Docket No. 22-325

IN THE

Supreme Court of The United States

ADAM BRUZZESE,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General of the United States,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A tenured government employee's occupation is considered their property which cannot be deprived without due process requiring a notice of charges, an explanation of supporting evidence, a reasonable opportunity to respond, a hearing which provides for self-defense and representation by legal counsel. Federal agencies are also required to prove misconduct charges by a preponderance of evidence, and to not rely on ex-parte statements.

The Questions Presented are:

Can the adverse employment action against Adam Bruzzese stand if it was administered in a manner which does not satisfy due process requirements?

Can a due process claim be raised if due process violations were included as elements of an EEO claim which was dismissed without considering these violations?

Does the District and Second Circuit Courts' lack of consideration of the ATF/DOJ failure to adhere to any of the aspects of due process in administering the adverse employment action necessitate a *per curiam* decision in favor of Bruzzese?

PARTIES TO THE PROCEEDING

The parties to the proceeding in United States Court of Appeals for the Second Circuit were petitioner Adam Bruzzese and respondent Merrick Garland – the United States Attorney General.

(Previous titles to this litigation have included the name of the current Attorney General at the time and have changed as new individuals occupied that position.)

CORPORATE DISCLOSURE STATEMENT

Petitioner has been an employee of ATF, a bureau under the United States Department of Justice since May 7, 2000. Merrick Garland is the current United States Attorney General; the head of the Department of Justice.

RELATED PROCEEDINGS

Adam Bruzzese v. Merrick B. Garland, Attorney General of the United States; No. 21-1448

Adam Bruzzese v. Merrick B. Garland Attorney General of the United States; No. 13-CV-5733 (SJ)

Adam Bruzzese v. Jefferson B. Sessions, Attorney General of the United States; No. 16-2775-cv

Adam Bruzzese v. Loretta E. Lynch, Attorney General of the United States; No. 13-CV-5733 (JBW)

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STATEMENT OF THE BASIS FOR THE JURISDICTION

The Second Circuit Court of Appeals En Banc denied a timely petition for rehearing in Case Number 21-1448. The mandate is dated July 29, 2022. This Court has jurisdiction under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the United States Constitution provides in pertinent part that, "No person shall be ... deprived of ... property, without due process of law..."

The First Amendment to the United States Constitution provides in pertinent part that, "Congress shall make no law ... prohibiting ... the

right of the people ... to petition the Government for a redress of grievances."

Title 5 USC 7513(b) provides

> An employee against whom an action is proposed is entitled to—
>
> (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
> (3) be represented by an attorney or other representative; and
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

Title 5 USC 7701(c) provides in pertinent part

> (1) ... the decision of the agency shall be sustained ... only if the agency's decision–
> (A) (in the case of an action based on unacceptable performance described in Section 4303, is supported by substantial evidence); or

(B) in any other case, is supported by a preponderance of the evidence.

STATEMENT OF THE CASE

I. Facts Regarding the Reassignment

Adam Bruzzese had been an 1811 Series - Special Agent with ATF since May 7, 2000, making him a tenured employee. On September 4, 2008, Bruzzese's supervisor, Eric Immesberger, sent a memo to then-Acting Special Agent in Charge of the NY Field Division Delano Reid stating several allegations against Bruzzese. Instead of contacting ATF's internal affairs to conduct an investigation to substantiate these allegations per ATF policy, Reid temporarily restricted Bruzzese's duties and arranged for a psychological fitness for duty evaluation through the Department of Health and Human Services. The allegations in the Immesberger memo to Reid were sent to the fitness evaluators. No charges for misconduct were sought at that time. There have never been any allegations against Bruzzese for subpar performance under Title 5 USC Section 4303.

A final evaluation report stated that Bruzzese has no psychological illnesses and advised ATF management that any action they take needs to be in accordance with ATF's discipline or job-performance policies. On June 4, 2009, ATF management sent a memo to Bruzzese which stated that he was being reassigned to an 1801 Series – Technical Surveillance Specialist. This memo did not state any

reason for the reassignment nor cite any evidence to support a reason for it, and gave an effective date for the reassignment as June 7, 2009. ATF management did not cite any charges for misconduct, and no hearing was conducted to afford Bruzzese an opportunity to present a self-defense. A copy of this memo is included in the appendix for the Court's information and consideration (Pgs. 53a-55a).

The reassignment is defined as an adverse employment action in precedent cases *Burlington Indus., Inc. v. Ellerth,* 524 US 742 (1998), *Hollins v. Atlantic Co.*,188 F. 3d 652 (6th Cir., 1999), *Lawson v. Avis Budget Car Rental, LLC.*, No. 15-CV-01510 (GBD) 2016 WL 3919653 (SDNY July 12, 2016), and *Ribando v. United Airlines, Inc.,* 200 F.3d 507 (7th Cir. 1999). The 1801 Series – Technical Surveillance Specialist occupation has lesser duties and responsibilities, lesser authority and prestige, and lesser benefits as it reduced Bruzzese's retirement annuity by approximately $23,000 per year and requires Bruzzese to stay employed for an additional 3 ½ years to be eligible for full retirement in order to retain medical and life insurance benefit programs. These facts make Bruzzese's occupation as an 1811 Series – Special Agent his property which requires adherence to due process for its deprivation.

DOJ attorneys also argued to the District Court that the time period of petitioner's temporary restriction of duty between September 4, 2008 and June 7, 2009 should be excluded from consideration since petitioner remained an 1811 Series – Special Agent during that time. This is an admission that the reassignment is indeed an adverse employment

action because the DOJ is stating that the effectuation of the reassignment on June 7, 2009 is the onset of the litigation.

II. The EEO Claim

In a timely manner, Bruzzese filed an EEO complaint pertaining to discrimination based on being regarded as disabled by ATF. The EEO claim was dismissed in the administrative EEO Courts and an EEO claim was timely filed in the Eastern District of New York (Case number 13-CV-5733). During the process of discovery, numerous depositions were conducted and documents were discovered. The claim was dismissed upon a motion for summary judgement in favor of ATF/DOJ. Bruzzese appealed to the Second Circuit Court (Case number 16-2775). The Second Circuit Court affirmed the dismissal and opined that Bruzzese could not have been regarded as disabled because the fitness evaluators told ATF management that Bruzzese was fit for duty. The Second Circuit Court further opined that they would not consider the additional "pretext" and "otherwise qualified" elements included in the EEO litigation because the claim was being dismissed on its first element – "regarded as disabled" (See Footnote #5, Pg. 23a). These other elements included the violations of due process and evidence which refuted the allegations made against Bruzzese.

III. The Due Process Claim

When the Second Circuit Court dismissed the EEO claim by stating that Bruzzese was fit for duty and gave no consideration for the due process violations and proof of false allegations encapsulated in the "pretext" and "otherwise qualified" elements, they opened the door to the due process claim. The question remained unanswered as to why Bruzzese was reassigned if he was indeed fit for duty. Bruzzese timely began the administrative process of seeking a remedy for the improper reassignment through due process.

Initially, Bruzzese sought to unseal evidence from the EEO record in case number 13-CV-5733 to present to the MSPB. When the MSPB declined to hear the claim, Bruzzese brought the due process claim to the Eastern District of New York under the same case number (The parties were the same and the sealing order would remain intact.). When the District Court dismissed the claim and opined that Bruzzese was attempting to re-hear the EEO claim under a new legal theory, an appeal was again brought to the Second Circuit Court (Case number 21-1448). The Second Circuit Court affirmed the District Court's finding.

IV. Notable Facts in the Record

The record developed during the EEO claim 13-CV-5733 contains voluminous evidence which clearly demonstrate that due process was indeed violated in administering the reassignment, and that the entire episode is based on false allegations made

by Eric Immesberger. The 2009 reassignment memo does not contain any notice of charges, reference to supportive evidence, and gave only three days' notice of the reassignment. The decision-maker, then-Special Agent in Charge Ronald Turk, testified that the reassignment removed Bruzzese's "6(c)" retirement benefits. Turk further testified that he relied on Immesberger's allegations and the fitness evaluation report to make his decision. Turk, who arrived in the New York Field Division in January of 2009, testified that he never knew Bruzzese prior to his arrival in New York, he relied on Immesberger's allegations and the fitness evaluation report to make his decision, and that he was not conducting an investigation nor did he review Bruzzese's personnel folder. The DOJ's own expert witness, Dr. Alexander Bardey, testified that the fitness evaluation was not fact-finding and Bruzzese's self-defense was viewed as a negative personality trait.

Documents and testimony from Dr. Samoon Ahmad and Dr. Haviva Golhagen who participated in the fitness evaluation demonstrate that ex-parte allegations were made to Dr. Ahmad by Eric Immesberger which were not included in Immesberger's memo to Delano Reid. The testimony and documents show that Bruzzese was never found to be unfit for duty, nor unsuitable for a law-enforcement position, and that the doctors *assumed* that the allegations were true. The fitness evaluation final report advises ATF management to follow their internal policies because Bruzzese cannot be excluded due to medical or psychological illness.

REASONS FOR GRANTING THE WRIT

Adam Bruzzese petitions for a Writ of Certiorari to review the judgement of the Second Circuit Court. This case presents an important question of law regarding the Second Circuit Court's upholding an adverse employment action which was administered in violation of due process. The Second Circuit's affirmation of the dismissal of both the EEO claim followed by the due process claim without any consideration of the violations of due process and ATF management's reliance on false allegations permits the deprivation of Bruzzese's property without due process. In their dismissal of the EEO appeal, the Second Circuit Court stated that they would not review the due process violations included in latter elements of the claim since the first element – being regarded as disabled – could not be demonstrated. The question remains unanswered as to why Bruzzese was reassigned if the Court agreed he was fit for duty.

Several aspects of the administration of the reassignment constitute individual violations of due process. Multiple precedent cases and federal laws and regulations support the claim that due process was violated and requires the reversal of the reassignment. The Second Circuit Court's opinion that the due process claim is "piecemeal litigation" is not consistent with precedent cases which permit seeking a new route for a remedy when the first route chosen could not afford one.

The District Court and Second Circuit Court's dismissal of the claims without considering the due process violations is inconsistent with precedent

cases which mandate that the due process claim be heard. The failure of ATF management to prove allegations of misconduct is a violation of law. The failure of ATF and DOJ attorneys to inform the various Courts that the allegations are false, and to admit that due process was not followed is in violation of federal regulations governing obligations to candor before the tribunal.

I. The opinion of the District Court is based on due process violations, including ATF/DOJ's admission that the reassignment is an adverse action, and thus is inconsistent with the dismissal of the due process claim.

In the EEO claim, the District Court stated in their opinion that one reason ATF/DOJ argued for the dismissal of the claim was that although the reassignment was an adverse employment action, it could not be linked to discriminatory animus (Pg. 47a). The District Court agreed that an adverse action was administered. Judge Weinstein stated in his opinion that ATF/DOJ had evidenced non-pretextual reasons for the adverse action (Pg. 49a). Ronald Turk stated in his deposition that he had "cause" to administer the reassignment. This reasoning is inconsistent with adherence to due process. ATF/DOJ gave no written notice as to what this supposed cause or non-pretextual reasons were, nor did they cite any substantiated evidence to support any cause or reason. The subsequent ruling to dismiss the due process claim cannot be supported

because it cements the deprivation or property without due process and gives Bruzzese no opportunity to seek redress.

Judge Weinstein relied on the repeated list of allegations which were never investigated or substantiated, despite Judge Weinstein erroneously stating that there was a thorough investigation prior to removing Bruzzese's firearms (Pg. 27a). Judge Weinstein lists as "facts" a mere repetition of Immesberger's allegations (Pgs. 28a-29a) and gives no weight to the other witnesses' deposition statements and ATF policies which plainly refute these allegations. Judge Weinstein refers to Ronald Turk's testimony as "unrebutted" (Pg. 49a) which is inconsistent with the evidence in the record, but likewise inconsistent with due process since properly following ATF policy, the law, and precedent cases would have given Bruzzese an opportunity to rebut Ronald Turk's decision.

Throughout his opinion, Judge Weinstein refers to Ronald Turk reliance on "behaviors." (Pg. 48a), and reliance on non-pretextual reasons for the reassignment decision (Pg. 49a). This is inconsistent with the due process requirements which mandate notice of charges, opportunity to respond, a hearing allowing for Bruzzese to dispute the charges, and proof by preponderance of evidence that misconduct occurred. Judge Weinstein takes the further step of opining that Ronald Turk made a decision based on potential future behavior (Pg. 48a), even though the current allegations were never substantiated, and Bruzzese never given an opportunity to dispute the allegations.

Judge Weinstein also makes several references to the fitness evaluation throughout his opinion to support the dismissal of the EEO claim. This is likewise inconsistent with due process requirements since the fitness evaluation was not an adversarial hearing affording the opportunity to dispute allegations with the assistance of counsel, and was not fact-finding or truth-seeking according to the DOJ's own expert witness, Dr. Bardey.

Judge Weinstein's opinion of Bruzzese regarding the "direct threat" and "qualified individual" aspects relies completely on the unsubstantiated allegations (Pgs. 44a-45a). Despite twice referring to the fitness evaluation's advice to ATF management that they need to follow internal administrative policies (Pgs. 31a-33a), Judge Weinstein based his opinion in the allegations and fitness evaluation which are both rooted in due process violations (Pg. 45a). Judge Weinstein's citation of Bruzzese's evidence used to support his EEO claim (Pgs. 45a-46a, 49a) is demonstrative of the failure to provide what was required by due process in terms of notice and opportunity to respond to charges, and the administration of a hearing in making the reassignment decision.

The District Court rulings (and subsequent Second Circuit Court affirmations) are inconsistent. With the one hand the District Court in the EEO claim is stating that Bruzzese was subject to an adverse action (which requires adherence to due process), and the District Court is then dismissing the due process challenge to this same adverse action with the other hand. The Second Circuit

affirmed both dismissals even though they noted the inconsistency and due process issues during oral arguments of the EEO claim. This inconsistency is un-Constitutional, was observed by the Second Circuit Court, yet they declined to allow Bruzzese to be heard on the due process issue.

II. *Leslie Kerr v. MSPB,* 17-2538 (Fed. Cir. 2018) provides Bruzzese with the ability to seek a new review route under the due process claim.

In *Kerr*, the Court stated that "... election of a review route that cannot afford a remedy will generally not foreclose access to a route that can provide a remedy." Firstly, throughout all of the litigation processes involved in this case, all of Bruzzese's filings have been timely. As seen in *Kerr*, Bruzzese did not "sleep" on any aspect of seeking a remedy. The EEO claim pertained to ATF management "regarding" Bruzzese as disabled. Despite ATF management sending Bruzzese for a psychological evaluation instead of filing misconduct charges, Bruzzese was found to be fit for duty, and still Bruzzese was reassigned. The lack of charges, false allegations, and ATF management's failure to follow any of its own policies support the theory that ATF management regarded Bruzzese as disabled, especially following the completion of the fitness evaluation.

The "regarded as disabled" EEO claim doesn't require the finding of an actual disability, but an action taken despite the finding that Bruzzese was

not psychologically disabled. Without reviewing the "pretext" and "otherwise qualified" elements of the EEO claim, the Second Circuit Court did not give consideration to the entirety of the claim. No "regarded as" EEO claim could ever be successful since one would have to have no illnesses to satisfy "regarded as" disabled. Had there been an illness, the EEO claim would be one of ordinary disability instead of "regarded as" disabled.

However, the Second Circuit Court opined that it is Bruzzese's fitness for duty which eliminates the possibility of the claim. It is this dismissal and the opinion it relies on which makes the EEO claim an impossible scenario to afford a remedy. Had Bruzzese been found unfit, he would certainly have been reassigned and an EEO claim could not have been successful. As described by one of the Circuit Judges as "damned if you do and damned if you don't," Bruzzese's EEO claim was dismissed because he was fit.

Since the EEO claim could not afford a remedy due to the fact that either outcome of the fitness evaluation would result in a dismissed EEO claim, Bruzzese should not be foreclosed from seeking a review route which could afford a remedy – the due process claim. The violations of due process and proven false allegations were included in the "pretext" and "otherwise qualified" prongs of the EEO claim. This was explained during oral arguments of the EEO appeal to the Second Circuit Court when one of the Circuit Judges asked if there was a due process claim, an issue recognized by this Judge.

The fact that the due process violations were included in the EEO claim and identified by one of the Circuit Judges during the oral arguments of Case Number 16-2775-cv, the Second Circuit Court opinion in Case Number 21-1448 that the due process claim is "piecemeal" litigation is faulty. Notwithstanding the reasoning in *Kerr* which allows the due process claim to be heard, the Second Circuit Court has eliminated Bruzzese's right to petition for a redress of grievances guaranteed by the First Amendment. By dismissing the EEO claim and ignoring the included due process violations, then dismissing the subsequent due process claim, the Second Circuit Court is closing the circle on all opportunity for Bruzzese to undo the wrongful reassignment. It permits ATF management to *circumvent* due process by using a fitness evaluation based on unsubstantiated allegations instead of the required fact-finding, adversarial hearings with legal representation, and proving misconduct occurred in administering the adverse employment action with its deprivation of property. The Second Circuit Court was also requesting new evidence from Bruzzese to support overturning the earlier District Court Order. This is an impossible task since all of the evidence had already been presented to the Court, just not considered by the Court.

III. The Order from the District Court affirmed by the Second Circuit is directly opposed to precedent cases *Cleveland Board of Education v. Loudermill,* 470 US 532 (1985), *Arnett v. Kennedy,* 416 US 134 (1974), *Green v. Department of Health and Human Services,* 48 MSPR 161 (1991), *and Stephen v. Department of the Air Force* 47 MSPR 672, (1991), which all require a notice of charges and reasonable opportunity to respond. The precedent case in *Carey v. Piphus,* 435 US 247 (1978) requires consideration of the due process claim.

Throughout the entirety of the litigation, it has never been disputed that the June 4, 2009 memo advising Bruzzese of the reassignment does not contain the required notice of charges with supporting evidence and afforded a reasonable opportunity to respond. The memo advised that the reassignment was effective on June 7, 2009 – three days later. Title 5 USC 7513(b)(1) requires a minimum of thirty days unless the event is of an employee being arrested for a crime. (Bruzzese has never been arrested for any offense).

Not only is this important because of its chronological shortcoming which cannot be disputed by ATF/DOJ, it deprived Bruzzese a reasonable time to make an informed decision on how to proceed. The

choice of review route is forever tainted by this particular due process violation.

In addition, Title 5 USC 7513(b)(4) required ATF to give Bruzzese a written decision citing the reasons for the reassignment. The June 4, 2009 memo does not state any reason for the reassignment. In subsequent communications with ATF management, Bruzzese has never been advised of what evidence ATF management relied upon to administer the adverse action.

Judge Weinstein's opinion based upon Ronald Turk's reliance on a "totality of behaviors" and the fitness evaluation permits the evasion of the requirements of notice and opportunity to respond. Again, we see the conflict between the opinion that behavior is the reason for the reassignment, but since the behavior is not rooted in mental illness, an EEO claim cannot be sustained, and yet there is no adherence to due process in stating what behavior constituted misconduct and what evidence existed to substantiate any charges related to behavior or misconduct. This condition also allows for the evasion of whether the alleged behavior or related charges (had they been properly filed) warranted the adverse action.

The opinion in *Carey v. Piphus* requires that due process claims be heard regardless of the underlying substance of the event. Whether Bruzzese could prove discrimination or not is immaterial since the due process claims incapsulated in the EEO litigation exist, requiring their consideration.

IV. The opinion of the District Court and Second Circuit Court's reliance on the fitness evaluation findings is in conflict with the precedent cases *Boddie v. Connecticut,* 401 US 371 (1971), *Goldberg v. Kelly,* 397 US 532 (1985), and *Greene v. McElroy* 360 US 474 (1959), which all require that a hearing be held which would afford Bruzzese an opportunity to dispute the allegations.

In his deposition, the decision maker Ronald Turk stated that he based his decision on a "totality of behaviors" and the results of the fitness evaluation. The fitness evaluation was not a hearing which allowed Bruzzese to dispute the allegations. In their depositions, Dr. Ahmad, Dr. Goldhagen, and the government's expert witness, Dr. Bardey all stated that the allegations were assumed to be true. This assumption is a fatal flaw in the evaluation which can never make it equal to a hearing, and thus, relying upon the evaluation does not meet the standard required by due process as seen in these precedent cases.

Dr. Bardey stated that Bruzzese's dispute of the allegations was seen as a negative attribute. The final evaluation report stated that Bruzzese's failure to admit to wrongdoing was a negative personality trait, when the reality was that no wrongdoing was committed. The choice is admit misconduct which would result in an adverse action or don't admit misconduct and suffer the adverse action anyway. The fitness evaluators were not informed of the

details of any ATF policy that Bruzzese was alleged to have violated.

In one pertinent example, Immesberger alleged that Bruzzese attended only one Peer Response Program meeting after a critical incident and that Bruzzese did not take any time off after the incident. The fitness evaluators were not informed of the pertinent ATF policies which clearly stated that Bruzzese was not mandated to take any time off and attendance at only one meeting was all that was required by the Peer Response Program. In a submission to the District Court, AUSA James Cho wrote, "Plaintiff separately met with members of the peer response team approximately four to six times," which clearly contradicts Immesberger's allegation. The Peer Responder Program is also confidential, so there would be no way for Immesberger to know how many meetings Bruzzese attended. This fact was also not presented to the fitness evaluators.

In a memo to Bruzzese, Delano Reid stated that the fitness evaluation was seeking medical documentation. The "consent" form regarding the evaluation stated that failure to participate could result in employment repercussions. Bruzzese was never afforded the opportunity to have legal representation during the fitness evaluation which would have been required at a hearing under Title 5 USC 7513(b)(3).

Greene v. McElroy references the individuals' right to "confrontation and cross-examination, ... not only in criminal cases, ... but in all types of cases where administrative ... actions were under scrutiny." It states that the Supreme Court has been

"zealous to protect these rights from erosion." It is clearly demonstrated that the lack of any hearing where Bruzzese could challenge the allegations against him violates this standard.

The District Court's opinion stated that the case demonstrated the necessity of granting substantial deference to supervisors of employees who may endanger the public by their control of firearms or other dangerous instruments. Granting substantial deference does not override due process requirements. The opinion further stated that an employer must be able to remove an employee when confidence in the employee's ability to safely perform their duties is absent. Again, this ability to remove an employee does not supersede the requirements to adhere to due process.

The Second Circuit Court's opinion that the finding of fitness caused the dismissal of the EEO claim, followed by their dismissal of the due process claim, allows for the circumvention of the requirement for a hearing. Bruzzese was completely deprived of the ability to present a self-defense. It is the fitness evaluation – not a hearing - which results in the finding of fitness for duty, and thus the non-adherence to due process in failing to conduct a hearing resulting in the dismissal of both claims.

In a submission to the District Court dated August 31, 2020, Bruzzese referenced a memo received from ATF management. In this memo, the ATF legal department in Headquarters advised through the chain of command that the reassignment decision was based on reliance on expert advice, meaning the fitness evaluation

(ignoring the fact that the fitness report and the doctors' testimonies stated that Bruzzese was not unfit or unsuitable). This is an admission that they did not rely on the findings of a hearing which is required by precedent cases and federal law. Nowhere in any part of the litigation has ATF or DOJ cited the result or finding of any hearing required by the precedent cases and federal law.

V. The Order of the District Court affirmed by the Second Circuit is violative of the standard set in *United States Postal Service v. Gregory*, 534 US 1 (2001), and Title 5 USC 7701(c)(1)(B) which require that misconduct be proven by a preponderance of evidence.

By affirming the District Court Order and dismissing the due process claim, the Second Circuit allows for the deprivation of property without ATF management ever proving misconduct. The memo containing allegations of misconduct was sent from Immesberger to Reid on September 4, 2008. Some of the allegations required that Reid contact ATF's internal affairs to conduct an investigation per ATF policy. Internal affairs was never contacted. In Court submissions, DOJ attorneys stated that Reid had Immesberger conduct his own investigation. This is completely improper. In their depositions, multiple co-workers identified by Immesberger as the origin of allegations refute what Immesberger stated. This lack of corroboration clearly demonstrates that the improper investigation supposedly conducted by

Immesberger was falsified if it ever even took place. Judge Weinstein also erroneously stated that a thorough investigation was conducted. Bruzzese requested through discovery all documentation from ATF's internal affairs regarding investigation of the allegations and nothing was provided.

Instead of substantiating the allegations and filing charges for misconduct, Reid forwarded the unsubstantiated allegations to ATF Headquarters who then forwarded them to the fitness evaluators. These unsubstantiated allegations were relied upon by the evaluators and appear in the final evaluation report. Again, these are the same allegations and evaluation report that Ronald Turk relied upon in making the reassignment decision, and the same allegations recited by Judge Weinstein as "facts."

A constant repetition of unsubstantiated allegations is not evidence at all that the allegations are true. In their depositions, co-workers identified by Immesberger do not corroborate statements Immesberger attributed to them, and refute other allegations described by Immesberger. In his deposition, Reid testified that he knew some of the allegations to be inaccurate to his own personal knowledge. Various ATF policies also refute some of the allegations which pertain to Immesberger's accusation that Bruzzese violated policies in certain instances. Mere repetition of allegations does not constitute proof required by the statute or due process seen in the precedent case.

Regarding Ronald Turk's statement that he relied upon a "totality of behaviors," it is required that a behavior be labeled or described in some

specific charge of misconduct, with each charge of misconduct being supported by evidence. There are no charges of misconduct against Bruzzese, and no citation of any evidence in support of any charge. The phrase, "totality of behaviors" is completely arbitrary and undefined. While there exists specific charges that could have defined certain alleged behavior as misconduct such as insubordination or conduct detrimental to the agency, nothing of the sort was ever filed against Bruzzese. There is no way for Bruzzese to know what alleged behavior equated to misconduct as the reason for the reassignment in order to mount a defense against the alleged misconduct or if it warranted the penalty, both of which violate due process.

Almost a decade later, in communications with Bruzzese, ATF management stated that the reason for the reassignment was that Bruzzese was deemed to be unsafe or irresponsible in handling firearms. Aside from this specific reason not being stated in the reassignment memo, there has never been any evidence cited to support this reason. Quite the opposite is true; there is ample evidence in the record that refutes this allegation such as Bruzzese continuing duties as an ATF Firearms Instructor for more than 8 years after the reassignment.

In his brief to the Second Circuit Court, AUSA Cooper stated that the reason for the reassignment was that the fitness evaluation found Bruzzese to be unsuitable for a law-enforcement position. In her deposition and in the evaluation report, Dr. Goldhagen stated the opposite – that she did *NOT* find Bruzzese to be unsuitable because suitability is

determined by job performance and is not a medical determination. Even relying on AUSA Cooper's assertion, Dr. Goldhagen establishes that due process was violated because there is no determination by ATF management that Bruzzese's job performance was subpar or marred by misconduct. Ronald Turk testified that he did not review Bruzzese's performance evaluations. Dr. Goldhagen expressly advised in the evaluation report that ATF should follow its own internal policies. This required due process in the form of notice, opportunity to respond, a hearing, proof by preponderance of evidence, etc.

This failure to adhere to due process and the law also unfairly shifts the burden of proof. Instead of ATF fulfilling their legal and Constitutional requirements to prove Bruzzese committed misconduct, it is Bruzzese who now has the burden of proving that ATF acted illegally or improperly. Bruzzese is guilty unless he can prove his innocence. The Second Circuit Court is additionally opining that Bruzzese does not have standing to even prove his innocence because of the decision to seek a remedy through the EEO claim. Evidence supportive of Bruzzese innocence - being found fit for duty - was the reason for the Second Circuit Court's dismissal of the EEO claim.

VI. The fitness evaluation report contains ex-parte communications and the reliance upon them is a violation of due process as seen in precedent cases *Stone v. FDIC* 179 F.3d 1368 (1999), and *Ward v. United States Postal Service,* 673 F.3d 1294 (Fed. Cir. 2012).

During the discovery phase of the litigation in 13-CV-5733, Dr. Ahmad submitted the entire file from his participation in the fitness evaluation. Dr. Ahmad also testified in a deposition. Dr. Ahmad's file was received by Bruzzese in November of 2014, more than five years after the reassignment. The documents and testimony unequivocally show that Immesberger made several additional allegations against Bruzzese to Dr. Ahmad which do not appear in Immesberger's memo to Reid on September 4, 2008. Dr. Ahmad interviewed Immesberger *after* Dr. Ahmad interviewed Bruzzese and did not re-interview Bruzzese regarding these additional allegations.

The *Stone* and *Ward* precedents clearly bar this kind of ex-parte communications from being involved in an adverse employment action. There is no way for Bruzzese to present a defense to allegations that are made outside of his knowledge. Ronald Turk makes no reference to whether his "totality of behaviors" reliance included any or all of these additional allegations. There is no explanation of what findings in the fitness evaluation report relied upon by Turk are based on or influenced by these ex-parte allegations.

The language in the *Stone* precedent is clear, "The introduction of new and material information by means of ex-parte communications to the deciding official undermines the public employee's constitutional due process guarantee of notice (both of the charges and of the employer's evidence) and the opportunity to respond." *Stone* further states, "An employee is entitled to a certain amount of due process rights at each stage and, when these rights are undermined, the employee is entitled to relief regardless of the stage of the proceedings." *Ward v. US Postal Service* reiterated the same concern of ex-parte communications' effect on due process, but extended this ideal to include the employee's ability to challenge the penalty that was imposed.

Bruzzese compiled an outline of the allegations made by Immesberger in his memo to Reid and the ex-parte allegations made by Immesberger to Dr. Ahmad which was given to ATF and DOJ, and submitted to the District Court and Second Circuit Court. The allegations made to Dr. Ahmad involve co-workers questioning Bruzzese's use of deadly force (ATF/DOJ presented no corroborating witness to this allegation and in a deposition, Immesberger himself contradicts his own allegation regarding this action for which Bruzzese was deemed justified by a grand jury, within ATF's use of force policy, and decorated for valor by ATF), co-workers asking that Bruzzese be relieved of his firearms (in depositions, these co-workers refuted that allegation, and ATF/DOJ presented no witness to corroborate this statement), and an instance described by Immesberger as an improper arrest made by Bruzzese (numerous witnesses including

other ATF managers, and ATF policies submitted into the record refute this allegation).

This information is material to granting the petition because it clearly shows that the ex-parte communications were prejudicial to the fitness evaluation and the decision maker, Ronald Turk. Not citing them in charges of misconduct or evidence to support a charge of misconduct is a violation of notice and opportunity to respond reflected in the *Stone* and *Ward* cases. Likewise, ATF and DOJ attorneys should have recognized the existence of these ex-parte statements and acknowledged the due process violations.

VII. The truth matters in determining due process.

Capital cases involve life. Criminal prosecutions involve liberty (incarceration) and sometimes property (fines and penalties). Clearly the claim brought by Bruzzese involves property in the form of his occupation and retirement benefits. The Fifth Amendment protects life, liberty and property equally. The difference being the level of proof needed for lawful deprivation through due process. However, they all rely upon the truth. If it is determined that a key witness in a prosecution lied, any resulting conviction must be vacated. If it is discovered that some Constitutional violation occurred during a criminal prosecution, any resulting conviction must be vacated.

What is proven after the development of a thorough record in 13-CV-5733 is that witness

testimony from multiple co-workers including other ATF managers and other documentary evidence demonstrate that the allegations against Bruzzese are indeed false. Evidence developed in the record also clearly demonstrate due process violations which were not known at the time of the reassignment when the decision to pursue an EEO claim was made. ATF and DOJ attorneys do not offer any dispute to the elements of the due process claim. They only argue that Bruzzese should not be heard. Since there can be no dispute made to the elements of the due process claim itself, the claim must be heard. For the purposes of this petition, it means Certiorari should be granted.

Notwithstanding the fact that the fitness evaluation did not constitute the required hearing, it was likewise tainted by the false allegations. Dr. Goldhagen testified that if the allegations against Bruzzese were false, then there would be no reason to restrict Bruzzese from returning to full duty. Dr. Ahmad testified that if Bruzzese's behaviors were inaccurately described, then Bruzzese should not have been sent for a fitness evaluation at all. The process that ATF substituted for what was supposed to be a hearing was tainted by false information for which Bruzzese was given no ability to challenge.

VIII. Stark contrast to Broward Sheriff's Office arbitration ruling after Parkland high school shooting.

Bruzzese submitted to the District Court and Second Circuit Court information from a separate

incident which shows a drastically different result related to Constitutional due process and adverse employment actions.

Two law enforcement officers, Sergeant Brian Miller and Deputy Josh Stambaugh, who were fired for inaction after a deadly school shooting were reinstated after an arbitrator ruled that their due process rights were violated.

Sgt. Miller was found to have hidden behind his vehicle and ignored his radio for 10 minutes during the shooting and Deputy Stambaugh was found to have hidden behind his vehicle and then left the scene of the incident. After a lengthy investigation, both were fired. State law required the Broward Sheriff's Office to impose a penalty within 180 days of the completion of the investigation. In Miller's case, the Broward Sheriff's Office missed that deadline by 2 days. In Stambaugh's case, they missed that deadline by 13 days. The arbitrator ruled that this violation of state law was a violation of Constitutional due process rights.

Comparing this to Bruzzese's case, ATF awarded Bruzzese a medal of valor for immediately confronting and attempting to apprehend a subject who was threatening to detonate a hand grenade on a residential Bronx street. An investigation of the incident determined the use of deadly force by Bruzzese was legally justified and compliant with ATF policy. Ten months after that incident, Immesberger made allegations against Bruzzese which resulted in no investigation, no substantiation, and no charges for misconduct. After Bruzzese was sent for a fitness evaluation in which

Bruzzese was found to be without illness and fit for duty, Bruzzese was subject to an adverse employment action without adherence to due process. Specifically related to the Broward case was that Bruzzese was afforded only three days' opportunity to respond which is well short of what is required by federal law.

Although the types of administrative and legal proceedings were different, the overarching due process theory is inconsistently applied. In the Broward case, a violation of state law was viewed as a due process violation even though an investigation found the existence of misconduct. In Bruzzese's case, ATF's violation of federal law is being permitted by the Courts even though there is no misconduct committed by Bruzzese.

IX. Federal regulations regarding candor before the tribunal required ATF and DOJ attorneys to advise the various Courts of false testimony from Immesberger and the discovery of due process violations.

Courts have the power to set aside fraudulently begotten judgements (*Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 US 238 (1944)). Title 32 CFR 776.42 and Title 37 CFR 11.303 state that attorneys have an obligation to report false testimony, report due process violations, and reveal holding precedents even if they are detrimental to their own case. There are numerous instances where

Immesberger testified to some event which were subsequently refuted by numerous other witnesses in material substance which was more than mere difference in perception or opinion. Some of these instances include Immesberger attributing a statement made by a witness, then that witness being deposed and refuting the statement. Some of these instances include Immesberger alleging Bruzzese violated a certain ATF policy, then other witnesses testifying that the policy was not at all violated, plus the specific policy included in the record.

The fact that the reassignment memo clearly allows only three days opportunity to respond in violation of due process and federal law which is something that must be admitted to by ATF and DOJ attorneys. Likewise for the fact that the reassignment memo lacks any notice of charges of misconduct or citation of evidence. The memo "says what it says and doesn't say what it doesn't say." (to quote Honorable Justice Antonin Scalia). The absence of any type of hearing clearly violates the due process standard set in the *Boddie, Goldberg*, and *Greene* precedents. The ex-parte allegations clearly violate the due process standard set in the *Stone* and *Ward* precedents.

At no point in the litigation do the ATF or DOJ attorneys bring to any Court's attention these obvious violations of due process. Upon the discovery of due process violations such as the ex-parte communications in Dr. Ahmad's file discovered in November of 2014, the ATF and DOJ attorneys were *obligated* to bring the due process violations to the

Court's attention and admit to the obvious Constitutional shortcomings. Instead, ATF and DOJ attorneys maintained their course of claiming that Bruzzese was given all the process that was due, that the reassignment was not an adverse action, and that Bruzzese engaged in behavior that warranted the reassignment. Precedent cases, the law, and the evidence contradict all of these.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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