23-6736

NO. ___

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER CHIN-YOUNG,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

US MERIT SYSTEMS PROTECTION AGENCY,

Respondents.

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER CHIN-YOUNG

Petitioner, Pro Se

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QUESTIONS PRESENTED

Whether covered Federal employees under employment-at-will have an absolute right to constitutionally sound due process procedures under MSPB administrative law

Whether Federal employees-whistle blowers are entitled to *de novo* legal review of a directed reassignment

Whether federal employees return rights to official employment positions are discretionary

PARTIES TO THE PROCEEDING

Petitioners in this Court is Christopher R Chin-Young, in his capacity as a disabled veteran, and whistle-blower, appearing *pro se* (non-lawyer)..

Legal Representative(s) of the United States Merit Systems Protection Agency, and

Legal Representative(s) of the Department of the Army

RELATED PROCEEDINGS

United States Court of Appeals for the Federal Circuit (CAFC) in *Chin-Young*, 2023-1510, Review of Merit System Protection Board (MSPB) in No. DC-0752-15-1030-I-1.

United States Court of Appeals for the Federal Circuit (CAFC) in *Chin-Young*, 2023-1590, Review of Merit System Protection Board (MSPB) in No. DC-1221-17-0013-W-1.

United States Court of Appeals for the Federal Circuit (CAFC) in *Chin-Young*, 2023-1588, Review of Merit System Protection Board (MSPB) in No. DC-0752-11-0394-I-1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Chin-Young, *pro se,* respectfully requests the issuance of a writ of certiorari to review the judgments of the United States Federal Circuit Court of Appeal in these cases. Pursuant to this Court's Rule12.4, the Petitioner is filing a "single petition for a writ of certiorari" because the "judgments *** sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

The decision of the United States Federal Circuit Court of Appeals in *Chin-Young*, 2023-1510 is published at _____ (Fed Cir. 2023), and is reproduced at Pet. App. A

The decision of the United States Court of Appeals for the Federal Circuit in *Chin-Young*, 2023-1590 is published at _____ (Fed Cir. 2023), and is reproduced at Pet. App. A.

The decision of the United States Federal Circuit Court of Appeals in *Chin-Young*, 2023-1588 is published at _____ (Fed Cir. 2023), and is reproduced at Pet. App. A

JURISDICTION

The Federal Circuit Court of Appeals Circuit entered judgment in *Chin-Young*, 2023-1510 on September 20, 2023. *See* Pet. App. A This petition is timely filed with 60 days of the decision on Petition for Rehearing En Banc entered on November 08, 2023 *See* Pet. App. A.

The Federal Circuit Court of Appeals Circuit entered judgment in *Chin-Young*, 2023-1590 on November 14, 2023. *See* Pet. App. A

The Federal Circuit Court of Appeals Circuit entered judgment in *Chin-Young*, 2023-1588 on November 09, 2023. *See* Pet. App. A

This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. See Pet. App. D.

FEDERAL RULE INVOLVED

Pertinent rules are reprinted in the appendix to this petition. See Pet. App. B.

Federal Rule of Civil Procedures, Rule 15. Amended and Supplemental Pleadings

Federal Rule of Civil Procedures, Rule 25. Substitution of Parties

Federal Rule of Civil Procedures, Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes Primary tabs

Federal Rule of Evidence 404(b). Character Evidence; Crimes or Other Acts

STATEMENT

1, Case# 23-1510. In 2015, after a series of whistle-blower complaints by Petitioner, the Department of the Army removed petitioner from his Supervisory Program Analyst position, Deputy Director CXO with the Army CIO/G6 organization based on his refusal to accept a directed reassignment to a new career field as cybersecurity subject matter expert in a SCIF at the Pentagon with new requirements for a top secret clearance. Petitioner argued that he was denied due process, that he had return rights to his permanent position that was not abolished, and the detail reassignment to the Cyber Security Directorate was a phantom assignment and "illegitimate," but the MSPB ruled that such an argument about directed assignment goes to the merits of the Agency's decision to detail him, and thus does not fall within the Board's jurisdiction. The Federal Circuit affirmed.

2, Related Case# 23-1588. After a series of IG complaints and EEO complaint, the Department of the Army removed petitioner from his position with the U.S. Army Contracting Command (ACC) as a Supervisory Program Analyst in 2011, and Petitioner appealed appearing *pro se* before the MSPB. In a related EEO case that Petitioner had filed an earlier against his employer through his then-counsel, Robert Waldeck, to the EEOC, petitioner informed the counsel for the Army that he retained new counsel in the ongoing EEO case. The new counsel was identified to be James Shoemaker. Mr. Shoemaker entered an appearance in the EEO case, but because of confusion about a "mixed case" he also submitted a Designation of Representative form to the MSPB, which was not signed by petitioner. Mr. Shoemaker appeared before the Board and arranged a settlement agreement to resolve petitioner's claims. The settlement agreement was signed by Mr. Shoemaker.. A Board administrative judge approved the settlement and dismissed the appeal. Petitioner protested that he did not authorize settlement and did not sign the settlement, but a fraudulent signature was attributed to him; in addition, a stipulation of the agreement barred Petitioner from any contact with the Agency in negotiations or

otherwise. Later, Mr. Shoemaker filed for enforcement of the agreement, and a second modified agreement was arranged and signed without Petitioner's consent. Subsequently, petitioner, pro se, filed a petition for review of the administrative judge's decision that dismissed the case as settled. Petitioner alleged newly discovered evidence in the form of an affidavit from Mr. Shoemaker, which stated that Mr. Shoemaker was not designated as petitioner's representative in the case. Petitioner referred to the designation of representative forms submitted to the MSPB, one that he signed designating himself as proceeding pro se, and the another submitted by Mr. Shoemaker which lacked petitioner's signature. Petitioner contended that Mr. Shoemaker was not petitioner's designated representative and was not authorized to enter into the settlement agreement nor the modified settlement agreement. However, the MSPB denied the appeal, and the Federal Circuit affirmed the denial.

3. Related Case 23-1590. While on tour in Afghanistan, on a formal reassignment from the Army to the Department of Defense, Petitioner filed a complaint to the Special Investigator for the Reconstruction of Afghanistan, and was immediately issued travel orders to return to the DoD MoDA program office in the United States. Subsequently, Petitioner filed complaints with the Office of Special Counsel. On August 31, 2016 Petitioner was advised by OSC of his right to seek corrective measures by filing with MSPB. OSC issued the final determination letter that indicated: "Your disclosures concerned Dr. Catherine Warner's appointment and possible contract violations." Petitioner then filed an IRA with the MSPB which was denied jurisdiction. The Federal Circuit affirmed.

I. ISSUES OF VITAL IMPORTANCE TO MERIT BASED FEDERAL EMPLOYMENT

MSPB Administrative Judge Constitutionality Issue (common to all three cases)

Issues of subject matter jurisdiction are never waived and therefore can be raised on a collateral appeal where in this case Petitioner submits that MSPB AJ Sherry Zamora's findings and decision were issued in violation of the US Constitution and is thus void ab initio. In the record below, Petitioner moved for recusal of the AJ and for a hearing before a bona fide Administrative Law Judge (ALJ), but his motion was denied by AJ Sherry Zamora who refused to recuse from the case. MSPB administrative judges are not administrative law judges (commonly referred to as ALJs), an entirely separate classification of independent, highly skilled, and carefully screened judicial officers defined by the Administrative Procedure Act (APA). The APA actually makes no reference to administrative judges, nor does the MSPB organic statute, which does refer to administrative law judges. MSPB administrative judges, it turns out, are a creation of the MSPB itself. Seizing on the flexibility permitted by these statutes (while ignoring the precatory language regarding ALJs), the MSPB adopted regulations that define "judge" to include "[a]ny person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board." While thus coining the disingenuous title "administrative judge," the MSPB has largely dispensed with ALJs. The "judge" label is misleading for another reason, since the MSPB itself uses the term "attorney-examiner" for performance evaluations of its so-called administrative judges, who actually are the agency's own lawyers. Noteworthy, the Board's rules grant MSPB employees, including the Board Members themselves, the right to a hearing before an ALJ. Furthermore, AJs are required to be appointed IAW 5 CFR § 9701.706 - MSPB appellate procedures. (b) MSPB may decide any case appealed to it or may refer the case to an administrative law judge appointed under 5 U.S.C. 3105 or other employee of MSPB designated by MSPB to decide such cases. MSPB or an adjudicating official must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM. However, AJ Sherry Zamora was not properly appointed.

Similarly, in Lucia v. Securities and Exchange Commission, 585 U.S. ___ (2018) this Court ruled that SEC employees serving as ALJs exercised such significant governmental authority over people like Ray Lucia that they were Officers of the United States, rather than merely civil-service employees. As officers, the Court held, the ALJs should have been appointed pursuant to the Appointments Clause in Article II of the Constitution. (Article II requires the President, with advice and consent of the Senate, to appoint principal officers; Congress may vest the appointment of inferior officers in the President, Heads of Departments, or courts of law). But in a later case, the Federal Circuit in *McIntosh v. Department of Defense, No. 19-2454 (Fed. Cir. 2022)* held that MSPB AJs are not principal officers because, among other things, the AJs' decisions are subject to review by the MSPB's three-member Board – who are nominated by the President and confirmed by the Senate (*i.e.*, principal officers). Importantly, the Federal Circuit held that the Board "maintains significant review authority over [AJs'] decisions." However, there are the two types of constitutional officers: principal officers and inferior officers, if not principal officers then MSPB AJs are inferior officers, and improperly appointed nonetheless. Importantly, the Supreme Court held that an inferior officer is one who has a superior and whose work is directed and supervised at some level by others who were nominated by the President and confirmed by the Senate. *Edmond v. U.S.*, 520 U.S. 651 (1997).

Post *Lucia*, MSPB treated *Lucia* as little more than a formality and had its Department Head issue pro forma order to rubber-stamp the prior internal appointments of its AJ, and later this action was found to be deficient so the new MSPB Board ratified prior appointments (See App C) on April 04, 2022, some seven years later. However, none of these actions cured the fact that MSPB AJ Sherry Zamora was not properly appointed when she made her findings and decisions in the three cases (combined herein) in her initial decisions in 2015-2019, and the Board erred in extending deference to her 2015-2019 findings and credibility decisions, with further compound error by the Federal Circuit in applying a deferential standard of review. Bottom line is that AJ Sherry Zamora in all three cases did

not have the authority to review Petitioner's employment appeals, and Petitioner was denied a sound constitutional review process.

II SEPARATE CASE CONTROVERSIES

1. CAFC CASE # 23-1510

Constitutional Protection

A covered federal employee is entitled to pre-action due process procedural rights as identified at 5 U.S.C. § 7513. When an agency fails to provide these pre-action due process rights, the adverse action cannot be sustained and the Board will overturn the action. Cheney v. Dept. of Justice, 479 F.3d 1343, 1352-53 (Fed. Cir. 2007); King v. Alston, 75 F.3d 657, 659-661 (Fed. Cir. 1996). The U.S. Supreme Court has repeatedly held that, when a cause is required to remove a public employee, due process is necessary to determine if that cause has been met. Neither Congress nor the President has the power to ignore or waive due process. Applying deference, ignoring, or overlooking the record undermines the whole point of constitutional protection.

The CAFC Decision states "...Mr. Chin-Young's argument that the Agency committed harmful procedural error by not making accessible the evidence it relied on in deciding to remove him. This argument is contrary to the substantial evidence of record, and the Board did not err by concluding that offering to make the materials available upon request was not a harmful procedural error...Here, substantial evidence supports the Board's conclusion that the Agency made the evidence accessible to Mr. Chin-Young by offering it for inspection upon request. *E.g.*, S.A. 181–82 (Notice of Proposed Removal informing Mr. Chin-Young that he had the right to reply to the notice and "to review the material relied upon in this matter," by contacting a Human Resource Specialist whose contact information was provided). And while Mr. Chin-Young implies that he tried to access the documents

but was refused access, this allegation is not supported by the record. As the administrative judge explained in her decision, the only evidence that Mr. Chin-Young tried to access these documents was his own testimony, and the administrative judge did not find that testimony credible. S.A. 89 n.33. In contrast, the other testimony—which the administrative judge did find credible—and the email evidence on this point show (1) that Mr. Chin-Young was informed he needed to contact the Human Resource Specialist to access the evidence supporting his removal and (2) that he did *not* request those documents. Thus, there is substantial evidence that the Agency made the materials accessible to Mr. Chin-Young and that Mr. Chin-Young was not denied access."

Contrary to this decision, the written record shows in the Petition for Review submitted to the Board, in his rebuttal to the proposed removal notice, Petitioner stated: "Agency failed to provide all documents in relied upon in tis action." ECF #28-14 at 3, outline no. 6. On June 2, 2015 Petitioner's rebuttal to Blohm's proposed removal notice was mailed to the deciding official, Randell Robinson, and to his supervisor of record Gary Wang. ECF #28-14 at 4. On the same day, June 2, 2015, Petitioner emailed the same rebuttal statement to Ms. LaBacz and others, including Mr. Blohm. Agency MSPB File subtab 4E at MSPB Tab 9, p. 47-50 of 75. He also indicated his "Home/Mailing Address" of Alpharetta, GA. ECF #28-14 at 4. Subsequently, as he testified without objection, that he "continuously requested the materials because ... there were no materials sent to me any which way." HT 4, 127:21-128:1. Petitioner did exactly what he was told to do to obtain the evidence file: contact Ms. LaBacz. ECF #28-3 at 22. Ms. LaBacz did not produce the evidence file nor did she (or anyone) invite Petitioner to the Pentagon or anywhere else to access any evidence file. Instead, in a belated effort to cover the error, on June 26, 2015 Ms. LaBacz emailed Petitioner, falsely claiming "you have not requested the materials relied upon to support the action proposed, as was offered to you in the Notice [of the proposed removal]." Ex 16, p. 72. Ms. LaBacz's June 26, 2015 email was copied to Richard Kane, the Agency counsel, and to Essye Miller, the new Director, Cybersecurity. Ex 16, p. 72,

p. 50. The evidence file relied upon was never emailed or mailed to him. Instead, on June 19, 2015, Gary Blohm, the proposing official, emailed Petitioner, reiterating the same instruction on how to obtain the evidence file: to contact Angela LaBacz by phone or email. Id.

The record further shows in Petitioner's Informal Opening Brief that On June 2, 2015 Petitioner mailed and emailed Ms. LaBacz and others, including Mr. Blohm (the proposing official) and Mr. Robinson (the deciding official), attaching his rebuttal to the Notice of Proposed Removal, which he entitled: "Answer And Defense of Employee." Ex 15. Chin-Young emails to Gary Wang, May 26, 2015 and May 20, 2015, p. 48, p. 51. In his aforementioned rebuttal, Petitioner wrote down his mailing address in Georgia: 14635 Birmingham Hwy., Alpharetta, GA 30004. Ex 15, p. 3. Specifically, Petitioner stated in his rebuttal: "Agency failed to provide all documents it relied upon in its actions" and demanded that "a certified copy of all evidence relied upon by the Agency" be provided to him. Id. He testified credibly without objection on the 4th day of hearing on February 5th 2016 that he requested the evidence file by emailing and by calling LMER. Ex 11: Hearing Transcript on 4th day, p. 128, lines 1-8. His request for the evidence file fell on deaf ears. He never received the evidence the proposing official relied upon to issue the notice of proposed removal. Ex 11, p. 129, line 22 through p. 130, line 1. The written record contradicts the Court's erroneous finding, "and (2) that he did *not* request those documents." The US Constitution requires that Petitioner at least be given a chance to make a meaningful reply to the charges against him, before his property rights in employment are taken away by the Government.

It is not reasonable that the Federal Circuit could not or chose not to review sworn testimony *de novo*, and just kept repeating the findings of the MSPB AJ. While factual questions are normally reviewed under a deferential standard, here the MSPB AJ erroneously excluded consequential evidence of sworn testimony that was accorded no weight whatsoever, and so the Federal Circuit was required to review the record *de novo*. It's an egregious error to rule that that "the only evidence that Mr. Chin-

Young tried to access these documents was his own testimony..." when a certified record of sworn testimony of the Agency's proposing official and Decision official receiving Petitioner's request to access the documents is right at one's finger tip. The CAFC Decision is in further error by stating, "In contrast, the other testimony—which the administrative judge did find credible..." but provides no reference to "the other evidence." The record is devoid of any contrasting testimony on this point except for Agency Counsel's assertions and the AJ's speculation that if the Petitioner had reported to a [phantom] detail assignment at the Pentagon then he would've been allowed a limited amount of time to access the evidence file, but none of that is evidence. Just look at the record (extracted) below. The Agency's removal proposing authority (Mr. Blohm), and the Agency's removal authority (Mr. Robinson) both did their best to avoid saying that the Petitioner contacted them and the LMER for the evidence relied on by the Agency and none was sent or given to him, but their sworn testimony confirmed they received Petitioner's reply to the removal proposal requesting the evidence and the request was sent via email and post mail to them. See Pet. App. E

However the MSPB administrative Judge simply dismissed Petitioner's testimony by saying he wasn't credible, and the Board, followed by the Federal Circuit applied deference to her credibility decision. This is an egregious error that renders the certified record worthless. Note, MSPB maintains a win rate of nearly 99% in favor of Agencies against federal employees by simply stating the Appellant (Petitioner) is not credible and establishing an AJ-made record favorable to Agencies for review; but in case 23-1510 (the only case where the MSPB allowed a hearing), Petitioner went the extra mile to fight for a record documented by a certified court reporter which eventually was placed in the file after a protracted struggle with AJ Sherry Zamora who denied several request for the certified record, but was unsuccessful in keeping it out. See Pet. App. F

Ex Parte Communication is a Due Process violation that cannot be overlooked, omitted, or excused

The Federal Circuit Court's Decision highlights the significance of the external information and ex parte communication that factored into the Agency's decision and MSPB affirmation of that decision, specifically, "After Mr. Chin-Young had served only six weeks abroad, the Senior Telecommunications Advisor working with Mr. Chin-Young in Afghanistan recommended that Mr. Chin-Young be immediately redeployed because he had "demonstrated an inability to adjust . . .[,] caused Senior Leaders to question his ability . . ., and [was] a negative influence to other team members." S.A. 119." And separately that "To the contrary, the evidence of record shows that he came back to the United States ten months early and that at least one other employee in Afghanistan recommended that he be sent back because of unsatisfactory work."

Arguendo, if the Petitioner was at fault for not "accessing" the evidence file for any reason, the Agency's Decision Official (and Proposal Official) could still not be excused for considering external information or ex parte communication that was not even mentioned in the Proposal for Removal. In proposing removal for Petitioner, the proposing official, Mr. Gary Blohm, only served Petitioner his May 29, 2015 Memorandum of the Notice of Proposed Removal, and nothing else, via mail and emails , including to the address of Petitioner's home of record in Alpharetta, Georgia. Agency File Part 1, subtab 4F at MSPB Tab 9, p. 74 of 75. During his testimony, Mr. Blohm stated that he reviewed the following documents in support of his Proposal: multiple emails between Petitioner and other management staff, leave requests, documents regarding Petitioner's detail to Afghanistan, Petitioner's reasonable accommodation requests, and the letter from Dr. Catherine Warner. HT 2, 211:7-22, 204:12-22. There was no way for the Petitioner and or his non-attorney representative to know that Dr. Warner's memo existed and would be factored so heavily in the decision to remove; it certainly wasn't mentioned in the proposal to remove. Despite many written requests, phone calls, and email communication by the Petitioner to Agency officials, including LMER, CIO/G6 cybersecurity

managers, CIO/G6 leadership, the Removal Proposal Authority, and the Removal Decision Authority – no evidence file was produced and there was no mention of the material ex parte communication in memo form from Dr. Warner to CIO/G6 officials that was separate from the HQISAF travel authorization letter. Dr. Warner's memo turned out to be derogatory diatribe that the Proposal Official reviewed but did not mention in his proposal or any other communique, and on which the Deciding Official heavily relied, per his testimony, to reach his false conclusions that the Petitioner could no continue in the MoDA program and therefore was effectively released.

Due process under the Constitution requires that a tenured federal employee be provided "written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). Petitioner did not receive the constitutional and statutory procedural protections to which he was entitled before his removal or termination. When an Agency subjects a non-probationary federal employee to an appealable Agency action that deprives him of his property right in his employment without prior notice and an opportunity to respond, such an action constitutes an abridgment of the employee's Constitutional right to minimum due process of law. See *Cleveland Board of Education v. Loudermill*, 40 U.S. 532, 546 (1985); T*ompkins v. Office of Personnel Management*, 72 M.S.P.R. 400, 407 (1996); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991). The record shows the Agency demonstrated inadequate notice, withholding of material evidence relied on, unlawful ex parte communication, and failure to provide a meaning opportunity to reply to the removal authority.

Violation of the separation of distinct legal entities

DoD and the US Army are separate legal entities. The record is clear that Petitioner was not released from DoD to the Army after returning from his DoD Detail assignment (to Kabul Afghanistan)

to the DoD MoDA Program Office, before the Army prematurely removed him from his official position of employment that was obligated by return rights. The record is rather telling that even Ms. Miller whose memo of detail assignment the Agency relies on, admits to knowing the travel letter or Letter of Release was not a release from the MoDA detail but in fact just what it says – Release for Redeployment. Verbatim, the record of Ms. Miller's testimony reads as such --

238:11 Q. The document that was shown from the agency

238:12 file, the subject, Letter of Release for Redeployment,

238:13 signed by Mr. Gale on August 29, 2014. Does this

238:14 document have anything to do with release for his

238:15 travel from Afghan to the United States?

238:16 A. I don't know.

238:17 Q. Do you know what document this is, what kind

238:18 of nature of the document this is?

238:19 A. The document says that his -- basically, his

238:20 deployment was done, and he was free to return.

238:21 Q. Okay. So to your knowledge, this document

238:22 shows that he's released from the detail?

239:1 A. No. He's released from his deployment.

239:6 A. This is a release from his deployment to

239:7 Afghanistan supporting the Ministry of Defense-

239:8 Afghanistan.

239:9 Q. So this letter says that he's released from

239:10 that detail?

239:11 A. From his deployment.

Obviously, since the Petitioner was not released from DoD to the Army then the Army had no authority to detail him from his permanent position of record. This is indisputable evidence of record that Petitioner's removal was unlawful on the merits and in execution.

Split Circuit Conflict: This Non Precedential Decision conflicts with established Precedent concerning discipline resulting from Directed Assignments

The Federal Circuit's Non Precedential Decision in affirming the MSPB/Agency decision is flawed, and contravenes established precedent by the Board, this Circuit, and other Circuit Courts about discipline concerning directed assignments; specifically the Court's Decision states "...We agree with the Board that such an argument goes to the merits of the Agency's decision to detail him, and thus does not fall within the Board's jurisdiction..." However it is well settled law that the agency has the burden of proving by a preponderance of the evidence the legitimacy of a removal action taken against an employee. 5 U.S.C. § 7701(c)(1)(B). If the AWOL charge is based upon an employee's failure to accept a directed assignment, the agency must prove by a preponderance of the evidence that its decision to assign the employee to another position was bona fide, and based upon legitimate management reasons. Umshler v. Department of the Interior, 44 M.S.P.R. 628, 630 (1990). To avoid the potential abuses that can occur if an agency should use directed reassignments to procure an employee's separation through retirement, resignation, or removal, the Board held in Ketterer v. Department of Agriculture, 2 M.S.P.R. 294 (1980), that the agency must show that its decision to reassign an employee was a bona fide determination based on legitimate management considerations in the interests of the service. There, it warned that "agency discretion to reassign may no more properly be invoked as a veil to effect an employee's separation than may a reduction in force. Ketterer, 2 M.S.P.R. at 299 n.8. Significantly, in Wear v. Department of Agriculture, 22 M.S.P.R. 597 (1984), the

Board explicitly recognized the complexity of situations where agencies could effect action either by RIF or by directed reassignments. In a holding that has important implications for the instant case, the Board stated that the reasons that would justify a RIF would also justify a directed reassignment. See also Rabourn v. Department of Justice, 38 M.S.P.R. 103, 105 (1988), finding that an agency's obligation is to provide evidence that supports the "genuineness" of the reasons for its reassignment; Renville v. Department of Health & Human Services, 26 M.S.P.R. 566, 568 (1985), These cases show that the Board's review of a directed assignment action is to assure that an otherwise legitimate management tool is not used for illegitimate reasons, and that in so doing, it focuses on the actual reasons for the reassignment rather than the means by which it was effected. That is, the Board's review centers on the legitimacy of the reasons for the reassignment, not on whether the action was reversed on technical, procedural, or other grounds. In Youssef v. Dept. of Justice, 112 LRP 38310 (July 20, 2012), the D.C. Circuit ruled that a lower court erred when it ruled for the agency without allowing the case to proceed to a jury trial. Ultimately, the D.C. Circuit found that a reasonable juror could conclude that an "extraordinary reduction in responsibilities" as a result of a reassignment could constitute a materially adverse action. The D.C. Circuit ruled that a "reassignment with significantly different responsibilities...generally indicates an adverse action," and cited a previous D.C. Circuit case, Holcomb v. Powell, 433 F.3d 889, 902 (D.C. Cir. 2006). Bottom line is that if Petitioner, a whistleblower can be ordered to a directed assignment by unreviewable Agency discretion (for detail assignments without use of the Agency's personnel system), to vacate his official position as Deputy Director to a lesser position as cybersecurity subject matter expert to which he had no qualifications or training, and to require him to obtain a top secret clearance (at Agency's discretion to grant or terminate for failing to obtain), then essentially the administrative state has endorsed taking whistleblowers outback to the wood shed for special treatment.

Faulty Reasoning that Petitioner retained his position of record but said position no longer existed; and Petitioner did not establish a violation of his return rights under § 1586

Contrary to the record, the Court erroneously found that Petitioner's position of record no longer existed, and that he did not have return rights, as stated, "We are also unpersuaded as to the merits of Mr. Chin-Young's return-rights argument. Section 1586 entitles an employee who has been assigned to a position abroad to return "without reduction in the seniority, status, and tenure held by the employee immediately before his assignment to duty outside the United States." 10 U.S.C. § 1586(c). **If the employee's former position no longer exists**, however, the statute provides that the employee can be placed in a different position so long as they retain "rights and benefits equal to the rights and benefits of, and in a grade equal to the grade of, the position which he held immediately before his assignment to duty outside the United States." *Id.* § 1586(c)(2). **Here, the Board's finding that Mr. Chin-Young retained his position of record until his removal is supported by substantial evidence** —his removal documents show that he maintained the same grade and pay up until he was removed. The Board's finding that the CXO Directorate was effectively dissolved is also supported by substantial evidence, including testimony that the administrative judge appeared to find credible. S.A. 33 (citing the consistent testimonies by the Chief Information Officer, the Deputy Chief Information Officer, and the Chief of Human Resources). Given these facts, Mr. Chin-Young has not established a violation of his return rights under § 1586. [emphasis added]. The Decision repeats erroneous and groundless fact, which was initially proposed by the Army Counsel Mr. Richard Kane (although he later stipulated to the opposite on the first day of hearing), which were then adopted by MSPB Administrative Judge ("AJ") in her Initial Decision (ECF #2 at 12-94), which were subsequently re-asserted by MSPB ("Board") in its Final Order or Decision (ECF #2 at 95-118), and which was finally repeated in Respondent's Brief (ECF #27).

First and foremost it is impossible for an employee to retain a non-existent position of record. That is not how Civil Service employment works – a federal employee may only occupy a bonafide position of record. Fact of record, is that the Petitioner's position of record existed throughout his tenure and even at termination, as conceded by the Agency by admission on record, and Petitioner's official personnel file on record. Army's counsel, Mr. Richard Kane, stipulated on the first day of hearing on January 11, 2016: that "[Petitioner's] position has not been eliminated" at the time of his removal. ECF #28-7 at 8, line 19. On Day 3 of the MSPB hearing held on January 13, 2016, AJ Sherry J Zamora reaffirmed this stipulation, when she stated on record:

> I will read it one more time. Please listen carefully. Agency Counsel stipulated that the Petitioner's official position, Supervisory Program Analyst, GS-0343-15-CXO, was not eliminated prior to the Petitioner's separation…

ECF #28-9 at 7-8.

AJ later reiterated her statement on record:

> I read you the stipulation. You know the stipulation. There hasn't been any witness who has said the position was abolished officially….

ECF #28-9 at 10, lines 17-20.

Fact is no email message, or testimony can replace an official federal personnel file as in a SF50 or SF52, official personnel record. The official personnel file throughout the Petitioner's tenure showed his position as Deputy Director of CXO was not eliminated; and his Directorate was not abolished. Ex 10 (HT3), p. 8, lines 14-20. All of Petitioner's SF-50's, effective April 19, 2015, January

11, 2015, and July 31, 2015 (the effective date of his removal), show CXO as Petitioner's position of record, as Petitioner testified to credibly based on those SF-50's. Ex 3; Ex 19 (BT 31), pp. 5, 6, 26, 27; Ex 11, pp. 125-26. In fact, CXO Directorate was not scheduled to be dissolved until 2016, as LTG Ferrell testified, as AJ cited in her Initial Decision. Ex 12, p. 10. Note that even the Removal SF50 continued to show the Petitioner's Directorate and Position as CXO and intact.

Unfortunately, the Federal Circuit credits the ex parte communication of one employee, Dr. Warner's derogatory memo but is silent on many flattering recommendations from several other employees on record. Nevertheless, a fact of serving in any supervisory or management position is that not all employees will like the Petitioner's management style or decisions, especially employees in competition for a SES job as was Dr. Warner; but it certainly doesn't mean the Petitioner was not successful in his performance. In any event, none of these employees including Dr. Warner, served in any supervisory capacity over the Petitioner, and their opinions were not made a part of DoD or the US Army's performance management system that had any bearing on Petitioner's performance of record. In fact, Petitioner has never received any performance rating below "Highly Successful" and was never accessed for unsatisfactory performance by any Agency. Neither the MSPB or Agency Counsel's speculation may count for an evaluation of the Petitioner's performance at any Agency. The issue is the unlawful consideration of this ex parte communication by the Proposing and Decision officials, and that this Court's Decision alludes to "unsatisfactory" performance on account of the unlawful ex parte communication. In any event the Court's Decision of "unsatisfactory" performance is contrary to the record. Petitioner was never disqualified or relinquished his return rights to his obligated permanent position of record, nor was he voluntarily or involuntarily assigned to any detail position outside his obligated permanent position that remained intact throughout his tenure, before he was unlawfully removed by the US Army. In other words, Petitioner maintained a hofeldian[1] right to his official

1. In reference to the Hohfeldian analysis of rights

position with the Army and the Agency had a duty to reinstate him to his position since the position was not abolished and he was not disqualified in any way.

The Decision violates law that requires an Agency to follow its own regulation(s)

The record is devoid of any evidence of DoD reassignment of the Petitioner back to his permanent position, where then he had return rights to his permanent position of employment with the Army CIO/G6, in accordance with DoD and US Army "Documentation of Deployed Civilian Employees" that required issuance of SF50 personnel documentation for Personnel Assignment Nature of Action Codes 921-Reassignment Not to Exceed, 922 – Termination of Reassignment, and 923-Extension of Reassignment. No such documentation exists in the record. An Agency must comply with its own regulation and procedures, *McGriff v. Department of the Army*. The record is devoid of any personnel documentation of Petitioner's purported reassignment according to regulations. Speculation cannot trump the absence of any evidence, but in any event, the Agency failed to comply with DoD and US Army regulations.

Misapplication of Case Law

Misapplication of Novotny v. Department of Transportation, 735 F.2d 521, 523 (Fed. Cir. 1984)." There are great differences between the Petitioner's case and the *Novotny* case: Novotny was in pay status with DOT/FAA in his permanently position, in his official place of duty, and he participated in an illegal strike and went AWOL, leading to his removal. And he found it inconvenient to visit his Agency's facility while he was on a voluntary strike to review records of evidence relied on. In contrast the Petitioner was in involuntary non-pay status, unlawfully denied return rights to his permanent position, denied entry to his official place of duty at Fort Belvoir, unlawfully denied post-deployment medical leave and administrative leave as required to be recorded by his parent organization, while he

was still appointed to the DoD MoDA program and not (yet) released back to his permanent position with the Army. Petitioner was not involved in any strike, and unlike *Novotny*, he challenged the Agency's unlawful actions, denied all charges at every turn, and testified at a MSPB Hearing. The Army's decision to leave the Petitioner without pay and benefits for rejecting a phantom, and premature demotion to a fictitious cybersecurity detail assignment is distinct from DOT/FAA handling of the *Novotny* case. The MSPB erred by its false equivalence of the instant case and the *Novotny* case. Furthermore, DOT/FAA did not rely on ex parte communication in effectuating Novotny's removal

The Federal Circuit misapplied the *Charity* case ("[P]roviding access to the materials the agency relied upon to support the removal action was sufficient to satisfy any possible due process concerns."); *Charity v. Gen. Servs. Admin.*, 180 F. App'x 952, 954 (Fed. Cir. 2006) (concluding there was no harmful procedural error where "the record showed that the agency offered [the employee] access to the evidence it relied on in its charges but that there was no showing that [the employee] requested and was denied such access"). The facts in the *Charity* case about access to the evidence file are completely different than Petitioner's case where the evidence file was presumably under lock and key behind armed guards in an office in the Pentagon that was inaccessible to the Petitioner whose badge access had expired and security clearance suspended. Unlike the misapplied *Charity* case, Petitioner requested the evidence file from the Agency but nothing was provided or produced, and he was denied the opportunity make a meaningful reply to the Agency's Decision Authority in violation of his due process rights. This point alone begs the overturning of the Court's Decision.

2. CAFC CASE # 23-1588

This case is akin an unauthorized commitment (UAC), defined by FAR 1.602-3(a) as "an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government." See AFARS 5101.602-3-90. The

record shows Petitioner appeared pro se on a signed MSPB Designation of Represenative form in th MSPB forum, but MSPB accepted in the record another designation of representative form signed by Mr. Shoemaker which was not signed by the Petitioner. The MSPB then allowed Mr. Shoemaker to enter into a Settlement Agreement, and later into another modified Settlement Agreement without approval by the Petitioner. Since then the Petitioner has sought to overturn the unauthorized Settlement Agreement, and unauthorized modified Settlement Agreement. Now the Federal Circuit is in error to uphold the fraudulent agreements.

Clear Legal Error

The Federal Circuit's Decision in this case 23-1588 states—Petitioner argues that Mr. Shoemaker did not have authority to enter into the settlement agreement under 5 C.F.R. § 1201.31(a). We disagree. We do not find any procedural defect under section 1201.31(a). That section provides "[a] party to an appeal may be represented in any matter related to the appeal. Parties may designate a representative, revoke such a designation, and change such a designation in a signed submission, submitted as a pleading." 5 C.F.R. § 1201.31(a). Petitioner contends that this regulation requires a signed submission in order for a designation to take effect. The Department of the Army contends that the regulation does not require a signed submission because it uses the word "may" instead of "shall." This is error. First, the decision is a misreading of the revised regulation: Yes, a party does not have to designate but may designate are representative. However the operative "may" ceases to operate at the end of the first comma in the sentence, specifically at the end of "Parties may designate a representative." The remainder of the of the sentence is appended and stand on its own – "revoke such a designation, and change such a designation in a signed submission, submitted as a pleading." The plain words, "signed submission submitted as a pleading" makes it perfectly clear that it must be done in writing (maybe by manual or electronic means) but nevertheless in writing. It is disingenuous to

interpret a signed submission to be in some other form that writing. Note, earlier versions of the regulation before two iterations of revision by MSPB since the filing of the Petitioner's appeal read verbatim (as published by the Government Printing Office and disseminated on the internet for public consumption) -- 5 C.F.R. § 1201.31. A party to an appeal may be represented in any matter related to the appeal. The parties must designate their representatives in writing and also must inform the Board and all other parties of any subsequent changes in their representation in writing." Now the revised version states, "**Representatives.** (a) *Procedure*. A party to an appeal may be represented in any matter related to the appeal. Parties may designate a representative, revoke such a designation, and change such a designation in a signed submission, submitted as a pleading." Bottom line is the US Supreme Court should not allow the Government to disenfranchise the Petitioner or any other federal employee with revised loose wording of this regulation for the Government to overcome Petitioner's case or other cases.

There exists no legally valid or enforceable settlement agreement and or modified settlement agreement in this case. The Petitioner has never entered into any agreement with the Agency. Instead, a non-party/non-designated "representative" Mr. Shoemaker, as assigned by MSPB, entered into agreement by facsimile means (fax), and again into modified agreement by fax with the Agency and MSPB – their agreement and modified agreement cannot be binding on the Appellant. Nonetheless, the Federal Circuit states, "We agree with the Board that petitioner's failure to sign the designation of representative form does not invalidate the settlement agreement or the modified settlement agreement. Mr. Shoemaker acted with apparent authority as petitioner's representative, and petitioner previously admitted that he hired Mr. Shoemaker. S.A. 241 (noting he retained Mr. Shoemaker's firm). Even if Mr. Shoemaker lacked the authority to execute the settlement agreement and the modified settlement agreement, the petitioner also signed those documents." This is error. Petitioner repeatly plead that the signatures on the agreements were not provided by him and are fraudulent signatures. The record

details sworn declarations, motions, and other evidence provided by the Petitioner about these fraudulent documents. The record is devoid of any evidence by the Agency stating otherwise. The Agency representative's advocacy and MSPB speculation cannot serve as evidence, and does not outweigh Petitioner's sworn evidence to the contrary.

Manifest Injustice

The Federal Circuit's error goes deeper in stating, "However, there is no indication that petitioner has adequately raised these allegations of coercion, bad faith, and other procedural issues before the administrative judge in the present case...Because these issues were not properly raised before the administrative judge or the Board, we cannot address them on review." This is error. The MSPB final decision states, "The Board has explicitly addressed the appellant's arguments concerning fraudulent inducement, the imposition of legal obligations on third parties, and general assertions of bad faith, fraud, and misrepresentation. FO at 6-9. To the extent that any particular allegations of fraud and/or misrepresentation previously have not been before the Board, they are all based on facts that were known to the appellant at the time of his earlier claim of invalidity. Similarly, all of the purported facts surrounding the appellant's coercion claim have been known to him for some years." The Petitioner plead fraud, and fraud is sufficiently broad enough to entail " allegations of coercion, bad faith, and other procedural issues." The Federal Circuit is in error not to address these substantial issues that would have manifestly changed the outcome of the case.

Furthermore, the Petitioner did not receive the statutory procedural protections to which he was entitled before his removal or termination in this first case. MSPB states on record that "The appellant argues at some length on review that the removal action underlying his original appeal was procedurally flawed and imposed without affording him constitutional due process. PFR File, Tab 1 at 10-12. He also asserts that the administrative judge erred by denying a motion for sanctions in the

original appeal. *Id.* at 13. The appellant waived his right to pursue these matters when he settled his appeal." The Federal Circuit affirmed this ruling in error. Petitioner has not entered into any agreement, and he certainly has not waived his Constitutional rights, nor did he receive the evidence the Agency relied on to remove him in this case. This was also a violation of FRCP Rule 34a production requirement. When an Agency subjects a non-probationary federal employee to an appealable Agency action that deprives him of his property right in his employment without prior notice and an opportunity to respond, such an action constitutes an abridgment of the employee's Constitutional right to minimum due process of law. See *Cleveland Board of Education v. Loudermill*, 40 U.S. 532, 546 (1985); T*ompkins v. Office of Personnel Management*, 72 M.S.P.R. 400, 407 (1996); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991). The record shows that the Agency demonstrated inadequate notice, and denial of an opportunity to respond.

3. CAFC CASE # 23-1590

Legal Error

MSPB substituted the US Army for the Department of Defense as defendant in this case, and the US Army failed to enter an appearance at the MSPB. Nevertheless, the MSPB ruled in favor of the Army, and the Federal Circuit affirmed the decision. These are truly egregious acts to a defenseless federal employee. In any event, according to the Federal Circuit in this case 23-1590, "The Board did not err in deciding that petitioner failed to inform OSC with the required particularity and clarity of the basis for his request for corrective action based on fraud under the WPA and that the Board lacked jurisdiction." That Court went on to say, "While petitioner's second complaint to OSC made vague mentions of contract irregularities, it did not mention contract fraud." However, the record shows that on August 31, 2016 Petitioner was advised by OSC of his right to seek corrective measures by filing with MSPB in the case docketed as MS-16-3058. See Board Entry #6 at p. 8 of 17. More specifically,

on August 31, 2016 OSC issued the final determination letter on MA-16-3058 and indicated: "Your disclosures concerned Dr. Catherine Warner's appointment and possible contract violations." Then, OSC advised Appellant of his right to seek corrective action from the Board. Board Tab 1, p. 16 of 37." Petitioner made it abundantly clear with supporting evidence that he had made non-frivolous allegations of contract violations—fraud and waste of funds that were not vague, conclusory, or facially insufficient and that he reasonably believed the allegations to be true. Therefore, the matter is sufficient for the Board to assert its jurisdiction, leaving the merits of the case to be determined at the hearing.

According to CAFC, "Petitioner contends that the DOD is the proper agency because Dr. Warner, who petitioner contends retaliated against him, was an employee of the DOD." This is a disengenous rephrasing of the Petitioner's argument, where Petitioner clearly demonstrated on record that he was formally reassigned from the Department of the Army to the Department of Defense (DoD) as an employee of the DoD MoDA program, and while serving as a DoD employee this controversy arose where he sued his current employer, the Department of Defense. The fact that Petitioner maintained return rights to his former position with the US Army did not change the fact the he was an employee of DoD during the time of his MoDA service. MSPB does not have any authority to substitute defendant DoD with the US Army, and the Federal Circuit erred in affirming the substitution. Furthermore, this Federal Circuit's decision in 23-1590 violates FRCP Rule 25 (c), and FRCP Rule 15.

REASONS FOR GRANTING THE WRIT

1. This Court should grant certiorari to review the legitimacy of administrative judges of the US Merit Systems Protection who are of national importance in ruling over employment actions for federal employees. The details and arguments of the case and current law, including a late ruling from an iteration of this Court is described in the first section of this petition.

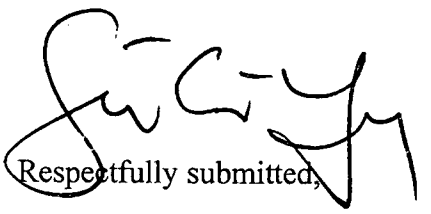
2. This Court should grant certiorari to reconcile the split and conflict among federal circuit courts handling the review of adverse employment action cases based on the merits or lack thereof directed reassignments, especially for whistleblowers. All three cases above exemplify how an Agency deals with a federal employee whistleblower deemed troublemaker, and the sort of of legal review he encounters when trying to exercise his legal rights in the MSPB administrative process. Details of the specific cases are addressed above. This Court should clarify the proper scope and limits of the special Federal Circuit Court review of MSPB administrative employment cases.

3. This Court should grant certiorari for reasons of Clear Error and Manifest Injustice in the three cases (combined). If the Federal Circuit is correct in affirming that an improperly appointed MSPB AJ can issue findings and credibility decisions that it must give deference, and review of a directed assignment leading to termination of a whistle-blower is beyond its reach in 23-1510; and that MSPB may appoint a non- designated representative to enter into settlement on Petitioner's behalf in 23-1588; and MSPB may substitute a defendant and delete the Petitioner's named defendant as it see fit in 23-1590 – then "employment for cause" will then have been effectively converted to "employment at will." This Court should address these late attacks on merit based federal employment by the current administrative state.

CONCLUSION

Despite the long odds of a pro se litigant being heard by this Court, the highest Court in the United States of America, Petitioner prays for justice that he at least be extended an opportunity for a meaningful reply to the Government before the final taking of over a decade of his property rights in employment. Petitioner, an unemployed pro se litigant, submits that he cannot afford the services of an Attorney, and humbly requests, in accordance with Title VII Civil Rights Act of 1964, § 706 (f)(1)(B), 42 U.S.C. § 2000e-5(f)(1)(B) provided upon application and in such circumstances as the Court may

deem just, the Court may appoint an Attorney representative and may authorize the commencement of the action without the payment of fees, cost, or security, in the interest of Justice. In the interest of Justice, Petitioner respectfully requests that this Court issue a writ of certiorari.



Respectfully submitted,

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