UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 18-1458

THOMAS F. SWEENEY,

Petitioner - Appellant,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (1:17-cv-00926-CMH-IDD)

Argued: May 9, 2019 Decided: June 14, 2019

Before GREGORY, Chief Judge, and WYNN and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: William Paul Bray, OTEY SMITH & QUARLES, Williamsburg, Virginia, for Appellant. Dennis Carl Barghaan, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Matthew W. Smith, OTEY SMITH & QUARLES, Williamsburg, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Thomas F. Sweeney ("Appellant") filed a "mixed case" appeal with the Merit Systems Protection Board ("Appellee" or "MSPB"), i.e., a discrimination claim coupled with a challenge to a personnel action decision. Specifically, Appellant alleged that the Federal Aviation Administration ("FAA") discriminated against him on the basis of gender and improperly forced him to accept a reassignment that resulted in a reduction in grade and pay.

The MSPB, however, concluded that it lacked jurisdiction to entertain Appellant's claims because Appellant voluntarily accepted the reassignment. Appellant then filed a complaint in the district court seeking review *only* of the MSPB's decision that it lacked jurisdiction. The district court granted the

MSPB's motion to dismiss the complaint. In this appeal, Appellant argues that the district court erred by: (1) failing to convert MSPB's motion to dismiss to a motion for summary judgment; and (2) failing to recognize that genuine issues of material fact remain on the jurisdictional issue. As explained below, we reject these arguments and affirm.

I.

A.

Factual Background

On August 5, 2009, Appellant began working for the FAA as a developmental air traffic control specialist ("ATCS"). A developmental ATCS must successfully complete extensive training before becoming a certified professional controller ("CPC"). Pursuant to FAA policy, in order to remain employed with the FAA as an air traffic controller, an individual must satisfactorily complete the FAA's training program, become a CPC, and obtain "facility or area certification" at the facility to which the individual is assigned. J.A. 130.[1] But, if a developmental ATCS demonstrates an "[i]nability to successfully complete an air traffic control training program," FAA officials may ask a training review board to make a recommendation to the facility's air traffic manager whether to terminate that controller's training

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

program. *Id.* at 129–30.

After completing an initial training period, in December 2009 Appellant reported to the Washington Air Route Traffic Control Center in Leesburg, Virginia (the "Washington Center"). In December 2012, during Appellant's time at the Washington Center, FAA officials identified deficiencies in his work performance and placed him in an additional remedial training program. They then suspended his training on February 22, 2013. On April 11, 2013, a training review board concluded that he was not likely to obtain facility or area certification at the Washington Center. The training review board recommended that Appellant's training be discontinued.

As a result, the Air Traffic Manager, Steven Stooksberry, sent Appellant a memorandum titled "Discontinuation of Training" dated April 15, 2013. J.A. 67. Stooksberry wrote, "This memorandum is notification that your training is being terminated due to unsatisfactory performance . . . ." *Id.* The memorandum informed Appellant of the training review board's recommendation, and Stooksberry's determination that Appellant "ha[d] been offered every opportunity to succeed in the ATCS Training Program and that [Appellant had] not demonstrated that [he] possess[ed] the knowledge, skills, and abilities required to safely perform the duties of a CPC" at the Washington Center. *Id.* "Therefore," Stooksberry wrote, "it is my decision that your training be discontinued." *Id.* The memorandum also

provided Appellant with an opportunity to respond within seven days, and noted that in the event Appellant failed to respond, "the appropriate action (position change or separation) shall be initiated." *Id.*

On April 23, 2013, Appellant responded to Stooksberry's memo. Appellant's response did not challenge the discontinuation of Appellant's training at the Washington Center. Instead, Appellant requested that the FAA "recommend [him] for continued employment and placement at a lower level FAA Air Traffic Control Facility." J.A. 148. He added, "I believe I can be a CPC at a different facility." *Id.* On May 13, 2013, Stooksberry sent Appellant a memo stating, "[I]t is my final determination that your training at [the Washington Center] be terminated." *Id.* at 104.

When an ATCS has been unsuccessful in completing training at a particular facility, the FAA's National Employee Services Team recommends to senior management whether to offer that ATCS reassignment at a different facility. An ATCS who accepts reassignment is provided with a "clean slate" with respect to his training, and thus, he may reapply for a position at a higher level facility in the future. J.A. 131. But if the ATCS does not accept the reassignment, the FAA may "initiate proper separation activities," *id.*; i.e., propose the individual's removal from federal service. However, the individual has an opportunity to respond to the removal determination before the FAA issues a final

employment decision.

Pursuant to this policy, in another memorandum dated November 29, 2013 (the "Reassignment Memo"), the FAA offered to reassign Appellant to a position as an air traffic control specialist at Harrisburg International Airport, a lower-level facility. The Reassignment Memo stated that the reassignment would be at Appellant's own expense, and that if he "decline[d] . . . this offer, there is no assurance that any other offer will be forthcoming." J.A. 64. Additionally, the Reassignment Memo stated that if Appellant did "not accept this reassignment" to Harrisburg, his "removal from [his] ATCS position and from the Federal Service will be proposed." *Id.* at 65. Finally, the Reassignment Memo stated: "I fully understand this process and consider it to be for my personal benefit and . . . the Agency has not exercised any pressure on me." *Id.* Appellant accepted all of the terms of the Reassignment Memo by signing it on December 3, 2013. Appellant then transferred from the Washington Center to the Harrisburg International Airport, where he remained employed as an ATCS when this case was filed in district court.

B.

Procedural History

1.

Appellant's FAA Complaint

Appellant, proceeding pro se, filed a complaint with the FAA alleging that the termination of his training and his subsequent transfer were the result of unlawful gender discrimination. *See* 29 C.F.R. § 1614.302(a)(1). The FAA was then obligated to investigate Appellant's allegations of employment discrimination and issue a final agency decision ("FAD"). *See id.* § 1614.302(d); *see also id.* § 1614.101–110.

On July 28, 2014, the FAA completed its investigation of Appellant's complaint and subsequently issued its FAD. The FAD concluded that Appellant had established a prima facie case of gender discrimination, but that he failed to produce sufficient evidence of pretext; thus, the agency made an overall finding of no discrimination.

2.

MSPB Proceedings

Appellant, still pro se, filed a mixed case appeal with the MSPB on October 15, 2014, which, in addition to review of his discrimination allegations, sought review of the FAA's termination of his training and subsequent transfer to Harrisburg.

On October 23, 2014, an MSPB Administrative Judge ("AJ") issued an order to show cause requiring Appellant to address whether the MSPB could exercise jurisdiction over his case. The AJ explained that "[t]he [MSPB] does not have jurisdiction over all actions that are alleged to be incorrect but only those

actions in which jurisdiction is provided by pertinent statutes and regulations," and "[i]t is the appellant's burden to establish that the [MSPB] has jurisdiction over this appeal." J.A. 31.

On November 2, 2014, Appellant responded to the order and asserted that the Harrisburg reassignment resulted in a reduction in grade and pay, and he explained that the Reassignment Memo "stated if I did not accept the offer of assignment [to Harrisburg], my *involuntary removal* from my ATCS position and Federal Service will be proposed." J.A. 44 (emphasis supplied). On December 4, 2014, the AJ issued a supplemental order to show cause that "afford[ed] him another opportunity to submit evidence and argument to show cause why this appeal should not be dismissed." *Id.* At 52. This order advised Appellant that although the MSPB typically possessed jurisdiction over reassignments that were accompanied by a reduction in grade and/or pay, reassignment must have been "involuntary" for jurisdiction to attach. *Id.* at 53. The order informed Appellant that it was "incumbent on [him] to establish that his acceptance of the agency's offer rendered the assignment . . . involuntary because it was the result of duress, coercion, or misrepresentation by the agency." *Id.* at 54–55. In his response, filed December 14, 2014, Appellant noted that "[i]t is obvious that if I did not accept my reassignment I would have been removed from service." *Id.* at 61.

On April 12, 2016, the AJ issued her decision,

concluding that the MSPB lacked jurisdiction to consider Appellant's case. Specifically, the AJ held that the MSPB could not exercise jurisdiction over Appellant's reassignment to Harrisburg because there was no evidence that in agreeing to the reassignment, Appellant was deprived of the "freedom of choice." J.A. 170. The AJ noted that Appellant "accepted the reassignment," and the FAA's explanation that his removal from employment would be proposed if he declined the reassignment did not render that assignment involuntary:

> [T]he fact remains that [Appellant] had an option in that he could have declined [reassignment] and then challenged the removal action. The fact that he accepted the reassignment in lieu of removal does not make his reassignment involuntary because he had the option to face removal and exercise his appeal rights to the E[qual] E[mployment] O[pportunity] C[ommission] and/or the MSPB. While this is admittedly an unpleasant choice to face, it is well established that the fact that an employee is faced with unpleasant alternatives does not in and of itself render the situation improperly coercive.

Id. at 171.

Appellant filed a petition for review of the AJ's decision with the full MSPB. On September 23, 2016, the MSPB issued a final order that affirmed the AJ's

decision, explaining that it lacked jurisdiction over Appellant's reassignment to Harrisburg because "[a] choice between unpleasant alternatives does not render a decision to accept the agency's proposal involuntary." J.A. 211.[2]

3.

District Court Proceedings

Appellant filed a petition for review of the MSPB's final order in the Federal Circuit. However, as a result of the Supreme Court's intervening decision in *Perry v. MSPB*, 137 S. Ct. 1975 (2017) (holding that if the MSPB dismisses a mixed case on jurisdictional grounds, the district court, not the Federal Circuit, is the proper forum for judicial review), Appellant's petition was transferred to the United States District Court for the Eastern District of Virginia.

The district court ordered Appellant to file a formal complaint, and he did so on December 18, 2017. Although Appellant premised the district court's jurisdiction in part on Title VII of the Civil Rights Act of 1964, the complaint did not present a cause of action

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[2] Both the AJ and the MSPB rejected Appellant's argument that the May 13, 2013 termination of his training violated due process, and that termination was an adverse action over which the MSPB possessed jurisdiction. *See* J.A. 168, 211–13. Although not specifically raised in this appeal, we agree with the AJ and MSPB that, absent circumstances not present in this case, denial of training is not within the MSPB's jurisdiction. *See* 5 C.F.R. § 1201.3(a).

under Title VII or otherwise seek the district court's adjudication of his gender discrimination allegations. The complaint only sought judicial review of the MSPB's conclusion that it lacked jurisdiction to entertain his mixed case.

On February 5, 2018, the MSPB moved to dismiss the complaint and attached the Administrative Record from the MSPB proceedings. The MSPB also provided Appellant with notice that its motion was dispositive and informed him of his right to file a response to the motion. However, Appellant did not file a response.

On March 13, 2018, the district court granted the MSPB's motion and dismissed the complaint. In doing so, the district court concluded that the MSPB lacked jurisdiction to consider any employment decision that involved any "voluntary action by the employee," J.A. 290 (quoting 5 C.F.R. § 752.401(b)(9)), and that the MSPB had correctly concluded that Appellant's reassignment to Harrisburg was such a voluntary action.

On April 6, 2018, Appellant filed a motion for reconsideration of the district court's dismissal order. Appellant asserted that he had not filed a response to the MSPB's motion to dismiss because the legal argument that he would have articulated in such a response was already set forth in his complaint; accordingly, his response "would have been a 'cut and paste' [which would] be irrelevant and a waste of this Court's time." J.A. 294. Appellant challenged neither

the accuracy of the Administrative Record, nor the district court's use of the Administrative Record in resolving the MSPB's motion to dismiss. The district court denied Appellant's motion for reconsideration, and this appeal followed.

We possess jurisdiction pursuant to 28 U.S.C. § 1291, and we review the grant of a motion to dismiss de novo. *See ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 211 (4th Cir. 2019).

II.

A.

Failure to Convert to Summary Judgment Motion

Appellant first contends that the district court erred by failing to convert MSPB's motion to dismiss into a motion for summary judgment. Specifically, he claims the district court was required to do so under Federal Rule of Civil Procedure 12(d) when it reviewed material outside the pleadings, namely, the MSPB Administrative Record.[3]

Even if the district court erred in this regard, "[a] district court's failure to comply with the procedural safeguards of Rule 12(d) does not constitute reversible error if it did not *prejudice* the

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[3] Rule 12(d) provides, "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. Proc. 12(d).

parties." *Russell v. Harman Int'l Indus., Inc.*, 773 F.3d 253, 255 (D.C. Cir. 2014) (emphasis in original).

For his part, Appellant asserts four reasons that the error was not harmless:

> (1) "Rule 12(d) requires that [Appellant] be given a reasonable opportunity to submit 'all the material that is relevant to the motion' of which he was deprived";
>
> (2) "Rule 56(c) and (e) afford [Appellant] important protections by requiring the moving party to clearly identify the basis for summary judgment and the materials in the record supporting such a motion";
>
> (3) "Rule 56(d) protects [Appellant] from summary judgment based on facts not available to him at the time the motion is considered"; and
>
> (4) "[T]he district court's own Local Rules contain requirements for summary judgment motions that enhance the protections of Rule 56. [Appellant] was afforded none of these protections in the proceedings below."

Appellant's Br. 3 (citation omitted). None of these arguments demonstrate that Appellant was prejudiced by the district court treating the MSPB's motion as one to dismiss rather than one for summary judgment.

As to his first argument, Appellant was not deprived of a reasonable opportunity to submit "all the material that is relevant to the motion" for two reasons. Appellant's Br. 3. First, Appellant would not have been permitted to introduce additional material in any event because the jurisdictional claim was governed solely by the Administrative Record. *See Rana v. United States*, 812 F.2d 887, 888–89 n.1 (4th Cir. 1987); *Rockwell v. Dep't of Transp.*, 789 F.2d 908, 913 (Fed. Cir. 1986) (per curiam). Second, to the extent Appellant wished to argue that there were genuine disputes of material fact precluding summary judgment (or any other argument, for that matter), he had an opportunity to do so -- by filing a response to the motion. He elected not to. And, of note, Appellant does not assert that he was unaware of his right to file a response. To the contrary, Appellant states that he chose not to file a response because any argument that he would have presented was already in his complaint.

As for Appellant's second and fourth arguments, he asserts that the district court's failure to convert the motion prejudiced him because he was deprived of various procedural benefits under Rule 56 and the district court's own local rules. *See Appellant's* Br. 3, 8–10. But Appellant fails to demonstrate how this prejudiced him. Significantly, Appellant does not allege that the district court's strict compliance with all applicable rules would have changed Appellant's behavior in any way. And, even on appeal with the

benefit of counsel, Appellant fails to identify any material dispute of fact that would have precluded summary judgment. Instead, he attempts to rehash the facts underlying his gender discrimination claim, which he abandoned in the district court. Finally, a district court's alleged failure to comply with its own local rules is not a basis for reversal by an appellate court, particularly where Appellant has not identified any basis for prejudice.

As to Appellant's third argument, the MSPB attached the Administrative Record to its motion; therefore, the motion was not granted "based on facts not available to [Appellant] at the time the motion [was] considered." Appellant's Br. 3. Indeed, Appellant does not identify what those facts might be and did not challenge the use of the Administrative Record in district court.

To be sure, Appellant was a pro se litigant, and as a result, the district court must read the pleadings liberally in his favor. *See Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 72 (4th Cir. 2016). But the court cannot prosecute Appellant's claim for him. Where Appellant (1) declined to file a response to the motion to dismiss or challenge the district court's consideration of the Administrative Record; (2) does not allege that strict compliance with the summary judgment procedural requirements would have changed his decision not to respond to the motion; and (3) cannot, even with the benefit of appellate counsel, point to particular disputed *facts* that would have

precluded summary judgment, we cannot conclude Appellant was prejudiced by any error on the district court's part, regardless of his pro se status.

For these reasons, assuming the district court should have converted the motion to dismiss to one for summary judgment, any error was harmless.

B.

Genuine Issues of Material Fact

We next address whether the MSPB was correct in deciding as a matter of law that Appellant's reassignment was a product of Appellant's voluntary choice, thereby depriving it of jurisdiction. Appellant contends this was improper because genuine issues of material fact remain on this issue.

1.

The MSPB's Jurisdiction

The MSPB has jurisdiction to adjudicate challenges to certain adverse employment actions taken by a federal agency against its employees. *See 5* U.S.C. § 7701(a); *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (enbanc). As elevant here, when a federal employee suffers an employment action that he or she believes to be unwarranted, and that the MSPB has jurisdiction to review, the employee can challenge the action through an "appeal" to the MSPB.

The MSPB possesses jurisdiction to consider

"any action which is appealable to the [MSPB] under any law, rule or regulation." 5 U.S.C. § 7701(a). However, "[t]he jurisdiction of the MSPB is not plenary, but is limited to those areas specifically granted by statute or regulation. . . . In other words, jurisdiction for the [MSPB] to hear a particular type of action must be granted by some law, rule or regulation." *Garcia*, 437 F.3d at 1327 (quoting *Antolin v. Dep't of Justice*, 895 F.2d 1395, 1396 (Fed. Cir. 1989) (internal quotation marks omitted)).

Pursuant to 5 U.S.C. § 7513(d), the MSPB has jurisdiction to hear appeals over certain enumerated adverse actions taken by an agency against an employee. The enumerated adverse actions are: (1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less. *See* 5 U.S.C. § 7512.

However, the MSPB does not have jurisdiction to review *voluntary* actions by the employee. *See* 5 C.F.R. § 752.401(b)(9); *Garcia*, 437 F.3d at 1328 ("Nothing in 5 U.S.C. § 7512, which enumerates specific adverse actions over which the [MSPB] has jurisdiction, extends the [MSPB's] jurisdiction to facially voluntary acts."). Accordingly, an employee who *voluntarily* accepts a reduction in grade or pay (which are otherwise reviewable adverse actions) has no right to appeal to the MSPB. *See id.* There is an exception to this general rule, however, "if the employee proves, by a preponderance of the evidence, that his or her action was involuntary and thus

tantamount to a forced enumerated adverse action." *Id.* at 1329 (alterations and internal quotation marks omitted).

2.

Voluntary Action

To establish that a seemingly voluntary action was nonetheless involuntary, an employee must show by a preponderance of the evidence that (1) the agency "effectively imposed" the terms of the action; (2) the employee "had no realistic alternative" but to take the action; and (3) the action was "the result of improper acts by the agency." *Garcia*, 437 F.3d at 1329 (internal quotation marks omitted). The test is an objective one that is based on the totality of the circumstances, and the "employee must establish that a reasonable employee confronted with the same circumstances would feel coerced into" taking the action. *Id.* (internal quotation marks omitted).

We conclude the district court was correct in deciding that Appellant cannot meet this standard. Although Appellant had to choose between the unattractive options of participating in termination proceedings or being reassigned to Harrisburg, he was still presented with a choice. Both the Federal Circuit and the MSPB have repeatedly held that "the fact that an employee is faced with an unpleasant situation or that his choice is limited to two unattractive options does not make the employee's decision any less voluntary." *Staats v. U.S. Postal Serv.*, 99 F.3d 1120,

1124 (Fed. Cir. 1996); *see also Gaudette v. Dep't of Trans.*, 832 F.2d 1256, 1259 (Fed. Cir. 1987) (concluding an air traffic controller's reassignment was voluntary in similar circumstances, explaining the fact that "the employee would prefer to stay in the position from which he or she faces possible removal and dislikes taking a pay-cut does not make their decision to accept the offer of a lower-grade position legally involuntary"); *Loggins v. U.S. Postal Serv.*, 112 M.S.P.R. 471, 476 (2009) ("An employee's acceptance of a lower-graded position is generally considered to be voluntary and not subject to the Board's jurisdiction."); *Reed v. U.S. Postal Serv.*, 99 M.S.P.R. 453, 460 (2005) (same), *aff'd*, 198 F. App'x 966 (Fed. Cir. 2006). Similarly, the Federal Circuit has held that a federal employee who, like here, accepts reassignment to a lesser position in lieu of facing proposed removal cannot demonstrate that the reassignment is "involuntary" so as to vest the MSPB with jurisdiction. *See Daniel v. MSPB*, 534 F. App'x 937, 941 (Fed. Cir. 2013). Accordingly, Appellant has not shown that the FAA effectively imposed the Harrisburg reassignment on him or that he had no realistic alternative (as opposed to no attractive alternative) other than to accept the reassignment.

Nor did the reassignment result from improper acts by the FAA. Indeed, Appellant signed the Reassignment Memo, which stated, "I fully understand this process and consider it to be for my personal benefit and . . . the Agency has not exercised

any pressure on me." J.A. 65. The district court correctly determined that Appellant's reassignment was voluntary as a matter of law, and thus, the MSPB properly dismissed Appellant's case for lack of jurisdiction.

III.

For the foregoing reasons, we affirm the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

THOMAS F. SWEENEY,	)	
	)	
Petitioner ,	)	
v.	)	
	)	Civil Action No.
MERIT SYSTEMS	)	l:17 -cv-926
PROTECTION BOARD,	)	
	)	
Respondent .	)	

ORDER

THIS MATTER comes before the Court on Petitioner's Motion for Reconsideration of the March 13th, 2018 Order granting Respondent ' s Motion to Dismiss. The Court is of the opinion that the March 13 Order was correct for the reasons stated.

Accordingly , it is here by

ORDERED that Petitioner's Motion for Reconsideration is DENIED.

/s/ CLAUDE M. HILTON
CLAUDE M. HILTON
UNITED STATES
DISTRICT JUDGE

Alexandria , Virginia
April 24 , 2018

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

THOMAS F. SWEENEY,	)	
Petitioner,	)	
v.	)	Civil Action No. 1:17-cv-926
MERIT SYSTEMS PROTECTION BOARD,	)	
Respondent.	)	

ORDER

THIS MATTER comes before the Court on Defendant's Motion to Dismiss Plaintiff s Complaint. Plaintiff Thomas Sweeney here seeks judicial review of a final decision issued by the Merit Systems Protection Board ("MSPB"). Plaintiff , an air traffic controller employed by the Federal Aviation Administration ("FAA"), filed this suit after the FAA discontinued his developmental training due to repeated difficulties he was experiencing and after he

accepted a reassignment offer to a lower-level facility resulting in a pay grad e reduction .

Plaintiff initially filed a formal administrative complaint of discrimination with the FAA, alleging that the discontinuation of his training program and his transfer were the result of unlawfu l gender discrimination. The FAA issued a Final Agency Decision finding that Plaintiff had not been the victim of unlawful discrimination . Plaintiff then filed an appeal with the MSPB seeking both generic review of his reassignment a .d accompanying pay reduction as well as review of his allegations of gender discrimination under Title VII of the Civil Rights Act of 1964. Plaintiff later sought leave of the MSPB to amend his appeal to include an allegation that the FAA had terminated his air traffic control training in violation of his constitutional due process rights because the FAA officials did not follow usual training procedures in doing so.

The MSPB Administrative Judge (" AJ") ultimately decided that the MSPB lacked jurisdiction to entertain Plaintiff ' s appeal. The AJ held that the MSPB could not exercise jurisdiction over a voluntary employee decision such as Plaintiff's reassignment. The AJ found that Plaintiff had voluntarily agreed to the reassignment, and there was no evidence that he was deprived of freedom of choice.

Plaintiff then filed a petition for review by the full MSPB , which resulted in a final order that affirmed the initial decision by the AJ. The MSPB held that

Plaintiff's reassignment was not rendered involuntary simply because he was not provided the option to remain at his former duty station. The MSPB also addressed Plaintiff's belated due process claim, holding that it lacked jurisdiction to consider allegations related to the agency 's decision to terminate his training, and further that his due process claims were without merit because he was not deprived of a constitutionally -viable property interest and was afforded an opportunity to tender a written response to the FAA' s proposal to discontinue his training.

Plaintiff filed a petition for review with the Court of Appeals for the Federal Circuit, but due to the intervening decision by the U.S. Supreme Court in Perry v. Merit Systems Protection Board, 137 S. Ct. 1975 (2017), which changed the appropriate jurisdiction for this type of appeal, the case was transferred to this Court on August 16, 2017 . Defendant filed this Motion to Dismiss along with a Roseboro notice on February 5, 2018 , and Plaintiff failed to timely file any opposition.

The single issue for this Court to review is whether the MSPB correctly held that its statutory and regulatory charter precluded it from exercising jurisdiction over plaintiff's allegations . "The jurisdiction of the MSP B is not plenary." Maddox v. Merit Sys. Prat . Bd., 759 F.2d 9, 10 (Fed. Cir. 1985). Although the MSPB generally possesses jurisdiction to adjudicate adverse employment actions such as

"[r]emovals [and) reductions in grade or pay," 5 C.F.R. § 1201.3(a)(1), there are a number of exceptions to this grant of jurisdiction, including any "voluntary action by an employee," id. § 752.401 (b)(9). Thus , even where an employee experiences what would otherwise be a reviewable adverse employment action , the MSPB lacks jurisdiction to consider it if it was the result of a voluntary action by the employee. See, e.g., Staats v. O.S. Posta l Serv., 99 F.3d 1120, 1123-24 (Fed. Cir. 1996).

As noted by the MSPB , Plaintiff voluntarily accepted the FAA' s proposed reassignment and its accompanying pay grade reduction , and therefore the reassignment was not an adverse employment action. Despite Plaintiff's assertion that he was deprived of free choice because his only other alternative was to fight his potential removal from federal employment , Federal Circuit precedent has established that this alone does not render an employment action involuntary. See Staats, 99 F.3d at 1124 ("[T]he fact that an employee is faced with an unpleasant situation or that his choice is limited to two unattractive options does not make the employee's decision any less voluntary ."); see also Gaudette v. Dep' t of Transp., 832 F.2d 1256 (Fed. Cir. 1987) (rejecting Plaintiff's exact argument in similar case).

The MSPB also correctly held that it did not possess jurisdiction to review Plaintiff's due process challenge to the FAA's discontinuance of his training program. As the MSPB recognized, its statutory and

regulatory authority does not include "jurisdiction over an agency ' s decision to terminate an employee's training . [or] the agency 's rules and procedures for required training and the process and the implementation of those procedures." For the foregoing reasons, it is hereby

ORDERED that the Defendant' s Motion to Dismiss is GRANTED, and this case is DISMISSED.

/s/ Claude M. Hilton
CLAUDE M. HILTON
UNITED STATES
DISTRICT JUDGE

Alexandria, Virginia
March 13, 2018

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

THOMAS F. SWEENEY,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2017-1255

Petition for review of the Merit Systems Protection Board in No. DC-0752-15-0060-I-1.

Before LOURIE, MOORE, and O'MALLEY, *Circuit Judges.*

PER CURIAM.

O R D E R

Thomas F. Sweeney ("Sweeney") petitions for review of the final order of the Merit Systems Protection Board ("the Board") dismissing his appeal for lack of jurisdiction. *See Sweeney v. Dep't. of Transp.*, No. DC-0752-15-0060-I- 1, 2016 WL 5366354 (M.S.P.B. Sept. 23, 2016) ("*Final Order*"); *see also* Resp't's App. ("R.A.") 1–10. Because we lack jurisdiction over Sweeney's appeal, we transfer it to

the United States District Court for the Eastern District of Virginia.

BACKGROUND

Sweeney was employed as a Developmental Air Traffic Control Specialist ("ATCS") with the Federal Aviation Administration ("the Agency") at the Washington Air Route Traffic Control Center ("ARTCC"). *Final Order*, 2016 WL 5366354, ¶ 2. In December 2012, Sweeney was placed in a training program after the Agency identified deficiencies in his work performance. *Id.* The Agency then suspended his training on February 22, 2013. *Id.* The Agency's training review board ("TRB") met on April 11, 2013 and determined that Sweeney's performance had not improved and that he was unable to obtain the certification necessary to perform his specific position. *Id.* Thus, the TRB recommended that Sweeney be reassigned to a lower-level facility. *Id.*

On April 15, 2013, the Agency notified Sweeney that his training would be discontinued because of his unsatisfactory performance in the training program, and that he was entitled to provide written comments relating to the proposed action. *Id.* ¶ 3. Sweeney filed a response and on May 13, 2013, the Agency made a final determination terminating Sweeney's training at ARTCC. *Id.* Sweeney subsequently filed a request for reconsideration, which was denied by the Agency. *Id.* Consistent with the TRB recommendation, the Agency offered Sweeney a list of facilities that he could be

reassigned to, including one in Harrisburg, Pennsylvania. *Id.* In a memorandum dated November 29, 2013, Sweeney was offered the assignment to the Harrisburg facility effective December 1, 2013. *Id.* Sweeney was informed that if he declined the Agency's offer to be reassigned to a lower-level facility, his removal from his current ATCS position and from the Federal service would be proposed. *Id.* Sweeney accepted the reassignment and was reassigned to the Harrisburg facility. *Id.*

Sweeney then filed a discrimination complaint with the Agency, arguing, *inter alia*, that he was unlawfully discriminated against when the Agency terminated his training, subsequently transferred him to a lower-level facility, and reassigned him to a downgraded position. *Id.* The Agency determined that no discrimination had occurred. *Id.*

Sweeney then appealed to the MSPB, alleging a re- duction in grade and pay, as well as a denial of a within- grade increase ("WIGI"). *Id.* ¶ 5. Sweeney also claimed that (1) the Agency's training program was deficient; (2) the Agency's actions resulted from discrimination; and (3) the Agency's decision to discontinue his training was essentially a constructive removal. *Id.*

The MSPB administrative judge ("AJ") issued two separate Show Cause Orders, instructing Sweeney to submit evidence and argument establishing that his claims fell within the Board's jurisdiction. *Id.* ¶ 6. The AJ issued an initial decision

dismissing the appeal for lack of jurisdiction, concluding that Sweeney did not make any nonfrivolous allegations of facts that, if proven, would establish the Board's jurisdiction over his appeal. *Id.*

Sweeney filed a petition for review by the full Board, and the full Board affirmed. First, the Board determined that the termination of Sweeney's training was not a performance-based action under 5 U.S.C. § 4303, over which the Board had jurisdiction. *Id.* ¶ 7. The Board also rejected Sweeney's argument that his reassignment resulted in a reduction in grade and pay. Specifically, the Board determined that there was no evidence that Sweeney's grade and pay were reduced, and that even if there were such evidence, Sweeney had voluntarily accepted his reassignment in lieu of removal. *Id.* ¶ 8. The Board reasoned that "[a] choice between unpleasant alternatives does not render a decision to accept the agency's proposal involuntary." *Id.* ¶ 9 (citing *Soler-Minardo v. Dep't of Def.*, 92 M.S.P.R. 100, ¶ 9 (2002); *see also Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc); *Gaudette v. Dep't of Transp.*, 832 F.2d 1256, 1258 (Fed. Cir. 1987). Therefore, the Board reasoned, Sweeney did not nonfrivolously allege an appealable grade and pay reduction. *Id.*

The Board also rejected Sweeney's argument, which was presented to but not addressed by the AJ, that the Agency had violated his due process rights. Sweeney argued that his rights were violated because, *inter alia*, TRB's recommendation that his training be

terminated was a *de facto* decision notice to which he did not have an opportunity to respond because, Sweeney alleged, the decision to terminate his training had already been made. *Id.* ¶ 12. The Board determined that because the decision to terminate Sweeney's training was not an appealable adverse action, it did not have jurisdiction over Sweeney's allegations. *Id.* ¶ 14.

The Board also determined that even if it had jurisdiction, there was no merit to Sweeney's due process argument. The Board noted that the TRB did not propose or recommend discipline at all. *Id.* ¶ 14. Instead, the Air Traffic Manager, not the TRB, made the final decision to terminate Sweeney's training, and the Air Traffic Manager specifically noted that he considered Sweeney's reply in reaching his decision. *Id.*

Thus, the Board affirmed the AJ's decision dismissing the appeal for lack of jurisdiction.

Sweeney timely appealed from the Board's final order, attempting to invoke our jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

Before we can reach the merits of Sweeney's appeal, we must first ensure that we have jurisdiction. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 857 F.3d 1347, 1350 n.1 (Fed. Cir. 2017).

Because Sweeney raises claims relating to both discrimination and an adverse employment action, this is a "mixed case." *See Perry v. Merit Sys. Prot.*

Bd., 137 S. Ct. 1975, 1979 (2017). If the Board dismisses a mixed case on the merits or on procedural grounds, then that decision may only be reviewed in a district court, not this court. *Id.* Before *Perry*, we had held that we had jurisdiction to review appeals only from the Board's dismissal of a mixed case for lack of jurisdiction. *See Conforto v. Merit Sys. Prot. Bd.*, 713 F.3d 1111, 1117–19 (Fed. Cir. 2013). *Perry*, however, superseded *Conforto* by holding that mixed cases dismissed on jurisdictional grounds must also be reviewed in district court. 137 S. Ct. at 1979.

Briefing was completed in this appeal before *Perry* was decided, and so, at that time, *Conforto* justified our jurisdiction. After *Perry*, we issued an order asking the parties to address whether *Perry* required transfer and, if so, to which district court this appeal should be transferred.

The government responded that if Sweeney did not waive his discrimination claims, *Perry* required that this appeal be transferred to a district court. The government suggested that the appeal be transferred to the United States District Court for the District of Maryland, where Sweeney currently resides.

Sweeney did not waive his discrimination claims. In- stead, he moved to bifurcate his claims. He asks that the discrimination claims be transferred to the United States District Court for the Eastern District of Virginia because the acts giving rise to his claims occurred in Loudoun County, Virginia, and that his other claims remain before this court. The

government responded that bifurcation is not permitted in mixed cases, citing *Williams v. Department of the Army*, 715 F.2d 1485, 1490–91 (Fed. Cir. 1983) (en banc).

We agree with the government that *Williams* specifically precludes bifurcation of a mixed case. In that case, we held that the language of the statute and related statutes, the legislative history, the relevant policy considerations, and the interests of the litigants indicated that bifurcation of claims in a mixed case was not proper. *Id.* Thus, Sweeney's motion to bifurcate his claims is denied.

As Sweeney has not waived his discrimination claims, we also agree with the government that this appeal must be transferred to a district court. We may transfer the appeal to any court in which the "appeal could have been brought at the time it was filed or noticed." 28 U.S.C. § 1631. Under the relevant venue provisions, Sweeney's action could have been brought in, *inter alia*, "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." *Id.* § 1391(b)(2). As the events giving rise to Sweeney's claims occurred in Loudoun County, Virginia, which is within the Eastern District of Virginia, we determine that this appeal should be transferred to that district.

Accordingly,

IT IS ORDERED THAT:

(1) Sweeney's Motion for Bifurcation is denied.

(2) This appeal be transferred to the United States District Court for the Eastern District of Virginia.

FOR THE COURT

August 16, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS F. SWEENEY,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
DC-0752-15-0060-I-1

DATE: September 23, 2016

THIS FINAL ORDER IS NONPRECEDENTIAL[4]

Thomas F. Sweeney, Frederick, Maryland, pro se.

Michael Doherty, Esquire, Washington, D.C., for the agency.

BEFORE
Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

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

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED by this Final Order to address the appellant's due process allegations, we AFFIRM the initial decision.

BACKGROUND

¶2 The appellant was employed as a Developmental Air Traffic Control Specialist (ATCS)

at the agency's Washington Air Route Traffic Control Center (ARTCC). The agency's training review board (TRB) met on December 6-7, 2012, to evaluate the training of several employees, including the appellant. Initial Appeal File (IAF), Tab 18, Exhibit (Ex.) O. Although training deficiencies were identified for the appellant, the TRB decided to continue his training but with specific training recommendations to address his performance issues. *Id.* The appellant's training was subsequently suspended on February 22, 2013, resulting in another TRB meeting on April 11, 2013. *Id.*, Ex. P. The TRB determined that the appellant's deficiencies had not been resolved by the additional training and that he could not achieve the necessary certification, and thus, it recommended that his training be discontinued. However, the TRB further recommended that the appellant "be given strong consideration for reassignment to a lower level facility, as per agency directives." *Id.*

¶3 The agency notified the appellant in a memorandum dated April 15, 2013, that his training was being terminated due to unsatisfactory performance in Radar Controller Training, Stage IV. IAF, Tab 16, Ex. D. The memorandum advised the appellant that, in accordance with the Employment Policy for Air Traffic Control Specialist in Training—EMP-1.14—he could discuss the matter with the Support Manager for Training and, within 7 calendar days from receipt of notification, he could provide written comments regarding the proposed action. *Id.*;

IAF, Tab 15, Ex. G. The appellant filed a response, and the agency issued a final determination on May 13, 2013, terminating his training at ARTCC. The appellant submitted a request for reconsideration, which the agency denied, noting that all TRB members had concurred with the decision to suspend his training. IAF, Tab 15, Exs. K, M. The agency subsequently offered the appellant reassignments to Atlantic City, New Jersey; Allenton, Pennsylvania; and Falmouth, Massachusetts. IAF, Tab 2 at 28. The appellant's regional National Air Traffic Controllers Association was able to get a facility at Harrisburg, Pennsylvania, added to the appellant's list of options and he accepted the offer to that location because it was closer to his home. IAF, Tab 16, Ex. B. In a memorandum dated November 29, 2013, the appellant was offered an assignment to the Harrisburg facility effective December 1, 2013. *Id.*, Ex. A. The appellant was advised that, if he declined the agency's offer of reassignment, his removal from the ATCS position and from the Federal service would be proposed. *Id.* The appellant accepted the assignment, and he was reassigned to the Harrisburg facility. *Id.*

¶4 The appellant filed a discrimination complaint with the agency, alleging that he was discriminated against based on his sex because his training was not conducted in accordance with Federal Aviation Administration (FAA) orders and procedures and because the agency terminated his training, transferred him to a lower-level facility, and

reassigned him to a downgraded position. IAF, Tab 2 at 3. The agency issued a final agency decision in which it determined that no discrimination had resulted. *Id.* at 36.

¶5 The appellant filed this appeal, alleging a reduction in grade and pay and a denial of a within-grade increase (WIGI). IAF, Tab 1. The appellant also alleged multiple deficiencies in the agency's training program and asserted that the agency's actions were the result of discrimination. In addition, he alleged that the agency's decision to discontinue his training was tantamount to a constructive removal. IAF, Tab 7 at 5.

¶6 The administrative judge issued an order to show cause, notifying the parties of the elements and burdens of proof for establishing Board jurisdiction. IAF, Tab 4. Because the appellant's response raised a constructive removal claim, the administrative judge issued a supplemental order to show cause to address this claim. IAF, Tab 13. After providing the parties with the opportunity to respond to the orders and without holding a hearing, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 21, Initial Decision (ID) at 1, 11. Specifically, the administrative judge found that the appellant failed to nonfrivolously allege that he had suffered an appealable reduction in grade or pay or that he was denied a WIGI. ID at 6-10. The administrative judge also found that, absent an otherwise appealable action, the Board lacked

jurisdiction over the appellant's claim of sex discrimination. ID at 10. The appellant then filed a petition for review of the initial decision. Petition for Review (PFR) File, Tabs 1-2. The agency filed a response to the petition for review. PFR File, Tab 4.

DISCUSSION OF ARGUMENTS ON REVIEW

¶7 On review, the appellant argues that the Board has jurisdiction over claims filed by FAA employees, including performance-based actions taken under chapter 43.[5] PFR File, Tab 1 at 4-5, 7. Specifically, the appellant appears to be arguing that the termination of his training was such a performance-based action. However, contrary to the appellant's assertions, the agency did not take a performance-based action under 5 U.S.C. § 4303 when it terminated his training. Thus, those procedures are not applicable here.

¶8 The appellant also asserts that he provided evidence and argument below showing that his reassignment, from the ATCS-2152-LG position at the ARTCC to the ATCS-2152-GG position in Harrisburg, was a reduction in grade and that the administrative judge erred in finding otherwise. PFR File, Tab 1 at 8-10. The appellant argues that, because he was reduced in grade and pay, the administrative

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[5] The appellant on review does not challenge the administrative judge's finding that he was not denied a WIGI, and we therefore need not disturb this finding.

judge erred by dismissing this appeal for lack of Board jurisdiction. *Id.* However, as the administrative judge correctly found, there is no evidence that the appellant was reduced in grade and pay. Moreover, the administrative judge correctly found that, even if the appellant was subjected to a reduction in grade and pay, the record reflects that the appellant voluntarily accepted the reassignment in lieu of removal after he failed to complete the agency's training requirements. IAF, Tab 16.

¶9 To the extent the appellant reiterates his claim that his reassignment was involuntary because agency policy did not provide him any option of remaining in his current duty station after his training was terminated, PFR File, Tab 1 at 8-11, we disagree. A choice between unpleasant alternatives does not render a decision to accept the agency's proposal involuntary. *Soler-Minardo v. Department of Defense*, 92 M.S.P.R. 100, ¶ 9 (2002) (finding that the fact that the appellant was faced with either a demotion or a possible removal did not render his acceptance of the agency's proposal involuntary). Here, the appellant does not submit any evidence or argument suggesting that his acceptance of the reassignment to the ATCS-2152-GG position was based on misinformation. *Cf. Wright v. Department of Transportation*, 99 M.S.P.R. 112, ¶ 10 (2005) (observing that the appellant's assertion that he accepted a position based on agency misinformation regarding the nature of the reassignment and its

effect on his base pay constituted a nonfrivolous allegation that the appellant's reduction in pay was involuntary). Thus, as the administrative judge correctly found, the appellant failed to nonfrivolously allege that he suffered an appealable reduction in grade and pay.

¶10 The appellant also asserts that the agency engaged in ex parte communications[6] in connection with the decision to terminate his training, and thus violated his right to due process. The appellant asserts that he raised this claim below and that the administrative judge failed to address it in the initial decision. PFR File, Tab 1.

¶11 Pursuant to 5 U.S.C. § 7701(c)(2), an agency's adverse action "may not be sustained . . . if the employee or applicant for employment shows harmful error in the application of the agency's procedures in arriving at such decision[.]" Reversal of an agency's action is therefore required where an appellant establishes that the agency committed a procedural error that likely had a harmful effect on the outcome of the case before the agency. *Goeke v. Department of Justice*, 122 M.S.P.R. 69, ¶ 7 (2015). Here, the record reflects that the appellant attempted to file a new Board appeal concerning this same action

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[6] An ex parte communication is a communication between one party and the decision-maker where the other party is not present and not given the opportunity to present his or her side of the argument. Stone v. Federal Deposit Insurance Corporation, 179 F.3d 1368, 1372-73 (Fed. Cir. 1999).

by submitting a pleading in which he raised due process arguments. IAF, Tab 19. Rather than docketing this pleading as a new appeal, the administrative judge noted that the appellant was alleging that the agency's actions in this case resulted in due process violations, and she entered the pleading into the record in the instant appeal. IAF, Tab 20. However, while the administrative judge submitted the pleading into the record, she neglected to address the appellant's due process arguments in the initial decision. Nonetheless, because we now address the appellant's due process arguments, the administrative judge's failure to do so was not prejudicial to the appellant's substantive rights, and it provides no basis for reversal of the initial decision. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

¶12 The appellant asserted below and on review that the agency's proposal notice informing him that the TRB had recommended termination of his training is a de facto decision notice, rather than a proposal notice, "because it was obvious" from the notice that the decision already had been made to terminate his training. PFR File, Tab 2; IAF, Tab 7 at 15. Specifically, the appellant argues that the agency failed to provide him the opportunity to respond to the proposed adverse action prior to receiving the de facto decision notice and prior to his being placed in a duty assignment with the Plans & Programs Office. PFR File, Tab 1 at 5-6. Thus, the appellant contends that

this resulted in the agency violating both agency procedures and his due process right to a 30-day advance written notice of the agency's action against him. *Id.*

¶13 It appears that the appellant's argument is based on his belief that the agency's decision to terminate his training constitutes an appealable adverse action. However, the Board's jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). In this case, the Board does not have jurisdiction over an agency's decision to terminate an employee's training. Nor does it have jurisdiction over the agency's rules and procedures for required training and the process and the implementation of those procedures. Thus, any error by the administrative judge in failing to address this argument is harmless, as it provides no basis for reversal of the initial decision.

¶14 In any event, even if we were to find that the Board has jurisdiction over this appeal, we would find no merit to the appellant's claim that the agency violated his right to due process of law. Due process is a fundamental principle of law that ensures that legal proceedings will be fair and that citizens will be given notice of the proceedings and an opportunity to be heard before the Government deprives them of life, liberty, or property. The U.S. Constitution guarantees due process and applies to the property interest of

public employment in which the Government has demonstrated that there is cause to remove or suspend an employee. *See Gilbert v. Homar*, 520 U.S. 924, 935-36 (1997) (suspension); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (removal). The appellant seems to argue that, under the U.S. Court of Appeals for the Federal Circuit's decisions in Ward *v. U.S. Postal Service*, 634 F.3d 1274, 1279-80 (Fed. Cir. 2011), and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999), his right to due process was violated by ex parte communications between the TRB and the instructors and supervisors who were interviewed by the TRB. PFR File, Tab 1 at 5-6. *Ward* and *Stone* stand for the proposition that a deciding official violates an employee's due process rights when he relies upon new and material ex parte information as a basis for his decision on the merits of a proposed charge or the penalty to be imposed. *See Mathis v. Department of State*, 122 M.S.P.R. 507, ¶ 6 (2015). In this case, the appellant received a copy of the TRB report, along with the April 15, 2013 memorandum from the Air Traffic Manager notifying him of his training status being terminated due to unsatisfactory performance. The memorandum advised the appellant that he could submit a reply within 7 days. IAF, Tab 16, Ex. D. The appellant supplied a written response on April 23, 2013. IAF, Tab 15, Ex. H. In his May 13, 2013 memorandum finalizing the decision to terminate the appellant's

training, the Air Traffic Manager specifically mentioned that he considered the appellant's written reply. *Id.*, Ex. I. In addition, the TRB merely convened to consider and ultimately recommend terminating the appellant's training. IAF, Tab 18, Subtabs O, P. The TRB did not propose or recommend discipline. Indeed, there was no proposed action or discipline in this case. Rather, the appellant accepted a reassignment in lieu of a removal action. Thus, the appellant was not deprived of any property interest. Therefore, whether the agency committed harmful error or violated the appellant's due process rights by implementing its training requirements and TRB process is of no consequence in this appeal.

¶15 Based on the foregoing, we discern no basis for disturbing the administrative judge's finding that the appellant failed to make a nonfrivolous allegation of an involuntary reduction in grade or pay. *See Henderson v. Department of the Treasury*, 61 M.S.P.R. 61, 65 (1994). Accordingly, the administrative judge properly dismissed the appeal for lack of jurisdiction without holding a hearing. *See id.* The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R.§ 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final

decision by the U.S. Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

U.S. 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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 U.S. Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the U.S. Code, at our website, http://www.mspb.gov/appeals/uscode.htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono

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

FOR THE BOARD: /s/ Jennifer Everling
Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA MERIT SYSTEMS
PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

THOMAS F. SWEENEY, Appellant,	DOCKET NUMBER DC-0752-15-0060-I-1
v.	
DEPARTMENT OF TRANSPORTATION, Agency.	DATE: April 12, 2016

Thomas F. Sweeney, Frederick, Maryland, pro se.
Jennifer D. Ambrose, Esquire, Washington, D.C., for the agency.

BEFORE
Sherry A. Zamora
Administrative Judge

INITIAL DECISION

On October 15, 2014, the appellant, Thomas F. Sweeney, filed an appeal with the Merit Systems Protection Board (MSPB) challenging the agency's decision to terminate his training and alleging an involuntary removal from his position. Because there was no factual dispute bearing on the issue of jurisdiction and because the appellant failed to make a nonfrivolous allegation of jurisdiction, the hearing

the appellant requested was not held. *See Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984). For the reasons below, the appeal is dismissed for lack of jurisdiction.

jurisdiction

Undisputed Facts

The appellant was employed as a Developmental Air Traffic Control Specialist (ATCS) at the Washington Air Route Traffic Control Center (Washington ARTCC or Washington Center), with the Federal Aviation Administration (FAA), Department of Transportation (agency). On December 67, 2012, a training review board (TRB) met to evaluate the training of several employees, including the appellant. AF, Tab 18, Appellant's Exhibit O. Although the TRB identified training deficiencies for the appellant, it decided to continue the appellant's training at Washington Center and provided specific training recommendations to address the appellant's performance issues. *Id.* The appellant's training was subsequently suspended on February 22, 2013. As a result, another TRB met on April 11, 2013. *Id.* at Appellant's Exhibit P. The review board determined that the appellant had continuing performance deficiencies which had not been resolved by the additional training provided. *Id.* at Appellant's Exhibit P. The TRB determined that the appellant could not achieve the necessary certification and recommended that his training be discontinued. *Id.* The TRB participants further recommended, however,

that the appellant "be given strong consideration for reassignment to a lower level facility, as per agency directives." *Id.*

By memorandum dated April 15, 2013, Steven Stooksberry, Air Traffic Manager, informed the appellant that his training was being terminated due to his unsatisfactory performance in Radar Controller Training, Stage IV. AF, Tab 16, Appellant's Exhibit D. The appellant was advised that, in accordance with the Human Resources Policy Manual, Employment Policy for Air Traffic Control Specialist in Training (EMP 1.14), dated June 23, 2006, he could discuss the matter with the Support Manager for Training and, within seven calendar days following receipt of the notification, he could provide written comments regarding the proposed action. *Id.* See also AF, Tab 15, Appellant's Exhibit G. He was informed that, if no response was received within the response period, it would be considered that there were no comments and the appropriate action, either position change or separation, would be initiated. *Id.* The appellant filed a written response dated April 23, 2013. AF, Tab 18, Appellant's Exhibit Q. In his response, Mr. Stooksberry acknowledged the appellant's response but found that there had been agreement between the appellant's "peer, management, staff and training administrator TRB participants" regarding the appellant's failure to adequately complete the required training and, thus, he found "no reason to reconsider [his] decision to terminate [the appellant's] training and forward [his] case to the National

Employee Services Team." *Id.* at Appellant's Exhibit L.

By memorandum dated May 13, 2013,[7] Mr. Stooksberry issued a final determination that the appellant's "training at Washington ARTCC be terminated and that the disposition of this matter be processed in accordance with EMP1.14a and Article 61 of the 2009 Collective Bargaining Agreement between the National Air Traffic Controllers Association and the Federal Aviation Administration." AF, Tab 15, Appellant's Exhibit L. On August 7, 2013, the appellant submitted a request for reconsideration based on allegations that the training provided by the agency was deficient. *Id.* at Exhibit K. In his response, Mr. Stooksberry addressed the findings of the two TRB's. *Id.* at Exhibit M. He noted that, while the first TRB noted performance deficiencies, it recommended additional training but, in the second TRB, all members unanimously agreed that skill enhancement training would not adequately address and correct the appellant's performance deficiencies and, thus, they concurred with the decision to suspend his training. *Id.* Accordingly, Mr. Stooksberry determined that there was no reason to reconsider his decision to terminate the appellant's training and forward his case to the National Employee Services Team. *Id.* at Exhibit L.

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[7] The appellant indicated that he did not receive the memorandum until May 30, 2013. AF, Tab 14

In the agency's report of investigation in regard to the appellant's discrimination claim, the agency indicated that the appellant stated that he was given the following reassignment options: Atlantic City, New Jersey; Allentown Pennsylvania; and Cape TRACON in Falmouth, Massachusetts. AF, Tab 2, Page 28.[8] However, the appellant said that he asked Mr. Stooksberry if there were other options, and Mr. Stooksberry advised him to confer with the National Air Traffic Controllers Association (NATCA). *Id.* The appellant's regional NATCA representative was able to get a facility at Harrisburg, Pennsylvania added to the appellant's list of options and the appellant accepted the offer to that location because it was closer to his home. AF, Tab 16, Appellant's Exhibit B. Accordingly, by memorandum dated November 29, 2013, the appellant was offered an assignment to the Harrisburg facility effective December 1, 2013. *Id.* at Appellant's Exhibit A. The appellant was required to indicate whether or not he accepted the agency's offer. *Id.* at Appellant's Exhibit B. He was advised that, if he declined the offer of assignment, his removal from the ATCS position and from the Federal service would be proposed. *Id.* The appellant accepted the assignment and he was reassigned to the Harrisburg facility. *Id.*

The appellant filed a discrimination complaint with the agency alleging that the agency's action was

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[8]All cited page numbers refer to the page numbers assigned by the Board's electronic case file.

discriminatory against based on his sex when, in September 2013, he determined that his training was not conducted in accordance with FAA orders and procedures and, because his training at Washington ATRCC was terminated, he was transferred to a lower-level facility and reassigned to a downgraded position effective December 1, 2013. AF, Tab 2, Page 3. In its final agency decision, the agency determined that no discrimination had resulted. *Id.* at Page 36.

On October 15, 2014, the appellant filed the instant appeal with the MSPB alleging a reduction in grade and pay and a denial of a withingrade increase (WIGI). AF, Tab 1. The appellant alleged multiple deficiencies in the agency's training program and asserted that the agency's actions were the result of discrimination. *Id.* Because it appeared that this appeal may not be within the jurisdiction of the MSPB, an Order to Show Cause was issued on October 23, 2014. AF, Tab 4. In his response, filed November 2, 2014, the appellant alleged that the agency's decision to discontinue his training was tantamount to a constructive removal. AF, Tab 7, Page 5. A Supplemental Order to Show Cause was issued on December 13, 2014, to address the appellant's constructive removal claim. AF, Tab 13.

The appellant filed multiple submissions which have been fully considered. AF, Tabs 1-2, 6-7, 14-16, and 18-19. The agency filed a response and motion to dismiss the appeal for lack of jurisdiction. AF, Tab 17. All evidence and argument from both parties has been fully considered.

Legal Standard and Burden of Proof

As noted above, the appellant has alleged an involuntary reassignment to a downgraded position, the denial of a WIGI, and an involuntary removal. The jurisdiction of the MSPB is not plenary, but is limited to those areas specifically granted by some law, rule, or regulation. *See* 5 U.S.C. § 7701(a); *Johnston v. Merit Systems Protection Board*, 518 F.3d 905, 909 (Fed. Cir. 2008). Thus, the Board does not have jurisdiction over all actions that are alleged to be incorrect. *See*, e.g., *Weyman v. Department of Justice*, 58 M.S.P.R. 509, 512 (1993). The appellant bears the burden of establishing by preponderant evidence that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2). Preponderance of the evidence is defined by regulation as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. See 5 C.F.R. § 1201.56(c)(2).

The appellant has requested a hearing. AF, Tab 1. To be entitled to a jurisdictional hearing, the appellant must make a nonfrivolous allegation of jurisdiction. Non-frivolous allegations of Board jurisdiction are allegations of fact, which if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). To meet the non-frivolous standard, an appellant need only plead allegations of fact which, if proven, could show jurisdiction, though mere pro forma allegations are

insufficient to satisfy the non-frivolous standard. *Id.* The pertinent determination is whether the appellant alleged facts which, if proven, would constitute a prima facie case of jurisdiction. However, for the reasons discussed below, I find that the appellant did not meet the requisite burden and, thus, he was not afforded the hearing he requested.

The appellant failed to establish the MSPB's jurisdiction over the alleged denial of a WIGI.

In his appeal form, the appellant checked a box on the form indicating that he was appealing the denial of a WIGI. AF, Tab 1. He provided no further evidence or documentation regarding this allegation. In response to my show cause order, the appellant indicated only that, as a result of the agency's discrimination, he was denied a WIGI. AF, Tab 7, Page 6.

The MSPB generally has jurisdiction over a denial of a WIGI after a negative determination of acceptable performance is sustained by the agency after reconsideration. 5 C.F.R. § 531.401(d). An agency's denial on reconsideration is a statutory requirement which must be met before an appeal denying a WIGI is properly within the MSPB's jurisdiction. *See Priselac v. Department of the Navy*, 77 M.S.P.R. 332 (1998) (MSPB can exercise jurisdiction over an appeal from the withholding of a WIGI only if the agency has affirmed its initial determination upon reconsideration or has unreasonably refused to act on a request for reconsideration). An appeal to the MSPB must then

be filed within the required time period following issuance of the agency's reconsideration decision.

The appellant provided no evidence or argument that a WIGI was denied or that reconsideration of any denial of a WIGI was requested and issued. His bare allegation that the agency's discrimination against him resulted in a WIGI is insufficient to constitute a nonfrivolous allegation of jurisdiction. Thus, I find that the appellant failed to establish the MSPB's jurisdiction over this allegation by preponderant evidence.

The appellant failed to establish by preponderant evidence that he suffered an appealable reassignment or a constructive removal.

In response to my show cause orders, the appellant asserted that the termination of his training was a "constructive removal." AF, Tab 7, Pages 67. However, a removal involves a separation from the Federal service and the termination of a training program and resulting reassignment does not constitute such a separation. The agency has asserted without dispute that the appellant has not been separated from service and the appellant notes throughout his submissions that he accepted a reassignment to another facility. Thus, there is no evidence that a constructive removal has occurred.

The appellant further asserted that the "[t]ermination of [t]raining on [May 30, 2013] was the actual adverse action." However, absent circumstances not present here, a denial of training

is not within the Board's jurisdiction. 5 C.F.R. § 1201.3.

The appellant further asserts that he was involuntarily reassigned to a lower graded and/or lower paying position. An employee's reassignment to another position within an agency is not generally appealable to the MSPB as an adverse action. See *Tankesley v. Tennessee Valley Authority*, 54 M.S.P.R. 147, 150 (1992); *Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 93 (1992). An exception exists for actions which result in a reduction of grade or pay. 5 C.F.R. §§ 752.401(a)(3) and (4). However, as the appellant was advised in my show cause order, there is nothing in any documentation submitted with the appellant's appeal demonstrating that the appellant was reassigned to a position at a reduced grade and/or pay. AF, Tabs 1, 4. If the appellant's reassignment did result in a reduction in grade or pay, the appellant was ordered to submit evidence to support his allegation. AF, Tab 4. He failed to do so. Thus, in none of his submissions to the MSPB did the appellant establish an actual reduction in grade or pay. AF, Tabs 1-2, 6-7, 1416, 18-19.

Moreover, to constitute an appealable action, a reduction in grade or pay must be involuntary. 5 C.F.R. § 752.401(b)(9); *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1328 (Fed.Cir.2006) (en banc); Huyler v. Department of the Army, 101 M.S.P.R. 570, ¶ 7 (2006). A reduction in grade would be considered involuntary if the appellant proves that it was obtained by agency

coercion, misinformation, or deception. *Huyler*, 101 M.S.P.R. 570, ¶ 5. *See also Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). To establish a claim of duress or coercion, the appellant must show that: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no alternative; and (3) those circumstances were the result of coercive acts of the opposite party. *Soler Minardo v. Department of Defense*, 92 M.S.P.R. 100, ¶6, *review dismissed*, 53 Fed. Appx. 545 (Fed.Cir.2002).

In order to establish involuntariness on the basis of coercion, an employee must show that the agency effectively imposed the terms of his demotion, that the employee had no realistic alternative, and that the employee's decision was the result of improper acts by the agency.[9] The common element in all cases finding an involuntary action is that factors have operated on the employee's decisionmaking processes that deprived him of freedom of choice. See *Heining v. General Services Administration*, 68 M.S.P.R. 513, 519 (1995). The determination of whether the employee was effectively deprived of free choice is based on the totality of the circumstances. *Id.* at 519-20. When considering whether an action was

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[9] Again, there is no showing that any demotion occurred as the appellant failed to present evidence or argument showing any reduction in grade or pay. Nonetheless, assuming, arguendo, that there was any such reduction, the appellant's reassignment was, as discussed herein, voluntary.

"involuntary," it is well established that the fact that an employee is faced with an inherently unpleasant situation or that his choices are limited to unpleasant alternatives does not make his decision involuntary. *See Lawson v.U.S. Postal Service*, 68 M.S.P.R. 345, 350 (1995).

If the action is not initiated by an employee, then the action is not presumed to be voluntary. *Soler-Minardo*, 92 M.S.P.R. 100, ¶5. However, the MSPB and its reviewing court, the Court of Appeals for the Federal Circuit, have not interpreted the phrase "initiated by" to require the change be suggested, in the first instance, by the employee. Rather, this phrase also encompasses actions voluntarily agreed to by the employee based upon the agency's proposal. *See Gaudette v. Department of Transportation*, 832 F.2d 1256, 1258 (Fed.Cir.1987); *Goodwin v. Department of Transportation* , 106 M.S.P.R. 520, 12 (2007).

Upon review of the evidence and argument, I must find that the appellant has failed to make a nonfrivolous allegation of jurisdiction. First, as noted herein, there is no evidence or argument that the appellant's reassignment involved a reduction in grade or pay. Further, while the appellant disagrees with the agency's decision to terminate his training, he has provided very little argument and no supporting evidence to suggest that agency officials caused his training failure or knew that the threat to remove him on this basis was unsupportable. To the contrary, the record indicates that the decision to

terminate the appellant's training was unanimous among multiple agency officers, including two training review boards, and was reached only after months of well- documented retraining efforts failed. The appellant has provided no basis for concluding that agency officials intentionally caused him to fail the training.

Further, the appellant accepted the reassignment to a different position when he failed to complete the agency's training requirements. AF, Tab 16, Appellant's Exhibit B. The appellant asserted that, because the agency had advised him that, if he declined the reassignment offer, he may be removed, his reassignment was involuntary. *Id.* See also AF, Tab 16, Exhibits A-B. He further asserted that the agency's actions were the result of sex discrimination based on allegations that multiple female employees were given additional training and treated differently than he was which led to his removal, reduction in pay and grade, and denial of his WIGI. AF, Tab 7, Page 4.

In its notice of reassignment, the agency indicated that, if he declined it, his removal from his ATCS position and from the Federal service would be proposed. AF, Tab 2, Page 2. However, the fact remains that the appellant had an option in that he could have declined it and then challenged the removal action. The fact that he accepted the reassignment in lieu of removal does not make his reassignment involuntary because he had the option to face removal and exercise his appeal rights to the EEOC and/or the MSPB. While this is admittedly an

unpleasant choice to face, it is well established that the fact that an employee is faced with unpleasant alternatives does not in and of itself render the situation improperly coercive. *See Lawson*, 68 M.S.P.R. at 350. Thus, under the totality of the circumstances established by the written record for this appeal, I find that the appellant has failed to non-frivolously allege that he suffered an appealable reduction in grade or pay.

Although the appellant has alleged sex discrimination, it is well established that, absent an otherwise appealable action, the MSPB lacks independent jurisdiction to decide these affirmative defenses. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 87173 (D.C. Cir. 1982). Moreover, as noted above, because the appellant has failed to present a nonfrivolous allegation of jurisdiction, he is not entitled to the hearing he requested.

For all of the reasons discussed above, I find that the appellant has failed to present a nonfrivolous allegation of jurisdiction and, accordingly, this appeal must be dismissed for lack of jurisdiction.

Decision

The appeal is DISMISSED.

FOR THE BOARD:

_____/S/_____
Sherry A. Zamora
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on May 17, 2016 unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

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

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

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

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

implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

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

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

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

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

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

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201,

Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. See 5 C.F.R.§ 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. See 5 C.F.R. § 1201.14(j)(1).

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

NOTICE TO AGENCY/INTERVENOR

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

notice to the appellant regarding
your further review rights

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, that is, representation at no cost to you, the Federal Circuit Bar Association may be able to assist you in finding an attorney. To find out more, please click on this link or paste it into the address bar on your browser:

https://fedcirbar.org/Pro-Bono-Scholarships/Government-Employees-Pro-

Bono/Overview-FAQ

The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FILED: August 13, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1458
(1:17-cv-00926-CMH-IDD)

THOMAS F. SWEENEY
Petitioner - Appellant

v.

MERIT SYSTEMS PROTECTION BOARD
Respondent - Appellee

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge Wynn, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

No. 18-1458

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS F. SWEENEY,
Appellant,

v.

MERIT SYSTEMS PROTECTION BOARD
Appellee.

Appeal From The United States District Court For
The Eastern District Of Virginia
Alexandria Division

PETITION FOR REHEARING

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STATEMENT OF PURPOSE REQUIRED BY RULE 40(b)

Rehearing is warranted as there are multiple factual matters not addressed, a Jurisdictional question, a question of exceptional importance, and an opinion that is in direct conflict with the Supreme Court, and other Court of Appeals that were not addressed in this panel's unpublished opinion.

After Appellant's Counsel failed to properly address direct questions by this panel during oral arguments, Appellant removed his Counsel and filed a Motion for Leave of Court to File Post Argument Brief to address the questions of this Court and other issues/reasoning Appellant found important. This Court considered the Motion's supporting reasoning for the brief- as the brief itself and granted the Motion. This panel's unpublished opinion did not address or reference any of the Motion for Leave of Court to File Post Argument Brief content in any manner. The majority of the Motion for Leave of Court to File Post Argument Brief points are repeated in this petition.

This panel failed to address that a determination of Training Termination of an Air Traffic Control Specialist - In Training (ATCS-IT, also called a developmental ATCS) is a major adverse action as this decision *requires* that the employee be removed from their current position. This was not the case in *Gaudette* as the FAA's procedures have changed and now contained in Human Resources Policy Manual 1.14a ("HRPM") (JA 124) along with

the issue in *Gaudette* not being a training failure, but if the lack of Notice to Appeal made their reassignment an involuntary transfer. This panel even acknowledges the FAA's current policy that to remain employed as an Air Traffic Control Specialist (ATCS), that the ATCS *must* satisfactorily complete the training program in order to remain employed.

Unpublished Opinion (I) (A), *Sweeney v. Merit Sys. Prat. Bd.,* 2019 U.S. App. LEXIS 17930, Fourth Circuit (2019) ¶ 14. There is a direct nexus between a decision of Training Termination at a facility and being removed from the position, as the procedures are directly listed in the HRPM 1.14a (JA 124). The requirement that an ATCS *must* satisfactorily completing training only reinforces that the decision to Terminate the Training of an ATCS is a required step that ends with the ATCS-IT being removed from federal service, or reassignment to a lower grade/pay facility.

This panel also failed to address if the Appellant's Due Process rights were violated by the FAA when Appellant was subjected to the procedural actions of a final decision of Training Termination on April 16th 2013 when Appellant was only given a Proposal of Training Termination on April 16th, 2013 (JA 067), thus making Appellant believe the decision was already made before being able to provide any written comments or concerns. The procedural actions of a final decision of Training Termination includes being removed from the control room floor, assigned

administrative duties, assigned administrative days off *I* work hours, assigned to an administrative supervisor, and required to take a 30 minute unpaid lunch. With the fact that the word 'proposal' only appeared once (in the bottom of the third paragraph) of the purported Proposal of Training of Termination received April 16th, 2013 (Subject: Discontinuation of Training) at JA 067, along with the Training Termination procedural actions already enacted, any reasonable person would believe the decision was already made to Terminate their Training and instead of arguing with the deciding official who also decides if that person is even offered a lower grade/pay ATCS-IT position, one would reasonably only ask for assistance in keeping their employment, and being near their family- as the Appellant did.

Panel also overlooked if Appellant has the right to re-challenge a final decision regarding Termination of Training if Appellant did not select from the lower grade/pay reassignment list. The Termination of Training is directly related to, and apart of a removal process, and should have MSPB appeal rights and due process to a decision to Terminate Training.

On average 608 FAA Employees not complete the training program per year. Although of the 608 employees some might be transfer or other reasons for not completing training, but the vast majority will be the result of Training Termination.

If *Gaudette,* which is the current controlling case law, has changed due to a change in the FAA's

management procedures, the possibility of 608 government employees per year are being stripped of their MSPB review rights by the usage of bad or misunderstood case law that is in itself_ exceptional importance- and must be addressed.

The Supreme Court ruled in *Perry* quoting *Kloeckner,* that 'mixed-case' must be filed in district court, as opposed to the Federal Circuit. But the 'key' to district court review is a claim that an agency appealable to the MSPB violates an antidiscrimination statute listed in §7702(a)(l). As noted in this panel's opinion that Appellant did not present a cause of action under Title VII. If this is the case, Appellant did not meet the 'key' in *Perry* (quoting *Kloeckner)* thus the district court did not have jurisdiction, requiring transfer back to the Federal Circuit.

In the instance where a complainant while prose, comes to the district court as a mixed case (where discrimination was claimed previously) and fails to specifically assert a Title VII claim in their complaint in district court, should the court specifically issue a Show Cause Order of mixed case proceedings requiring the appellant to amend the complaint or waive their discrimination claims, instead of holding them to such strict standards as lawyers. If waiving their discrimination claims the complaintant will be tranferred to the Federal Circuit as required by law.

It has been upheld for almost half a century

that a civil servant holds a property right to their job by the Supreme Court and must have due process prior to it being taken away. "We conclude that all the process that is due is provided by a pretermination opportunity to respond....". *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 1030-79 (Supreme Court 1985). With this panel's oversight that the Appellant was subjected to the procedural elements of Training Termination prior to even responding, his right of due process was violated as he believed the decision was already made, but the only reason for response is if the air traffic manager should assign him [to a lower grade/pay facility] or separate from federal service. Since the panel overlooked factual evidence that a genuine issue of material fact was present in the district court, the FRCP Rule 12 (b) (6) motion to dismiss must be converted to a FRCP Rule 56 motion for summary judgement.

BACKGROUND

On August 5, 2009, Appellant began working for the FAA as an air traffic control specialist - in training ("ATCS-IT", also called developmental ATCS). An ATCS-IT must successfully complete extensive training before becoming a certified professional controller ("CPC"). Pursuant to FAA policy, in order to remain employed with the FAA as an ATCS, an individual must satisfactorily complete the FAA's training program, become a CPC by obtaining a facility or area certification at the facility

the employee is assigned. If an ATCS-IT shows difficulty in attaining certification, FAA Management may Suspend an ATCS-IT training pending a Training Review Board ("TRB"). A TRB's sole job is to interview the On The Job Instructors that train the ATCS-IT, the ATCS-IT supervisor, the ATCS-IT, and others who had significant contact to determine if training procedures were followed. The TRB makes a recommendation to the Air Traffic Manager who has the final decision to re-enter the ATCS-IT in the training program or to terminate the ATCS-IT training at that facility. If the facilities Air Traffic Manager decides to terminate the ATCS-IT training at the facility, the ATCS-IT will be assigned administrative duties/days off/hours/ manager, and not allowed to control air traffic on positions they were certified on. The ATCS-IT training paperwork, with recommendation letters from the trainers, is submitted to the National Employee Services Team ("NEST"), who makes a determination if the employee will be transferred to a lower level facility, or separated from federal service.

After completing an initial training period, in December 2009 Appellant reported to the Washington Air Route Traffic Control Center in Leesburg, Virginia ("Washington Center"). In August 2012 Appellant had numerous disagreements with an assigned On the job instructor ("OJTI") who was a previous NATCA representative. The OJTI used his persuasion as an OJTI for the Appellant and with FAA management to

create false documentation of training. FAA management, when confronted with the allegations of false documentation, refused to remove the *om* in question. FAA Training Procedures require FAA Management to correct circumstances that prevent proper training, FAA Management refused. In November 2012 Appellant has his training suspended by FAA management. A TRB was conducted. The Washington Center air traffic manager (length of time as air traffic manager was less than 1 year) reinstated Appellant into training with abnormally restricted additional training hours and the same supervisor. It is standard practice that the supervisor is changed for the OJTI. The supervisor for the Appellant in the period in question was apart of the "Emerging Leaders" program where they are awarded with fast promotions as long as the supervisor gets positive remarks from their superiors.

FAA Management later suspended Appellant's in February 2013. The TRB recommended termination of training but highly suggested being retained at a lower level facility. It is an unwritten rule in the FAA that a person does not get additional training after the 2nd training review board on the same radar position. The air traffic manager (new air traffic manager, length of time in position was about 1-2 months) implemented the TRB recommendation via memo dated April 15th, 2013 Subject "Discontinuation of Training", received on April 16th, 2013. Immediately after receiving the

"Discontinuation of Training" memo on April 16th, 2013, Appellant was no longer allowed to perform duties as an Air Traffic Control Specialist controlling traffic, but assigned to the administrative schedule, assigned to an administrative supervisor, and assigned administrative duties pending placement determination.

Since Appellant was subjected to the procedures that occur when it is determined that an ATCS-IT training is terminated, Appellant only asked for the air traffic managers assistance in being retained with the FAA and remaining in the area near his wife (who works at Washington Center). On April 23rd, 2013 the FAA's Employment procedures were modified to require any ATCS-IT whose training was terminated to the final decision of separation from federal service or reassignment to a lower grade/pay facility to be done at the national level by the NEST. Appellant was offered reassignment 4 lower grade/pay facilities or be separated from federal service. Since the decision of Termination of Training was final the Appellant would have been terminated (or separated) from Federal Service per HRPM policy if he had not selected one of the facilities offered to him for reassignment. Effective December 1st, 2013 (JA 064) Appellant was reassigned to Harrisburg Tower in Middletown, MD. Appellant became a CPC at Harrisburg Tower in 2015, and subsequently resigned due to development delays of his child complicated by this 3 hour round trip for his job. Appellant is

currently employed by a private contractor as an Air Traffic Control Specialist at Frederick Tower in Frederick Maryland.

ARGUMENT

A. Panel's opinion overlooked a material fact that Termination of Training requires the employee's removal from their current position.

The FAA's Technical Training program for Air Traffic Controllers and the FAA's Personnel Management System ("PMS") is unique in the government civil service. The Congress even exempted the FAA PMS from the MSPB in beginning April 1, 1996- yet Congress reimplemented employees of the FAA ability to appeal to the MSPB on April 5th, 2000 retroactive to March 31, 1996 in P.L. 106-181 § 307. Currently the FAA is exempted from most of U.S.C. Title 5 Personnel Management System except for a few Chapters. Notably 49 U.S.C. § 40122 (g) (2) (H) reimplements 5 U.S.C. §§ 7701-7703 as it applies to the MSPB, allowing the ability for FAA employees to file an MSPB appeal.

This panel contradicted itself in its opinion regarding the potential outcome(s) after a decision of Termination of Training. "But if the ATCS does not accept the reassignment, the FAA may 'initiate proper separation activities,' *id.;* i.e, propose the individual's removal from federal service". *Unpublished Opinion* at (I) (A) ¶5. Yet in *Unpublished Opinion* at (I) (A) ¶ 1 states "Pursuant to FAA policy, in order to remain

employed with the FAA as an air traffic controller, an individual must satisfactorily complete the FAA's training program, become a CPC, and obtain 'facility or area certifications' at the facility to which the individual is assigned. J.A. 130." This acknowledges that the Panel understands after a decision of Termination of Training, if the employee does not accept the purported 'voluntary' reassignment, the employee *will* be terminated from their position.

The FAA- not once- has shown that an employee has remained in their exact position after a decision to Terminate Training of an employee.

Once the FAA issues a final decision to Terminate Training of an employee, that decision follows the employee. If the employee does not choose to accept the 'voluntary' reassignment, the final decision of Termination of Training is held against the employee during the Removal from Federal Service. Is the employee able to 'rechallenge' the Termination of Training, even though the employee was already given his opportunity to respond?

Termination of Training is an action that is directly based on the unacceptable performance of the employee. The MSPB's Appellate jurisdiction for actions based on unacceptable performance is directly addressed in 5 U.S.C. § 7701 (c) (1) (A) "in the case of an action based on unacceptable performance described in section 4303... " which invokes procedures in 5 U.S.C. § 4303.

If the employee takes no action after a decision

of Termination of Training, the employee will be removed. So is Termination of Training the beginning of Separation from Federal Service disguised to portray an involuntary reassignment causing a reduction of grade/pay as a seemingly voluntary action? Appellant believes it.

This panel further misinterpreted *Gaudette* as the issue in *Gaudette* was not if Termination of Training was an adverse action, but if not giving them Notification of Appeal Rights created an misinformed decision. *Gaudette* filed a greivance for her Termination of Training. A person can only do one of two actions, either file a grievance, or file a MSPB appeal, one can not do both. In *Gaudette,* the reason the Federal Ciruit did not address it, as they did not have jurisidiction due to Gaudette filing the grievance. Furthermore the procedures the FAA uses have been extensively modified and must be readdressed due to this.

B. Panel relied on Appellee's incorrect description of 'dean slate'

Appellee stated *in Appellee's Brief* that after accepting a reassignment after Termination of Training they are provided with a 'clean slate'. Appellee is misleading this Court with that statement is it is factually incorrect as discussed below.

A decision of Termination of Training follows the employee as if they are having their Training Terminated at the lower grade/pay facility, per the

HRPM 1.14a (JA 124) they are not allowed to be offered a 'voluntary reassignment' if they have their Training Terminated and the next facility. Only if the employee attains CPC status at the lower grade/pay facility, is when they attain a 'clean slate'. The 'clean slate' means if the employee, after becoming CPC at the lower grade/pay facility, transfer to a different facility then has their Training Terminated the employee can be again offered reassignment to a lower grade/pay facility.

Appellee attempted to disguise the 'clean slate' as it specifically describes how a decision of Termination of Training is an adverse action that is held against the employee until they attain CPC.

This panel improperly believes a person can re-challenge a Termination of Training determination if the employee does not select from the reassignment choices the FAA provides. Once due process is given for a decision of Termination of Training, and a decision made, does the employee get to re-challenge it, or is Termination of Training apart of the Removal Process.

C. Panel's opinion overlooked a material fact that Appellant was immediately subjected to the procedural actions of the proposal termination of training before having the ability to respond.

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 Appellants Motion for Leave of Court to File Post Argument Brief, Exhibit A.

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 decison of Termination of Training with still in the 'propsal' stage is highly prejudicial and created misinformation that the Appellant relied on when responding on April 24th, 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 115-17

D. Panel's opinion is in conflict with multiple Supreme Court decisions that requires the government give an employee an opportunity to respond before an adverse action is taken.

The Supreme Court and the Court of Appeals for the Federal Circuit has specifically held that a government employee shall have a pretermination opportunity to respond. "We conclude that all the process that is due is provided by a pretermination opportunity to respond... " "Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 1079, U.S. Supreme Court (1985). Also quoted in *Stone v. Federal Deposit Insurance,* 179 F.3d 1368, Federal Circuit (1999) and *Ward v. United States Postal Service,* 634 F.3d 1274, Federal Circuit (2011. At no time did the district court, or this panel address the allegation that Appellant had no chance to respond *before* being subjected to the procedural actions of Training Termination. The Appellant believed the response was for the air traffic manager's decision of separation or position chance, not Termination of Training, since Appellant was

already subjected to the procedural actions.

The FAA's so called proposal letter, dated April 15, 2013 (received April 16), subject: "Discontinuation of Training" was unconstitutionally vague as it is not dear that it was a proposal. The word 'proposal' is found only once in the whole document in the third paragraph. Given the totality of the vagueness, and being subjected to the procedural actions of training termination, a reasonable person would assume their training was terminated and they only wanted a response if the air traffic manager would "reassign or separate" the employee. JA 067.

E. Panel's opinion is in conflict with the Supreme Court's decisions that require liberal discretion when dealing with pro se litigants.

Being pro se, the court need not argue for the pro se litigant or re- write their complaint, but be liberally construed. It should not be unreasonable for a court to directly address a technical nicety of an otherwise meritorious claim. This would be easily accomplished by an Order to Show Cause by the district.

The Court of Appeals for the Federal Circuit even noted that since Appellant did not waive his discrimination claim that it should be heard in the district. A discrimination claim was contained in the MSPB.

F. Panel's opinion is in conflict with the Supreme Court's and the Federal Circuit's opinions of jurisdiction of MSPB mixed case claims without a

discrimination cause of action.

"The key to district court review is the employee's 'clai[m] that an agency action appealable to the MSPB violates an antidiscrimination statute listed in §7702(a)(1).' " *Perry v. Merit Systems Protection Bd.,* 582 U.S. _____ (2017) at 9.

> "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 Systems Protection Bd., 582 U.S. ___(2017) at 17.

G. Panel's opinion lacked consideration of the FAA's Termination of Training due process as it is subjected on an average of 608 Federal Employees every year and is a matter of exceptional importance.

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.

Appellant also believes a standardized procedure created by the FAA to turn an involuntary action based on unacceptable performance into a voluntary one after the final decision of Termination of Training- which is based on unacceptable performance in training- should also be evaluated for its constitutionality of due process.

CONCLUSION

The panel should grant a rehearing of this appeal and consider the arguments raised in this Petition for Rehearing along with arguments raise in *Appellants* Motion for Leave of Court to File Post Oral Argument Brief.

Respectfully submitted,

/s/Thomas Sweeney

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DATED: July 26th, 2019

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CERTIFICATE OF COMPLIANCE REQUIRED BY RULE 32(g)

Excluding Cover Page, Table of Contents, Table of Authorities, Rule 32(g) Certificate of Compliance, and Certificate of Service, this Petition for Rehearing contains 3,835 words.