

19-144
No.

IN THE
Supreme Court of the United States

JAMES T. RYAN, PETITIONER

v.

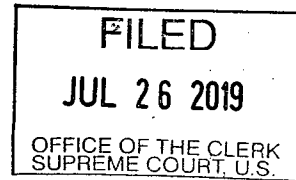
DEPARTMENT OF DEFENSE

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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pro se

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QUESTION(S) PRESENTED

James Ryan, the Petitioner, request this Petition for Writ of Certiorari be granted because the personnel action violated his constitutional right to due process, as well as the Whistleblower Protection Act (WPA). Petitioner was not provided with notice and opportunity to respond to a specification within a personnel action that removed him from employment as a police officer in the federal service. Additionally, the Merit Systems Protection Board (MSPB) Administrative Judge did not analyze whether the Agency would have taken the personnel action absent disclosures protected by the WPA. The case should have been remanded by the Court of Appeals for the Federal Circuit (CAFC) to the MSPB.

- 1) Can the government sustain a specification without giving the employee notice?
- 2) Can the government overcome a whistleblower defense without an objective test?

TABLE OF CONTENTS

	Page
QUESTION(S) PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	10
APPENDIX	
<i>Opinion of the U. S. Court of Appeals</i>	1a
<i>Initial Decision</i>	6a
<i>Order Denying Rehearing</i>	15a
<i>Petition for Rehearing</i>	15a

TABLE OF AUTHORITIES

Page

CASES

CLEVELAND BOARD OF EDUCATION V.
LOUDERMILL, 470 U.S. 532 (1985) 3, 6
GENTILE V. STATE BAR NEVADA, 501 U.S. 1030 6
LACHANCE V. ERICKSON, 522 U.S. 262 (1998)..... 6
PAUL V. DAVIS, 424 U.S. 693 (1976) 6

STATUTES

28 U. S. C. § 1254(1)..... 2

James Ryan, a former Pentagon Force Protection Agency police officer, respectfully petitions this court for a writ of certiorari to review an opinion of the Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The order by the Court of Appeals for the Federal Circuit denying Petitioners combination petition for panel rehearing, petition for rehearing en banc, decided by the Honorable Prost, *Chief Judge*, Newman, Lourie, Bryson¹, Dyk, Moore, O'Malley, Reyna, Wallach, Taranto, Chen, Hughes, and Stoll, *Circuit Judges*, dated April 29, 2019 is not published.

The disposition by the Court of Appeals for the Federal Circuit affirming the Merit Systems Protection Board's decision to sustain Petitioners removal from the federal service, decided by the Honorable Lourie, Bryson, and Moore, *Circuit Judges* dated February 13, 2019 is not published. Per Curiam.

The Merit Systems Protection Board's decision to sustain the Pentagon Force Protection Agency's removal action, issued by the Honorable Andrew M. Dunnaville, Administrative Judge, dated November 15, 2017 is not published.

JURISDICTION

The Court of Appeals for the Federal Circuit denied Petitioners combination petition for panel rehearing, petition for rehearing en banc on April 29,

¹ Circuit Judge Bryson participated only in the decision of the petition for panel rehearing.

2019. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S. Code § 2302(b)(8)(A)(i)(ii).

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific

danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

STATEMENT

This Court has held a public employee has a property interest in their employment. Subsequently, the employee has a right to due process during a removal action. The basis for public employee due process rights is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

The Constitutional requirements of *Loudermill* mandate an Agency to present the employee with the information relied on in taking an adverse personnel action and give the employee the opportunity to respond.

This case presents the question of whether the government can sustain an adverse action without notice.

Additionally, the Whistleblower Protection Act protects federal employees who discloses a violation of law, rule, or regulation from retaliation. An agency violates the act if it takes a personnel action because of a disclosure.

This case presents the question whether and agency can overcome whistleblower defense based on the deciding official's subjective denial of retaliation.

Facts

Petitioner obtained SV's annual rating of record lawfully subsequent to an EEO complaint. The Agency presented it within the report of investigation (ROI) as comparator evidence to mitigate Petitioner's complaint. Petitioner identified it as being falsified by the Sergeant. Sergeant inflated SV's rating of record with false acts of performance. This supported SV's exceptional performance rating and Sergeants recommendation SV receive a cash bonus for performance.

Petitioner had disclosed to his chain of command several times that SV allowed his post to become a location for unauthorized loitering and allowed the entrance to his post to be chocked open which circumvented the common access card-controlled door locks. Petitioner also disclosed Sergeant participated in the misconduct and it was continuous through the rating period. These assertions are undisputed by anyone with firsthand knowledge.

After obtaining SV's falsified rating of record, Petitioner reported to his chain of command Sergeant fraudulently inflated SV's rating of record and provided him with a cash bonus in exchange for allowing the post to deteriorate into a location for unauthorized activity. Petitioner also provided the objective facts that supported the conclusory statement. These assertions are undisputed by anyone with firsthand knowledge.

Appeal

Shortly after, Petitioner was removed from his position for numerous charges and specifications. On appeal, the MSPB sustained one specification of lack of

candor, one specification of conduct unbecoming, and one specification of misuse of government computer, as well as the penalty.

The agreed upon issue for hearing giving rise to the lack of candor specification at issue was, Petitioners assertion Sergeant inflated SV's rating of record. The deciding official testified at hearing he sustained the lack of candor specification based on ex-parte information and his conclusion Petitioner could not prove SV's rating was fraudulently inflated. In closing arguments, Petitioner raised a due process argument. The Agency conceded the deciding official likely violated Petitioner's due process rights by using ex parte information to sustain one lack of candor specification.

The MSPB AJ noted in his decision Petitioner may have believed SV's rating was inflated, but sustained the lack of candor specification because there was no information in the record to support the position Sergeant provided SV with the cash bonus in exchange for allowing the post to deteriorate.

The AJ erroneously categorized the deciding official's personal knowledge as cumulative and noted the deciding official's subjective assertion he would have sustained the lack of candor specification anyway as the reason for denying Petitioner his right to due process.

In affirming the MSPB decision, the CAFC held since Petitioner made a statement and failed to provide evidence to support it, he lacked candor. CFCA noted the deciding official's subjective assertion he would have sustained lack of candor absent ex parte information as a basis to deny Petitioner due process.

In consideration of Petitioners whistleblower defense, both the MSPB and the CAFC accepted the

deciding official subjective assertion he would have sustained the removal absent the protected disclosures. The Agency was not held to an objective test.

The CAFC failed to require an objective test to analyze Petitioners affirmative defenses.

REASONS FOR GRANTING THE PETITION

The United States Supreme Court should grant the Writ of Certiorari because Petitioner has an absolute right to due process.

This Court has held once federal employees are provided a property interest in their employment they can only be removed for cause. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *see also Lachance v. Erickson*, 522 U.S. 262 (1998). Subsequently, they have a right to notice and a meaningful opportunity to respond prior to an adverse action. *Loudermill*, 470 U.S. 532. In the case of an adverse employment action, combined with the "reputational injury" to the employee, a vague regulation will not satisfy the Constitutional notice requirement. *See Gentile v. State Bar Nevada*, 501 U.S. 1030; *See also Paul v. Davis*, 424 U.S. 693 (1976)

The Agency notified Petitioner he lacked candor for asserting Sergeant fraudulently inflated SV's annual rating of record without being able to prove it. Petitioner proved it at hearing.

Petitioner was not notified of the basis to sustain his removal.

The deciding official unequivocally testified he sustained a lack of candor charge solely based on ex

parte knowledge prior to Petitioners response; he later testified it was only one of two factors relied on. The ex parte knowledge was the only firsthand information that purported to prove Petitioners statement incorrect. The deciding official also testified he relied on that guilty finding in sustaining a separate lack of candor specification; the specification at issue here. The deciding official admitted he did not notify Petitioner prior to sustaining the adverse action.

The MSPB sustained Petitioners removal because there was no evidence in the record to support: the cash bonus was provided by Sergeant to SV in exchange for allowing his post to deteriorate to an unsafe condition. This is an entirely different specification than the specification brought by the Agency. Had Petitioner been notified, he could have obtained evidence through discovery and properly responded. Notwithstanding, there is no evidence in the record to disprove Petitioners sworn first-hand account of events. Neither Sergeant nor SV were called to testify that Petitioners assertions were incorrect. There is no evidence in the record indicating Petitioner did not believe his statement to be correct.

In dismissing Petitioners due process argument, both the MSPB and CAFC noted the deciding official's subjective assertion he would have sustained lack of candor absent the ex parte information. Once deciding official admits he relied on ex parte information a subjective statement asserting new and material information had only cumulative effects should not overcome due process. A proper test should objectively determine if the information was the type that would influence a deciding official. Otherwise due process becomes subject to the harmful error test.

CAFC held the MSPB decision inferred Petitioner accused Sergeant an SV of a quid pro quo criminal act. There is no information in the record to support this inference. Petitioner unequivocally requested a criminal investigation of Sergeant, not SV. The court further held Petitioner lacked candor for failing to offer any evidence to support a statement.

The MSPB decision to sustain was not based on the Agency's specification. Sustaining a lack of candor charge based on a statement not shown to be incorrect, and without evidence the employee believes it to be incorrect, merely because the statement is conclusory is too vague. Additionally, sustaining the lack of candor charge obliterated Petitioners reputation as a 19-year law enforcement officer; all his career experience is destroyed. Law enforcement employment is now impossible. Subsequently, Petitioner was not afforded notice as required by the Constitution. Thus, Petitioners fifth amendment due process rights were violated.

The lack of candor specification at issue controls the outcome of Petitioner's removal as well as future employment. The reversal of this specification will require a remand for penalty analysis because the deciding official provided inconsistent testimony about its effect, but ultimately and unequivocally testified he did not know if he would sustain the removal absent lack of candor. Reversal of this specification allows Petitioner to work elsewhere as a law enforcement officer.

**The United States Supreme Court should grant the
Writ of Certiorari because the action violated the
Whistleblower Protection Act 5 U.S.
Code §•2302(b)(8)(A)(i)(ii).**

Petitioner disclosed to his chain of command objective facts to show Sergeant fraudulently inflated a rating of record with false acts of performance. Petitioner disclosed to his chain of command a Pentagon facility door locking device had been tampered with and the door had been chocked open. Both were reported within a year of Petitioners removal. Petitioner showed at MSPB proceedings the Agency, as well as the proposing and deciding officials had knowledge.

The MSPB AJ failed to analyze whether the Agency would have taken the action absent the disclosures. The AJ accepted the deciding official's subjective denial in denying Petitioners whistleblower defense.

CAFC held Petitioners conclusory statement was not protected, thus the whistleblower defense fails. The correct test is to determine whether the Agency would have taken the action on the conclusory statement, and other specifications, absent the protected disclosures.

Since the Agency was not required to objectively show they would have taken the action against Petitioner absent the disclosures, the action violated the whistleblower protection act.

Petitioner pleas with this Court to grant the Writ due to the public policy issues of due process and whistleblower protection. Without an objective test for due process and whistleblowing an agency's compliance with the law becomes arbitrary.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request this Honorable Court grant the Writ of Certiorari or in the alternative remand to the MSPB for objective analysis to ascertain if Petitioner made a statement he knew to be incorrect, and to ascertain if the Agency would have taken the action absent whistleblowing.

Respectfully submitted,
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