No. 19-621

In the Supreme Court of the United States

THOMAS F. SWEENEY,
Petitioner,
v.
MERIT SYSTEMS PROTECTION BOARD
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas F. Sweeney
Petitioner Pro Se
7083B Jasper Dr
Middletown, MD 21769
Phone: (804) 457-8868
Thomas@reddn.com

QUESTIONS PRESENTED

The FAA is generally exempted from the Title 5 Personnel Management System, yet FAA employees MSPB Appeal rights are retained. FAA's employment policy of an Air Traffic Control Specialist - In Training (ATCS-IT) whose training was terminated by their Air Traffic Manager (ATM) due to unacceptable performance requires the employee be immediately placed on administrative duties. Through a subsequent process— a national group of FAA officials decide if the employee will be retained as an ATCS-IT at a different FAA facility with a lower grade and pay, or initiate separation from Federal Service. If the national group of FAA officials decide to retain the ATCS-IT at a lower grade/pay position, the ATCS-IT is given a list of 5 or less different facilities to choose from. If the ATCS-IT does not choose a facility in the list given to the ATCS-IT— per FAA employment policies FAA HRPM 1.14a— the FAA will initiate separation from Federal Service.

The questions present are:

1. Is a final decision to terminate the training of a FAA Air Traffic Control Specialist – In Training employee by FAA management— a reduction in grade or removal action based on unacceptable performance, or a major adverse personnel action that is appealable to the Merit Systems Protection Board.

If no: in the case the ATCS-IT is not retained by the FAA's national group of officials or fails to select a

QUESTIONS PRESENTED - *Continued*

lower/grade pay facility— during the separation from Federal Service procedures can the ATCS-IT re-challenge the final decision to terminate their training as an ATCS-IT

2. Does subjecting a non-probationary Federal employee to the effects of a proposed action— before the employee responds— violate due process by failing to allow a meaningful opportunity to respond to the action as held in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (U.S. 1985)?

3. If an appellant/plaintiff of a MSPB mixed case fails to allege a Title VII discrimination claim in a district court complaint— is the appropriate venue for judicial review the Federal Circuit, or the district court?

4. The district court's initial complaint lacked a specific Title VII discrimination claim, yet the complaint was listed as 'filed under' the Title VII in the opening statement as required under 5 U.S.C § 7703 (b) (2). Should the district court have liberally construed the pro se plaintiff's intent was to include a Title VII discrimination count?

PARTIES TO THE PROCEEDING

Petitioner Thomas F. Sweeney was the appellant in the Merit Systems Protection Board proceedings, petitioner in the court of appeals for the federal circuit proceedings, plaintiff/petitioner in the district court proceedings, and petitioner in the court of appeals for the fourth circuit proceedings. Respondent the Merit Systems Protection Board were the respondent after *recaptioning* in the court of appeals proceedings, respondent/defendant in the district court proceedings, and respondent in the court of appeals for the fourth circuit proceedings. The Department of Transportation was the agency in the Merit Systems Protection Board proceedings, and the respondent before being *recaptioned* in the court of appeals for the federal circuit proceedings.

RELATED CASES

- *Sweeney v Department of Transportation*, No. DC-0752-15-0060-I-1, U.S. Merit Systems Protection Board. Initial Decision Judgement entered April 12, 2016.
- *Sweeney v Department of Transportation*, No. DC-0752-15-0060-I-1, U.S. Merit Systems Protection Board. Final Order entered September 23, 2016.
- *Sweeney v. Merit Systems Protection Board,* recaptioned from *Sweeney v. Department of Transportation*, No. 17-1255, U.S. Court of Appeals for the Federal Circuit, Judgement Entered August 16, 2017.

RELATED CASES- *Continued*

- Sweeney v. Merit Systems Protection Board, No. 1:17-cv-926, U.S. District Court for the Eastern District of Virginia.

  Judgement entered March 13, 2018.
- Sweeney v. Merit Systems Protection Board, No. 18-1458, U.S. Court of Appeals for the Fourth Circuit. Judgement Entered June 14, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Thomas F. Sweeney respectfully petitions for a writ of certiorari to review the judgement of the United State Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at *Sweeney v. Merit Sys. Prot. Bd.*, 2019 U.S. App. LEXIS 17930 (4th Cir. 2019) (June 14, 2019) and is reproduced at Pet. App. 1a-20a. The district court's denial for reconsideration is reproduced at Pet. App. 21a. The district court's opinion (March 13, 2019) is reproduced at Pet. App. 22a-25a. The Merit Systems Protection Board final order is reproduced at Pet. App. 35a-48a. The Merit Systems Protection Board initial decision is reproduced at Pet. App. 49a-69a. The Fourth Circuit's denial of rehearing (August 13, 2019) is reproduced at Pet. App. 70a.

JURISDICTION

The Fourth Circuit Court of Appeals denied Sweeney's timely petition for rehearing on August 13, 2019 (Pet. App. 70a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOVLED

- **5 U.S.C. § 4303**

The Civil Service Reform Act, 5 U.S.C. .§ 4303- - sections' (a) – (c) [Actions based on unacceptable performance] provide:

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance

(b) (1) An employee whose reduction in grade or removal is proposed under this section is entitled to— (A) 30 days' advance written notice of the proposed action which identifies— (i) specific instances of unacceptable performance by the employee on which the proposed action is based; and (ii) the critical elements of the employee's position involved in each instance of unacceptable performance; (B) be represented by an attorney or other representative; (C) a reasonable time to answer orally and in writing; and (D) a written decision which— (i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and (ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the

employee who proposed the action. (2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee— (1) shall be made within 30 days after the date of expiration of the notice period, and (2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee— (A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and (B) for which the notice and other requirements of this section are complied with.

- **5 U.S.C. § 7121 (e)**

The Civil Service Reform Act, 5 U.S.C. .§ 7121 (e) [Grievance procedures] provides:

(e) (1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not

both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first. (2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

- **5 U.S.C. § 7513 (b)**

The Civil Service Reform Act, 5 U.S.C. .§ 7513 (b) [Cause and procedure (Removal, Suspension for more than 14 days, reduction in grade or pay...)] provides:

(b) An employee against whom an action is proposed is entitled to— (1) at least 30 days' advance written notice, unless there is

reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;(3) be represented by an attorney or other representative; and(4) a written decision and the specific reasons therefor at the earliest practicable date.

- **5 U.S.C. § 7703 (b)**

The Civil Service Reform Act, 5 U.S.C. .§7703 (b) [Judicial review of decisions of the Merit Systems Protection Board] provides:

(b) (1) (A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board. (B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)

shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board. (2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

- **42 U.S.C. § 2000e-2(a)(1)**

The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) [Unlawful employment practices] provides:

(a) Employer practices It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

of employment, because of such individual's race, color, religion, sex, or national origin; or

- **49 U.S.C. § 40122 (g) (2) (H) & (g) (3)**
  The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 40122 (g) (2) (H) & (g) (3) [Federal Aviation Administration personnel management system] provides:

(g) Personnel management System.-

(2) Applicability of title 5.—The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of—

(H) sections 1204, 1211–1218, 1221, and 7701–7703, relating to the Merit Systems Protection Board;

(3) Appeals to merit systems protection board.—Under the new personnel management system developed and implemented under paragraph (1), an employee of the Administration may submit an appeal to the Merit Systems Protection Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996. Notwithstanding any other provision of law, retroactive to April 1, 1996, the Board shall have the same remedial authority

over such employee appeals that it had as of March 31, 1996.

INTRODUCTION

This case finally comes to this Court after many years of proceedings by lower courts. I would not have continued with these proceedings if I did not believe they were not proper and not in accordance with regulations. Through the years of this case, I have spent hundreds of hours researching laws and writing briefs, along with $15,000 on counsel after the fourth circuit requested formal briefs. Unfortunately, my counsel at the time did not argue the merits of the judicial review, but mainly focused on arguing that it should have been a summary judgement order, instead of a F.R.C.P. Rule 12 (b) (6). Even at the oral arguments, the fourth circuit panel seemed interested in the merits contained in the informal brief, yet counsel did not have a meaningful answer to the direct questions on merit.

After oral arguments, Sweeney requested his counsel to withdraw. Immediately after, now *pro se*, Sweeney filed a Motion for Leave of Court to File Post Oral Arguments Brief (ECF 51), which was not intended to be the brief itself— just a list of limited reasons why it is needed. The fourth circuit panel construed the request for leave to file a brief as the brief itself and granted the motion (ECF 52 & 53) .

In Sweeney's Motion for Leave of Court to File Post Oral Arguments Brief (ECF 51), basically raised 2 issues. (1) Sweeney did not have a meaningful opportunity to respond to the proposed action of termination of training, a reasonable person would have also concluded the decision was already final, as the April 16th, 2013 memo was vaguely written as a proposal and effects of the April 16th memo was immediately implemented against Sweeney. (2) A decision to terminate an ATCS-IT training requires the employee to be ultimately removed from their current position— either by reassignment to a lower pay/grade facility or by separation from federal service.

Both of the two above scenarios should be reviewable by the MSPB. In the case of not having a meaningful opportunity to respond, both the MSPB and district court held that because after the decision to terminate my training was finalized, that the FAA gave a choice of four (4) different lower level facilities to choose from, that the choice of the lower level facilities made it a voluntary action. This offer by the FAA, came after I attempted to redress my issues with the ATM in my request for reconsideration to him on August 7th, 2013, which the ATM initially did not respond to. As for the point that termination of training is not an appealable action— the FAA can not deny that an ATCS-IT is not allowed to stay employed if they do not transfer. Even if an ATCS-IT who had their training terminated did not select from a list of

facilities offered by the FAA, there are no procedures allowed for the ATCS-IT to re-enter training, requiring the employee to be removed.

The fourth circuit court of appeals panel's unpublished opinion only considered Sweeney's counsel's arguments contained in the formal brief, without ever addressing his arguments contained in either the informal brief, or his post argument supplemental brief. Basically put, the fourth circuit seemed interested in the content of the informal brief, but since Sweeney's counsel failed to raise the claims in the formal brief, Sweeney believes the court stopped listening.

STATEMENT OF THE CASE

A. Statutory Background

Congress passed the Civil Service Reform Act of 1978 (CSRA), Pub.L. 95–454, to reform the administration of the civil service employees. The CRSA established the Merit Systems Protection Board— an independent quasi-judicial agency. The MSPB has the power adjudicating appeals by employees (or its beneficiaries in some cases) regarding prohibited personnel practices, Whistleblower Protection Act, Uniformed Services Employment and Reemployment Rights Act, Civil Service Retirement system, Federal Employees' Retirement System, and major adverse personnel action.

A major adverse personnel action is codified at 5 U.S.C. § 7512, which include removal, suspension for more than 14 days, reduction in grade, reduction in pay, or a furlough of 30 days or less. Even if an action meets one of the above mentioned actions, there are instances where MSPB appeal rights are not applicable. If the action is a reduction in grade or removal under 5 U.S.C. § 4303 "Actions based on unacceptable performance" it is not normally appealable to the MSPB— although the agency must follow the procedures contained in 5 U.S.C. § 4303.

If an action is based on 5 U.S.C. § 4303, or unacceptable performance, the CRSA, at 5 U.S.C. § 4303 (b) (1) gives a list of entitlements — 30 days advanced written notice of the proposed action that gives specific instances of unacceptable performance and the critical elements of the employee's position involved of the unacceptable performance, be represented by an attorney or other representative, a reasonable time to answer orally and in writing, and a written decision that specifies the unacceptable performance by the employee with the final decision being by an employee who is in a higher position (unless head of the agency) than the employee who proposed the action.

After the implantation of the CRSA in 1979, FAA Air Traffic Control Specialist were competitive service Title 5 employees. In 1995 Congress passed the Department of Transportation and Related Agencies Appropriations Act, 1996, Pub.L. No. 104-50, § 347,

109 Stat. 436, 460 (1995), as amended by Pub.L. No. 104-122, § 1, 110 Stat. 876, 876 (1996) ("DOT Act"). The DOT act exempted the FAA from most of the Title 5 Personnel Management System (PMS), including the MSPB and directed the FAA to establish its own for its 'unique demands'. *See* 49 U.S.C. § 40122 (g).

DOT Act required the FAA to implement the PMS by January 1st, 1996, yet the FAA did not implement the FAA PMS until April 1st, 1996.

In April of 2000, Congress passed Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("Ford Act") Pub.L. No. 106-181 which among other things, allows FAA employees under the FAA PMS to appeal to the MSPB with the same remedial authority that the MSPB had on March 31st, 1996, which is before the FAA PMS was implemented. *See* at 49 U.S.C. § 40122 (g)(3).

B. Factual & Procedural Background

Sweeney began his employment with the FAA after passing various pre-employment aptitude test on August 5th, 2009 at the Mike Monroney Aeronautical Center in Oklahoma City, OK. After successfully completing all of the requirements of initial en route air traffic control classes Sweeney was assigned to the Washington Air Route Traffic Control Center (Washington Center) in Leesburg, VA. After being certified on 3 of the 6 sectors required to become a full performance level controller— a full performance level controller is a synonym for a certified

professional controller, which means the controller successfully completed training as an ATCS— Sweeney's training was delayed due to a re-alignment of airspace where other Full Performance Level controllers needed to be trained on different sectors in their realigned area of specialty. After the realignment, Sweeney as assigned a new trainer, who had minimal training experience. This trainer and Sweeney began to have difficulties in training. Sweeney made a request to Travis Febelkorn (Febelkorn), Sweeney's supervisor, to have a different trainer as the trainer was improperly documenting the training. The Febelkorn denied the request for a change in the trainer. Sweeney had his training suspended pending a training review board (TRB) on November 1st, 2012. A TRB's job is to individually interview the ATCS-IT, their instructors, and supervisor— then complies a report of statements and makes a recommendation to the ATM. The ATM makes the determination to re-enter the ATCS-IT in training, or to terminate the training of the ATCS-IT.

FAA management is required to do monthly skill assessments, and benchmarks at 25%, 50%, 75% of target hours. On November 3rd, 2012 after review of the paperwork for the TRB, Febelkorn forced Sweeney to sign a back dated 'recreation' of a skill check assessments and benchmark due to Febelkorn failing to properly conduct the required skill check assessments and benchmarks. On January 8th, 2013 Sweeney re-entered on the job training under highly

restricted non-standard provisions with Febelkorn assigned as supervisor. Typically, after a TRB, a trainee is assigned a different supervisor.

On February 22nd, 2013 Febelkorn suspended Sweeney's training. During a suspension of training, an ATCS-IT is allowed to perform air traffic control duties, but only certain functions. The TRB recommended termination of training but reassignment to a lower level facility.

On April 16th, 2013 Sweeney was given the April 15th, 2013 memorandum by ATM Steven Stooksberry Subject: "Discontinuation of Training" by Washington Center training manager Raymond Mittan (Mittan). (JA 051). Sweeney was instructed by Mittan that he was hereby assigned to administrative duties, required to work an administrative schedule, and no longer allowed to perform air traffic duties pending outcome of the National Employee Services Team (NEST)— who decide if an ATCS-IT is retained at a lower level/pay facility, or separated from federal service.

It is required by FAA facility administration and training procedures that an ATCS-IT whose training is terminated, is not allowed to perform air traffic duties. FAA ZDC Order 3120.8. Once an ATCS-IT training is suspended, the only outcome is either reassignment to a lower grade/pay facility, or separation from federal service. FAA policies and procedures preclude any other outcome.

Sweeney reasonably believed the decision was already made, and the comments requested by the memo from ATM Stooksberry dated April 15th, 2013 was only a deciding factor if the ATM would recommend if the ATCS-IT should be retained by the NEST. On April 23rd, 2013 Sweeney submitted comments requesting ATM Stooksberry's help in being retained with the FAA.

ATM Stooksberry recommended to the NEST that Sweeney be reassignment to a lower grade/pay position.

On August 7th, 2013 after reviewing the training procedures, Sweeney requested reconsideration of ATM Stooksberry's decision to terminate his training and continue his training in a different area of specialization based on 23 policies and procedures not being followed during his training. (JA 105) ATM Stooksberry orally responded by saying FAA policies and procedures do now allow him to reconsider the decision to terminate my training since the NEST already has the paperwork.

On August 22, 2013 Sweeney was notified by memorandum from Joseph Robert, Position Management Specialist for the Eastern Service Center, Subject: Article 61 Job Search, that I am being retained at a lower pay/grade facility, but I am given the choice between three (3) facilities, Cape TRACON in Falmouth, MA, Atlantic City, NJ Tower, or Allentown, PA Tower and a response is required within 7 days. With the assistance of the National Air

Traffic Controllers Association, acting as the sole bargaining unit union, my time to respond to the August 22, 2013 memo was extended via memorandum received on August 29th, 2013 by Gregory Ricketts, Staff Manger of Washington Center.

September 3, 2013 Sweeney received a memorandum from Tereshin White, Position Management Specialist, Subject: Article 61 Job Search, which had the same lower grade/pay facilities as the August 22, 2013 memorandum, but also added Harrisburg, PA tower. Harrisburg, PA tower is a lower grade/pay than Washington Center. Sweeney returned the memorandum stating he was interested in the Harrisburg, PA tower. The August 22, 2013, August 29, 2013, and September 3, 2013 memo and responses are not contained in the Joint Appendix created by Sweeney's counsel.

In or around September 2013, Sweeney became aware of 2 other female ATCS-IT whose training was suspended, but upon review found their monthly skill assessments and/or benchmarks were missed. Upon discovering the this, the training manager for Washington Center directed the supervisors for the two female ATCS-IT to immediately reset their training hours to conform to the required FAA training procedures and reenter training. This did not happen in Sweeney's case, where instead they 'recreated' the documentation showing compliance to FAA training procedures. It is the FAA policy that a TRB must occur when an ATCS-IT training is

suspended. The two female ATCS-IT did not proceed to a TRB as Sweeney did.

On October 15, 2013 Sweeney filed a MSPB mixed-case appeal alleging removal, reduction of pay/grade, denial of within grade increase (WIGI), and denial of promotion based on discrimination of sex.

On October 23, 2014 MSPB Administrative Judge (AJ) issued an Order to Show Cause why the appeal should not be dismissed due to the transfer being a voluntary reduction of grade/pay. On November 2, 2014 Sweeney responded, in the same manner currently, that the removal from training at Washington Center was not voluntary. There was no choice as the decision to terminate my training was already made and any decision after is tantamount to a constructive reduction of pay/grade.

In December 2015, Sweeney became a full performance level ATCS with the FAA.

In December 2015 Sweeney filed a second MSPB appeal alleging a due process violation as Sweeney was not afforded the opportunity to respond before having the effects of the proposal occur. The MSPB AJ implemented this appeal into the first appeal and issued an Initial Decision dismissing the appeal on April 12, 2016 for lack of jurisdiction due to the reduction of pay/grade being a voluntary action. The MSPB AJ did not address the due process issue.

Sweeney timely petitioned for review of the full MSPB in May of 2016. The MSPB in their final order dated September 26, 2016 denied petition for review,

modified the MSPB AJ Initial Decision addressing the due process claim, yet still affirming the initial decision for reasons of lack of jurisdiction that the reduction of pay/grade was voluntary.

Sweeney timely appealed to the Court of Appeals for the Federal Circuit, due to this Court's decision in *Perry v. Merit Sys. Prot. Brd.*, 137 S. Ct. 1975 (2017), the case was transferred to the district court of eastern Virginia as this appeal was a mixed-case that involved a Title VII discrimination claim.

Upon transfer to the district court, the district court required a complaint from Sweeney. In the district court complaint listed the complaint being brought under Title VII and 5 U.S.C. § 7703, but lacked a specific count or cause of action under Title VII.

The MSPB filed a Motion to Dismiss under F.R.C.P. Rule 12 (b) (6). (JA 218, Memorandum of Law IN support of MSPB's Motion to Dismiss, JA 222) Sweeney did not respond to the Motion to Dismiss as Sweeney already knew the position the MSPB would take, and argued it in the complaint. Sweeney's response would have been a cut and paste of the complaint, and relying on the requirement that the court's must consider all pleadings available to the court, that the district court would take my arguments from the complaint against the defendants motion to dismiss.

The district court did not consider my complaint, with its arguments contained in its order granting the

MSPB's motion to dismiss. Sweeney motion for the district court to reconsider its order granting motion to dismiss as it failed to consider argument contained in my complaint (JA 293). The district court denied my request for reconsideration (JA 299).

Sweeney timely filed a Notice of Appeal on April 11, 2018 (JA 297).

On May 18, 2018 Sweeney filed an informal brief with the fourth circuit generally raising two issues, (1) failure of due process, as Sweeney did not receive a meaningful opportunity to respond before having the actions contained in the April 15, 2013 memo proposal taken against him. This made Sweeney believe he could not challenge the decision. (2) is that termination of training is an appealable action with the MSPB as it is a reduction of grade/pay while it is also an action taken against an employee due to 'unacceptable performance' listed in 5 U.S.C. § 4303. The MSPB submitted their informal brief on June 28, 2018, and Sweeney submitted his reply to the MSPB's informal brief on July 18, 2018.

On October 26, 2018 The fourth circuit stated formal briefs and oral arguments would be beneficial in deciding the issues at hand, but if I was not represented by an attorney, oral arguments may not occur.

Sweeney's counsel submitted the Brief of *Appellant* on December 19, 2018. Sweeney's counsel failed to raise any claims contained in his informal briefs, instead contending the Rule 12 (b)(6) should

have been converted to a Rule 56 Summary Judgement Order. The MSPB filed its formal brief in February 2019 with Sweeney's reply on February 22, 2019.

Oral arguments occurred on May 9, 2019. Two of the judges asked direct questions concerning due process of termination of training, but Sweeney's counsel was unable to answer the question, only stating 'that is what we want the chance to argue' to the judges.

After spending $15,000 on counsel, Sweeney was not able to spend more money to have counsel re-dress his position. On Sweeney's request, his counsel filed a motion to withdrew on May 18, 2019, with the motion being granted on May 21, 2019.

On May 22, 2019 Sweeney filed a Motion for Leave of Court to file post oral argument brief, with the same main issues he has raised in the district court, and informal briefs, but with limited argument why there should be a post argument brief. The panel granted the motion 2 to 1 but construed the motion as the brief itself.

On June 14, 2019 the fourth circuit issued its unpublished opinion affirming the district court. The fourth circuit did not address or show any consideration in Sweeney's May 22, 2019 Motion for Leave of Court to file post oral argument brief.

On July 29, 2019 Sweeney filed a petition for rehearing restarting the opinion did not consider any argument contained in either my informal brief or my

later May 22, 2019 Motion for Leave of Court to file post oral argument brief. The panel denied the petition for rehearing on August 13, 2019.

This Petition for Writ of Certiorari ensues.

REASONS FOR GRANTING THE PETITION

I. When the FAA Terminates the Training of an ATCS-IT for Unacceptable Performance, the FAA is Required to Follow the Procedures in 5 U.S.C. § 4303

This court has not ruled on a case that involves 5 U.S.C. § 4303 since *United States v. Fausto*, 484 U.S. 439 (1988) where the primary argument was related to back pay. This court has not ruled addressed if the FAA's procedures involving termination of training for unacceptable performance are appealable by the MSPB.

The procedures used by the FAA in dealing with the termination of training of Air Traffic Control Specialist – In Training has ever been evolving. The current most controlling case law is *Gaudette v. Department of Transportation*, 832 F.2d 1256. Fed. Cir. 1987 where the sole issue was if failure to inform the employee of their MSPB rights constituted an 'un-informed decision' to accept an agency proposal, in lieu of termination proceedings.

One big issue the district court, and court of appeals for the fourth circuit is their over reliance in the opinion in Gaudette, where the Federal Circuit was not considering the merits of the case, as Gaudette had already filed a grievance in regard to their training.

The CSRA required an election of forum, either a negotiated grievance procedure, or appellate procedures with the MSPB, but not both

> Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.

5 U.S.C. § 7121 (e)(1). Civil Service Reform Act of 1978 § 701.

The Federal Circuit in Gaudette would not even have the ability to review the merits of their training since they filed the grievance regarding their training.

Without the ability to review the FAA's decision to terminate Gaudette's training, their decision to otherwise accept other employment was voluntary.

A. Over Six hundred FAA Employee's Per Year are not being Informed of or Allowed to Pursue their MSPB Appeal Rights After Having Their Training Terminated for Unacceptable Performance

As of July 2019 the FAA's Priority Placement Tool (PPT) which gets data from the FAA's Staffing Workbook (SWB) states the FAA currently has 3,708 ATCS-IT, average training success is 80.6%, and an average training time of 1.48 years across all FAA Air Traffic Facilities. This means an average of 900 FAA Employees will not be successful in training every 1.48 years, or on average 608 employees per year.

As stated above, an employee will be removed from their position after a decision to Terminate Training. The FAA has no evidence to the contrary. Only after this decision is when the FAA offers employee's whose training was terminated a lower level facility. The panel must consider how voluntary the action is in totality given it occurs after Termination of Training. Appellant believes if this were to be a completely voluntary action, in lieu of Termination of Training, the voluntary transfer must occur before a final decision of Termination of Training.

II. The Fourth Circuit Failed to Consider That Subjecting an Employee to the Effects of a Proposed Action, Before the Employee Responds is Coercion and Violates the Employees Due Process Rights as Held in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (U.S. 1985)

FAA's procedures require an employee whose training was terminated to be assigned to non-control duties only. When on non-control duties, also called administrative duty, the employee is required to work an administrative schedule, and report to an administrative supervisor. The procedure was not contained in the Joint Appendix, but attached with the fourth circuits *Appellants* Motion for Leave of Court to File Post Argument Brief, Exhibit A. (ECF 51)

Immediately after receiving the purported proposal of Termination of Training memorandum on April 16, 2013 (JA 067), the Appellant was assigned to non-control duties, assigned an administrative schedule, and assigned an administrative supervisor. Appellant, and any reasonable person would believe the decision of Termination of Training was already made, and the air traffic manager wanted the Appellants comments on if he should be retained at a lower grade/pay facility or be separated from Federal Service. Subjecting Appellant to the procedural actions of a final decision of Termination of

Training with still in the 'proposal' stage is highly prejudicial and created misinformation that the Appellant relied on when responding on April 23, 2013.

Had Appellant been given a reasonable opportunity to respond before believing his Training was Terminated, Appellant's response would have been brought up numerous issues, as Appellants request did in his request for reconsideration on August 7th, 2013 (JA 105-13). The air traffic manager after receiving the August 7th, 2013 verbally stated request since Training Termination decision was already made, there was nothing he could do. In October of 2013 after Appellant requested a response in writing to the August 7th request, the air traffic manager responded on October 30, 2013 while a substantive part of the response appeared to be an attached addendum not on FAA letterhead. (JA 115-117)

III. The Court of Appeal for the Fourth Circuit erred by not applying this Court's ruling in *Perry,* holding if an MSPB appellant only asserts rights under CRSA, then judicial review is exclusively in the Federal Circuit

This courts message was clear in *Perry,*

> "In the CSRA, Congress created the Merit Systems Protection Board (MSPB or Board) to review certain serious personnel actions against federal employees. If an employee

> asserts rights under the CSRA only, MSPB decisions, all agree, are subject to judicial review exclusively in the Federal Circuit. §7703(b)(1). -- *Perry v. Merit Sys. Prot. Bd.,* No. 16-399 (June 23, 2017)"

Perry v. Merit Systems Protection Bd., 582 U.S. ___(2017) at 17.

Although it was not Sweeney's intent to waive for fail to properly raise this Title VII discrimination claim, but if this Court holds that he did, then judicial review reverts back to the Federal Circuit with Sweeney abandoning his Title VII discrimination claim.

IV. The District Court Erred by not Liberally Construing Petitioner's Complaint for Discrimination

The district court and court of appeals for the fourth circuit held Sweeney's *pro se* complaint to a level which a lawyers complaint is to be held. There is no doubt the intent of the complaint, and if properly liberally construed, a court would have ascertained its intent. This level of liberally reading the complaint would not have required a complete re-writing.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

Thomas F. Sweeney
Pro se
7083B Jasper Dr
Middletown, MD 21769
(804) 457-8868
Thomas@reddn.com

November 11, 2019

APPENDIX TABLE OF CONTENTS