

APPENDIX TABLE OF CONTENTS

Appendix A:

U.S. Court of Appeals Fed. Cir., Denial
(August 8, 2023) 2a

Appendix B:

U.S. Court of Appeals Fed. Cir., Judgment
(June 30, 2023) 4a

Appendix C:

U.S. Court of Appeals Fed. Cir., Opinion
(June 30, 2023) 5a

Appendix D:

MSPB, Final Decision
(Dec. 20, 2022) 18a

Appendix E:

Dept. of Labor, Closure Letter
(April 8, 2022) 33a

Appendix F:

Legal Text Involved 36a

2a

Appendix A

Case: 23-1306, Document: 20, Page: 1
Filed: 08/08/23

NOTE: This order is nonprecedential.

**United States Court of Appeals for the
Federal Circuit**

AISHA TRIMBLE,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2023-1306

Petitions for review of the Merit Systems Protection
Board in No. DA-3330-22-0254-I-1.

ON PETITION FOR PANEL REHEARING

Before HUGHES, CUNNINGHAM, and STARK,
Circuit Judges.

PER CURLIAM.

O R D E R

Aisha Trimble filed a petition for panel rehearing.

3a

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

August 8, 2023

FOR THE COURT

/s/ Jarrett B. Perlow

Jarrett B. Perlow

Clerk of Court

4a

Appendix B

Case: 23-1306 Document: 18 Page: 1
Filed: 06/30/2023

**United States Court of Appeals for the
Federal Circuit**

AISHA TRIMBLE,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2023-1306

Petition for review of the Merit Systems Protection
Board in No. DA-3330-22-0254-I-1.

JUDGMENT

THIS CAUSE having been considered, it is
ORDERED AND ADJUDGED:

AFFIRMED
FOR THE COURT
June 30, 2023

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

5a

Appendix C

Case: 23-1306, Document: 17, Page: 1
Filed: 06/30/2023

NOTE: This disposition is nonprecedential.

**United States Court of Appeals for the
Federal Circuit**

AISHA TRIMBLE,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2023-1306

Petition for review of the Merit Systems Protection
Board in No. DA-3330-22-0254-I-1.

Decided: June 30, 2023

AISHA TRIMBLE, Dallas, TX, pro se.

DANIEL FALKNOR, Commercial Litigation Branch,
Civil Division, United States Department of Justice,
Washington, DC, for respondent.

Also represented by BRIAN M. BOYNTON,
PATRICIA M. MCCARTHY, FRANKLIN E. WHITE,
JR.

Before HUGHES, CUNNINGHAM, and STARK,
Circuit Judges.

PER CURIAM.

Ms. Aisha Trimble appeals a decision from the Merit Systems Protection Board (MSPB) denying her request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). Because the Board's findings were supported by substantial evidence and because the Board did not legally err, we affirm.

I

Ms. Trimble served on active duty in the United States Army from August 1996 through June 2000. She was honorably discharged and has service-connected disabilities at 30% or greater.

In November 2021, Ms. Trimble applied for an Executive Assistant position with the Board of Veterans Appeals (the agency) based on a job listing posted on USAJobs.gov. The listing used a merit promotion certificate and indicated that the position was only open to career transition Federal employees, current or former competitive service Federal employees, individuals with disabilities, military

spouses, and veterans. Ms. Trimble qualified to apply for the position because of her status as a veteran.

On November 16, 2021, the agency notified Ms. Trimble that it would “assess [her] qualifications based upon [her] resume, the responses [she] provided in the questionnaire, as well as all other materials requested in the job opportunity announcement.” SAppx24.¹

On December 10, 2021, the agency notified Ms. Trimble that she had been referred to the hiring manager. The agency also informed Ms. Trimble that she was entitled to “CPS-10-point preference” because she had a service-connected disability of 30% or more. Appx25. The job posting indicated that the agency was seeking six Executive Assistants. After accepting applications from November 15 to November 26, 2021, the agency identified 521 candidates who preliminarily qualified for the six positions. Of these candidates, about 92 were individuals who were 30% or more disabled veterans, including Ms. Trimble.

This list of more than 500 candidates was sent to six executives (selecting officials). The list was split across three certificates of eligible candidates, and the applicants were listed in alphabetical order on each certificate. When the selecting officials were given the list of candidates, they were “reminded that while you

¹ We use “SAppx,” to refer to the appendix attached to the government’s response brief, and “Appx” to refer to the appendix attached to Ms. Trimble’s opening brief.

are not required to select an internal candidate, you must consider internal applicants first.” Appx15.

The selecting officials reviewed the applications and rated each candidate as either meriting or not meriting an interview based on the candidates’ ability or experience in four areas: (1) supporting a senior executive (or equivalent) in the Federal service; (2) overseeing or leading tasks or programs involving compliance with deadlines or organizational change; (3) working collaboratively with executives, peers, and subordinates; and (4) supporting operations in a judicial or quasi-judicial environment. One of the selecting officials listed Ms. Trimble as a “maybe” for an interview, but ultimately she was not one of the 26 individuals interviewed.

After conducting interviews in January 2022, six candidates were extended offers. Of the individuals given offers, this record indicates that at least three are veterans or have prior military service, and at least one of the individuals has service-connected disability ratings of at least 30%. Ms. Trimble was notified that she had not been selected for an Executive Assistant position on February 9, 2022.

Ms. Trimble filed a complaint with the Department of Labor alleging that her right to compete as a preference-eligible veteran was violated. Her claim was denied because the job listing was a merit promotion announcement, and so she was not entitled to “receive veterans’ preference points or priority over

others.” SAppx1. Ms. Trimble filed a request with the MSPB for corrective action under the VEOA, arguing that the chosen applicants had been preselected and the agency violated statutes and regulations that entitled her to veterans’ preference. The Board denied her request for a hearing, holding there were no material facts in genuine dispute, and denied her request for corrective action in an Initial Decision.

The Board first found that Ms. Trimble’s claims of pre-selection were “speculative and not supported by evidence.” Appx9. The Board also held that the Executive Assistant job listing was a merit promotion listing, to which the veterans’ preference requirements do not apply.

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

II

We set aside the Board’s decision only if it is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures re- quired by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.” 5 U.S.C. § 7703(c). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *McLaughlin v. Off. of Pers. Mgmt.*, 353 F.3d 1363, 1369 (Fed. Cir. 2004). Legal conclusions by

the Board are reviewed de novo. *Wrocklage v. Dep't of Homeland Sec.*, 769 F.3d 1363, 1366 (Fed. Cir. 2014).

III

Ms. Trimble's appeal raises two issues under the VEOA. The first is whether she was denied a right to compete under merit promotion procedures. The second is whether the agency violated her rights to veterans' preference. We affirm as to both.

A

We begin with Ms. Trimble's right to compete. Because substantial evidence supports the Board's finding that Ms. Trimble had the opportunity to compete, we affirm.

The VEOA provides that "veterans . . . may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures." 5 U.S.C. § 3304(f)(1). While this requires that preference eligible veterans have the chance to compete for such vacant positions, it does not ensure that the veteran will be selected for the position. *Joseph v. Fed. Trade Comm'n*, 505 F.3d 1380, 1384 (Fed. Cir. 2007). Here, there is no genuine dispute that Ms. Trimble is a preference eligible veteran, and that the vacancy was to be filled through

merit promotion procedures.² The only issue is whether she had a chance to compete for the position. The Board found that Ms. Trimble had the opportunity to compete because the agency publicly advertised the Executive Assistant position, Ms. Trimble applied for the position, and her application was referred to the selecting officials for consideration. This is evident at least from the job posting; the emails to Ms. Trimble confirming that her application was received and that she qualified as an applicant; and the email to the selecting officials with the attached certificates, on which Ms. Trimble was listed as a candidate to consider. Though unnecessary to show an opportunity to compete, we know Ms. Trimble remained in competition past the initial narrowing round and into the pre-interview stage because she was listed as a “maybe” on one of the selecting official’s interview lists. The record thus contains substantial evidence to support the Board’s conclusion that Ms. Trimble was not denied an opportunity to compete.

² In her brief, Ms. Trimble argues “[t]here is no such thing as a Merit Promotion Announcement,” and that “[t]he job opportunity was posted to USAJobs.gov as a Competitive Service vacancy announcement.” Pet. Br. 6. But this argument misunderstands the law. As discussed below in section III.B, there are two separate procedures for agencies to fill a position in the competitive service: the procedures for open competition jobs and the procedures for merit promotion jobs. Here, it is clear from the certificate of eligible candidates that this job was to be filled with merit promotion procedures. Appx22 (classifying the certificate as “Competitive Merit Promotion.”).

Ms. Trimble argues that the agency violated her right to compete by preselecting internal candidates. Her support for this argument is an email from an agency employee instructing the selecting officials to “consider internal applicants first.” Appx15. But that email also specifies that the selecting officials were not required to choose internal applications, and any remaining allegations of preselection are speculative at best. See, e.g., Pet. Br., 5 (“I strongly believe that neither [sic] of the six Selecting Officials thoroughly reviewed 521 resumes and applications referred under the vacancy. . . . I believe names were randomly placed on Exhibits 12 & 13, and the Selecting Officials preselected the appointed Selectees.”) (emphases added); see also *id.* at 7–8 (speculating that the timing of the offer letters to the selectees and the lack of signatures necessarily mean there was preselection). Ms. Trimble’s subjective belief that the selecting officers preselected the six selectees—and her implication that the agency then created a sham job posting, drafted certificates, and interviewed 26 candidates to try to appear fair—is not supported by the record. Rather, as explained above, there is substantial evidence that Ms. Trimble was given a fair opportunity to compete.

Ms. Trimble also alleges that she was denied a right to compete because all six selectees were current federal employees at the time of their selections, and the selectees were less experienced than her or were not veterans. First, some of these allegations are speculative and reflect only Ms. Trimble’s opinions or

beliefs. For example, Ms. Trimble states that one of the selectees is “possibly not a veteran,” and faults the Board for using DD-214 records as proof of military service because such records “can be falsified.” Pet. Br. 1–2. But nothing in the record suggests that the relevant documents were, in fact, falsified. Moreover, even to the extent Ms. Trimble does rely on the record, the facts that some selectees were not veterans and others had fewer years of experience as “Executive Assistants” are irrelevant. It is not up to the MSPB, in a VEOA case, to decide which of the applicants are most qualified for this position. *Miller v. Fed. Deposit Ins. Corp.*, 818 F.3d 1361, 1366 (Fed. Cir. 2016) (“[T]he VEOA does not authorize the MSPB to conduct, on appeal, a substantive review of the veteran’s qualifications and adjudicate the correctness of the agency’s hiring decision.”). Nor was the agency required to ultimately hire veterans and preference eligible veterans who were outside the federal workforce. All that was required was that those individuals had the opportunity to compete. *Joseph*, 505 F.3d at 1384.

Finally, Ms. Trimble cites to facts developed in a hearing for a separate MSPB matter under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). But the Board did not hold a hearing here, and the hearing in the USERRA case is not part of this record. These arguments are irrelevant and do not persuade us that the Board lacked substantial evidence in concluding Ms. Trimble had an opportunity to compete.

B

Next, we address Ms. Trimble's argument that the agency violated various statutes and regulations by not giving her veterans' preference in the application process. Besides providing a right to compete claim, "[t]he VEOA provides preference eligible veterans with a right to file a claim for any agency hiring decision that violated the veteran's rights under a statute or regulation relating to veteran's preference." *Lazaro v. Dep't of Veterans Affs.*, 666 F.3d 1316, 1318 (Fed. Cir. 2012) (citing 5 U.S.C. § 3330a). Here, Ms. Trimble argues the agency violated statutory and regulatory provisions that give veterans preference over other applicants by, for example, not applying her preference points; not creating and ranking her on a Best Qualified or Well Qualified Candidate Certificate; and not giving notice of passing her over and allowing her to object. Pet. Br. 1, 5-6.³

There are generally two ways for federal agencies to fill vacancies in the competitive service: (1) through open competition; or (2) through merit promotion. *Joseph*, 505 F.3d at 1381. Open competition is used when the agency seeks to fill the position with employees not already in the competitive service.

³ Apart from the right to compete provision in 5 U.S.C. § 3304(f)(1), Ms. Trimble identifies the following veterans' preference statutes: 5 U.S.C. §§ 2302(b)(11)(a-b), 3309(1), 3311(2), 3313(2), 3317(b), and 3318(c)(2-4). She also identified the following veterans' preference regulations: 5 C.F.R. §§ 332.401(a)(b) and 332.406(a)(1). These additional authorities all involve veterans' preference.

Kerner v. Dep't of the Interior, 778 F.3d 1336, 1337 (Fed. Cir. 2015). In contrast, merit promotion is used to fill a vacancy by promoting or transferring an employee of the agency or by hiring an applicant from outside the agency who has "status" for that position. Joseph, 505 F.3d at 1382.

Different procedures apply depending on whether a job vacancy is filled through open competition or merit promotion. When a position is filled through open competition, the agency provides a "category rating system," by which candidates at similar levels are in the same category; and a preference eligible with a compensable service-connected disability of at least 10% must be listed in the highest quality category. 5 U.S.C. § 3319. See also *Lodge v. E.E.O.C.*, 389 F. App'x 993, 996 (Fed. Cir. 2010) (non-precedential). Within each category, preference eligible veterans must be listed above non-preference eligible individuals. 5 U.S.C. § 3319. Moreover, an agency may not select a non-preference eligible over a preference eligible in the same category unless it seeks and receives approval for a pass over. *Id.*

These same advantages do not extend to the merit promotion context. An applicant "is not entitled to veterans' preference in the merit promotion process." Joseph, 505 F.3d at 1383. Veterans are guaranteed only the right to apply and an opportunity to compete for a merit promotion position. *Miller*, 818 F.3d at 1359–60.

Here, the vacancy was filled through merit promotion procedures. The job posting sought to promote or transfer either Federal employees into the role, or employees who had status to apply as an individual with a disability, a military spouse, or a veteran. Appx29. And the relevant certificate of eligible candidates was explicitly labeled a “competitive merit promotion” certificate. Appx22. This reaffirms that the role was to be filled through merit promotion procedures. Because this was a merit promotion listing, none of the open competition procedures Ms. Trimble identifies apply. *Joseph*, 505 F.3d at 1383. Thus, there are no underlying violations regarding veterans’ preference that give rise to a viable VEOA claim.

IV

In addition to her merits arguments, Ms. Trimble argues that the Board denied her a right to due process by not holding a hearing. Pet. Br. 1. She also alleges that the Board violated her rights, for example, by saying that it would likely “throw out [her] Appeal before [beginning] discovery;” ignoring material facts; and allowing the government to redact names during discovery. *Id.* at 6–8.

In a VEOA appeal, “[t]he Board . . . has the authority to decide [the] appeal on the merits, without a hearing, where there is no genuine dispute of material fact and one party must prevail as a matter of law.”

Jones v. Dep't of Health & Hum. Servs., 640 F. App'x 861, 864 (Fed. Cir. 2016) (citing 5 C.F.R. § 1208.23(b)).

We agree with the Board that there was no genuine dispute of material fact about whether Ms. Trimble had the opportunity to compete for this position. Ms. Trimble did not identify any evidence disputing that the agency publicly disclosed the job position, received over 500 applications, reviewed her submission, and held 26 interviews before choosing the six selectees. We see no reversible error regarding Ms. Trimble's remaining procedural complaints and hold that the Board did not violate Ms. Trimble's procedural rights.

V

We have considered Ms. Trimble's remaining arguments and do not find them persuasive. We affirm because the Board's findings were supported by substantial evidence, the Board correctly held that Ms. Trimble was not entitled to veterans' preference, and the Board did not err in deciding these issues without holding a hearing.

AFFIRMED

No costs.

18a

Appendix D

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE**

DOCKET NUMBER DA-3330-22-0254-I-1

AISHA TRIMBLE,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DATE: November 15, 2022

Aisha Trimble, Dallas, Texas, pro se.
Joan Green, Esquire, Oklahoma City, Oklahoma, and
Tijuana D. Griffin, North Little Rock, Arkansas, for
the agency.

BEFORE

Theresa J. Chung Administrative Judge

INITIAL DECISION INTRODUCTION

On April 20, 2022, the appellant filed a request for corrective action with the Board pursuant to the Veterans Employment Opportunities Act of 1998 (VEOA). Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this appeal. See 5 U.S.C. § 3330a(d); IAF, Tab 10. I did not hold the hearing the appellant requested because there are no material facts in genuine dispute. See *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 9 (2008). I issued a close of record order on May 18, 2022, and I extended the close of record deadline at the appellant's request. IAF, Tabs 10, 13. The deadline was extended again, and the record closed on July 7, 2022. IAF, Tabs 18, 26.¹ For the reasons that follow, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed. The appellant served on active duty in the United States Army from August 1996 through June 2000. IAF, Tab 11 at 12. She was honorably discharged. *Id.* She has a service-

¹ Following the close of record, the appellant filed an additional pleading. IAF, Tab 30. She did not show good cause for the late submission. 5 C.F.R. § 1201.59(c). I have, however, reviewed the appellant's submission and find it would not compel a different result.

connected disability rated at 30% or greater. Id. at 19; IAF, Tab 10 at 6 (stipulated fact 1).

In or around November 2021, the appellant applied for the position of Executive Assistant, with the Department of Veterans Affairs, Board of Veterans' Appeals (BVA), under Announcement number CARX-11288119-22KB. IAF, Tab 11 at 25-37, 39.

The merit promotion announcement was open to "status" candidates, including career transition federal employees, current or former competitive service federal employees, individuals with disabilities, military spouses, and veterans. Id. at 27.

On December 10, 2021, the agency notified the appellant that she was referred to the hiring manager. Id. at 41. That same day, the agency notified the appellant that she was found "CPS-10 point preference based on a compensable service-connected disability of 30 percent or more." Id. at 43. The agency informed her that she was tentatively eligible for the position based on her self-rating of her qualifications. Id.

A total of 521 people were listed on the certificates, including 92 individuals who were 30% or more disabled veterans. IAF, Tab 27 at 11-12. The six executives at the BVA – Nina Tann, Robert Scharnberger, Tamia Gordon, Thomas Rodrigues, Silas Darden, and Christopher Santoro – reviewed

the certificates and the applications of the 521 eligible candidates, and selected individuals to interview.

IAF, Tab 11 at 116-17; IAF, Tab 27 at 16. The panelists prepared a memo listing the 26 individuals who were interviewed. IAF, Tab 11 at 116-17.

The panelists conducted interviews on January 18, 2022, through January 21, 2022, and prepared written notes of their interviews. IAF, Tab 27 at 85-98. After conducting the interviews, the six executives decided to select the following individuals: Carly Wright, Maria Braswell, Deborah Moutinho, Carolyn Colley, Voncelle James, and Natasha Anderson. IAF, Tab 11 at 57-58, 80, 86, 94, and 116-17, 119. Darden's selectee, Anderson, declined the position.² Id., at 57, Tab 25 at 4.

On February 3, 2022, the agency extended tentative offers of employment to the selectees. IAF, Tab 27 at 100-07. On February 9, 2022, the agency notified the appellant of her non-selection. IAF, Tab 11 at 45. Of the individuals who were given offers, four are

² It appears Anderson declined the position. IAF, Tab 11 at 57, Tab 25 at 4.

veterans or have prior military service (Braswell³, Colley⁴, James⁵, and Moutinho⁶). Two of the selectees have service-connected disability ratings of at least 30% or more. IAF, Tab 27 at 8, 22, 39.

On March 17, 2022, the appellant filed a complaint with the Department of Labor (DOL) alleging a violation of her right to compete as a preference-eligible applicant. IAF, Tab 1 at 14. DOL issued the appellant a close-out notice on April 8, 2022, see *id.* at 14-15, and she timely filed this appeal, see IAF, Tab 1. The record is closed. IAF, Tab 26.

Applicable Law

The Board has jurisdiction over two types of claims under VEOA: (1) the appeal of a preference eligible who alleges that an agency has violated her rights under any statute or regulation relating to veterans' preference with respect to Federal employment, see 5 U.S.C. § 3330a(a)(1)(A); and (2) the appeal of a preference eligible or veteran who has been separated

³ See IAF, Tab 27 at 20-21 (DD Form 214 reflecting service from 1984 to 2004 as a Telecommunications Operations Chief and Administrative Specialist with the U.S. Army); *id.* at 22.

⁴ See IAF, Tab 27 at 30 (DD Form 214 reflecting service from 2001 to 2005 as a Slavic Crypto Linguist-Russian for the Air Force); *id.* at 39.

⁵ See IAF, Tab 27 at 47-48 (DD Form 214 reflecting service from 1996 to 2005 for the Air Force as an Information Manager); *id.* at 49; Tab 11 at 94 (listing James' initials as J.V.M.).

⁶ See IAF, Tab 27 at 58 (DD Form 214 reflecting service for the Air Force from 1990 to 2005 as a Chaplain Assistant).

from the armed forces under honorable conditions after 3 years or more of active service and alleges she has been denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures, see 5 U.S.C. §§ 3330a(a)(1)(B), 3304(f)(1).

To prevail on the merits of a complaint filed under 5 U.S.C. § 3330a(a)(1)(A), an appellant must establish by preponderant evidence that she: (1) exhausted her DOL remedy; (2) she is a preference eligible within the meaning of VEOA, as defined at 5 U.S.C. § 2108(3); and (3) the agency violated her rights under a statute or regulation related to veterans' preference. See *Isabella v. Department of State*, 106 M.S.P.R. 333, ¶¶ 21-22 (2007), *aff'd on recons.*, 109 M.S.P.R. 453 (2008).

In short, to be entitled to relief under VEOA, the appellant must prove by preponderant evidence that the agency's action violated one or more of her statutory or regulatory veterans' preference rights in its selection process. See *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 209, ¶ 10 (2010).

In the second type of VEOA claim, a right-to-compete VEOA claim, the appellant must prove by preponderant evidence: (1) she exhausted her DOL remedy; (2) she is a veteran described in 5 U.S.C. § 3304(f)(1) or a preference eligible under 5 U.S.C. §

2108(3); and (3) the agency denied her the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce. *Becker v. Department of Veterans Affairs*, 115 M.S.P.R. 409, ¶ 5 (2010); *Graves*, 114 M.S.P.R. 209, ¶¶ 10, 19. Based on the undisputed facts and evidence discussed above, I find the first two elements are satisfied as to a claim under 5 U.S.C. § 3330a(a)(1)(A), and elements 1 and 2 are met as to a claim under 5 U.S.C. § 3304(f)(1). The appellant failed to prove the agency violated her rights under VEOA.

The appellant contended the agency should have afforded her "hiring priority" over the six selected candidates due to her "veterans' preference points, application and resume experience." IAF, Tab 1 at 4. She also alleged the agency violated statutes or regulations related to veterans' preference by failing to acknowledge her status as a 30% or more disabled veteran and her professional experience. *Id.* at 5. She asserts that she had more than twelve years as an Executive Assistant, and that the applications of the selectees reflect that they were far less qualified than her. IAF, Tab 27 at 6-8. She contends that several of the selectees were "illegally appointed" as "reassignments" and that individuals were preselected, thereby denying the appellant an opportunity to compete. *Id.* She further alleged the certificates improperly listed individuals in alphabetical order, instead of in accordance with their preference eligible order. *Id.* at 13. She also alleged

the agency violated statutes or regulations related to veterans' preference and federal hiring.⁷ E.g., IAF, Tab 27.

Evidence of preselection could potentially establish that an applicant did not have a bona fide opportunity to compete. See *Montgomery v. Department of Health & Human Services*, 123 M.S.P.R. 216, ¶ 11 (2016); *Shapley v. Department of Homeland Security*, 110 M.S.P.R. 31, ¶ 10 (2008). In *Montgomery*, it was undisputed the agency filled a position by transferring a federal employee from outside its workforce into the position without issuing a vacancy announcement. *Montgomery*, 123 M.S.P.R. 216, ¶¶ 2, 7. *Montgomery* asserted the selectee was preselected for the position. *Id.*, ¶ 11. The agency argued *Montgomery* and the selectee were considered for the position because they had both applied for a similar position of the same grade and the agency considered the certificate of eligibles for the advertised position

⁷ The appellant alleged the agency discriminated against her in the hiring process based on her race, age, disability, and veterans' status. A separate appeal was docketed to address the appellant's allegation of discrimination based on uniformed service. See *Aisha Trimble v. Department of Veterans Affairs*, MSPB Docket No. DA-4324-22-0350- I-1. With regard to her claims of race, age, and disability discrimination, the Board's authority to adjudicate claims under VEOA does not include the authority to review discrimination or prohibited personnel practice claims. See *Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 11 (2005). Accordingly, the Board lacks jurisdiction to address those allegations in this appeal.

in filling the position it did not advertise. Id., ¶⁸. In that instance, the Board found there was a genuine dispute of material fact as to whether the appellant had a bona fide opportunity to compete for the unadvertised position. Id., ¶¶ 6-11.

The facts of this case are distinguishable from Montgomery. It is undisputed the agency publicly advertised the Executive Assistant position at issue in this appeal; the appellant applied for it; and the appellant was referred to the selecting official for consideration. IAF, Tab 11 at 41, 43. The appellant's claims of preselection are speculative and not supported by evidence. For instance, she alleged that Braswell, Colley, James were illegally appointed as reassignments; that Moutinho was illegally appointed as a transfer; and that Wright was illegally appointed as a promotion. IAF, Tab 27 at 6-8. In support of these contentions, she notes that the resumes of Braswell, Moutinho, and Wright "reflect[] zero years of EA (Executive Assistant) experience," and that the appellant has more years of EA experience than the selectees. Id. (emphasis in original).

⁸ I have considered the appellant's arguments that the three certificates are not signed; the electronic signature of the Approving Official on the selectees' SF-50s is somehow not a real signature; and the timing of the agency's steps in the hiring process is somehow suspicious. IAF, Tab 27 at 14-16. These allegations fail to demonstrate the agency violated her right to compete, or otherwise failed to comply with VEOA.

As to the qualifications of the selectees, I note that the matter at issue in a VEOA appeal is not whether a particular personnel action is proper and should be sustained. *Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶ 11 (2001) (“The provisions of VEOA give the Board no authority to adjudicate the merits of any personnel action.”). Rather, the Board is authorized only to determine whether an agency has, in connection with the action that is the subject of an appeal, violated a statutory or regulatory provision relating to veteran preference. *Id.* As such, the selectees’ specific qualifications for the position are not at issue here. Also, the appellant contends the selectees did not meet the 3-year continuous, non-temporary career or career-conditional service requirement for career tenure. IAF, Tab 27 at 11. However, the record reflects the selectees had permanent tenure in the competitive service at the time of their selections. *Id.* at 29, 45-46, 57, 72-73, 75-78.

With regard to the appellant’s contentions that the review, interview, and selection process was essentially a fabrication or sham effort “to give the illusion of compliance” with VEOA and to mask the agency’s unlawful preselections, these claims are speculative and not supported by evidence. IAF, Tab 27 at 9-10. The appellant offered no evidence that her application was considered differently from those of the other candidates and only speculation that the selection process was somehow a sham.⁸ *Id.* In sum, I

find the appellant has not established by preponderant evidence that she was denied a bona fide opportunity to compete due to preselection. I conclude the agency afforded the appellant the right to compete, as required under 5 U.S.C. § 3304(f)(1).

The appellant contends the agency violated various laws related to Federal hiring procedures, including that the agency did not properly assemble the certificates of eligibles; failed to apply category rating procedures, see 5 U.S.C. § 3319, 5 C.F.R. §§ 211.102(d)(4), 337.302, and the Presidential Memorandum on Improving the Federal Recruitment and Hiring Process (May 11, 2010); failed to appropriately rank her on the certificate of eligibles, see 5 C.F.R. § 332.401; and failed to comply with pass over requirements, see 5 U.S.C. § 3318 and 5 C.F.R. § 332.406. IAF, Tab 7 at 4, Tab 27.

Federal agencies generally fill vacancies in two ways: (1) open competition, which is also known as delegated examining; and (2) merit promotion. *Joseph v. Federal Trade Commission*, 505 F.3d 1380, 1381 (Fed. Cir. 2007). Open competition is used to fill vacant positions within the competitive service, and it is based on a fair test of the “relative capacity and fitness of the persons examined for the position to be filled.” *Abell v. Department of the Navy*, 343 F.3d 1378, 1380 n.2 (Fed. Cir. 2003); *Perkins v. U.S. Postal Service*, 100 M.S.P.R. 48, ¶ 10 (2005); 5 C.F.R. § 2.1. Traditionally, an integral part of the open competitive process was the assignment of numerical scores for

the purpose of rating and ranking candidates. *Dean v. Consumer Product Safety Commission*, 108 M.S.P.R. 137, ¶ 2 n.* (2008). However, pursuant to the Homeland Security Act of 2002, competitive vacancies are filled by means of “category rating,” by which candidates with similar proficiency are placed in the same category, and a preference eligible with a compensable service-connected disability of 10% or more must be listed in the highest quality category; within a category, preference eligible veterans are listed ahead of non-preference eligibles; and an agency may not select a non-preference eligible ahead of a preference eligible in the same category unless it seeks and receives approval for a pass over. *Launer v. Department of the Air Force*, 119 M.S.P.R. 252, ¶ 7 (2013). An agency may assign numerical scores for purposes of placing applicants in categories, but veterans’ preference points are not added to such scores. *Id.*

In contrast, merit promotion is used when the position is to be filled by an employee of the agency or by an applicant from outside the agency who has “status” in the competitive service. *Joseph*, 505 F.3d at 1382; *Perkins*, 100 M.S.P.R. at 51. Merit promotion procedures “differ from open competitive examination procedures and do not provide the same advantages to preference eligible candidates.” *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶ 10 (2006). Simply put, **“an employee is not entitled to veterans’ preference in the merit promotion process.”** *Joseph*, 505 F.3d at 1383.

Instead, veterans are guaranteed only a right to apply and an opportunity to compete for merit promotion positions. *Id.*

Here, it is undisputed that the selection was from a merit promotion certificate, not open competition (delegated examining). IAF, Tab 10 at 7, Tab 11 at 26-37. Accordingly, veterans' preference did not apply. *Joseph*, 505 F.3d at 1383 (further holding the agency was not precluded from making a selection from the merit promotion process where it also advertised the same position through the open competition examination process). In other words, because the vacancy at issue in this appeal was announced under merit promotion procedures, none of the competitive examination procedures the appellant identified are applicable. *Brandt*, 103 M.S.P.R. 671, ¶ 16. The appellant's subjective belief that she was more qualified than the selectees does not establish that the agency violated her veterans' preference rights. Accordingly, I find the appellant has not established by preponderant evidence that the agency violated her veterans' preference rights by listing candidates in alphabetical order or on any of the other bases she cited. Again, the Board does not determine in a VEOA appeal whether a preference-eligible should have been selected for the position in question, but rather, only assesses whether the preference-eligible was permitted to compete for the position on the same basis as other candidates. *Miller v. Federal Deposit Insurance Corporation*, 121 M.S.P.R. 88, ¶ 11 (2014), *aff'd*, 818 F.3d 1357 (Fed.

Cir. 2016), cert. denied, 137 S. Ct. 386 (2016). Although a preference eligible is entitled to have a broad range of experiences considered by the agency in reviewing her application for a position, how the agency adjudges and weighs those experiences is beyond the purview of the Board's review in a VEOA appeal. *Id.*, ¶ 9. As previously stated, I find the appellant was permitted to compete for the position on the same basis as other candidates. The right to compete under 5 U.S.C. § 3304(f)(1) does not preclude an agency from eliminating a veteran or a preference eligible from further consideration for a position based on her qualifications for the position; it requires only that the individual be permitted to compete on the same basis as other candidates. *Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534, ¶ 11 (2010).

Based on the record in its entirety, I conclude the appellant has failed to establish the agency violated her rights under any statute or regulation relating to veterans' preference or denied her the opportunity to compete. Therefore, she is not entitled to corrective action under VEOA.

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

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

32a

NOTICE TO APPELLANT

This initial decision will become final on December 20, 2022 unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board.

Appendix E

U.S. Department of Labor
Office of the Assistant Secretary for
Veterans' Employment and Training 1001 North 23rd
Street, Room 184 Baton Rouge, LA 70804-9094
Phone: (240) 867-2349
Fax: (225) 342-3152

April 8, 2022

Aisha Trimble
P.O. Box 41451
Baton Rouge, LA 70835
RE:LA-2022-002-VPH

Dear Ms. Trimble:

This letter is to advise you that the U.S. Department of Labor, Veterans' Employment and Training Service (VETS), has completed its investigation of your veterans' preference complaint filed under the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. 3330a. Your complaint was timely filed on March 17, 2022.

Based on VETS' investigation of your complaint, the evidence does not support your allegation that the U.S. Department of Veterans Affairs, Veterans Board of Appeals violated your preference rights. In your complaint, you alleged that your veterans' preference was violated because you were found eligible, but not

selected when you applied for vacancy announcement CARX-11288119-22-KB, Executive Assistant, GS-0301-14 location negotiable after selection.

Our investigation concluded that this vacancy announcement was not open to all U.S. citizens but was instead open to a limited group of applicants; this is called merit promotion examining. Agencies can limit the area of consideration (geographically or organizationally) under merit promotion as long as there is a reasonable expectation that enough high-quality applicants (as determined by the agency) will apply.

Merit promotion announcements are typically only open to 'status' candidates which consists of current career or career-conditional employees in the competitive service or those that have reinstatement eligibility based on having held such a position in the past. VEOA was specifically intended to open opportunities to veterans that would otherwise be closed to them because the agency had limited the area of consideration. When VEOA are accepted under merit promotion announcements, they compete along with status applicants but do not receive veterans' preference points or priority over others.

Veterans' preference does not require an agency to use any specific appointment process. Agencies have broad authority under law to hire from any appropriate source of eligible, including special appointing authorities. The documentation you

35a

provided this office shows that you were found eligible for this position, but you were not selected. Since your VEOA eligibility was properly adjudicated, your case will be closed effective April 8, 2022.

Although we have made this determination, you have the right to appeal your case to the Merit Systems Protection Board (MSPB) within 15 calendar days from the date of receipt of this letter. In accordance with the MSPB regulations, you must file your appeal with the MSPB regional or field office that has responsibility for the geographic area in which you were employed when your complaint arose. In your case, your appeal must be sent to:

Dallas Regional Office
1100 Commerce Street
Room 620
Dallas, TX 75242-9979

A copy of the MSPB Appeal Form is enclosed for your convenience. If you prefer, you may file your MSPB appeal electronically at <https://e-appeal.mspb.gov/>. If you have questions concerning the appeal process, you may contact the MSPB at 1-800-209-8960 or reference "Questions and Answers about Appeals" at <https://eappeal.mspb.gov/faq.aspx>.

Sincerely,
Jonathan Narcisse
Investigator – Louisiana
Enclosure: MSPB Appeal Form

Appendix F

Constitutional Laws Involved

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

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

U.S. Const., Amend. 5.5.1 - No person shall be deprived of nor be deprived of life, liberty, or property, without due process of law.

Federal Statutes Involved

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

5 USC § 2302(b)(6) - Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority grant any preference or

advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

5 USC § 2302(b)(11)(a-b) - Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

5 USC § 2302(e)(1) - (1) For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law: (A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701. (B) Sections 943(c)(2) and 1784(c) of title 10. (C) Section 1308(b) of the Alaska National Interest Lands Conservation Act. (D) Section 301(c) of the Foreign Service Act of 1980. (E) Sections 106(f), 7281(e), and 7802(5) (F) Section 1005(a) of title 39 . (G) Any other provision of law that the Director of the Office of

Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection. (H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

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

5 USC § 3304(f)(2) - If selected, a preference eligible or veteran described in paragraph (1) shall receive a career or career-conditional appointment, as appropriate.

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

5 USC § 3311(2) - In examinations for the competitive service in which experience is an element of qualification, a preference eligible is entitled to

credit for all experience material to the position for which examined, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether he received pay therefor.

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

5 USC § 3317(a) - The Office of Personnel Management shall certify enough names from the top of the appropriate register to permit a nominating or appointing authority who has requested a certificate of eligibles to consider at least three names for appointment to each vacancy in the competitive service.

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

entitled to advance notice of discontinuance of certification.

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

5 USC § 3318(c)(1-2) - if an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office for passing over the preference eligible. The Office shall make the reasons presented by the appointing authority part of the record of the preference eligible and may require the submission of more detailed information from the appointing authority in support of the passing over of the preference eligible. The Office shall determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference eligible under paragraph (2) of this subsection. When the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office. In the

case of a preference eligible described in section 2108(3)(C) of this title who has a compensable service-connected disability of 30 percent or more, the appointing authority shall at the same time it notifies the Office under paragraph (1) of this subsection, notify the preference eligible of the proposed passover, of the reasons therefor, and of his right to respond to such reasons to the Office within 15 days of the date of such notification. The Office shall, before completing its review under paragraph (1) of this subsection, require a demonstration by the appointing authority that the passover notification was timely sent to the preference eligible's last known address.

5 USC § 3330a(a)(1)(b) - A veteran described in section 3304(f)(1) who alleges that an agency has violated such section with respect to such veteran may file a complaint with the Secretary of Labor.

5 USC § 3330a(d)(1)(b) - if the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe, except that in no event may any such appeal be brought later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2).

5 USC § 3330c(a-b) - (a) if the Merit Systems Protection Board (in a proceeding under section 3330a) or a court (in a proceeding under section 3330b) determines that an agency has violated a right described in section 3330a, the Board or court (as the case may be) shall order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved. If the Board or court determines that such violation was willful, it shall award an amount equal to backpay as liquidated damages. (b) A preference eligible who prevails in an action under section 3330a or 3330b shall be awarded reasonable attorney fees, expert witness fees, and other litigation expenses.

5 USC § 7701(a)(1) - An applicant for employment may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right to a hearing for which a transcript will be kept;

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

the Board issues notice of the final order or decision of the Board.

5 USC § 7703(c)(1-3) - in any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be - (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence;

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

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

28 USC § 1254(1) - Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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

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

38 USC § 4214(b)(1)(a) - To further the policy stated in subsection (a) of this section, veterans referred to in paragraph (2) of this subsection shall be eligible, in accordance with regulations which the Office of Personnel Management shall prescribe, for veterans recruitment appointments, and for subsequent career-conditional appointments, under the terms

and conditions specified in Executive Order Numbered 11521 (March 26, 1970), except that—

(A) such an appointment may be made up to and including the level GS-11 or its equivalent;

38 USC § 4311(a) – a person who has performed, in a uniformed service shall not be denied **initial employment**, by an employer on the basis of that performance of service.

Federal Regulations Involved

5 CFR 211.102(d)(6) - ...Preference eligible veterans' preference does not apply, however, to in-service placement actions such as promotions.

5 CFR 212.301 - competitive status means an individual's basic eligibility for noncompetitive assignment to a competitive position. Competitive status is acquired by completion of a probationary period under a career-conditional or career appointment, or under a career executive assignment in the former executive assignment system, following open competitive examination, or by statute, Executive order, or the Civil Service rules, without open competitive examination. An individual with competitive status may be, without open competitive examination, reinstated, transferred, promoted, reassigned, or demoted, subject to conditions prescribed by the Civil Service rules and regulations.