

No. _____

In The
Supreme Court of the United States

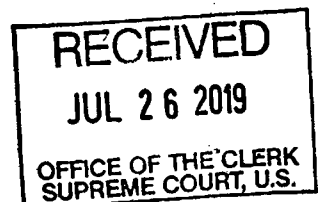
HENRY E. GOSSAGE,
Petitioner,
v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Given that the United States Office of Personnel Management (OPM) has exclusive statutory authority to make a 5 C.F.R. § 731 et seq. suitability determination of a preference eligible veteran, with a compensable service-connected disability of 30 percent or more to initial federal employment (5 U.S.C. §3318). The Merit System Protection Board (MSPB) has jurisdiction over an applicant's disqualification, because of a suitability determinations (5 C.F.R. § 731.103(d), 5 C.F.R. § 731.404, 5 C.F.R. § 731.501, 5 C.F.R. § 1201.3(a)(7))(2001), 5 U.S.C. § 7701(a).

The Question presented:

1. Whether the MSPB lacks jurisdiction over OPM's December 27, 2004 5 C.F.R. § 731 et seq. determination, a new and material OPM determination; amending and vacating OPM's May 16, 2001 suitability charges, disqualification determination, debarment, and reinstating Petitioner's employment eligibility as a preference eligible veteran pending MSPB SE-0731-01-0261-I-2 appeal?

2. Whether an applicant has NO right to challenge an adverse 5 C.F.R. § 731 et seq. determination, where the original underlying charges are amended or vacated (5 C.F.R. § 731.501), pursuant to 5 U.S.C. § 7701(a)?
3. Whether the Jurisdiction attaches at the time an appeal is originally filed and is unaffected by the parties' subsequent action?

PARTIES TO THE PROCEEDINGS

Petitioner, Henry E. Gossage was the Petitioner at the Merit Systems Protection Board in Case No. SE-0731-01-0261-I-2 and SE-0731-01-0261-I-5; and in the United States Court of Appeals for the Federal Circuit in USCA Case No. 2005-3155, 2009-3197, and 2018-1970.

The Merit Systems Protection Board was Respondent in the same cases and actions noted above. No other relevant parties are represented in the instant matter.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry Eugene Gossage respectfully petitions for a writ of certiorari to review “lack of jurisdiction”, the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. A 6-10) is Unreported. The Federal Circuits 2010, 2009-3197 Order (Appendix J, A-49) and 2005-3155 original decision (Appendix M, A-72) are unreported.

The final letter of the Merit Systems Protection Board (“Board”) is unreported, but is reproduced at Pet. Appendix D, A-14.

The Board’s 2008 remand initial decision, SE-0731-01-0261-I-5 (Cassidy) is unpublished but is reproduced at Appendix L, A-55.

The Board 2002 initial decision, SE-0731-01-0136-I-2 (Freet) is unpublished, but is reproduced at Appendix P, A-111.

JURISDICTION

The order of the court of appeals was entered on October 2, 2018. That Court denied for lack of jurisdiction for rehearing on January 16, 2019, and rehearing en banc on February 1, 2019. The petition for a writ of certiorari was filed on April 8, 2019.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Appendix X (A-147), *infra*, for pertinent text of statutes and regulations:

U.S. Constitution V, 5 U.S.C. § 702, 5 U.S.C. § 704, 5 U.S.C. § 1204, 5 U.S.C. § 2108, 5 U.S.C. § 3304, 5 U.S.C. § 3318-19, 5 U.S.C. § 3330, 5 U.S.C. § 7701-3, 28 U.S.C. § 1295, 28 U.S.C. Appendix, 5 C.F.R. § 300.103-104, 5 C.F.R. § 332.406, 5 C.F.R. § 731 et seq., 5 C.F.R. § 1201 et seq., 5 C.F.R. § 1208 et seq., 38 U.S.C. § 4311, 38 U.S.C. § 4324, and are reproduced at Petitioner's Appendix X.

I. STATEMENT

On December 27, 2004 (Appendix R, A 123-128), Office of Personnel Management amended and vacated Henry Eugene Gossage, a preference eligible veterans' May 16, 2001 administrative conviction and debarment to initial federal employment.

This case brings before the Court the validity of the May 16, 2001 (Appendix Q, A 120-122) administrative conviction and debarment and presents this Court with an opportunity to bring in coherence and clarity to appellate jurisdiction and agency notification standards, where a federal agency has taken misconduct/disciplinary removal action and those charges are subsequently vacated or modified while on appeal.

The Merit System Protection Board (MSPB), U.S. District Court Western Washington (USDCWWa), and Federal Circuit Court of Appeals (F. Cir.) all holding, "**lack jurisdiction**" over Henry Eugene Gossage's 5th Amendment Due Process rights, where OPM's December 27, 2004 (*see* Appendix R, S; A 123-134) new and final suitability determination (5 C.F.R. §731 et seq.) amending and vacating its initial May 16, 2001 determination on December 27, 2004.

Thus, the jurisdictional history in this very case is as follows:

1. the MSPB assumed jurisdiction (5 U.S.C. 7701, 5 C.F.R. § 1201.3) over petitioner's appeal in the first round, SE-0731-01-0261-I-2ID (Appendix P, A-111);
2. petition for review jurisdiction in the second round, SE-0731-01-0261-I-2PFR (Appendix O, A-97);

3. USDCWWa, C04-5669RJB (Appendix N, A-79) assumed appellate jurisdiction (5 U.S.C. 7703) in the third round and subsequently transferred the appeal to the F. Circuit Court of Appeals in 2005;
4. F. Cir., 05-3155 (Appendix M, A-72) took appellate jurisdiction (5 U.S.C. 7703, 28 U.S.C. 1295(a)(9)) in the fourth round and vacated and remanded back to the MSPB for a “constructive” 5 C.F.R. §731 et seq. suitability determination in 2006, Certiorari Denied 05-1579;
5. the MSPB, SE-0731-01-0261-I-5ID (Appendix L, A-55) retained jurisdiction over petitioner’s appeal in the fifth round of litigation, held a hearing and affirmed OPM’s May 16, 2001 5 C.F.R. §731 et seq. suitability determination in 2006;
6. MSPB affirmed on petition for review in the sixth round (Appendix K, A-52);
7. F. Cir., 09-3197 (Appendix J, A-49) procedural dismissal by the clerk.

If OPM’s (case 01-904-277, Appendix Q, A 116-122) May 16, 2001 initial suitability determination was within the MSPB’s June 8, 2001 original jurisdiction. It necessarily follows that OPM’s December 27, 2004 (Appendix R & S, A 123-134) new and final determination, amending and vacating its initial May 16, 2001 determination would also fall within jurisdiction of the MSPB, USDCWWa, and F. Cir. Court of Appeals for reopening original, new appeal, or as an independent cause of action.

However, if the MSPB or Federal Circuit **lacked** 5 U.S.C. § 7701 jurisdiction in this case, then it would also follow, the Federal Circuit and Merit System Protection Board lacked jurisdiction in ALL prior cases intertwined with OPM's May 16, 2001, 5 C.F.R. §731 et seq. suitability determination.

Without jurisdiction, the Board's decision on the merits of a petition is a nullity. See *King v. Reid*, 59 F.3d 1215, 1217 (F. Cir. 1995); If the Board lacks jurisdiction, we also are without authority to hear the merits of the appeal. See *Manning v. MSPB*, 742 F.2d 1424, 1427 (F. Cir. 1984) (indicating that "[i]f the [Board] does not have jurisdiction, then neither do we, except to the extent that we always have the inherent power to determine our own jurisdiction").

Gossage is a 30% or greater service-connected disabled Vietnam Era Army veteran, beginning in 1997 sought initial federal employment, as an Industrial Hygienist with the USDOL/OSHA.

In Gossage's September 2000 employment application, based on his extensive agency specific compliance experience and qualifications, USDOL/OSHA rated Gossage as its highest-scoring and only veteran eligible candidate for the position. Nevertheless, USDOL/OSHA hiring officials interviewed and considered non-veterans who ranked lower on the list of "best qualified" applicants for employment. Despite Petitioner's top score, qualifications, and agency specific compliance industrial hygienist experience, OSHA continued to interview four lower ranking nonveterans, and ultimately selected a lower non veteran as its preferred candidate.

5 U.S.C. §3318(b) requires a federal agency must obtain approval from the Office of Personnel Management (OPM) whenever they "propose to pass over" a disabled veteran in favor of hiring a lower scoring non-veteran. USDOL/OSHA requested approval from OPM to pass over Gossage on suitability (5 C.F.R. §731 et seq.). Once OPM has completed its review of the proposed pass over request, it shall send its findings to the appointing authority and to the preference eligible.

On June 8, 2001, the Merit System Protection Board (MSPB SE-0731-01-0261-I-1, Appendix Q, A 116-119) assumed appellate jurisdiction over Office of Personnel Management's (OPM Case 01-904-277) May 16, 2001 employment disqualification and debarment. (5 C.F.R. §1201.3, 5 C.F.R. §731.501).

On April 22, 2002 (Appendix P, A-111), the MSPB affirmed OPM's 2001 determination and Gossage petitioned for review. This decision became the MSPB final decision on September 27, 2004.

On October 8, 2004, Gossage appealed the MSPB September 27, 2004 final decision (SE-0731-01-0261-I-2 PFR; Appendix O, A-97) to the U.S. District Court Western Washington (C04-5669RJB, Appendix N, A-79).

On December 27, 2004, while Petitioner's MSPB SE-0731-01-0261-I-2 PFR appeal was pending before the United States District Court Western Washington (C04-5669RJB), OPM vacated its two 5 C.F.R. §731.202(b)(2-3) charges, vacating its May 16, 2001 negative suitability determination, reinstating Gossage's eligibility to USDOL/OSHA positions OSH-

00-87 and OSH-0087-S-1, and including all federal employment (Appendix R and S, A 123-134).

Pursuant 5 U.S.C. §3318(b)(1), C.F.R. §§'s 731.303, 304, 404, OPM DID NOT notify Gossage of its new, material, and final December 27, 2004 amended determination, vacating its May 16, 2001 negative suitability determination, and reinstating Petitioner's eligibility to OSH-00-87 and OSH-00-87-S-1 positions.

OPM sent its December 27, 2004 (Appendix S, A 129-134) findings to USDOL/OSHA that it DID NOT approve Gossage's November 17, 2000 pass over request on suitability. The agency did not disagree with OPM's findings and did not appeal this decision to the MSPB. Nevertheless, USDOL/OSHA hiring officials did not comply with OPM's findings, instead the agency granted a preference not authorized, when it hired a non-veteran who ranked lower on the list of "best qualified" applicants.

Counsel (Attorney General for Western Washington, OPM, and USDOL Counsel) did not notify Gossage, MSPB, USDCWWa, or the Federal Circuit of OPM's December 27, 2004 amended and final determination, vacating both OPM charges, and its May 16, 2001 C.F.R. § 731 et seq. suitability determination.

However, instead of sending its new and material 2004 OPM findings to the preference eligible veteran, it's OPM's policy "Do Not Disclose Outside of OPM" (Appendix R, A 128; Appendix S, A-134) exculpatory material evidence, this is consistent with widespread employment practice among federal agencies of non-disclosure of agency policy and procedures, and concealment of exculpatory material

evidence from the Pro Se appellant. Petitioner seeks the “real truth”, this Court has long held, “**let the truth be told**” *Clark v. U.S.*, 289 U.S. 1, 15 (1933).

OPM subjected Gossage to double punishment (1998 and 2001) for the same misconduct pursuant C.F.R. § 731 et seq. suitability determination. The agency cannot impose disciplinary or adverse action more than once for the same misconduct, *Anderson v. United States Postal Service*, 24 M.S.P.R. 488, 491 (1984), *affd*, 776 F.2d 1060 (Fed. Cir. 1985) (Table); *Adamek v. United States Postal Service*, 13 M.S.P.R. 224, 226 (1982).

I. FACTUAL AND LEGAL BACKGROUD

II.

1. Gossage is an honorably discharged service-connected disabled Vietnam Era veteran. See Federal Circuit Court of Appeals 2005-3155 (Appendix M, A-72) OPM’s Supplemental Appendix (F. Circuit 2005-3155, RA 1-110).
2. On January 27, 1998, OPM (case 97-900-648; *see* 2005-3155, RA 34-40) disqualified Gossage on two charges (5 C.F.R. § 731.202). After serving OPM’s debarment, Gossage applied for initial federal employment with OSHA. USDOL/OSHA Chief of Employment kept this 1998 suitability investigation file on Gossage.
3. In September 2000, Gossage applied for the vacant USDOL/OSHA Industrial Hygienist position, OSHA-00-87 (2005-3155, RA 64-66). USDOL’s Chief of employment Floria Jones contacted OPM to determine its obligation to

Gossage, as a preference eligible veteran, and after serving a previous OPM debarment. USDOL/OSHA rated Gossage as its number one candidate and highest scoring candidate for OSH-00-87. Each applicant experience and qualifications were evaluated, rated, and given a numerical score. A ranked list based on these scores produced a "certificate of eligibles." 5 C.F.R. § 332.401. The agency must select "from the highest three eligibles on the certificate and may not pass over a preference eligible veteran to select a lower scoring non-veteran" 5 U.S.C. § 3318(a), 5 U.S.C. § 3319(c)(2).

4. In November 2000 (2005-3155, RA 69), USDOL/OSHA requested OPM to pass over Gossage, a disabled veteran, pursuant to suitability (5 C.F.R. § 731 et seq.). A decision to pass Gossage over in favor of a non-veteran was subject to the limitations of federal veterans' preference law. Since 1865, the federal government has extended preference to veterans applying for federal jobs. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261 n.6 (1979). These laws are "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations." *Id.* at 265 (citation omitted). The form of preference has evolved over the years and depends on the nature of a veteran's service and the hiring process used by the federal agency. As relevant here, an honorably discharged veteran who has served in an active

campaign during specified war times (e.g., the Vietnam War), or who has become disabled as a result of his active duty service, is classified as a “preference eligible.” 5 U.S.C. § 2108(3). When hiring under the open competitive examination process, an agency that “proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible . . . shall” obtain approval from OPM. *Id.* § 3318(b)(1). In addition, where, as here, the preference eligible is 30 percent or more disabled, the agency must notify him of the proposed pass over and provide him with a chance to respond. § 3318(b)(2). OPM, in turn, must “determine the sufficiency or insufficiency of the reasons submitted,” and the agency “shall comply with [OPM’s] findings.” 5 U.S.C. § 3318(b)(1). OPM has provided guidance on what counts as sufficient or insufficient reasons for passing over a veteran. *See Report to the Chairman, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives Federal Hiring Reconciling Managerial Flexibility With Veterans’ Preference*, GAO/GGD-96-102, June 1995 (5 C.F.R. § 332.406(b,c,e)); U.S. Office of Pers. Mgmt., *Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices* 164-65 (2007), all federal agencies “must follow” the procedures of the DEO Handbook.

5. On April 4, 2001 OSHA’s Regional Administrator hired a lower scoring, non-preference eligible applicant for the vacant position.

6. On May 16, 2001, OPM (case 01-904-277; Appendix Q, A 120-121; Appendix M, 2005-3155, RA 73-80) disqualified Gossage for a second time (case 97-900-648; Appendix M; 2005-3155, RA 34, 36-40), based on the same two charges (5 C.F.R. § 731.202), rated D, ineligible on suitability, cancelled all applications and eligibilities, and debarred from competing in examinations for or accepting appointments in the competitive federal service.
7. On June 8, 2001 (Appendix Q, A 116-121; Appendix M, 2005-3155, RA 82-85), Gossage appealed OPM's May 16, 2001 suitability, debarment, and employment disqualification determination to the MSPB (SE-0731-01-0261-I-1, Appendix P, A-111). Inclusive in this appeal were Gossage's outstanding discrimination, VEOA, USERRA, prohibited personal practice claims, and civil double jeopardy claim (imposing disciplinary or adverse action more than once for the same misconduct).
8. On December 27, 2004, OPM (case 01-904-277; Appendix R, A 123-128) amended its Investigation Record, to include "DO NOT DISCLOSE OUTSIDE OF OPM". OPM modified its May 16, 2001 5 C.F.R. § 731 et seq. suitability determination, vacating its two 5 C.F.R. § 731.202 charges. OPM's new and material amended suitability determination were obtained from OPM on **May 25, 2011**, pursuant to Gossage **April 21, 2001** Freedom of Information Request. The agency **DID NOT**

provide notice of the new OPM 2004 final determination, as required by statute.

- a. OPM 2004 new suitability determination for OSH-00-87 and OSH-00-87-S-1:
 - i. Final Determination Acceptable
 - ii. Eligibility reinstated during MSPB appeal
 - iii. Debarment rescinded during MSPB appeal
- b. OPM DID NOT notify Gossage of OPM's final determination (5 U.S.C. § 3318, C.F.R. §§'s 731.303, 304, 404)

III. PROCEDURAL HISTORY

A. Background

Gossage filed a pro se appeal with the Merit Systems Protection Board over OPM's May 16, 2001 (case 01-904-277; Appendix Q, A 116-119; Appendix M, A-70, 2005-3155, RA 73-80) administrative conviction, disqualification, and debarment.

In this very case, if the MSPB (SE-0731-01-0261-I-2) assumed original jurisdiction over petitioner's 2001 OPM appeal in the first round and second round of litigation. The Federal Circuit Court of Appeals exercised appellate jurisdiction in the same OPM case (2004-3155) from 2004 and 2009 MSPB's decisions.

Thus, with OPM's 2004 new and final determination, amending and vacating its initial 2001 determination, it necessarily follows that petitioner's

subsequent appeal from OPM's 2004 new and final decision would also fall within the MSPB's, USDC, and Federal Circuit Court of Appeals jurisdiction.

B. Proceedings - Before April 2011 FOIA request to OPM

1. By letter dated May 16, 2001, Office of Personnel Management (OPM case 01-904-277; Appendix Q A 120-122) informed Gossage, a preference eligible applicant was unsuitable for federal employment for USDOL/OSHA industrial hygienist position, pursuant to 5 C.F.R. § 731 et seq. and took the following actions:

- (1) rated ineligible on suitability;
- (2) cancel all applications and eligibilities; and
- (3) debarred from competing in examinations for, or accepting appointments to positions in the competitive service until May 18, 2003.

2. On June 8, 2001, Gossage appealed OPM's May 16, 2001 administrative conviction to the MSPB (5 C.F.R. § 1204; 5 U.S.C. § 7701-7702; Appendix Q A 116-119) on the following issues:

- a. 5 U.S.C. § 3330a (VEOA)
- b. 38 U.S.C. § 4322 (USERRA)
- c. 5 U.S.C. § 2302 (Prohibited Personnel Practice)
- d. Discrimination (Civil Right Act 1964, 1991)
- e. U.S. Constitution 5th Amendment (Due Process)
- f. Prosecuted twice for the same misconduct (Case 01-904-277, 97-900-648)

After reviewing the evidence, without holding a hearing, the administrative law judge (ALJ), dismissed Gossage's mix case appeal, under the collateral estoppel doctrine as moot on April 22, 2004 (Appendix P, A-109). OPM stated, "that its actions did not change its decision to grant OSHA's request permission to disqualify the appellant for the industrial hygienist position." Still proceeding Pro se, Gossage petitioned the Board for review. The MSPB's split board panel became the ALJ's April 22, 2004, final decision on September 27, 2004 (Appendix O, A-97).

3. Gossage filed a mix case complaint to the USDC Western Washington (04-5669RJB), on October 8, 2004. The USDCWWa assumed initial appellate jurisdiction (5 U.S.C. 7703; 28 U.S.C. 1295(a)(9); 5 U.S.C. § 3330b, VEOA; 38 U.S.C. § 4322 (USERRA)).

While Gossage's mixed complaint was pending before the USDCWWa, OPM amended and vacated its May 16, 2001 5 C.F.R. § 731 et seq., suitability determination and debarment on December 27, 2004.

The U.S. Attorney General for Western Washington (OPM's counsel) and OPM did not advise or disclose to Gossage and USDCWWa, OPM amended and vacated its May 16, 2001 suitability determination and its two charges on December 27, 2004. These undisclosed exculpatory documents were obtained from OPM, pursuant Gossage's April 21, 2011 freedom of information act request. The relevant December 27, 2004 OPM documents include (Appendix R, A 123-128):

1. OPM Case # 01-904-277, Investigative Record Amend
2. Amending Request for Suitability Determination, dated May 16, 2001

3. "DO NOT DISCLOSE OUTSIDE OF OPM"

OPM's new and final 2004 suitability determination, **did not grant** OSHA's November 16, 2000 request to disqualify Gossage for the industrial hygienist position. OPM's final determination **established** Gossage was suitable for USDOL/OSHA industrial hygienist position (OSHA-00-87 and OSH-00-87-S-1) (Appendix R and S). OPM took the following undisclosed actions:

- (1) **Rated Eligible on Suitability;**
- (2) **OPM Removed**, "cancel all applications and eligibilities";
- (3) **Removed OPM debarment and;**
- (4) **OPM's Final Determination, ACCEPTABLE and;**
- (5) **OPM reinstated Gossage's eligibility to OSH-00-87 and OSH-00-87-S-1.**

OPM's December 27, 2004, amended determination is "new and previously unavailable material evidence", affecting 5 C.F.R. § 1201.3 and original appellate jurisdiction, and the outcome of this suitability case.

ON March 4, 2005 (Appendix N, A-79), USDCWWa J. Bryan determined it did not have jurisdiction over the claims in this case, and "because it is in the interest of justice to this case to the proper court, the case is hereby transferred to the USCA for the Federal Circuit as an appeal of the September 27, 2004, decision of the Merit System Protection Board".

4. The United States Court of Appeals for the Federal Circuit (05-3155), exercising its jurisdiction

from the case transferred, pursuant to 5 U.S.C. 1631 from the USDCWWa. OPM counsel did not advise or disclose to the Federal Circuit Court of Appeals or Gossage, OPM had amended its May 16, 2001 determination on December 27, 2004.

Both parties submitted informal briefs to the court, with supporting documentation in *Gossage v. OPM* (F. Cir. Case 05-3155). OPM submitted **Altered** suitability investigation records and determination in OPM's supplemental appendix (Appendix Q, A-120; Appendix M, RA73). OPM altered its December 27, 2004 final determination to appear like OPM's May 16, 2001 negative suitability determination.

The Court decided the case without argument or review, accepting OPM's recommendation, and with OPM's submitted **altered 5 C.F.R. § 731 et seq. suitability documents**. The court of appeals remanded, stating "thus we agree with OPM that remand is now appropriate, for determination of whether OPM's May 2001 decision was an appealable constructive negative suitability determination and, if so, whether OPM's decision is supported by substantial evidence". (Appendix M, A-72)

Gossage disagreed with the Federal Circuit remand decision, still proceeding pro se, filed a petition for certiorari. At the time the Supreme Court denied certiorari, this Court and Gossage **did not have** OPM's December 27, 2004 final determination for consideration, instead had OPM's **altered suitability documents** at the time the petition was filed, because this new and material OPM determination was disclosed for the first time to Gossage by OPM on May 11, 2011.

5. MSPB (SE-0731-01-0261-I-(3-5) on remand from the Federal Circuit on January 25, 2006 for further consideration regarding the May 2001 decision by the Office of Personnel Management (OPM) (i) disqualifying the appellant from an industrial hygienist position with the Occupational Safety and Health Administration, (ii) canceling any eligibility he may have obtained for this or any other competitive position, and (iii) debarring him from applying for any position in the competitive Federal service for two years.

The ALJ **ORDERED** the agency to serve me (ALJ), appellant, and appellant's representative, with the material listed on the enclosed schedule and any other information required by 5 C.F.R. § 1201.25. The agency counsel suppressed OPM's December 27, 2004, new, material, and final determination from petitioner, petitioner's counsel, and the MSPB ALJ. **OPM did not produce "all documents contained in the agency record of the action"** (5 C.F.R. § 1201.25(c). (Appendix R and S, A 121-132; *see* **Appendix V, A 141-143**)

An administrative law judge of the Merit Systems Protection Board (MSPB) held a hearing on November 7, 2007. During the hearing and without OPM's knowledge, the ALJ approached Gossage's counsel with a substantial monetary offer to settle the case; the ALJ's offer was rejected without hesitation.

OPM submitted in its closing brief to the MSPB, OPM's 2001 negative suitability determination with its arguments, in lieu of OPM's December 27, 2004 determination. The ALJ did not have OPM's (December 27, 2004) new and final suitability determination at the time of the ALJ's decision. OPM's new and final

determination was disclosed for the first time in 2011, pursuant to Gossage's FOIA request to OPM.

On July 8, 2008 (Appendix L, A-54), the ALJ affirmed OPM's May 16, 2001, 5 C.F.R. § 731 et seq. administrative conviction and debarment. The ALJ upheld OPM's findings, based upon Gossage's prior OPM's negative suitability determination, debarment, and conviction (OPM case 97-900-648, SE-0731-98-0139-I-2). The ALJ rejected Gossage's affirmative defense, **"an agency cannot impose disciplinary or adverse action more than once for the same misconduct"**.

The ALJ did not comply with the Circuit Court's specific remand instructions, "We also agree that remand is required for consideration of Mr. Gossage's discrimination claims. Mr. Gossage has outstanding discrimination claims, and OPM's recession of its cancellation of eligibility and general debarment from competition do not resolve this issue"

Still proceeding *pro se*—filed a petition for review SE-0731-01-0261-I-5ID before the MSPB. The Board stated on March 24, 2009, "after fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative for review (Appendix K, A-52). The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113. The appellant may now file appeals under the Veterans Employment Opportunities Act of 1998 and Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333), which he delayed filing pending resolution of this appeal". (Appendix H and I, A 31-48)

The Board did not have for consideration OPM's 2004 new and unavailable determination, which vacated OPM's May 16, 2001, administrative conviction.

6. The United States Court of Appeals for the Federal Circuit (2009-3197), assumed jurisdiction over the March 24, 2009 MSPB's final decision affirming OPM May 16, 2001, 5 C.F.R. § 731 et seq. administrative conviction and debarment. The Court dismissed on October 15, 2009, Gossage's appeal for failing to file a timely brief (Appendix J, A-49).

C. April 21, 2011 Freedom of Information Act Request to OPM

OPM's May 25, 2011 letter (Appendix R, A 123-128), Supervisory FOI/PA Specialist partially released to Gossage, its Federal Investigation Services Case 01-904-277 records. OPM disclosed for the first time, a new and final 5 C.F.R. § 731 et seq. determination, amending and vacating its May 2001 administrative conviction and debarment. OPM removed ALL employment disqualification and barriers to initial federal employment, including USDOL/OSHA's 2000 industrial hygienist positions, OSH-00-87 and OSH-00-87-S-1. OPM's new and final December 27, 2004 determination for OSHA-00-87 and OSH-00-87-S-1:

- (1) **Rated Eligible on Suitability;**
- (2) **OPM Removed**, "cancel all applications and eligibilities";
- (3) **Removed** OPM debarment and;
- (4) **OPM's Final Determination, ACCEPTABLE** and;

(5) OPM reinstated Gossage's eligibility to OSH-00-87 and OSH-00-87-S-1.

Pursuant to 5 U.S.C. § 3318 and C.F.R. §§'s 731.303, 304, 404, OPM did not disclose or notify in Gossage, the Court of Record, or MSPB in writing of OPM's new and favorable final suitability action.

By Letter dated August 10, 2011 letter, FOI/PA Specialist partially released to Gossage, USDOL/OSHA (OPM Case 01-904-277; (Appendix S, A 129-134) industrial hygienist Federal Investigation Services records. USDOL/OSHA records disclosed a new December 27, 2004 OPM final determination, amending, vacating, and **DENYING** the agency's November 17, 2000 pass over request. OPM removed USDOL/OSHA's **OBJECTION's** to Gossage's eligibility, suitability, and qualifications. This new and final USDOL/OSHA-OPM determination reinstated Gossage as eligible, qualified, acceptable, and suitable for the industrial hygienist position (OSH-00-87 and OSH-00-87-S-1).

This December 27, 2004 OPM and USDOL/OSHA final determination is new and material, affecting from inception, the outcome of the Gossage's litigation, and directly affects **ALL** of the prior Court and MSPB proceeding below:

- a. MSPB SE-0731-01-0261-I-2, ID and PFR DECISIONS;
- b. USDCWWa, 2004-5669RJB transfer ORDER;
- c. Fed. Cir. Court of Appeals 2004-3155, REMAND DECISION;
- d. MSPB SE-0731-01-0261-I-5, ID and PFR DECISIONS;

- e. 2009 - MSPB petition for review decision and;
- f. 2009 - Fed. Cir. Court of Appeals 2009-3197, appealing MSPB SE-0731-01-0261-I-5 decision

USDOL/OSHA did not notify Gossage its November 17, 2000 pass over request was denied by OPM in 2004 and eligibility reinstated for the industrial hygienist position.

D. Proceedings - After April 2011 FOIA request to OPM

1. By letter dated March 14, 2013 (Appendix G, A 24-30), MSPB's Information Services Director released to Petitioner's Gossage's February 7, 2013 reopen/new appeal/independent cause of action, pursuant to FRCP60 (b), (d) and 5th amendment due process claims:

- a. mistake, inadvertence, surprise, or excusable neglect;
- b. newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- c. fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- d. the judgment is void;
- e. the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or

applying it prospectively is no longer equitable; or

- f. any other reason that justifies relief; or as
- g. an independent action to relieve a party from a judgment, order, or proceeding.

On February 7, 2013, a new/reopen appeal (SF-0731-13-0252-I-1), based on new and material evidence, OPM amended and vacated its 2001 suitability determination in 2004. The Board shortly thereafter deleted this case without further review or notification to Gossage.

2. Gossage filed a motion for relief of judgment on May 7, 2014, pursuant FRCP60(b) and (d) in the USDCWWA, C04-5669 RJB. The district court denied the motion for relief, stating, "the court does not have jurisdiction over the case. Jurisdiction lies with the Federal Circuit" (Appendix E, A-15).

3. Proceeding Pro se, Gossage filed a new complaint with the Board, raising new and material evidence obtained in 2011, pursuant FOIA request to OPM. OPM disclosed for the first time, it amended and vacated its May 16, 2001 suitability determination on December 27, 2004. The MSPB stated its regulations do not provided for reconsideration pursuant: 5 U.S.C. §§'s 702, 7701 (a), (c)(2), 7702; 5 C.F.R. §§'s 300.104; 1201.3, 1201.115, 117-120 or; FRCP60(b), (d).

The Board stated, MSPB's SE-0731-01-0261-I-5 was its final decision, no further right to review this appeal, even though new and material OPM evidence, affecting the MSPB's jurisdiction, and the outcome of this MSPB final SE-0731-01-0261-I-5 decision. The MSPB made a new authoritative determination after

consideration of the fact, OPM vacated its initial negative suitability determination on December 27, 2004 (Appendix D, A-14).

IF the MSPB assumed appellate jurisdiction in the prior case, logic would dictate it would still have jurisdiction, if the substance or evidence in the case changed/modified/new and material to its June 2001 MSPB decision or jurisdiction.

4. Federal Circuit Court 2018, (Appendix A-C, A 6-13)

Gossage appealed the MSPB April 27, 2018 letter to the Federal Circuit, where the substance lies, where OPM made a new and final determination on December 27, 2004, the agency amended and vacated its prior May 16, 2001 initial determination. The Court's holding, "we may only hear "an appeal from a final order or final decision" of the board". The Court of Appeals holding, "clerk's board letter is not a final order or decision".

IF the Federal Circuit and MSPB assumed appellate jurisdiction, pursuant **5 U.S.C. § 7701-7703, 5 C.F.R. § 300.104 , 5 C.F.R. § 731.501, 5 C.F.R. § 1201.3**, in the original and prior cases (2004-3155, Appendix M, A-72; and 2009-3197, Appendix J, A-49), logic would dictate, the MSPB and Federal Circuit would still have jurisdiction in this case (2018-1970), if the substance or evidence changes/modified/new and material to its original decision or jurisdiction.

On July 13, 2019, the court of appeals denied the Gossage's petition for rehearing.

IV. REASONS FOR GRANTING THE PETITION

This Court has jurisdiction over OPM's December 27, 2004 final determination (Appendix R, A 123-128), amending and vacating its 2001 administrative conviction and debarment for lack of jurisdiction, pursuant the 5th amendment due process clause: "No person shall * * * be deprived of life, liberty, or property, without due process of law" and 28 U.S.C. § 1254(1). *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972).

The Federal Circuit and MSPB jurisdiction are in direct conflict with this Court's recent decision *Perry v. Merit Systems Protection Bd.*, 2017 U.S. LEXIS, 4044, "the key consideration is not what the MSPB determined about appealability; it is instead the nature of an applicant's claim that he had been "affected by an action appealable to the MSPB, "a party [may] establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements," *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537 (1995); *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981).

Gossage attacks the validity of the 2005-3155 Federal Circuits jurisdiction to remand OPM's May 16, 2001 suitability determination and vacated by OPM in 2004 on five separate grounds:

- A. Jurisdiction attached on June 8, 2001, at the time an appeal was filed, *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981);
- B. An Agency must follow its own policy, procedures, statutes, and regulations, *Acardi v. Shaughnessy*, 347 U.S. 260 (1954);

- C. Procedural due process is violated when an agency suppresses or conceals favorable evidence, *Cleveland Bd. of Educ. v Loudermill*, 470 U.S. 532, 541, 546 (1985);
- D. The court is not empowered to substitute its judgment for that of the agency, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971);
- E. Subject matter jurisdiction cannot be waived and may be attacked in any court, at any time, when a judgment is void, *Columbia Vly. Credit Exch., Inc. v. Lampson*, 12 Wash. App. 952, 955-6 (1975);
- F. MSPB 2001, 5 C.F.R. § 731 et seq. jurisdiction was removed by OPM on December 27, 2004.

This Court held in *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 782 (1985), review is limited to correcting errors involving "important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination", such as "Do Not Disclose Outside of OPM", or OPM's 2004 final determination, affecting the outcome of all prior decisions.

OPM's December 27, 2004 is a new and final determination and did not relieve the Board of its statutory duty to decide the appeal on its merits, pursuant the 5th amendment due process clause and Federal Rules of Civil Procedure 60(b), (d), or as an independent cause of action. The Merit Systems Protection Board has a statutory obligation to decide

those cases that are within its jurisdiction in which the parties have satisfied the procedural prerequisites for adjudication. *Ray L. Kagel, Jr. v. Department of the Army*, 126 F.3d 1455 (F.Cir. 1997); See 5 U.S.C. §§'s 7701-7703; 5 C.F.R. §§'s 300.104, 731.304, 501, 1201.3, 1201.25, 1201.115, 1201.118, 1201.120, and 1208.2.

In MSPB SF-0731-13-0252-I-1 ORDER, deleted by the MSPB, stating, "Fraud might be grounds for reopening an appeal...such request must be made to the Board's headquarters...not the regional office (Appendix G, A 23). However, this order is inconsistent and conflicts with *Sipe v. Homeland Security*, No. DA-0752-07-0212-I-1 (June 13, 2007). The MSPB has jurisdiction and is supported by ALJ Gutman's MSPB 2013 "~~deleted~~" ORDER forwarding petition, and in the interest of justice or any other reason that could support reopening this case. *Anderson v. Department of Transportation*, 46 M.S.P.R. 311, 349-50 (1990), *aff'd*, 949 F.2d 404 (Fed. Cir. 1991); *Quinto v. MSPB*, 56 F.3d 83 (Fed. Cir. 1995). OPM's 2004 amended determination does not support, "lack of jurisdiction", 28 U.S.C. § 1331, 5 U.S.C. §§'s 702, 7701-7703; 5 C.F.R. § 751.501. Where an appellant makes a nonfrivolous allegation of fact that could establish a prima facie case of Board jurisdiction over the matter at issue, is entitled to a hearing. *Upshaw, v. Consumer Product Safety Commission*, 2009 MSPB 74, ¶13 (2009); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994); *Edwards v. Department of Justice*, 87 M.S.P.R. 518 (2001). Deleting MSPB SF-0731-13-0252-I-1 by the Board is a fundamental due process violation, and questions the Boards appellate policy and procedures.

Former Chief Judge Henry Friendly for the 2nd Circuit Court of Appeals created a list of basic due

process rights "that remains highly influential, as to both content and relative priority" These rights, which apply equally to civil due process and criminal due process:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepares a record of the evidence presented.
10. Requirement that the tribunal prepares written findings of fact and reasons for its decision.

A. OPM made its initial 5 C.F.R. § 731 et seq. negative suitability determination and debarment in 2001. The Board's jurisdiction is "determined by the nature of an agency's action at the time an appeal is filed with the Board." *Fernandez v. Dep't of Justice*, 105 M.S.P.R. 443, 446 (2007). Three years later, while this May 16, 2001 determination was on appeal, OPM

vacated and concealed this 2001 determination on December 27, 2004. The Board's prior decisions were based on a vacated 2001 OPM determination and not on the merits in SE-0731-01-0261-I-(2-5), and on an incomplete and inaccurate review of the administrative record. The Board's jurisdiction remains intact and its 2001 prior decision is not a final judgment on its merits. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981).

It's clear that these jurisdictional issues were clearly and positively presented to the Board, as shown by these referenced records, which are in the appendix (Appendix R, A121-126). The question of jurisdiction can be raised by any party, or by the court on its own motion, at any stage of the proceedings. Lack of jurisdiction may not be waived by the parties nor ignored by the court. *Starobin v. United States*, 662 F.2d 747 (Ct.Cl.1981); *Reid v. Ford, Bacon and Davis Construction Corp.*, 405 F.2d 861 (CA8 1969). These principles apply whether the court is considering its own jurisdiction or the jurisdiction of an Administrative Board in a case appealed from the Board to the court, as in the instant case. Jurisdiction is always open to inquiry upon the court's own motion. *Pacific Towboat & Salvage Co. v. I.C.C.*, 620 F.2d 727 (CA9 1980).

The Federal Circuit and MSPB "lack of 5 U.S.C. § 7701-7703 jurisdiction" are in direct conflict with *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981) and its decision in *Michael J. Bruning v. Veterans Administration*, 834 F.2d 1019 (F. Cir. 1987). The MSPB and Federal Circuit has incorrectly decided a question of considerable importance to the MSPB and Court of Appeals original

and continued jurisdiction, where an agency's misconduct determination is amended or overturned during an appeal. Jurisdiction attaches at the time an appeal is filed (June 8, 2001) and generally unaffected by the parties' subsequent action (OPM's December 7, 2004 new determination). The agency's unilateral modification of an appealable action after an appeal has been filed cannot divest the Board of jurisdiction. *Holleman v. Merit Sys. Prot. Bd.*, 929 F. App'x.942, 946 (F.Cir. 2015).

In *Himmel*, the Board held that the nature of the agency's action against an appellant at the time an appeal is filed with the Board is determinative of the Board's jurisdiction. The Board found that the unilateral modification of the action by the agency after the appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture or unless the agency completely rescinds the action being appealed. *Gossage v. OPM*, 97 M.S.P.R., ¶ 6 (2004); *Gillespie v. Department of Defense*, 90 M.S.P.R. 327, ¶ 7 (2004); *Milton Wilson v. Small Business Administration*, 27 M.S.P.R. 561 (1985); *Russell B. Butler v. Office of Personnel Management*, 46 M.S.P.R. 288, 291 ¶ 10 (1990)). The administrative record contained a proposal notice, OPM negative suitability determination and debarment letter. The record does not contain OPM's reinstatement or amended 2004 letter. In *Rodriguez*, "while the appeal was pending, the agency sent the appellant a letter stating that on January 12, 2009, it overturned its negative suitability determination and officially offered the appellant the Agriculture Specialist position." *Rodriguez, v. Department of Homeland Security*, 2009 MSPB 199, ¶4.

In *Postal Service v. Gregory*, 534 U.S. 1, 10-11, 15-16 (2001) if pending grievances were later overturned in arbitration, "the foundation of the Board's *Douglas* analysis would be compromised." (citing *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981)). As one of respondent's disciplinary actions was overturned in arbitration before the Board rendered its decision, the Postal Service concedes that a remand to the Federal Circuit is necessary to determine the effect of this reversal on respondent's termination. U.S.P.S. Reply Brief for Petitioner, page 15-16. J. Ginsburg stated in *Gregory*,

"Indeed, it might well be "arbitrary and capricious" in such a situation for the Board to disregard the employee's revised record and refuse to reopen. Cf. 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4433, p. 311 (1981) (a "judgment based upon the preclusive effects of [a prior] judgment should not stand if the [prior] judgment is reversed"); *id.*, at 312-315; Restatement (Second) of Judgments § 16 and Comment c (1982) (nullification of an earlier judgment on which a subsequent judgment relied "may be made the ground for appropriate proceedings for relief from the later judgment with any suitable provision for restitution of benefits that may have been obtained under that judgment")."

OPM implemented an employment practice to conceal its Gossage's 2004 amended and final determination, OPM knowingly never had legal

authority to take or make its May 2001 5 C.F.R. § 731 et seq. suitability actions in its entirety, but for discriminatory reasons, therefore its May 2001 suitability decision cannot be sustained. *Scott v. OPM*, 2011 MSPB 50, ¶16; See 5 U.S.C. § 7701(c)(2)(C); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 683-84 (1991). Further adjudication is necessary to resolve Gossage's outstanding claims of discrimination. *Schibik v. Department of Veterans Affairs*, 98 M.S.P.R. 591, ¶ 11 (2005).

B. OPM did not follow 5 U.S.C. § 3318 and 5 C.F.R. § 731 et seq. suitability, notification, policy and procedures, *Acardi v. Shaughnessy*, 347 U.S. 260 (1954.)

When an agency proposes to pass over a 30% preference veteran on suitability, the applicant must be notified by OPM and after its findings. When OPM amended and made a new determination in 2004 and did not notify the veteran, due process notification is violated, 5 C.F.R. § 731.304. In *George L. Ferguson, v. Office of Personnel Management*, 100 M.S.P.R. 347, ¶4-5, the Board reopened solely to address the issue of suitability jurisdiction and to set forth the applicable analysis in reviewing the connection between the appellant's misconduct and his suitability.

In *Folio v. Department of Homeland Security*, 402 F.3d 1350, 1356 (F. Cir. 2005), finding that "§ 731.501 provides the Board with jurisdiction to review all aspects of an unsuitability determination, including whether the charged conduct renders an individual unsuitable for the position in question," and noting that "[t]he Board is precluded only from reviewing or modifying the ultimate action taken, which is left to OPM or the appropriately delegated agency."

The Board did not follow the agency policy and procedures, “[i]f the Board finds that one or more charges are supported by a preponderance of the evidence, it shall affirm the determination.” 5 C.F.R. § 731.501(a). *Eduardo Sosa v. Office of Personnel Management*, 2006 MSPB 101, ¶4-5. The MSPB was precluded from considering OPM’s 2001 determination, that determination was amended and vacated in December 2004. The MSPB’s may not substitute OPM’s 2001 vacated determination for OPM’s final 2004 determination, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

A different due process standard was applied in this case, then in other cases appearing before the Federal Circuit and MSPB (**see MSPB cases 1-10 below**). In this case, OPM vacated its two 5 C.F.R. § 731.202 suitability charges and its May 2001 determination, in effect, a much stronger argument, than a vacated or reversed decision by an appellate court, because this is a specific OPM decision. The refusal to reopen and consider OPM’s December 2004, amending and vacating its May 2001 determination is in **direct conflict** prior MSPB decisions, where a conviction or agency decision is vacated/overtaken/reversed on appeal.

1. *Behrendt v. Navy*, 22 M.S.P.R. 72 (1984);
2. *Robinson v. Army*, 21 M.S.P.R. 270 (1984);
3. *Underwood v. U.S.P.S.*, 18 M.S.P.R. 708, 711 (1984);
4. *Welber v. U.S.P.S.*, 62 M.S.P.R. 98 (1994)
5. *Czubinski v. Treasury*, 76 M.S.P.R. 552 (1997)

6. *Pawn v. Agriculture*, 90 M.S.P.R. 473 (2001);
7. *Prehoda v. Homeland Security*, 98 M.S.P.R. 418 (2005);
8. *Sipe v. Homeland Security*, No. DA-0752-07-0212-I-1 (June 13, 2007);
9. *Rodriguez v. Homeland Security*, 112 M.S.P.R. 446 (2009),

“While the appeal was pending, the agency sent the appellant a letter stating that on January 12, 2009, it **overturned** its negative **suitability** determination and officially offered the appellant the Agriculture Specialist position, which he accepted.”;

10. *Payne v. USPS*, 69 M.S.P.R. 503 (1996),
 “This case is before the Board on the appellant's motion to reopen two final Board decisions. For the reasons discussed below, we GRANT the appellant's motion under 5 U.S.C. § 7701(e)(1)(B), REOPEN and VACATE the decisions in *Payne v. U.S. Postal Service*, 55 M.S.P.R. 317 (1992), and *Payne v. U.S. Postal Service*, MSPB Docket No.CH-0752-92-0577-I-1 (Initial Decision, Oct. 22, 1992), and REVERSE the agency's action removing the appellant from his position.”

C. OPM's failure to notify Gossage of its new 2004 determination and “Do Not Disclose Outside of OPM”, violates the essential requirement of due process and a

meaningful opportunity to be respond, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, (1985); "In this regard, due process mandates that notice be sufficiently detailed to provide a meaningful opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The general rule applicable to jurisdictional notice statutes that expressly require receipt of the notice by the person charged, is that **proof of mailing**, without more, does not satisfy the statute. "The critical date for determining timely appeal to this court ... is the date petitioner received the Board's opinion and order." *Kumferman v. Navy*, 785 F.2d 286 (F. Cir. 1986) ¶8; *Strickland v. Merit Systems Protection Board*, 748 F.2d 681, 684 (F.Cir.1984).

Congress explicitly granted the full Board authority to reopen any initial decision upon its own motion. 5 U.S.C. § 7701(e)(1)(B) (1988). That authority was implemented in 5 C.F.R. § 1201.117 *See Dunning v. National Aeronautics and Space Admin.*, 231 U.S. App. D.C. 132, 718 F.2d 1170, 1173 (D.C. Cir. 1983) (Scalia, J.). This "reserved discretion" to reconsider OPM's 2004 amended and new determination was not exercised here. "New evidence is . . . material . . . [if it] is of sufficient weight to warrant an outcome different from that of the initial decision." *Bucci v. Department of Education*, 42 M.S.P.R. 47, 55 (1989).

The violation of Petitioner's due process rights under the Fifth Amendment to the United States Constitution, where the government counsel at each stage of the administrative proceedings, submitted improperly altered/fraudulent suitability documents (OPM's May 16, 2001 initial suitability determination) to the Court of Appeals (2015-3155) and the MSPB (SE-

0731-01-0261-I-5) to affirm an administrative conviction/judgment against Gossage, in lieu of OPM's December 27, 2004 amended/new and final suitability determination. *see Brady v. Maryland*, 373 U.S. 83, 87 (1963) (finding that the state's inadvertent but prejudicial suppression of favorable evidence was a due process violation). The alterations of evidence are material for due process purposes if there is a "reasonable probability of a different result" absent those alterations. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Cushman v. Shinseki*, 576 F.3d 1290, 1300 (F. Cir. 2009).

The Board has the authority to reopen and reconsider a final decision that it has rendered, even after several years have passed, where there has been fraud, concealment, or misrepresentation by a party before the Board. *Anderson v. Dep't of Transp.*, 46 M.S.P.R. 341, 349 (1990), *aff'd*, 949 F.2d 404 (Fed. Cir. 1991) (unpublished table decision); *Home Products Intern., Inc. v. United States*, 633 F.3d 1369, 1376-77 (F. Cir. 2011); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (F. Cir. 2008); *Gonzalez v. Crosby*, 545 U.S. 524, 528-30 (2005).

A judgment is void when the requirements for effective service have not been satisfied, *Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corporation*, 12 F.3d 1080, 1085-86 (F. Cir. 1993). A federal court may amend a judgment or order under its inherent power when the original judgment (Appendix J-N, A 48-77) or order was obtained through fraud on the court. Cf. *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1133 (CA9 1995) (non-disclosure of existence of videotape containing unfavorable results amounted to fraud on the court, thereby justifying new trial).

"Harm the integrity of the judicial process." *Alexander v. Robertson*, 882 F.2d 421, 424 (CA9 1989). To determine whether there has been fraud on the court, this circuit and others apply Professor Moore's definition:

"Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

A fundamentally fair adjudication within that framework, however, is constitutionally required in all cases, and not just in the large majority. *Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994) (explaining that the admission of improper evidence is a denial of due process where it infects the proceedings with fundamental unfairness).

D. The Court or Board is limited to reviewing the grounds invoked by the agency and may not "substitute what it considers to be a better basis for removal than what was identified by the agency" and is not empowered to substitute OPM's Vacated May 16, 2001 5 C.F.R. § 731 et seq. suitability and debarment determination for that of the OPM's December 27, 2004 final determination, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to "the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). See *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001).

To maintain 2001 jurisdiction in this case, OPM counsel maintained an employment practice (5 C.F.R. § 300.104(a)) to perpetrated “fraud on the court”, by submitting fraudulent/altered OPM’s 2004 suitability documents during the appeal process. Keeping in mind, USDOL, also had the same due process requirement as OPM to notify Petitioner of December 27, 2004 new and final determination, vacating its May 2001 negative suitability determination. USDOL was notified by OPM’s 2004 final determination which, “changes substantially the posture of the case”, specifically 5 C.F.R. § 1201 et seq. jurisdiction, the removal of the MSPB 2001 original jurisdiction provides a basis for revisiting the appeal. *Anderson*, 46 M.S.P.R. at 355. See also *George Dunbar Prewitt, Jr. v. Merit Systems Protection Board*, 133 F.3d 885 (F. Cir. 1998).

E. 5 C.F.R. § 731 et seq. jurisdiction cannot be waived and may be attacked in any court, at any time, when a judgment is void, *Columbia Vly. Credit Exch., Inc. v. Lampson*, 12 Wash. App. 952, 955-6 (1975); 533 P.2d 152; *Service v. Dulles*, 354 U.S. 363, 370-72 (1957). This case is similar to the patent litigation in *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944), in that fraud was perpetrated on the court to secure an invalid judgment by OPM, by submitting altered/fraudulent OPM documents to the court.

Petitioner is being held captive to an ill begotten judgment, when OPM’s 2004 final determination, amended and vacated its May 2001 initial determination. The MSPB’s judgment is based solely on OPM’s 2001 initial determination, and lacks even an “arguable basis” for jurisdiction, after 2004. *Nemaizer v. Baker*, 793 F.2d 58, 65 (CA2 1986). The lower court decisions from 2001-2019 is void and

conflicts with this Court's holding in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

OPM's December 27, 2004 determination removed MSPB jurisdiction from inception (June 8, 2001), the MSPB exceeded its jurisdiction and is void, without legal effect, and can be attacked in any proceeding. *Rose v. Himely*, 4 Cranch 241 (1808); *McDonald v. Mabee*, 243 US 90 (1917); 1 Freeman on Judgments, 120c.; *Jordon v. Gilligan*, 500 F.2d 701, 710 (CA6 1974); *Lubben v. Selective Service Bd. No. 27*, 453 F.2d 645 (CA1 1972). The Federal Circuit lacked jurisdiction in 2005, to enter its 2005-3155 judgement in violation of protections of due process, and therefore void and open to collateral attack. "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." *Marine Insurance Co. v. Hodgson*, 7 Cranch 32; *Marshall v. Holmes*, 141 U.S. 589 (1891); *Earle v. McVeigh*, 91 US 503 (1876); *Service v. Dulles*, 354 U.S. 363 (1957). Void judgment can be collaterally impeached in the District Court. See 7 Wright's Federal Practice p 60.41 (2d ed. 1992); *Fay v. Noia*, 372 U.S. 391 (1963); *Wexler v. MSPB*, 986 F.2d 1432 (CA10 1993).

V. CONCLUSION

A Pro se preference eligible veteran case can be very difficult and unpredictable, let alone where the pro se veteran has been subjected to double punishment for the same misconduct, a potential change in jurisdiction, and where OPM has sole statutory authority to make an administrative

suitability determination of a preference eligible veteran.

This Court's guidance is necessary to aid MSPB or Federal Circuit Court of Appeals in making these types of determinations, including the standard of review involving a Pro se litigant. What is the Court's obligation when an agency changes its administrative decision during the appeal process, which may affect original jurisdiction and decisions, and where the Court or MSPB decides to impose its own decision or procedures for that of the agency? For the above mention reasons, the issues A-E above, there is a clear conflict between OPM's 2001 initial and OPM's 2004 final determinations, Petitioner prays for a meaningful opportunity to be heard to present all the evidence. Clear conflict lies within the MSPB and Federal Circuit prior controlling decisions in: *Anderson v. Dep't of Transp.*, 46 M.S.P.R. 341, 349 (1990); *Behrendt v. Navy*, 22 M.S.P.R. 72 (1984); *Robinson v. Army*, 21 M.S.P.R. 270 (1984); *Espinood v. U.S.P.S.*, 18 M.S.P.R. 708, 711 (1984); *Welber v. U.S.P.S.*, 62 M.S.P.R. 98 (1994); *Czubinski v. Treasury*, 76 M.S.P.R. 552 (1997); *Pawn v. Agriculture*, 90 M.S.P.R. 473 (2001); *Prehoda v. Homeland Security*, 98 M.S.P.R. 418 (2005); *Sipe v. Homeland Security*, No. DA-0752-07-0212-I-1 (June 13, 2007); *Rodriguez v. Homeland Security*, 112 M.S.P.R. 446 (2009); *Payne v. U.S.P.S.*, 69 M.S.P.R. 503 (1996); *Anderson v. U.S.P.S.*, 24 M.S.P.R. 488, 491 (1984), *aff'd*, 776 F.2d 1060 (F. Cir. 1985, table; the agency cannot impose disciplinary or adverse action more than once for the same misconduct (1998 and 2001), *Adamek v. U.S.P.S.*, 13 M.S.P.R. 224, 226 (1982); *Home Products Intern., Inc. v. United States*, 633 F.3d 1369, 1376-77 (F. Cir. 2011).

For the foregoing reasons, the petition for a writ
of certiorari should be granted.

April 11, 2019

Respectfully submitted,

A handwritten signature in black ink, reading "Henry Eugene Gossage". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Henry Eugene Gossage

Pro se Veteran