award reasonable attorney fees in a case settled before the issuance of an order if the person can demonstrate that significant attorney fees were incurred and that justice requires such an award.

(d)(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

(3) In such Federal Circuit proceeding, the court shall award such person reasonable attorney fees, expert witness fees, and other litigation expenses if such person-

(A) prevails in such Federal Circuit proceeding; and

(B) is not represented by the Special Counsel in such Federal Circuit proceeding.

5 U.S.C. § 7703(a)(1)

Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

5 U.S.C. § 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.

28 U.S.C. § 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.

5 C.F.R. § 1201.114(i)(3)

Permissive intervenors. Any person, organization, or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization, or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.

APPENDIX I (continued)

PERTINENT PORTIONS OF 10 U.S.C. § 1034

§ 1034. Protected communications; prohibition of retaliatory personnel actions

(b)(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing—

(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to—

(iv) any person or organization in the chain of command; [or]

(C) testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under subparagraph (A) or (B), or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section.

(c)(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(A) A violation of law or regulation, including a law or regulation prohibiting ... unlawful discrimination.

From: Dowling, Jonathan E CDR USN STRATCOM J006 (USA)
To: Calese, Laura Jane COL USARMY STRATCOM J006 (USA)
Subject: hiring memo
Date: Tuesday, July 5, 2022 4:39:00 PM
Attachments: matrix (44.2 KB).msg
STRATCOM AF Civilian Attorney Hiring Recommendation.docx
Resume Scoring Matrix Olson (CAG).xlsx
RE interviews (223 KB).msg

COL Calese,

Please see attached the draft hiring panel memorandum. I listed Plew as the Primary Best Qualified Candidate and Meints as the Alternate Best Qualified Candidate.

Below is a summary of the facts that warrants caution in solely relying on total scores for the selection of the primary and alternate best qualified candidates.

1. Prior to developing the resume matrix, Mark identified six resumes for candidates that he wanted to interview. His non-select pile included resumes for Plew and Dendy-Sanders. For Plew's resume, Mark marked or otherwise stressed her GS-15 status as a reason for not selecting Plew for an interview. For Dendy-Sanders' resume, Mark placed a sticky note that read "FACEBOOK."

2. Based on my discussions with Jen Zona, I developed criteria for a resume matrix that focused on knowledge and ability to perform the three key duties. I shared it with Mark by email and asked for feedback in person. See attached (email matrix). Mark initially indicated no issues with this version of the resume matrix, so I sent it to a member of the CAG (Olsen) for scoring. See attached (excel sheet Olson).

3. On or about the next day, Mark revised the resume matrix using the original six KSAs with some modification. He removed a knowledge block and added an ability block. Using the revised resume matrix, Mark's top candidates were the same ones he initially identified for an interview.

4. Prior to interviews, Mark indicated that he reviewed some of the candidates' social media profiles and indicated that one of the candidates would have filed an EO complaint. I asked Mark if this practice was permissible, to which he responded in the affirmative. [I later found this to be a prohibited practice, which led to an interview for Dendy-Sanders. Mark asserted that he did not recall this conversation when I reminded him about it later as part of the justification to interview Dendy-Sanders. Upon reexamining her resume, he only recalled that Dendy-Sanders went to a historically black law school in New Orleans.]

5. For Dendy-Sanders' resume, Mark scored her as not meeting standards for one skill and one ability where all other reviewers found that she met or exceeded the standards for the those same categories.

6. During the interview panel discussions, Mark stressed his preference for a civilian with no

military experience. Karen seconded this consideration, stressing the diversity of viewpoints that civilians bring to the table. [This prompted me to seek legal counsel about the veterans preference.]

7. Mark shredded his interview notes after I explicitly wrote to him preserve his notes for collection at the conclusion of interviews. See attached (email Re: interviews).

In sum, Mark appeared to demonstrate a willingness to adjust scoring criteria and scoring to favor the candidates he initially selected for an interview prior to the adoption of the resume matrix. I'm concerned that Mark acted similarly with respect to the candidates entitled to a veterans preference as reflected in his interview scoring. Both Karen and I believed that Meints was the clear #1 choice among those candidates entitled to a veterans' preference. However, Mark awarded the same relatively low interview score to all the candidates entitled to a veterans preference.

Full disclosure, I was listening to Caste, The Origin of our Discontents, America's 'Caste' System: Isabel Wilkerson Says It's More Than Racism : NPR, during the hiring panel process, so I may have been overly sensitive to Mark's scoring of Dendy-Sanders' resume after he revealed that she went to a historically black law school. At the same time though, I do not think that Dendy-Sanders and Schneider satisfy the knowledge requirements in the announcement (i.e., knowledge as determined by the SJA as it relates to ethics and information law).

It is my assessment that the actions above did not impact Plew as the #1 choice based on the combined scoring. However, I believe that the concerns above should be factored in selecting the #2 choice. Again, I am willing to have an open discussion with you and the panel because Mark (and Karen) may have a different take or justification for his actions and scoring, which you may find valuable for your final and discretionary decision.

V/r, Jon

Jon Dowling
CDR, JAGC, USN
Chief, International & Administrative Law
U.S. Strategic Command, J006
COM: 402.912.0278
DSN: 912.0278

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

JAMES TUCKER,	§	
	§	
Appellant,	§	
	§	
vs.	§	DOCKET NO.
	§	DE-4324-22-0298-I-1
DEPARTMENT OF THE AIR FORCE,	§	
	§	
Agency.	§	

****

TRANSCRIBED VIDEOTAPED DEPOSITION OF

DR. KAREN MILLER

November 3, 2022

****

*** DISCLAIMER ***

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Capt. Palacios.

MR. MARTZEN: Okay. The mic's picking you up. Not a lot, but a little.

MR. MACKEY: I don't think we have any objections to just the excerpts.

MR. MARTZEN: I'll proceed with the question.

Q. (BY MR. MARTZEN) Dr. Miller, had you ever seen this e-mail from Cdr. Dowling?

A. I assume so. Given that we only have these two paragraphs, I'm not sure. Now, I remember him talking about this, but I can't say for sure that I got the whole e-mail trail because I know that he did send that some things to Col. Calese without CCing us.

Q. That's okay. I'd like to talk about first paragraph 6.

Do you think this is -- in paragraph 6, is that an accurate description of what occurred in the interview panel?

A. Not exactly.

Q. Tell me your version.

A. We did have a discussion about whether a civilian with no military experience versus a civilian with military experience, what that brought to the office and I stressed that it was a factor think about

in amidst of all the other things that you think about as you're looking for, you know, the best person to fit. My impression was that Mr. Barth was seeing it as a little bit stronger factor than maybe I was and then -- but Cdr. Dowling kind of got stuck on the idea that we were saying that we were not going to consider any military candidates, but that's not what we said.

I think there was just some misunderstanding on Cdr. Dowling's part about what we were trying to say during that conversation.

Q. I'll go back to -- I understand you were not briefed on the USERRA issues.

Keeping that in mind, you did consider a person without military background to -- you considered that the fact that a person would not have military background as one of any positive or potentially positive factors; is that right?

A. Possibly, possibly not. I mean, it really kind of depended on the whole of what you were looking at. Sometimes there's value in a non-military perspective just because you get groupthink when everybody's coming from the same background, but that's not necessarily a deciding factor because if you have a really, really qualified candidate who clearly demonstrates that they're going to be able to the job it really well, then

that to me would not be a factor at that point because the military member has sort of knocked it out of the park.

Q. What kind of things what a person with military experience need to demonstrate to show that they would bring a more open-minded perspective to you?

A. Well, it's not so much open minded, it's just that they are fully doing the job and that they're familiar with all of the vagaries of ethics law because one of the challenges is -- particularly in a combatant command is you're not just dealing with just military ethics, but you've also got GS civilian side of ethics, which, when you're coming up in the military, you may not see a lot of because you're at a wing that's predominantly military and you may not interact with a lot of civilians; whereas, in the combatant command, you are going to deal with a lot civilians and that's just a -- it's a different mix.

Q. Do you think that Lt. Col. Tucker was deficient in his experience on that in any way?

A. The challenge from my perspective with Lt. Col. Tucker was that he did not provide us with details of how he would do things. He would say, "I oversee the ethics program and, you know, the paralegals do the majority of the work and then I just sign" (audio

A. Yeah.
Q. It's the same general question there.
Does that look like your scores for the applicant's resumes?
A. Yes.
Q. I'm gonna bring us back to the Deposition Exhibit 7. I guess we need to -- somewhat chasing a rabbit here in response to question 6, but I want to talk again about that.
You did say -- correct me if I'm wrong, please, but you did say that it seemed like Mr. Barth was putting an emphasis on having a civilian with no prior military experience; is that correct?
A. He seemed to from my perspective.
Q. I want to turn it to paragraph number 7 also on the same page. Again, this is Cdr. Dowling talking. It says, "Mark shredded his interview notes after I explicitly wrote to him to preserve his notes for collection at the conclusion of the interviews."
Were you on the e-mail chain where Cdr. Dowling sent that note he's referring to?
A. Yes.
Q. Were you aware that Mark Barth shredded his interview notes?
A. Yes.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, D.C.

JAMES TUCKER, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	)))))))	DOCKET NUMBER DE-4324-22-0298-I-1 Date: See signature block

EXHIBIT B - AFFIDAVIT OF JONATHAN E. DOWLING

I declare under penalty of perjury that the foregoing is true and correct.

1. I am serving on active duty in the United States Navy. I am assigned to Navy Reserve Center Omaha.

2. Attachment 1 is a redacted version of the complaint that I filed with the DoD Office of the Inspector General (DoD IG) and Commander, U.S. Strategic Command, on January 27, 2023.[1]

3. Attachments 2 is a redacted version of the supplemental brief to my complaint that I filed with the (DoD IG) and Commander, U.S. Strategic Command, on March 2, 2023.[2]

4. Attachment 3 is the response from Commander, U.S. Strategic Command.

5. Attachment 4 is the Freedom of Information Act request that I submitted to the U.S. Army. Attachment 5 is the Freedom of Information Act response that I received from the U.S. Army. In my opinion, these documents are relevant for two reasons. First, in my opinion, these documents help explain why COL Calese would be reluctant to report my allegation that Mr. Mark Barth committed unlawful discrimination to senior leadership at U.S. Strategic

[1] I redacted potentially privileged or confidential information.
[2] I redacted potentially privileged or confidential information.

Command. Second, in my opinion, these documents help explain why COL Calese would seek to remove me from the Office of the Staff Judge Advocate.

6. Attachment 6 is a redacted email from Director of Logistics, J4, U.S. Strategic Command, Captain John "Jack" French, U.S. Navy, that I received on February 23, 2023.[3]

7. Attachment 7 is an undated memorandum for the record prepared by Mr. Mark Barth. Based on my conversation with Commanding Officer, Navy Element, U.S. Strategic Command, I *believe* that this memorandum for the record is the memorandum referenced in paragraph 159 of attachment 2. Attachment 8 is an undated memorandum for the record prepared by Mr. Mark Barth.

8. Attachment 9 is the DoD IG Administrative Investigations Manual.

9. If Mr. Barth's scoring is removed from the combined scoring of the applicants, then Mr. Meints and Ms. Plew are equally well qualified candidates under Air Force Instruction 51-101. In my opinion, this would have required USSTRATCOM to select Mr. Meints for the GS-13 attorney position under Air Force Instruction 51-101.

Executed on July 5, 2023.

DOWLING.JONATHAN.EDWARD.1266214150

Digitally signed by DOWLING.JONATHAN.EDWARD.1266214150
Date: 2023.07.05 15:46:42 -04'00'

Jonathan Edward Dowling

[3] I redacted contact information.

Gmail Jonathan Dowling <jonathan.e.dowling@gmail.com>

timeline

French, John A CAPT USN STRATCOM J4 (USA) [redacted] Thu, Feb 23, 2023 at 3:34 PM
To: Jonathan Dowling <jonathan.e.dowling@gmail.com>

Jon,

It was 8/2/2022 if that helps.

Very respectfully,

CAPT Jack French

Director of Logistics – J4

US Strategic Command

Comm: [redacted]

[redacted]

NIPR: [redacted]

[redacted]

[redacted]

From: Jonathan Dowling <jonathan.e.dowling@gmail.com>
Sent: Thursday, February 23, 2023 9:52 AM
To: French, John A CAPT USN STRATCOM J4 (USA) <john.a.french7.mil@mail.mil>
Subject: [Non-DoD Source] timeline

CAPT French,

Good morning. Hope all is well. I'm putting together a timeline and I wanted to clarify when Mark Barth said, "Lesson learned, don't hire reservists." Was it before June 2022? When? Thank you.

V/r, Jon

Attachment 6