

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2007 MSPB 186**

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Docket No. AT-3443-05-0550-B-1  
AT-0330-05-0409-B-1

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**Robert P. Isabella,**

**Appellant,**

**v.**

**Department of State,**

**Agency.**

August 10, 2007

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Robert P. Isabella, Clearwater, Florida, pro se.

Paul S. Veidenheimer, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman

Mary M. Rose, Vice Chairman

Barbara J. Sapin, Member

Chairman McPhie issues a separate concurring opinion.

**OPINION AND ORDER**

¶1 The appellant petitions for review of two initial decisions which denied the appellant's requests for corrective action pursuant to the Veterans Employment Opportunities Act of 1998 (VEOA) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). We DENY the petition for review for failure to meet the review criteria set forth at 5 C.F.R. § 1201.115. For the reasons set forth below, however, we REOPEN these appeals on our own motion pursuant to 5 C.F.R. § 1201.118, VACATE the initial decision with respect to the appellant's

USERRA appeal, DISMISS the appellant's USERRA appeal as moot, REVERSE the initial decision with respect to the appellant's VEOA appeal, and ORDER the agency to waive the age limit for the Diplomatic Security Service Special Agent position for which the appellant applied and to process the appellant's application for this position to completion.

## BACKGROUND

### Initial Proceedings Before the Administrative Judge

¶2 These appeals concern the appellant's claims that the agency violated his rights as a preference-eligible applicant and denied him initial employment on the basis of his obligation to perform service in a uniformed service when the agency accepted his application under vacancy announcement SA-04-01 for the position of Diplomatic Security Service Special Agent, a position with a maximum entry age of less than 37 years of age, but stopped processing the application shortly before the appellant's 37<sup>th</sup> birthday.<sup>1</sup> Initially, the administrative judge found that it was undisputed that the requirements for the position required candidates to be appointed before their 37<sup>th</sup> birthday and that the appellant would have turned 37 before November 15, 2004, the date the agency alleged was the earliest pre-scheduled appointment date on which it could have appointed Special Agent candidates who had applied under vacancy announcement SA-04-01. *Isabella v. Department of State*, MSPB Docket No. AT-3443-05-0550-I-1, slip op. (Initial Decision, May 27, 2005). Upon determining that the appellant failed to allege that the agency refused to select him because of his past or present military service, the administrative judge dismissed the USERRA appeal for lack of jurisdiction. *Id.* The administrative judge also dismissed the appellant's VEOA appeal for lack of jurisdiction upon determining that the appellant failed to

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<sup>1</sup> The record in these appeals establish that the appellant's date of birth was November 8, 1967. USERRA Initial Appeal File, Tab 7, Subtab 4e. Thus, the date the appellant turned 37 years of age was November 8, 2004.

nonfrivolously allege that his nonselection violated a statute or regulation related to veterans' preference. *Isabella v. Department of State*, MSPB Docket No. AT-0330-05-0409-I-1, slip op. (Initial Decision, Apr. 29, 2005). The appellant filed petitions for review with the Board in which he contested both dismissals.

### **Further Proceedings Regarding the VEOA Appeal**

¶3 With respect to the VEOA appeal, the Board determined that the appellant's allegations that the agency violated his veterans' preference rights in denying him initial employment were sufficient to satisfy VEOA's jurisdictional requirements. The Board first rejected the agency's argument that VEOA does not apply to the appointment process for Foreign Service Diplomatic Security Service Special Agent positions. The Board further found that the provisions of 5 U.S.C. § 3312(a)(1), which require agencies to waive age requirements for preference-eligible applicants unless the requirements are essential to the performance of the duties of the position, applied to the selection process for the Special Agent position for which the appellant had applied, regardless of whether the position was in the competitive service or the excepted service. However, because the parties did not have the opportunity to present evidence and argument before the administrative judge regarding the question as to whether the age requirements were essential to the performance of the duties of the Special Agent position, the Board remanded the appeal for further development of the record on this issue. *Isabella v. Department of State*, 102 M.S.P.R. 259, ¶¶ 7-14 (2006).

¶4 Following the remand, the administrative judge ordered the parties to file evidence and argument addressing whether the maximum entry age for the Special Agent position is essential to the performance of the duties of the position. VEOA Appeal Remand File (VARF), Tab 2. In response to this order, the agency noted that the Secretary of State has specific statutory authority to prescribe a maximum entry age for the Special Agent position and that the agency's age requirement is consistent with the requirements for other federal law enforcement personnel. VARF, Tab 7. It also argued that the agency's

requirement was “consistent with the long history of clearly stated Congressional intent to ensure a youthful and vigorous federal law enforcement force” and stated that the duties of the position are rigorous and demand the sort of “youth and vigor” referenced in the legislative history regarding the age limits for other federal law enforcement officers. The agency further noted that the vacancy announcement indicated that applicants were required to be fit for strenuous exertion and able to pass physical fitness tests. The agency concluded its argument by stating that the age requirements are essential to the performance of the duties of the Special Agent position and to ensure “that the Department has a Special Agent force of sufficient physical stamina and vigor to carry out the critical duties of these positions.” *Id.*

¶5 The agency also submitted a copy of the action memorandum dated January 4, 1988, through which Secretary of State George P. Schultz approved a maximum entry age of less than 35 years of age for Special Agents and a copy of the memorandum dated October 29, 1996, through which Secretary of State William Christopher approved raising the maximum entry age to less than 37 years of age. *Id.*, Exhibits B, C. The earlier memorandum indicated that the agency’s then-current hiring standards for security officers included physical testing requirements and a minimum age standard, but the maximum age for such positions was the same as the remainder of the Foreign Service, 60 years of age. The memorandum went on to explain that law enforcement work imposes exceptional physical demands and stress and recommended that the Department of State should enter on duty only candidates less than age 35 “in conformance with the practice of most federal law-enforcement agencies.” *Id.*, Exhibit B.

¶6 The second memorandum indicated that the Federal Law Enforcement Pay Reform Act of 1990 had raised the mandatory retirement age for law enforcement officers from 55 to 57 years of age and that most federal law enforcement agencies had raised the maximum entry age for their law enforcement officer positions from less than 35 to less than 37 years of age to allow for a minimum of

20 years service. This memorandum stated that past agency policy decisions had clearly established that an age limit is necessary and appropriate for the appointment of “Security Officers” and that the agency would be “hard pressed to make a case that its maximum age should be lower than that of other law enforcement agencies where the special agent duties are just as physically demanding.” *Id.*, Exhibit C.

¶7 In his response, the appellant did not contest the agency’s arguments regarding the basis for its position that the maximum entry age was essential to the performance of the duties of the position. Instead, the appellant argued that he believed that he could have been appointed prior to his 37<sup>th</sup> birthday and that he would have been eligible to “buy back” the necessary retirement time in order to allow him to retire at age 57. VARF, Tab 8.

¶8 On October 10, 2006, the administrative judge issued an initial decision in which he denied corrective action with respect to the appellant’s VEOA appeal, finding that the physical demands of the Special Agent position are consistent with those of other federal law enforcement officers and noting that the rationale for imposing maximum entry ages and mandatory retirement ages for such positions is to ensure that “federal law enforcement officers [are] ‘young men and women capable of meeting the vigorous demands of occupations which are far more taxing physically than most in federal service.’” *Isabella v. Department of State*, MSPB Docket No. AT-0330-05-0409-B-1, slip op. (Initial Decision, Oct. 10, 2006) (citing *Fagergren v. Department of the Interior*, 98 M.S.P.R. 649, 651 (2005), *aff’d*, 166 F. App’x 483 (Fed. Cir. 2006)). The administrative judge concluded that the maximum entry age for the Special Agent position was essential to the performance of the duties of that position and that the agency therefore did not violate the appellant’s veterans’ preference rights by failing to waive this requirement in considering the appellant’s application. *Id.* at 5.

### **Further Proceedings Regarding the USERRA Appeal**

¶9 With respect to the appellant's USERRA appeal, the Board found that the appellant's allegation that his military status was a factor in the agency's decision not to proceed with his application was sufficient to satisfy USERRA's jurisdictional requirements, and it remanded the USERRA appeal to afford the appellant the opportunity to prove by preponderant evidence that his military status was at least a motivating or substantial factor in the agency's decision to deny the appellant initial employment. The Board also instructed the administrative judge to issue a new initial decision after affording the parties an opportunity to conduct further discovery and to submit further evidence and argument regarding the USERRA appeal. *Isabella v. Department of State*, 102 M.S.P.R. 211, ¶¶ 10-15 (2006).

¶10 Following the remand, the administrative judge ordered the agency to respond to all of the appellant's outstanding interrogatories, either by supplying the requested information or by objecting to particular requests. The administrative judge also ordered the agency to provide any and all evidence in its possession establishing that November 15, 2004 was the earliest pre-scheduled appointment date for the training class of Special Agent candidates who had applied under vacancy announcement SA-04-01. USERRA Appeal Remand File (UARF), Tab 2. The appellant submitted a statement in which he averred the following:

I received final confirmation that State had received and was reviewing / processing my completed packet on 30 June 2004. Over two months elapsed where, from what I can determine no action was made to process or forward my application. During that period, as required, I notified State of an upcoming 19-day annual training tour, emailed the DSO office while away, and called in early September to check on the status of my application as I had not received any further direction. As nothing had been done on my application, time for processing the application was now noted as a concern, and I offered to go directly to their office in Washington D.C. for the interview and test. After having to explain the circumstances, i.e.,

military deployments, of why I had not applied to an earlier vacancy announcement to State's DSO recruiting decision maker, he stated that it could be done in the time available when he was under the impression that I had separated from active duty. Indeed, he even stated that I could buy back retirement years from my military service. After he learned that I had a Reserve affiliation rather than separating from the military, which would be the only other alternative for someone seeking the position in question, he stated in a manner that I did not perceive as favorable: 'oh you're a reservist.' He then changed his mind and said that it could not be done. This conversation leads me to believe a) that although the DSO office did not take any action to process my application in over two months, if they wished, it could still be done prior to my 37<sup>th</sup> birthday, and b) one could reasonably view his decision not to proceed as a USERRA concern. If necessary, I can always further substantiate this assertion through any neutrally administered polygraph test. Attempts to address the overall matter with a higher authority at State received no response until my Congressman intervened.

UARF, Tab 6.

¶11 The agency subsequently responded to the administrative judge's order regarding the pre-scheduled appointment date for the candidates who had applied for the Special Agent position under vacancy announcement SA-04-01. The agency asserted that appointment dates for Special Agents are set to coincide with orientation classes offered by the agency's primary training facility, the Foreign Service Institute (FSI). UARF, Tab 7. The agency also submitted the declaration of Vicky M. LeMaster, a Supervisory Human Resources Specialist for the Bureau of Diplomatic Security's Recruitment Office, which described the application and selection process for the Special Agent position. According to LeMaster's declaration, a candidate is not deemed unqualified on the basis of age until such time as the candidate actually reaches his 37<sup>th</sup> birthday. LeMaster also declared that candidates who have submitted a complete application are divided into appropriate geographic groupings and notified of the date and time of their testing before the agency's Board of Examiners (BEX), although candidates are also advised that they may travel at their own expense to Washington, D.C.,

where the tests are given with much greater frequency. *Id.*, Exhibit A. If the candidate's test score is competitive, the agency places the candidate's name on a rank-ordered list of eligible candidates where it can remain for 24 months or until age 37.<sup>2</sup> When the agency reaches a candidate on the list, it extends a conditional offer of employment, and, upon acceptance of the conditional offer, the candidate must complete paperwork for a top-secret background investigation and undergo a medical examination that must result in the candidate receiving a "class one" medical clearance. If the candidate is granted a top-secret security clearance upon completion of the background investigation, the agency's Final Review Panel determines whether the candidate is suitable for a career in the Foreign Service. If the candidate successfully completes all of these steps, the agency extends a final offer of employment which specifies a salary and a class date. LeMaster further declared that the process can take from 120 days to over a year and that it was very unlikely that any individual who applied under vacancy announcement SA-04-01, which closed on June 11, 2004, would have been able to make it through the process in time to attend the class scheduled for November 15, 2004. In addition, LeMaster declared that records she reviewed indicated that FSI offered the orientation classes starting on September 20, 2004, November 15, 2004, and in January 2005, but her understanding was that the first appointment of any individual who applied under vacancy announcement SA-04-01 was made on January 23, 2005, and that the agency appointed other selectees who had applied under that vacancy announcement later in 2005 or in 2006. *Id.*

¶12 The agency also submitted a spreadsheet which indicated the dates on which the BEX conducted examinations for the position. UARF, Tab 7, Exhibit A, Tab 3. According to this schedule, the agency scheduled an examination for

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<sup>2</sup> When an agency places a non-disabled preference-eligible candidate on such a list, it must augment such candidate's score by the appropriate number of veterans' preference points, and the names of preference-eligible candidates are entered ahead of other candidates having the same rating. *See* 5 U.S.C. §§ 3313(2)(B), 3320.

Seattle, Washington, the appellant's preferred testing site, during the period from August 23-27, 2004, and scheduled examinations for Washington, D.C. on numerous dates during the period from early August through November 2004. *Id.*

¶13 In response to the agency's submissions, the appellant stated that the agency did not notify him of the testing it conducted in Seattle in August 2004 despite the fact that the agency confirmed receipt of his complete application on June 30, 2004, and he further stated that the senior recruiting official with whom he spoke declined the appellant's request to take the test in Washington, D.C. after this official noted that the appellant had a Reserve affiliation. UARF, Tab 8. The appellant also alleged that the agency's Bureau of Diplomatic Security website indicated that the Office of Personnel Security and Suitability could grant an interim security clearance within a few weeks after a job candidate submitted a completed security clearance application package, and he continued to assert that the agency could have used various means to expedite the appointment process but refused to do so after learning of the appellant's ongoing Reserve obligation. *Id.* Regarding the agency's responses to the appellant's discovery requests, the appellant noted that he found the responses "foggy and unsupported," *id.*, but neither party submitted these responses into the record. The agency responded to the appellant's allegations regarding the possibility of granting him an interim security clearance in order to expedite the appointment process by submitting the declaration of Margaret M. Dean, the Staff Director of the Board of Examiners, who declared that the agency's Office of Diplomatic Security confirmed to her that interim security clearances are not available for Foreign Service appointments, including appointments to the Special Agent position for which the appellant had applied. UARF, Tab 10.

¶14 Prior to the close of the record, the appellant submitted additional statements in which he reiterated his prior contentions regarding the possibility of granting him an interim security clearance and allowing him to "buy back" his military time for civilian service credit, and he provided additional details

regarding his discussion with the agency recruiting official who initially indicated that it was possible to expedite the appellant's appointment process, but changed his mind upon learning of the appellant's ongoing obligations in the military reserves. UARF, Tabs 11, 12. The appellant also alleged that he called the Bureau of Diplomatic Security in early September 2004 and spoke to a Ms. Gibson, who agreed to allow the appellant to travel to Washington, D.C, to complete the examination and interview process due to the appellant's age. UARF, Tab 11.<sup>3</sup>

¶15 The agency subsequently submitted its final argument in which it contended that the appellant had failed to meet his burden of establishing that his military status was a substantial or motivating factor in the agency's action. UARF, Tab 13. It noted that the only support the appellant offered as evidence that his military status was a motivating factor in his nonselection for the position was "a purported statement made by an unnamed 'senior' DS recruitment official in the course of a telephone conversation to the effect that 'oh you're a reservist.'" *Id.* The agency further contended, "There is no evidence offered to indicate that the statement was actually made, who made it,<sup>4</sup> when it was made, or to substantiate the assertion that there was some discriminatory motive underlying the alleged statement." *Id.* The agency also contended that, even if

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<sup>3</sup> The record does not indicate that the appellant actually completed the examination process.

<sup>4</sup> It is not entirely clear why the appellant did not name the agency recruiting official with whom he allegedly spoke regarding expediting his application. The appellant raised this allegation very early in the course of his USERRA appeal, however, USERRA Appeal Initial Appeal File, Tab 4 at 4, and the agency certainly could have asked the appellant to name this individual in the course of conducting discovery. In addition, the appellant did identify this individual as "Disney" in a motion the appellant filed requesting that the administrative judge recuse himself. UARF, Tab 16. We note that the agency spreadsheet which identified the dates on which the BEX conducted the examinations for the position indicates that someone named "Disney" was among the agency employees responsible for conducting the examinations. UARF, Tab 7, Exhibit A, Tab 3.

the appellant proved that his military status was a substantial or motivating factor in his nonselection, the agency established that it would have taken the same action regardless of his military status, arguing that the appellant's application was treated in accordance with long-standing policy and procedures and that the agency appointed no applicant under vacancy announcement SA-04-01 prior to January 23, 2005. The agency concluded that the appellant's application for the position did not arrive with sufficient time to permit the agency to complete its required procedures before the appellant reached his 37<sup>th</sup> birthday. *Id.*

¶16 After the close of the record, the appellant attempted to file an additional submission, but the agency objected, and the administrative judge rejected the appellant's submission. UARF, Tabs 14, 15. The appellant subsequently requested that the administrative judge recuse himself, but the administrative judge denied the request. UARF, Tabs 16, 17. The administrative judge also denied the appellant's subsequent request to certify the ruling on the appellant's motion as an interlocutory appeal. UARF, Tabs 18, 20.

¶17 On October 6, 2006, the administrative judge issued an initial decision in which he denied the appellant's request for corrective action with respect to the USERRA claim, finding that the agency's failure to adopt a less lengthy procedure to allow for the appellant's appointment prior to his 37<sup>th</sup> birthday did not constitute a violation of the appellant's rights under USERRA. *Isabella v. Department of State*, MSPB Docket No. DA-3443-05-0550-B-1, slip op. (Initial Decision, Oct. 6, 2006). With regard to the appellant's claims regarding the agency recruiting official who allegedly indicated that the agency could expedite the process but then changed his mind after learning of the appellant's ongoing military obligation, the administrative judge stated as follows:

Needless to say, the tone of voice of this phantom, regarding a fanciful method for setting aside the threshold age requirement applicable to all applicants, falls well short of establishing that the appellant's military status was a motivating or substantial factor in the agency's decision to deny him initial employment.

*Id.* at 7.

¶18 On October 16, 2006, the appellant filed a single petition for review in which he contested the initial decisions issued with regard to his VEOA and USERRA appeals. VEOA Appeal Remand Petition For Review File (VARPFRF), Tab 1. In support of his argument that the administrative judge erred in finding that the maximum entry age was essential to the performance of the duties of the position, the appellant submitted documentation which indicated that Department of Justice policy allows an Assistant Attorney General to waive the maximum entry age for initial entry into a primary law enforcement position until the date immediately preceding an individual's 40<sup>th</sup> birthday. It appears that the appellant had previously submitted this documentation in the submission that the administrative judge rejected as untimely filed. In support of his USERRA claim, the appellant argues that he presented information which establishes that his affiliation with the military reserves was a motivating factor in the agency's decision to terminate his candidacy for the position. *Id.*

¶19 The agency filed separate responses to the appellant's consolidated petition for review. With respect to the appellant's VEOA appeal, the agency reiterates its contention that the maximum entry age requirement is essential to the performance of the duties of the position, and it objects to the Board's consideration of the appellant's evidence concerning the Department of Justice policy on the basis of relevance and timeliness. VARPFRF, Tab 3. With respect to the appellant's USERRA appeal, the agency reiterates the arguments it raised before the administrative judge regarding the credibility of the appellant's assertions describing his alleged discussion with an agency recruiting official. It also argues that, even if the appellant established that his military obligation was a substantial or motivating factor in the agency's decision to end the appellant's candidacy, it submitted sufficient evidence to meet its burden of proving that it would not have selected the appellant anyway, for a valid reason. USERRA Appeal Remand Petition For Review File (UARPFRF), Tab 3.

ANALYSIS

**The agency violated the appellant's veterans' preference rights under 5 U.S.C. §§ 3312(a)(1) and 3320 when it did not waive the maximum entry age requirement for the position of Special Agent.**

¶20 As a preliminary matter, we note that the agency asserted that the Secretary of State has designated all Foreign Service positions, including Special Agent positions, as excepted service positions, and the appellant has not contested this assertion. In addition, the agency's assertion appears consistent with the provisions of the Foreign Service Act of 1980. Pursuant to the Act, the Secretary of State is authorized to designate and classify positions in the Department of State and at Foreign Service posts which are to be occupied by "members of the Service," and such positions are excepted from the competitive service. 22 U.S.C. § 3981. The Act defines "members of the Service" to include "Foreign service personnel . . . who provide skills and services required for effective performance of the Service," 22 U.S.C. § 3903, and, despite the fact that 22 U.S.C. § 4823 provides that Special Agent positions shall be filled in accordance with the provisions of the Act and title 5, the language of § 4823 does not indicate that Special Agents are not members of the Service. Accordingly, we find that the record establishes that the Special Agent position at issue in this appeal is an excepted service position.

¶21 The Board has previously determined that the appellant established jurisdiction over his VEOA appeal by exhausting his remedies with the Department of Labor (DOL) and by making nonfrivolous allegations that he is a preference eligible, that his nonselection occurred after October 30, 1998, and that the agency violated his veterans' preference rights under 5 U.S.C. § 3312(a)(1) by failing to waive the maximum entry age with respect to his application for the position of Special Agent. *Isabella*, 102 M.S.P.R. 259, ¶¶ 5, 13. Now that the record is complete, we find that the appellant has established that he is preference eligible and that his nonselection occurred after October 30,

1998 by preponderant evidence. The appellant established his status as a preference eligible by submitting a copy of his DD Form 214 which indicated that he was the recipient of the Armed Forces Expeditionary Medal and the Global War on Terrorism Expeditionary Medal, and the agency has not contested the authenticity nor the accuracy of this document. *See Trabue v. U.S. Postal Service*, 102 M.S.P.R. 14, ¶ 8 (2006) (“[A]n employee’s DD-214 showing receipt of any Armed Forces Expeditionary Medal is acceptable proof of entitlement to veterans’ preference, regardless of whether the DD-214 form specifies the name of the theater or country of service for which the medal was awarded.”). The appellant was not selected for a position for which he timely applied in 2004, so it is obvious that the nonselection occurred after October 30, 1998.

¶22 To be entitled to relief under VEOA, however, the appellant must also prove by preponderant evidence that the agency’s action violated one or more of his statutory or regulatory veterans’ preference rights. *See Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1019 (Fed. Cir. 2002) (the Board’s regulations place the burden of proof on the appellant with respect to merits issues that are also jurisdictional issues); *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 10 (2006) (to be entitled to relief under VEOA, the appellant must prove by preponderant evidence that the agency’s selection violated one or more of his statutory or regulatory veterans’ preference rights). Accordingly, the question as to whether the appellant is entitled to relief with respect to his VEOA appeal turns on whether the agency was required to waive the maximum entry age for the Special Agent position pursuant to 5 U.S.C. §§ 3312(a)(1) and 3320.

¶23 As noted above, the appellant offered little or no evidence on this issue following the Board’s prior remand of his VEOA appeal. *See* ¶ 7, *supra*. After the record on review closed, the appellant apparently attempted to submit evidence to establish that the Department of Justice has a policy that allows waiver of the maximum entry age requirements with respect to certain of the law enforcement officer positions within that agency, but, because the appellant

submitted this evidence after the record closed without establishing that it was not readily available before the record closed, we find that the administrative judge did not abuse his discretion in rejecting this submission. *See* 5 C.F.R. § 1201.58(c) (“Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.”); *Barnes v. U.S. Postal Service*, 71 M.S.P.R. 337, 340 n.2 (1996) (administrative judges have broad discretion to control the proceedings and to extend time limits for good cause shown). Furthermore, the appellant’s attempt to introduce such evidence with his petition for review is equally unavailing. The appellant did not explain why he could not have obtained and submitted this evidence prior to the close of the record, and, under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party’s due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

¶24

In any event, the history of various provisions of the Foreign Service personnel system indicates that Congress intended to treat Diplomatic Security Service Special Agents in accordance with the treatment provided to law enforcement officers in other federal agencies. For example, the authority of the Secretary of State to prescribe maximum entry age restrictions for the position of Special Agent provided by 22 U.S.C. § 4823 is essentially identical to the authority the heads of other executive agencies have to determine and fix the maximum age limits for an original appointment to a position as a law enforcement officer or firefighter provided by 5 U.S.C. § 3307(d), (e). The legislative history of 22 U.S.C. § 4823 indicates that Congress provided the Secretary of State the authority to prescribe minimum and maximum entry age restrictions because “[s]uch age requirements are commonly found in organizations having security-related and law enforcement responsibilities.” H.R. Rep. No. 99-494, at 10 (1986). In 1998, Congress enacted the “Department

of State Special Agents Retirement Act of 1998,” Pub. L. No. 105-382, 112 Stat. 3406 (1998), for the purpose of providing “that the annuities of certain special agents and security personnel of the Department of State be computed in the same way as applies generally with respect to Federal law enforcement officers.” H.R. Rep. No. 105-755(I), at 1 (1998). Section 3 of this Act provided that individuals covered by the Act “shall be separated from the Service on the last day of the month in which such individual . . . attains 57 years of age or completes 20 years of service if then over that age.” Pub. L. No. 105-382, § 3 (codified at 22 U.S.C. § 4052(a)(2)). The legislative history of this Act indicates that Congress enacted the mandatory retirement provisions to subject Foreign Service special agents “to the same mandatory retirement provisions that currently apply to law enforcement officers under the Civil Service Retirement System.” H.R. Rep. No. 105-755(I), at 10.<sup>5</sup> In addition, as described previously, the memoranda through which Secretary of State Schultz initially set the maximum entry age at less than 35 years of age and Secretary of State Christopher raised the maximum entry age to less than 37 years of age indicate that the recommendations which these officials approved were based, in large part, on the treatment afforded to law enforcement officers by other federal agencies. *See supra*, ¶¶ 5-6. Based on the discussion set forth above, we accept the agency’s contention that the age limits applicable to the Special Agent position in the Diplomatic Security Service exist for the same

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<sup>5</sup> Just as the civil service has two retirement systems for its employees, the Civil Service Retirement System under 5 U.S.C. ch. 83 and the Federal Employees’ Retirement System under 5 U.S.C. ch. 84, the Foreign Service also has two retirement systems for its employees, the Foreign Service Retirement and Disability System under 22 U.S.C. ch. 52, subch. VIII, part I, and the Foreign Service Pension System under 22 U.S.C. ch. 52, subch. VIII, part II. The mandatory retirement provision for Special Agents set forth in 22 U.S.C. § 4052 appears in part I of subchapter VIII, but these mandatory retirement provisions also apply to Special Agents covered under part II of subchapter VIII by virtue of 22 U.S.C. § 4071d(a)(1), which provides that any participant of the Foreign Service Pension System “shall be retired under the conditions specified in section[] 4052 . . . of this title and receive benefits under this part.”

purpose as the age limits applicable to law enforcement officer positions in other federal agencies.

¶25 Thus, the question is whether age is essential to the performance of the duties of federal law enforcement officer positions. As a general rule, maximum age requirements are prohibited with respect to civil service positions in the federal government by virtue of 5 U.S.C. § 3307(a) and 29 U.S.C. § 633a. Section 3307(a) of title 5 establishes a general rule prohibiting the establishment of maximum age requirements for competitive service positions:

Except as provided in subsections (b), (c), (d), (e), and (f),<sup>6</sup> appropriated funds may not be used to pay an employee who establishes a maximum-age requirement for entrance into the competitive service.

5 U.S.C. § 3307(a). Congress enacted 29 U.S.C. § 633a as an amendment to the Age Discrimination in Employment Act of 1967 (ADEA) to make the provisions of the ADEA applicable to federal executive agencies. The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(B)(2), 88 Stat. 55 (1974) (codified as amended at 29 U.S.C. § 633a(a)). In pertinent part, this section provides as follows:

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of title 5<sup>7</sup> . . . shall be made free from any discrimination based on age.

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<sup>6</sup> These exceptions allow the heads of the applicable agencies to fix maximum entry ages for original appointments to positions as air traffic controllers (5 U.S.C. § 3307(b)), United States Park Police (5 U.S.C. § 3307(c)), law enforcement officer and firefighter positions subject to the Civil Service Retirement System (5 U.S.C. § 3307(d)), law enforcement officer and firefighter positions subject to the Federal Employees' Retirement System (5 U.S.C. § 3307(e)), and nuclear material couriers (5 U.S.C. § 3307(f)).

<sup>7</sup> We note that the Department of State is an "executive department" pursuant to 5 U.S.C. § 101 and that an executive department is an "executive agency" for the

(b) Enforcement by the Equal Employment Opportunity Commission . . . ; bona fide occupational qualification

. . . Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

29 U.S.C. § 633a(a), (b). Thus, unless a position is exempt from the provisions of the ADEA, a federal executive agency may not set a maximum age requirement for a position unless the Equal Employment Opportunity Commission (EEOC) determines that age is a bona fide occupational qualification (BFOQ) necessary to the performance of the duties of the position. *See* 29 C.F.R. § 1614.201(b) (“The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.”); 5 C.F.R. § 338.601 (a maximum age requirement may not be applied in either competitive or noncompetitive examinations for positions in the competitive service except as provided by 5 U.S.C. § 3307 or the ADEA).

¶26 The EEOC regulations implementing the ADEA make it exceptionally difficult, however, to establish age as a valid qualification requirement for a position that is not exempt from the ADEA. These regulations state, “[T]his concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed.” 29 C.F.R. § 1625.6(a); *see also Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (“The restrictive language of the statute and the consistent interpretation of the administrative agencies charged with enforcing the statute convince us that, like its Title VII counterpart, the BFOQ exception

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purposes of title 5 pursuant to 5 U.S.C. § 105. Thus, the Department of State is an executive agency as defined in section 105 of title 5.

‘was in fact meant to be a narrow exception to the general prohibition’ of age discrimination contained in the ADEA.”). The regulations further provide as follows:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer’s objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

29 C.F.R. § 1625.6(b). With respect to alternatives that might effectuate the employer’s goals with less discriminatory impact, the U.S. Supreme Court has stated, “Application of the [ADEA] starts with a presumption in favor of requiring the employer to make an individualized determination.” *Kimel v. Florida Board of Regents*, 528 U.S. 62, 87 (2000); *see also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 316 n.10 (1976) (noting that the introduction of individual examinations augmented the rationality of the state’s mandatory retirement scheme).

¶27 Thus, the concept of age as a BFOQ for a particular position is closely related to the concept of age as a requirement that is essential to the performance of the duties of the position. In fact, the Office of Personnel Management (OPM), which has the authority to prescribe and enforce regulations for the administration of the provisions of title 5 that implement veterans’ preference policy, 5 U.S.C. § 1302(b), (c), has implemented regulations which provide that agencies must waive requirements as to age when the requirement is not essential to the performance of the duties of an excepted service position, 5 C.F.R. § 302.202(a), and prohibit the application of a maximum-age requirement in examinations for positions in the competitive service except as provided by 5 U.S.C. § 3307 or by the ADEA, 5 C.F.R. § 338.601.

¶28 OPM, however, has not promulgated regulations describing when an age requirement is essential to the performance of the duties of a position. Nevertheless, in its Operating Manual concerning Qualification Standards for General Schedule Positions, OPM expressly ties the waiver of age requirements for preference-eligible candidates to the provisions of the ADEA. Specifically, the manual provides as follows:

Title 5 U.S.C. 3307(a) prohibits the establishment of a maximum entry age for Federal positions, except as provided below. The prohibition against establishing maximum entry age limits applies to noncompetitive actions as well as to competitive appointments, to the excepted as well as to competitive services, and to all agencies, including OPM. . . . There are no maximum entry age restrictions for most positions in the competitive service except as follows:

. . . The head of any agency is authorized to establish a maximum entry age for original appointment to positions of law enforcement officers or firefighters; and

Title 29 U.S.C. 633a permits agencies to establish a maximum age requirement only in instances where they have proven to the Equal Employment Opportunity Commission that age is a bona fide occupational qualification necessary for the performance of the duties of a particular position.

Maximum age restrictions established under 29 U.S.C. 633a or under the special authorities in 5 U.S.C. 3307 are not waived for persons entitled to veterans preference.

OPM, Operating Manual, Qualification Standards for General Schedule Positions, Part E.9(c)(2), available online at <http://www.opm.gov/employ/qualifications/SEC-II/s2-e8.asp>. Thus, this manual essentially provides that agencies are not required to waive age restrictions for preference eligibles in only two circumstances: (1) when the EEOC has determined that age is a BFOQ necessary for the performance of the duties of a particular position; or (2) when the maximum age restriction was established pursuant to one of the special authorities provided by 5 U.S.C. § 3307(b), (c), and (d).

¶29 As we stated in our prior decision remanding the appellant's VEOA appeal, 5 U.S.C. §§ 3312(a)(1) and 3320 require agencies to waive age requirements in determining the qualifications of a preference eligible for appointment to a position in the competitive or excepted service unless the requirement is essential to the performance of the duties of the position. *Isabella*, 102 M.S.P.R. 259, ¶ 13. Thus, the guidance set forth in OPM's Operating Manual suggests that OPM has determined that age requirements are essential to the duties of a civil service position only when the EEOC has determined that age is a BFOQ necessary for the performance of the duties of a particular position or when the age restriction was established pursuant to a special statutory authority. To the extent that OPM has interpreted 5 U.S.C. § 3312(a)(1) to equate the concept of an age requirement that is essential to the performance of the duties of a position with the concept of a BFOQ that is necessary to the performance of the duties of a position, we believe that OPM's interpretation is persuasive and entitled to considerable weight. *See Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶ 14 (2006) (although positions expressed by OPM in issuances that were not subject to notice-and-comment rulemaking procedures are not entitled to the deference accorded to regulations, they are entitled to some weight in accordance with such factors as the consistency of the agency's position, its formality, and its persuasiveness). OPM's interpretation that maximum age restrictions established under the ADEA or under special statutory authorities are not waived for persons entitled to veterans' preference has been in place since at least May of 1981, *see* Federal Personnel Manual (FPM), chapter 338, subchapter 5, § 5-3 (May 7, 1981), and the interpretation was published in formal documents, i.e., the FPM and an operating manual "directed primarily to personnel specialists who need to determine whether applicants meet the minimum requirements for the position being filled." OPM, Operating Manual, Qualification Standards for General Schedule Positions, Section I, available online at <http://www.opm.gov/qualifications/sec-i/s1-a.asp>.

¶30 Furthermore, while neither the FPM nor the Operating Manual explain the reasoning supporting OPM's interpretation, OPM's position regarding BFOQ's is persuasive. The Veterans' Preference Act requires agencies to waive an age requirement unless "the requirement is essential to the performance of the duties of the position." 5 U.S.C. § 3312(a)(1). The adjective "essential" means "absolutely necessary; indispensable." *The Random House College Dictionary* 451 (revised ed. 1980). While the ADEA speaks in terms of a BFOQ "necessary to the performance of the duties of the position," 29 U.S.C. § 633a(b), the criteria the EEOC applies in determining whether an age requirement qualifies as a BFOQ permit employers to use age as a qualification for a position only when age is "reasonably necessary to the essence of the business," when all or substantially all of the individuals excluded are disqualified or the disqualifying trait for some of the individuals cannot be ascertained except by reference to age, and, with respect to positions in which the employer's objective is the goal of public safety, when there are no acceptable alternatives which would better advance the employer's objective or equally advance it with less discriminatory impact. *See supra*, ¶ 26. Accordingly, while the ADEA uses the term "necessary" rather than the term "essential" to describe the standard an agency must meet in order to impose an age requirement with respect to a position, it is apparent that the regulatory BFOQ criteria are designed to allow an employer to impose an age requirement only when the employer establishes that age is "absolutely necessary" or "indispensable" to the performance of the duties of the position. Therefore, for all practical purposes, the EEOC's determination that age is a BFOQ necessary for the performance of the duties of the position is equivalent to a finding that age is essential to the performance of the duties of the position. Because 5 U.S.C. § 3312(a)(1) does not require agencies to waive an age requirement that is essential to the performance of the duties of the position, OPM's position that 5 U.S.C. § 3312(a)(1) does not require agencies to waive maximum age restrictions for preference-eligible applicants when the restrictions

were established in accordance with the provisions of the ADEA is reasonable and persuasive. In addition, OPM's position is consistent with both the veterans' preference requirement at 5 U.S.C. § 3312(a)(1) and the merit system principle that all employees and applicants should receive fair and equitable treatment in all aspects of personnel management with regard to age. *See* 5 U.S.C. § 2301(b)(2).

¶31 However, OPM's position that agencies are not required to waive age requirements established pursuant to special statutory authorities is not as persuasive. First, the language of 5 U.S.C. § 3312(a)(1) does not exempt statutorily-authorized age requirements from those that an agency must waive on behalf of preference eligibles, and the agency has pointed to no authority to suggest that Congress intended to exclude statutorily-authorized age requirements from the waiver provisions of the Veterans' Preference Act, at least where the statute authorizing the age requirement was not enacted based on a congressional finding that age was essential to the performance of the duties of the position. The Secretary of State derives the authority to set a maximum entry age for the position of Diplomatic Security Service Special Agent from 22 U.S.C. § 4823, but the legislative history of that provision indicates that Congress granted the Secretary such authority on the grounds that "age requirements are commonly found in organizations having security-related and law enforcement responsibilities." *See supra*, ¶ 24. Thus, while the legislative history of this Foreign Service provision indicates that Congress authorized a maximum entry age for the Special Agent position as consistent with the practice of other law enforcement organizations, it does not indicate that Congress made a specific finding that age was essential to the performance of the duties of the position.

¶32 Still, as we stated previously, it is apparent that Congress intended to treat Diplomatic Security Service Special Agents in accordance with the treatment provided to law enforcement officers in other federal agencies. *See supra*, ¶ 24. Thus, if Congress authorized maximum entry age requirements for other federal

law enforcement officers based on a finding that age was essential to the performance of the duties of those positions, the agency could reasonably argue that such a finding should carry over to the authority 22 U.S.C. § 4823 grants to the Secretary of State. Accordingly, we will consider whether Congress authorized federal agencies to fix maximum entry age limits for law enforcement officer positions based on a finding that age was essential to the performance of the duties of such positions.

¶33 Congress amended 5 U.S.C. § 3307 in 1974 to include subsection (d), the exception from the general rule for law enforcement officers and firefighters, to coincide with changes Congress enacted with respect to the retirement provisions for these employees. Pub. L. No. 93-350, 88 Stat. 355 (1974). The changes to the retirement provisions included a requirement to separate a law enforcement officer or firefighter from the service on the last day of the month in which such employee became 55 years of age or completed 20 years of service if then over that age.<sup>8</sup> *Id.*, § 4 (codified as amended at 5 U.S.C. § 8335(b)). However, Congress also amended the retirement provisions to allow such employees to retire earlier and with an annuity calculated at a higher percentage of average pay as compared to most other federal employees. *Id.*, §§ 5 (codified at 5 U.S.C. § 8336(c)(1)) (entitling a law enforcement officer or firefighter to an annuity after becoming 50 years of age and completing 20 years of service as a law enforcement officer or firefighter, or any combination of such service), 6 (codified as amended at 5 U.S.C. § 8339(d)(1)) (establishing the annuity of an employee retiring under the provisions applicable to law enforcement officers and firefighters as 2.5% of average pay multiplied by so much of their total service as

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<sup>8</sup> The amendment also permitted the head of an agency to exempt an employee from the mandatory retirement provision until the employee became 60 years of age when the head of the agency determined that the public interest so required. Pub. L. No. 93-350, § 4.

did not exceed 20 years, plus 2% of average pay multiplied by so much of their total service as exceeded 20 years).<sup>9</sup>

¶34 In *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982), the court addressed the propriety of a maximum entry age that the Department of Justice Bureau of Prisons established for its law enforcement positions pursuant to 5 U.S.C. § 3307(d). The appellants had challenged the age limit on the basis that it violated the ADEA and the Administrative Procedures Act. *Stewart*, 673 F.2d at 487. In rejecting the appellants' arguments, the court extensively discussed the basis for the passage of Pub. L. No. 93-350.

¶35 In describing the legislative history of the law, the court stated that Pub. L. No. 93-350 was expected to improve the incentives for early retirement of law enforcement officers in two ways: The amendments made it more economically practicable for law enforcement officers to retire early by providing an extra half a percentage point multiple for the first 20 years of service; and the amendments made it less worthwhile for such employees to work beyond 20 years by lowering the rate of computation for years of service in excess of 20 years. *Id.* at 487 n.4. With respect to the authority to set maximum entry age limits for law enforcement officer and firefighter positions, the court found that the legislative history of the amendments indicated that Congress intended to provide agencies with the authority to structure their hiring practices to implement the retirement scheme for law enforcement officers. *Id.* at 493.

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<sup>9</sup> At the time, the basic annuity for civil service employees was 1.5% of their average pay for each of the first five years of service, 1.75% for the next five years of service, and 2.0% for additional years of service. 5 U.S.C. § 8339(a) (1970). Prior to the 1974 amendments, a law enforcement officer could retire at age 50 with an annuity of 2.0% of average pay multiplied by the number of years of service if he completed 20 years of service, the head of the agency recommended that he receive an enhanced annuity, and the Civil Service Commission concurred. 5 U.S.C. § 8336(c) (1970); see *Stewart v. Smith*, 673 F.2d 485, 487 & n.4 (D.C. Cir. 1982).

¶36 The court also determined that the age limit being challenged as violative of the ADEA in *Stewart*, i.e., the Department of Justice Bureau of Prisons' choice of 34 as the maximum age for entry into its law enforcement positions, was supported by the statutory scheme implemented by Pub. L. No. 93-350. The appellants had argued that 5 U.S.C. § 3307(d) should be interpreted as merely authorizing maximum entry ages for law enforcement officer positions, with the legality of the maximum age policy adopted by the agency remaining contingent on whether the policy met the ADEA's BFOQ standard. *Id.* at 490-91. The Department of Justice had argued that § 3307(d) took maximum age rules for law enforcement officer positions outside the ambit of the ADEA, noting that § 3307(d) and the ADEA set out different procedures for establishing age-based requirements. *Id.* at 491-92. The court accepted the Department of Justice's argument and agreed that § 3307(d) was an exception to the ADEA, noting that accepting the appellants' argument would require the court to adopt a strained reading of § 3307(d):

Appellants' attempt to superimpose ADEA standards on agency discretion under section 3307(d), however, seems problematic when section 3307(d) is read in its entirety; for instead of simply lifting a general ban on agencies' setting age qualifications for law enforcement employment, section 3307(d) sets forth a specific procedure for agencies to follow in setting such qualifications. Under section 3307(d), and implementing executive orders, an entry age qualification must be proposed initially by the agency and concurred in by OPM. In contrast, the ADEA vests sole authority to establish exemptions from the general ban against age discrimination with the EEOC. . . . And, once the legislative history of section 3307(d) is examined, it is evident that Congress meant to do what the statute's terms suggest, namely, to provide for maximum age requirements for law enforcement officers on the theory that these jobs involve special concerns that require consideration of factors not ordinarily accounted for in the ADEA's independent scheme for evaluating age restrictions.

*Id.* at 492. The court also noted that the legislative history indicated that Congress provided agencies with the authority to set maximum entry ages for law

enforcement officers to enhance the scheme which required mandatory retirement at an early age. *Id.* at 493. For example, the court cited a letter the Civil Service Commission sent to the relevant congressional committees that stated, “It is important . . . to have a limit on the age of entry that is related to [mandatory retirement at age 55] so persons entering the occupations can be provided a full career.” *Id.* (citing H.R. Rep. No. 93-463, at 9 (1973)). The court further noted that Congress enacted the provisions of the law to promote the “youth and vigor” of the law enforcement profession and that the maximum entry age limit enabled employees to complete 20 years of service by the time they reached the mandatory retirement age of 55. *Id.* at 495. The court concluded that the exception set forth in 5 U.S.C. § 3307(d) “served to remove maximum entry ages from the scope of the ADEA and represents Congress’ judgment that such maximum entry ages are an appropriate tool for controlling the age composition of an agency’s workforce.” *Id.* at 500.<sup>10</sup>

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<sup>10</sup> Other federal courts, as well as the EEOC, have generally concluded that statutory provisions which authorize maximum entry ages and mandatory retirement ages are generally exceptions to, rather than implementation of, the ADEA provisions applicable to federal employees. *See Reed v. Reno*, 146 F.3d 392, 394 (6<sup>th</sup> Cir. 1998) (“It is well-established that the maximum entry age for law enforcement officers is a valid exception to the ADEA.”); *Strawberry v. Albright*, 111 F.3d 943, 947 (D.C. Cir. 1997) (finding that the mandatory retirement provisions contained in the Foreign Service Act of 1980 and incorporated in the Foreign Service Pension System were not controlled by the ADEA); *Patterson v. U.S. Postal Service*, 901 F.2d 927, 929-30 (11<sup>th</sup> Cir. 1990) (rejecting the argument that a maximum age limit adopted pursuant to 5 U.S.C. § 3307(d) must be considered under the ADEA’s BFOQ standards); *Brumbaugh v. Dahlberg*, EEOC Appeal No. 01A05531 (Mar. 29, 2001) (concluding that 10 U.S.C. § 10218, which mandates separation of all non-dual status military technicians who are eligible for an unreduced annuity, is a statutory exception to the ADEA); *DiLuglio v. Perry*, EEOC Appeal No. 01931715 (Aug. 22, 1994) (“The legislative history of 5 U.S.C. § 3307(d) demonstrates that Congress sought to create a special age entry rule – an exception to the ordinary prohibition against age-based discrimination under the ADEA – where a young work force was necessary due to the nature of the work, and where law enforcement officers would receive especially generous retirement benefits to offset a shorter work life.”).

¶37 Given the legislative history of Pub. L. No. 93-350, and the court's reliance on that history in *Stewart* as support for its conclusion that the authority to set maximum entry age requirements for law enforcement positions was a tool Congress provided to federal agencies to control the age composition of their law enforcement workforce, there is little doubt that Congress enacted 5 U.S.C. § 3307(d) in recognition of the fact that

these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire.

S. Rep. No. 93-948 (1974). Our reviewing court, the U.S. Court of Appeals for the Federal Circuit, has also recognized that three of the most probative factors in assessing whether a position exists as a law enforcement position subject to the special retirement provisions are related to age, i.e., whether there is an early mandatory retirement age, whether there is a youthful maximum entry age, and whether the job is physically demanding so as to require a youthful workforce. *Watson v. Department of the Navy*, 262 F.3d 1292, 1303 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1083 (2002).

¶38 Nevertheless, while the legislative history of 5 U.S.C. § 3307(d) and the special retirement provisions for law enforcement officers clearly establishes Congress' concern with the age composition of federal agencies' law enforcement officers, it also establishes that Congress' primary concern was not age, per se, but the effect that advancing age might have on the physical capabilities necessary to meet the vigorous demands of these positions. *See Crowley v. United States*, 398 F.3d 1329, 1339 (Fed. Cir. 2005) (there are 2 major factors that should be considered in determining whether a position should be conferred law enforcement officer status: First, and predominant, is the physical vigorousness required by the position; if the position is found to be vigorous,

then the second major factor necessary to establish law enforcement officer status – hazardousness – must be considered). The U.S. Supreme Court addressed the implications of this distinction in *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985). In *Johnson*, the city attempted to defend an ADEA claim, which challenged a municipal code provision that required firefighting personnel below the rank of lieutenant to retire at age 55, by asserting as an affirmative defense that age was a BFOQ for the position. The district court rejected the defense, concluding that the city had not shown that there was a factual basis to believe that all or substantially all of the firefighters above the retirement age would be unable to perform their jobs safely and efficiently nor that it was impossible or impractical to deal with the firefighters above the mandatory retirement age on an individualized basis. *Id.* at 359.

¶39 The U.S. Court of Appeals for the Fourth Circuit reversed the district court, holding that, because Congress had selected 55 as the retirement age for most federal firefighters, the same age constituted a BFOQ for all state and local firefighters as well, as a matter of law. *Id.* at 360. In considering the case, the U.S. Supreme Court stated as follows:

We must first resolve whether the age-55 retirement for federal firefighters reflects a congressional determination that age 55 is a BFOQ within the meaning of the ADEA, as the city urges, or whether Congress established the mandatory retirement age based on an analysis different from that mandated by the BFOQ standard.

*Id.* at 363. The Court first noted that neither the language of the ADEA nor the language of the mandatory retirement provision “reflect[ed] anything more than a congressional decision that federal firefighters must retire, as a general matter, at the age of 55.” *Id.* The Court further noted the following:

The history of the civil service provision, [i.e., 5 U.S.C. § 8335(b), the mandatory retirement provision for firefighters and law enforcement officers under the Civil Service Retirement System,] however, makes clear that the decision to retire certain federal employees at an early age was not based on BFOQs for the covered employment. This history demonstrates instead that Congress has

acted to deal with the idiosyncratic problems of federal employees in the federal civil service.

*Id.* at 363-64. The Court then described the history of the various federal statutes related to special retirement provisions for federal law enforcement officers, including a 1947 statute that permitted investigatory personnel of the Federal Bureau of Investigation to retire at age 50 with an enhanced annuity, a 1948 statute that extended the program to anyone whose duties for at least 20 years were primarily the investigation, apprehension, or detention of persons suspected or convicted of federal crimes, a 1972 statute that extended the special retirement provisions to federal firefighters, and, finally, the 1974 statute which required these employees to retire at age 55 if they had completed 20 years of service. After setting out the history of the various retirement provisions applicable to federal law enforcement officers and firefighters, the Court stated as follows:

Congress undoubtedly sought in significant part to maintain a youthful work force and took steps through the civil service retirement provisions to make early retirement both attractive and financially rewarding. However, neither the language of the 1974 amendment nor its legislative history offers any indication why Congress wanted to maintain the image of a “young man’s service,” or why Congress believed that older employees in fact could not meet the demands of these occupations. Indeed, Congressmen who opposed the bill voiced their concern for the singling out of one group of employees for preferential treatment through enhanced annuities and early retirement, and did not even acknowledge that the exigencies of the job might have anything to do with Congress’ willingness to accord special treatment to a group of employees. Moreover, the allowance that firefighters who had not yet served for 20 years could remain in their jobs, along with other exceptions to the general rule of retirement casts serious doubt on any argument that Congress in fact believed that either the employee or the public would be jeopardized by the employment of older firefighters.

The absence of any indication that Congress established the age limit based on the demands of the occupation raises the possibility that the federal rule is merely “an example of the sort of age stereotyping without factual basis that was one of the primary targets of the reforms of the ADEA,” and surely belies any contention that the age limit is based on actual occupational qualifications. Without

knowing whether Congress passed the statute based on factual support, legislative balancing of competing policy concerns, or stereotypical assumptions, we simply have no way to decipher whether it is consistent with the policies underlying the ADEA.

*Id.* at 365-66 (citations and footnotes omitted).

¶40 The Court also discussed Congress' treatment of the civil service mandatory retirement provisions when Congress extended the coverage of the ADEA to federal employees:

Instead of delaying the passage of the ADEA while those Committees studied the mandatory retirement provisions in light of the proposed ADEA, Congress decided to preserve the status quo with respect to the retirement program, pending further study. This express purpose definitively rules out any conclusion that Congress approved the retirement programs in light of the ADEA.

*Id.* at 367. The Court noted that, when the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service held hearings on the retirement provisions of 5 U.S.C. § 8335(b), the subcommittee considered a report from the General Accounting Office which found that “[r]etirement policies that disregard differences in physical abilities and productive capacity are costly and wasteful.” *Id.* at 368 n.11 (citing the Report to the House Committee on Post Office and Civil Service by the Comptroller General of the United States: *Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation*, at 10 (1977)). The Court also cited a report published by the House Select Committee on Aging which stated, “It is impossible to justify mandatory retirement or maximum hiring age policies based on arguments of public safety or job-related performance.” *Id.* (citing Chairman, House Select Committee on Aging, *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel*, 98<sup>th</sup> Cong., 2d Sess., IV (Comm.Print 1984)). In the end, the Court concluded as follows:

In sum, almost four decades of legislative history establish that Congress at no time has indicated that the federal retirement age for federal firefighters is based on a determination that age 55 is a BFOQ within the meaning of the ADEA. Congress adopted what

might well have been an arbitrarily designated retirement age in an era not concerned with the pervasive discrimination against the elderly that eventually gave rise to the ADEA. Thereafter, although Congress retained mandatory limitations in 1978, while questioning whether they continued to make good policy sense, it did so for the sake of expediency alone. On considering the language and history of the civil service provision, we find it quite possible that factors other than conclusive determinations of occupational qualifications might originally have led to the passage of this federal rule, and that the reason for its retention after 1978 further undercuts any argument that Congress has determined that age is a BFOQ for federal firefighters.

In the absence of an indication that Congress in fact grounded the age limit on occupational qualifications, we will not presume that it did so intend. The myriad political purposes for which Congress might properly make decisions affecting federal employees, and that body's uncontested authority to exempt federal employees from the requirements of federal regulatory statutes, simply do not permit the conclusion that Congress passed or retained this retirement provision because it reflects BFOQs. We therefore conclude that the civil service provision does not articulate a BFOQ for firefighters, that its presence in the United States Code is not relevant to the question of a BFOQ for firefighters, and that it would be error for a court, faced with a challenge under the ADEA to an age limit for firefighters, to give any weight, much less conclusive weight, to the federal retirement provision.

*Id.* at 369-70 (footnote omitted); *cf. Murgia*, 427 U.S. at 310 n.2 (although the Court found that a Massachusetts law that required uniformed state police officers to retire upon attaining age 50 rationally furthered the purpose of assuring the physical preparedness of the state police and therefore did not violate the Equal Protection Clause of the Fourteenth Amendment, the Court noted that the appellee made no claim under the ADEA).<sup>11</sup>

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<sup>11</sup> Subsequent to the *Johnson* decision, Congress amended the ADEA to allow states and political subdivisions thereof to set maximum hiring ages and mandatory retirement ages for firefighters and law enforcement officers under certain conditions. *See* 29 U.S.C. § 623(j); Pub. L. No. 99-592, § 3(a) (Oct. 31, 1986).

¶41 As the above discussion demonstrates, the U.S. Supreme Court, after reviewing the legislative history on which the agency in this case relies as support for its argument that age is essential to the performance of the duties of the position, rejected the notion that the legislative history of the mandatory retirement provision for federal law enforcement officers and firefighters indicated that Congress set the mandatory retirement age for such positions based on “the demands of these positions” or “actual occupational qualifications.” *Johnson*, 472 U.S. at 365-66. Thus, in accordance with the decision in *Johnson*, we find that Congress did not establish the mandatory retirement age for federal law enforcement officers based on the demands of the positions or actual occupational qualifications. Because Congress did not set the mandatory retirement provisions for federal law enforcement officers based on the demands or occupational qualifications of these positions, we find that the mandatory retirement age is not essential to the performance of the duties of federal law enforcement officer positions.<sup>12</sup>

¶42 As the U.S. Court of Appeals for the District of Columbia Circuit explained in *Stewart*, the purpose for setting a maximum entry age for a position with a mandatory retirement age generally would be to enhance the retirement scheme by allowing persons entering the position to enjoy a full career prior to reaching the mandatory retirement age. *Stewart*, 673 F.2d at 493. Thus, if the mandatory retirement age were essential to the performance of the duties of the position, it

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<sup>12</sup> We note that Congress raised the mandatory retirement age for law enforcement officers under both the Civil Service Retirement System and the Federal Employees’ Retirement System from 55 to 57 years of age in 1990, Federal Law Enforcement Pay Reform Act of 1990, Pub. L. No. 101-509, § 529 [Title IV, § 409(a), (b)], 104 Stat. 1389 (1990), but our review of the legislative history of these amendments did not reveal that Congress raised the mandatory retirement age for reasons that would affect our analysis. In fact, a statement by Congressman William Hughes indicated that the change was made because federal law enforcement agencies were “experiencing massive loss of senior personnel through retirement.” 136 Cong. Rec. E3716-01 (Oct. 22, 1990).

could be argued that a maximum entry age designed to allow an employee to enjoy a full career and still meet the requirements for an immediate annuity upon reaching the mandatory retirement age would also be essential to the performance of the duties of the position. However, where the mandatory retirement age is not itself essential to the performance of the duties of the position, an agency cannot rely on the fact that a maximum entry age will serve to effectuate the mandatory retirement age as support for the proposition that the maximum entry age is essential to the performance of the duties of the position.

¶43 The evidence in this case indicates that Secretary of State Schultz approved the maximum entry age of less than 35 years of age, and Secretary of State Christopher approved the maximum entry age of less than 37 years of age, for the position of Diplomatic Security Service Special Agent based on the practice of other federal law enforcement agencies. VARF, Tab 7, Exhibit B, C; *see supra*, ¶¶ 5-6. However, as explained in the preceding paragraph, the practice of other federal agencies, i.e., the practice of establishing a maximum entry age for law enforcement officer positions based on the years of service necessary to qualify for the law enforcement officer enhanced annuity at the mandatory retirement age, is insufficient to establish that the maximum entry age is essential to the performance of the duties of the position. Because the record establishes that the maximum entry age for the position of Special Agent is not essential to the performance of the duties of the position, we find that the appellant established that the agency's failure to waive this age requirement violated the appellant's rights under statutes related to veterans' preference, specifically, 5 U.S.C. §§ 3312(a)(1) and 3320.

¶44 When the Board determines that an agency has violated a preference eligible's rights under a statute related to veterans' preference, the VEOA provides that the Board shall order the agency to comply with the statute it violated, to award compensation for any loss of wages or benefits suffered by the individual by reason of the violation, to award an amount equal to back pay as

liquidated damages if the Board determines that the violation was willful, and to award reasonable attorney fees, expert witness fees, and other litigation expenses. 5 U.S.C. § 3330c. In this case, the record does not establish whether the agency would have actually appointed the appellant to the position, even if it had properly waived the maximum entry age requirement and continued to process the appellant's application, because the record indicates that there still were several steps left in the appointment process the appellant would have had to successfully complete prior to his appointment at the time the agency terminated its consideration of the appellant's application. *See supra*, ¶ 11. In *Walker v. Department of the Army*, 104 M.S.P.R. 96, ¶ 18 (2006), the Board determined that the proper remedy where an agency violates a statute related to veterans' preference by denying an appellant the right to compete for a particular position is to order the agency to reconstruct the selection process. Accordingly, we find that the proper remedy with regard to the appellant's VEOA appeal is an order requiring the agency to waive the maximum entry age requirement on the appellant's behalf and to reconstruct the selection process, including affording the appellant any other advantage to which his status as a preference eligible might entitle him. *E.g., see supra*, ¶ 11 n.2.

**The disposition of the appellant's VEOA appeal renders the appellant's USERRA appeal moot.**

¶45 Our review of the record evidence regarding the appellant's USERRA claim raises some concern as to whether the administrative judge properly determined that the appellant failed to establish that his reserve obligation was a motivating factor in the agency's decision to stop processing his application. If the Board were to credit the appellant's version of the events, it is at least arguable that the appellant's un rebutted sworn statements regarding the agency recruiting official's actions upon learning of the appellant's ongoing obligations in the military reserves were sufficient to meet the appellant's burden of proving that his military status was a substantial or motivating factor in his

nonselection.<sup>13</sup> *See Woodall v. Federal Energy Regulatory Commission*, 30 M.S.P.R. 271, 273 (1986) (a declaration subscribed as true under penalty of perjury, if uncontested, proves the facts it asserts); *see also Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001) (discriminatory motivation under USERRA may be reasonably inferred from such circumstantial evidence as temporal proximity between the appellant's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the individual's military activity, and disparate treatment of certain individuals compared to others with similar work records). Furthermore, the agency's argument that it established that it would have taken the same action regardless of the appellant's military status, based on the fact that it did not appoint any applicants who applied under vacancy announcement SA-04-01 until after the appellant's 37<sup>th</sup> birthday, is untenable in light of our conclusion that 5 U.S.C. § 3312(a)(1) required the agency to waive the maximum entry age requirement even if it would have been impossible or impracticable to expedite the application process to allow the appellant's appointment prior to this 37<sup>th</sup> birthday.

¶46 Nevertheless, it is unnecessary to resolve definitively whether the appellant's military status was a substantial or motivating factor in the agency's decision to terminate its consideration of the appellant's application because our disposition of the appellant's VEOA appeal renders the appellant's USERRA

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<sup>13</sup> In addition to the facts the appellant alleged regarding his discussion with the agency recruiting official, we note that the agency apparently violated its own policy with regard to its processing of the appellant's application. As discussed in the background section, Vicky LeMaster, a Supervisory Human Resources Specialist, submitted a declaration in which she stated that the agency did not deem a candidate unqualified on the basis of age until such time as the candidate actually reached his 37<sup>th</sup> birthday. *See supra*, ¶ 11. The agency conceded, however, that it "terminated consideration" of the appellant's application before he turned 37 "because he was only months away from his 37<sup>th</sup> birthday." USERRA Appeal Initial Appeal File, Tab 7, Subtab 1.

appeal moot. Mootness can arise at any stage of litigation, and an appeal is moot when, by virtue of an intervening event, the Board cannot grant any effectual relief because the appellant has obtained, by whatever means, all of the relief he could have obtained had he prevailed before the Board. *See Moore v. Department of Veterans Affairs*, 102 M.S.P.R. 689, ¶ 6 (2006); *see also Fernandez v. Department of Justice*, 105 M.S.P.R. 443, ¶ 5 (2007) (for an appeal to be deemed moot, the employee must have received all of the relief that he could have received “if the matter had been adjudicated and he had prevailed”).

¶47 USERRA provides that the Board, upon determining that an executive agency has not complied with the provisions of USERRA, “shall enter an order requiring the agency . . . 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.” 38 U.S.C. § 4324(c)(2). In this case, even if the appellant established that his military status was a substantial factor in the agency’s decision to terminate consideration of his application, the appellant did not establish that the agency would have appointed him if it had continued to process his application. Thus, the only relief the Board could order with respect to the appellant’s USERRA appeal would be an order directing the agency to continue to process his application. *See Tully v. Department of Justice*, 58 F. App’x 501, 503 (Fed. Cir. 2003) (NP) (where the appellant established that the agency did not process his applications for various positions in retaliation for his past USERRA appeals, a Board order directing the agency to process his applications was the relief to which the appellant was entitled). The appellant is already entitled to such an order, however, as a result of the Board’s disposition of his VEOA appeal. In addition, like USERRA, VEOA also requires the Board to award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved, but the provisions of VEOA are

more generous than the provisions of USERRA with respect to damages<sup>14</sup> and attorney fees and litigation expenses. *Compare* 38 U.S.C. § 4324(c)(4) (the Board may, in its discretion, award reasonable attorney fees, expert witness fees, and other litigation expenses to a person for whom the Board issues an order requiring an agency to comply with the provisions of USERRA) *with* 5 U.S.C. § 3330c(b) (the Board shall award reasonable attorney fees, expert witness fees, and other litigation expenses to a preference eligible who prevails in an action under VEOA). Thus, there is no effective relief that we could order with regard to the appellant's USERRA appeal in addition to the relief we are ordering with regard to the appellant's VEOA appeal. Accordingly, we DISMISS the appellant's USERRA appeal is moot.

#### ORDER

¶48 We ORDER the agency to waive the age limit for the position of Diplomatic Security Service Special Agent with respect to the appellant's application for the position and to process the appellant's application to completion. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶49 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶50 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement

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<sup>14</sup> Other than an award of compensation for lost wages and benefits, USERRA does not provide for the award of damages, while VEOA requires the Board to award an amount equal to back pay as liquidated damages if it finds that the agency's violation was willful. 5 U.S.C. § 3330c(a).

with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶51 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT  
REGARDING YOUR RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees, expert witness fees, and litigation expenses. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 3330c(b). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.203 and 1208.25. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING  
YOUR RIGHT TO REQUEST DAMAGES

You may be entitled to be compensated by the agency for any loss of wages or benefits you suffered because of the violation of your veterans' preference rights. 5 U.S.C. § 3330c(a); 5 C.F.R. § 1208.25(a). If you are entitled to such compensation, and the violation is found to be willful, the Board has the authority to order the agency to pay an amount equal to back pay as liquidated damages. 5 U.S.C. § 3330c(a); 5 C.F.R. § 1208.25(a). You may file a petition seeking compensation for lost wages and benefits or damages with the office that issued

the initial decision on your appeal WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION.

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. 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, and 11.

FOR THE BOARD:

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Matthew D. Shannon  
Acting Clerk of the Board  
Washington, D.C.

CONCURRING OPINION OF NEIL A. G. MCPHIE

in

*Robert P. Isabella v. Department of State*

MSPB Docket Nos. AT-0330-05-0409-B-1 & AT-3443-05-0550-B-1

¶1 I agree with the majority that the appellant should not receive any relief on his claim under the Uniformed Services Employment and Reemployment Rights Act, but I do not join the majority's reasoning. The administrative judge weighed the evidence and concluded that the appellant had not met his burden of proof under 38 U.S.C. §§ 4311 & 4324. The appellant has not shown that the administrative judge made an error of law, a finding of fact not supported by the record, or any other reversible error. Accordingly, I would deny the appellant's petition for review in No. AT-3443-05-0550-B-1 for failure to meet the criteria of 5 C.F.R. § 1201.115.

¶2 I also agree with the majority that the appellant is entitled to relief on his claim under the Veterans Employment Opportunities Act, but here too, my reasoning differs from that of the majority. The agency argues in this litigation that age is essential to the performance of the duties of a Diplomatic Security Special Agent. However, there is no evidence that at the relevant time, which was when the appellant applied for employment in 2004, any agency official with authority to make a determination under 5 U.S.C. § 3312 actually decided that the appellant could not be considered for the Diplomatic Security Special Agent position because age was essential to the performance of its duties. The appellant submitted his application months before his 37<sup>th</sup> birthday, that is, before he exceeded the maximum entry age. Initial Appeal File, Tab 10, Subtabs 4A, 4B, 4E, 4F. The agency cannot now argue, after the appellant's 37<sup>th</sup> birthday has passed, that the appellant was properly excluded from consideration, when statute requires the agency to waive a maximum entry age requirement for a preference

eligible veteran such as the appellant unless age is essential to the performance of the duties of the position and the agency failed to make a timely determination that the age requirement should not be waived. Accordingly, I would reverse the initial decision in No. AT-0330-05-0409-B-1, order the agency to waive the maximum entry age for the appellant herein, and further order the agency to reconstruct the selection process for the position he sought.

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Neil A. G. McPhie  
Chairman