

No.

In The
Supreme Court of the United States

William T. Cunningham

Petitioner

v.

Merit Systems Protection Board (MSPB)

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner is a preference eligible United States Veteran that has 8 years of prior federal employment with the United States Postal Service (USPS) where he reached Career Tenure Status before leaving the USPS for the private sector.

On November 19th, 2015 the Petitioner received his official offer letter of employment from the Bureau of Labor Statistics (BLS) appointing him to a GS-12 IT Specialist position with job announcement number MS-15-BLS-OT-144. Job announcement number MS-15-BLS-OT-144 was a noncompetitive Veterans Employment Opportunity Act (VEOA) position.

On April 22nd, 2016, the Petitioner requested a shop steward regarding his “Core Hours” being removed from his schedule. On December 1st, 2016 the Petitioner was handed a termination letter stating that he would be terminated on December 9th, 2016. The Petitioner’s termination later didn’t state why the Petitioner was being terminated. The Petitioner had 4 unexcused absences during his entire time being employed by the BLS.

1. The Petitioner pointed out in his appeal to the MSPB that upon being hired by the BLS it constituted a “Reinstatement” to federal employment where the Petitioner’s prior Career Tenure Status exempted him from a probationary period. Did the BLS, MSPB and the United States Court of Appeals for the Federal Circuit violate the Petitioner’s 5th and 14th Amendments Rights by disregarding Title 5 CFR § 315.201(a)(c)(4), Title 5 CFR § 315.801(d) and Title 5 USC § 4303?

2. Which case takes precedence? Does National Treasury Emp. Union v. Reagan where the US Court of Appeals for the D.C. Circuit ruled that notification sent to plaintiffs of their selection to federal jobs was an unconditional appointment, even though the required appointment forms had not yet been completed or Skalafuris v. The United States where the US Court of Federal Claims ruled that a SF-50 or Oath of Office is the last act of appointing?

3. In the Petitioner's Informal Reply Brief, the Petitioner pointed out to the US Court of Appeals for the Federal Circuit that upon receiving his official offer letter of employment on November 19th, 2015, which stated "Congratulations on your appointment and welcome to the BLS" that pursuant to Title 5 CFR § 300.703 the Petitioner was appointed to federal employment. Did the US Court of Appeals for the Federal Circuit violate the Petitioner's 14th Amendment Right by disregarding Title 5 CFR § 300.703 and National Treasury Emp. Union v. Reagan while forcing a law on the Petitioner along with not providing the Petitioner with equal protection under the law when the court affirmed the MSPB decision referencing Skalafuris v. The United States?

4. Upon being appointed to federal employment an individual must complete requirements with other federal agencies during the "Entry on Duty" phase of the hiring process. In order to complete those requirements an individual has to be on the rolls of the hiring agency. Did the MSPB and the US Court of Appeals for the Federal Circuit violate the Petitioner's 5th and 14th Amendment Rights by disregarding Title 5 CFR § 315.802(c)?

5. In the Petitioner's Rehearing Request to the United States Court of Appeals for the Federal Circuit the Petitioner pointed out referencing *Skalafuris v. The United States* that the Petitioner was on the agency rolls by December 8th, 2015, and had completed a 1 year probationary period on December 7th, 2016. Did the United States Court of Appeals for the Federal Circuit violate the Petitioner's 5th and 14th Amendment Rights by denying the Petitioner's Rehearing Request while disregarding Title 5 CFR § 300.703, Title 5 CFR § 315.802(c) and Title 5 USC § 7511?

6. The US Court of Appeals for the Federal Circuit ruled that according to Title 5 USC § 7511, the Petitioner was not a federal employee at the time of termination. If the Petitioner was not considered a federal employee at the time of termination, shouldn't the DoL have been held accountable for violating the National Labor Relations Act by not adhering to the Collective Bargaining Agreement (CBA) between the BLS and American Federation of Government Employees Union (AFGE) that states that the BLS cannot track or surveil an individual by their badge rings into the building and must give an individual a 2 week notice before termination? Is this a violation of the Petitioner's 4th, 5th and 14th Amendment Rights?

7. The National Labor Relations Act states that an employer cannot retaliate against an individual for requesting a shop steward. The Petitioner's termination letter also didn't meet the standards of Title CFR 5 § 315.804(a). Is this a violation of the National Labor Relations Act and a violation of the Petitioner's 5th and 14th Amendment Rights?

8. In *Perry v. Sindermann* the court found that Perry had property interest in his job. The Petitioner received his official offer letter of employment on November 19th, 2015, and believes he was a Career Tenured federal employee on November 20th, 2015, because of 8 years of prior federal employment where the Petitioner achieved Career Tenure Status and pursuant to Title 5 CFR § 315.201(a)(c)(4), *National Treasury Emp. Union v Reagan*, Title 5 CFR § 300.703, and Title 5 USC § 7511. Did the US Court of Appeals for the Federal Circuit aid and abet the MSPB and DoL in seizing the Petitioner's property by violating the Petitioner's 4th Amendment Right to be protected from unreasonable searches and seizures by allowing the DoL to electronically surveil the Petitioner as in *Olmstead v. United States*?

9. The Petitioner pointed out to the US Court of Appeals for the Federal Circuit that he interviewed for a GS-14 position with the DoL. The Petitioner pointed out to the US Court of Appeals for the Federal Circuit how he found out he was selected for the GS-14 position with the DoL. Did the US Court of Appeals for the Federal Circuit violate the Petitioner's 4th Amendment Right by disregarding Perry v Sidemann since the GS-14 position the Petitioner was selected to was within the same agency where the Petitioner was Career Tenured?

10. In Douglas vs. Veterans Administration the MSPB established the Douglas Factors. The Petitioner pointed out to the MSPB and the US Court of Appeals for the Federal Circuit the technical or inadvertent actions of the Petitioner which led to adverse action against the Petitioner. Did the MSPB and the US Court of Appeals for the Federal Circuit violate the Petitioner's 5th and 14th Amendment Right?

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RELATED PROCEEDINGS

Merit Systems Protection Board

Cunningham v. DoL, No. DC-315H-17-0167-I-1

United States Court of Appeals (Federal Circuit)

Cunningham v. MSPB, No. 22-2088

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is listed in Appendix A. The denial of rehearing with the United States Court of Appeals for the Federal Circuit is listed in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on January 13th, 2023. A petition for rehearing and rehearing en banc was denied. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

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

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 5 CFR § 300.703 - Definitions

Appointment means any personnel action that brings onto the rolls of an executive agency as a civil service officer or employee as defined in 5 U.S.C. 2104 or 2105, respectively, a person who is not currently employed in that agency. It includes initial employment as well as transfer between agencies and subsequent employment after a break in service. Personnel actions that move an employee within an agency without a break in service are not covered. A break in service is a period of 4 or more calendar days during which an individual is no longer on the rolls of an executive agency.

Title 5 CFR § 315.201 - Service requirement for career tenure.

- (a) Service requirement. A person employed in the competitive service for other than temporary, term, or indefinite employment is appointed as a career or career-conditional employee subject to the probationary period required by subpart H of this part. Except as provided in paragraph (c) of this section, an employee must serve at least 3 years of creditable service as defined in paragraph (b) of this section to become a career employee.
- (c) Exceptions from service requirement. The service requirement for career tenure does not apply to:
 - (4) The reinstatement of a person who once completed the service requirement for career tenure.

Title 5 CFR § 315.801 - Probationary period, when required.

- (a) Upon noncompetitive appointment to the competitive service under the Postal Reorganization Act (39 U.S.C. 101 et seq.), an employee of the Postal Career Service (including substitute and part-time flexible) who has not completed 1 year of Postal service, must serve the remainder of a 1-year probationary period in the new agency.

Title 5 CFR § 315.802 - Length of probationary period; crediting service.

- (c) Periods of absence while in a pay status count toward completion of probation. Absence in nonpay status while on the rolls (other than for compensable injury or military duty) is creditable up to a total of 22 workdays. Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full upon restoration to Federal service. Nonpay time in excess of 22 workdays extends the probationary period by an equal amount. An employee serving probation who leaves Federal service to become a volunteer with the Peace Corps or the Corporation for National and Community Service serves the remainder of the probationary period upon reinstatement provided the employee is reinstated within 90 days of termination of service as a volunteer or training for such service.

Statement

On October 22nd, 2015, the Petitioner was contacted by Erika Werking of the BLS with a tentative job offer for a GS-12 IT Specialist position with the BLS for job announcement number MS-15-BLS-OT-144. Job announcement number MS-15-BLS-OT-144 was a Veterans Employment Opportunity Act position. (See Appendix C) On October 28th, 2015, the Petitioner accepted the BLS position and submitted a Declaration for Federal Employment (OF306) to begin the background investigation of the Petitioner that ensures that the Petitioner is fit to be appointed to federal employment. The Petitioner pointed out in his OF306 that he is a preference eligible United States Veteran that also had 8 years or prior federal employment with the USPS. On November 19th, 2015, the Petitioner received his Official Offer Letter of Employment from the BLS and accepted the position with the BLS (See Appendix D). On December 8th, 2015, the Petitioner received an email from the BLS stating that he must visit the Office of Personnel Management's (OPM) website to complete his Electronic Questionnaires for Investigations Processing (e-QIP). On December 10th, 2015, the Petitioner went to the General Services Administration (GSA) to have his photo taken, be fingerprinted and to set up Personal Identity Verification (PIV) Credentials. (See Appendix F)

1. National Treasury Emp. Union v. Reagan which was decided by the US Court of Appeals for the D.C. Circuit ruled that notification sent to plaintiffs of their

selection to federal jobs was an unconditional appointment, even though the required appointment forms had not yet been completed. The Petitioner believes this ruling solidifies Title 5 CFR § 300.703, Title 5 CFR § 315.802(c), Title 5 USC § 7511 and that the US Court of Appeals for the Federal Circuit erred in its ruling against the Petitioner; violating the Petitioner's 4th, 5th, and 14th Amendment.

2. After the Petitioner accepted the position with the BLS he entered what the OPM Guide to Processing Personnel Actions and OPM E2E Hiring Roadmap calls "Entry on Duty". (See Appendix E) During the "Entry on Duty" phase of the hiring process a new appointee is required to complete several "Entry on Duty" requirements with other federal agencies. These requirements range from completing the e-QIP with OPM to having your picture taken, getting fingerprinted and setting up PIV Credentials with the GSA. A new appointee cannot complete these "Entry on Duty" requirements without being on the rolls of the hiring agency. The E2E Hiring Roadmap is designed to ensure that a new appointee is properly added to the rolls of an agency regardless of the date listed on an Initial Appointment SF-50. The Petitioner believes E2E Hiring Roadmap solidifies Title 5 CFR § 300.703, Title 5 CFR § 315.802(c) and that the US Court of Appeals for the Federal Circuit erred in its ruling against the Petitioner.

3. In *Skalafuris v. The United States* the US Court of Federal Claims, which is the lower court with appeals being handled by the US Court of Appeals for the Federal Circuit, ruled that that a SF-50 or Oath of Office is the last act of appointing. The Petitioner believes that the US Court of Appeals for the Federal Circuit erred in its ruling against the Petitioner by affirming the MSPB decision referencing *Skalafuris v. The United States* while disregarding another US Court of Appeals ruling in *National Treasury Emp. Union v. Reagan*. Although the US Court of Appeals for the Federal Circuit referenced *Skalafuris v. The United States*, the Petitioner provided proof in his request for rehearing that he was on the agency rolls on December 8th, 2015, and had successfully completed a 1 year probationary period on December 7th, 2016 prior to being wrongfully terminated on December 9th, 2016. The Petitioner believes his 4th, 5th and 14th Amendments rights were violated by US Court of Appeals for the Federal Circuit when it chose to disregard Title 5 CFR § 300.703, Title 5 CFR § 315.802(c) and *National Treasury Emp. Union v. Reagan*.
4. The Petitioner pointed out in his MSPB appeal that he was “Reinstated” to federal employment when hired by the BLS. Because the position the Petitioner was hired into was a noncompetitive Veterans Employment Opportunity Act position along with the Petitioner being career tenured,

Title 5 CFR § 315.201(a)(c)(4), Title 5 CFR § 315.401(b) and Title 5 CFR § 315.801(d) should have applied to the Petitioner. The Petitioner should have never had a probationary period once appointed to the position. The Petitioner believes his 4th Amendment right was violated in accordance with Perry v. Sindermann, along with his 5th and 14th Amendments rights were violated by the MSPB and the US Court of Appeals for the Federal Circuit when both chose to disregard Title 5 CFR § 315.201(a)(c)(4), Title 5 CFR § 315.401(b), Title 5 CFR § 315.801(d), Title 5 USC § 4303 and Title 5 CFR § 1201.3(a)(1).

In January 2016 the Petitioner's supervisor conducted a meeting with the employees that report to him and asked for a volunteer to work the 10am to 6:30pm shift. Since all the other employees either lived a significant distance from the facility and caught the Marc Train to work or had small children that required a 6pm pickup from daycare the Petitioner volunteered for the 10am to 6:30pm shift. The Petitioner's lived the closest to the facility and his children were young adults in college at the time. On April 22nd, 2016, the Petitioner arrived late to work due to an incident on the Metro Red Line. The Petitioner's supervisor told the Petitioner that he had to submit a leave slip for being late to work. The Petitioner immediately asked his supervisor about his "Core Hours". The Petitioner's supervisor told him that since he is on the 10am to 6:30pm shift that the Petitioner no longer has "Core Hours". The Petitioner immediately requested a shop steward.

The Petitioner's supervisor stormed off to the Branch Chief's office while loudly expressing his disappointment with the Petitioner to the Branch Chief.

The Petitioner's supervisor's exact words were "William has requested a shop steward about his Core Hours. I'm not going to have an employee running to a shop steward every time I tell him something."; then the supervisor closed the door. The Petitioner contacted the shop steward via email and asked about his "Core Hours". (See Appendix G) After the Petitioner was told by the shop steward that the Petitioner's supervisor was correct the Petitioner started to come in at least 30 minutes to 1 hour early for work. This allowed the Petitioner to get breakfast since the building cafeteria stopped serving breakfast at 10am or go for a quick workout at the building gym where the Petitioner was a paying member and often discussed politics or worldly events with other gym members. On May 20th, 2016, OPM issued guidance regarding the Metro SafeTrack program instructing agencies to be flexible with their work schedules and telework for employees. (See Appendix H) In late June or early July of 2016, the Petitioner's supervisor told the Petitioner he could not come into the building more than 15 minutes prior to his starting time and instructed the Petitioner to input his arrival time into the building as his start time on his timesheet.

On August 11th, 2016, the Petitioner emailed his supervisor asking to get off of the 10am to 6:30pm shift because if the Petitioner entered the building at 10:01am then entered 10:01am on his timesheet, the timesheet system would automatically take 15 minutes of annual leave from the Petitioner even if the Petitioner stayed until 6:31pm. (See Appendix I) The Petitioner's supervisor never responded to the email. Two days after no response from the Petitioner's supervisor the Petitioner went and directly talked to the supervisor telling him due to Metro SafeTrack with rush hour trains stopping at 9am that he would like to change his schedule. The Petitioner's supervisor responded to the Petitioner by saying "I will get back with you". Nothing ever happened with the Petitioner's request for a schedule change. The Petitioner's supervisor terminated the Petitioner on December 9th, 2016, verbally telling him that he was being terminated for falsifying time on his timesheet. (See Appendix J)

After the Petitioner was terminated he found out that the time on the building access system was purposely kept 15 minutes ahead of the actual time that an individual would input into the timesheet system and that BLS management has terminated quite a few people using this technique.

1. The Petitioner was clearly retaliated against for requesting a shop steward regarding his "Core Hours" being removed and was wrongfully terminated. This is a clear violation of the National Labor Relations Act

and a violation of the CBA because the Petitioner didn't get a 2 week notice of termination as stipulated in the CBA. The Petitioner's termination letter also didn't meet the standards of Title CFR 5 § 315.804(a) because it didn't consist of the agency's conclusions as to the inadequacies of his performance or conduct. (See Appendix J) The Petitioner also believes the BLS, MSPB and US Court of Appeals for the Federal Circuit violated the Petitioner's 1st Amendment right in accordance with *Sloman v. Tadlock*, the Petitioner's 4th Amendment right was violated per *Perry v. Sindermann*, *Olmstead v. United States* and *Douglas v. Veterans Administration* (Douglas Factors).

REASONS FOR GRANTING THE PETITION

There Petitioner believes there is a conflict in laws between *National Treasury Emp. Union v. Reagan* and *Skalafuris v. The United States* that warrant a review. The US Court of Appeals for the Federal Circuit erred in concluding that the Petitioner was not an employee of the BLS when wrongfully terminated.

CONCLUSION

In every courthouse in the United States of America whether civilian or military there is a statue or a portrait of a woman that is blindfolded while holding a scale and a sword. This statue or portrait is called Lady Justice. Lady Justice holds scales to represent the impartiality of the court's decisions and a sword as a symbol of the power of justice. She is blindfolded because justice is unbiased and should not be based on a person's appearance or other outside influences.

The Petition believes he has proven to the highest court in the land that he was an employee by law before being wrongfully terminated. The Petitioner hopes Lady Justice wills her sword for justice in favor of the Petitioner and isn't obscured by outside influences.

Respectfully Submitted

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