

No. 19-143

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 REHEARING

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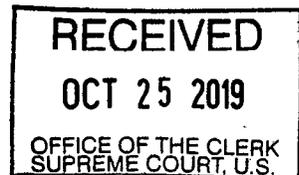


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PETITION FOR REHEARING

This Court may have inadvertently overlooked 5 CFR § 1201.3 Jurisdiction in Office of Personnel Management (OPM) Case 01-904-277 December 27, 2004 Decision, rendering SE-0731-01-0261-I-2 as Moot, *U.S. v. Munsingwear, Inc.*, 340 U. S. 36, 39 (1950):

1. **Final Decision (Appendix A, A-2) - December 27, 2004.**
2. **Initial Decision (Appendix B, A-3) - May 16, 2001.**

Pursuant to Sup.Ct. Rule 44.2 petitioner, Henry Eugene Gossage respectfully petitions this Court for an order (1) granting rehearing, (2) vacating the Courts October 7, 2019 Order denying certiorari, and redispensing this case by granting petition for a writ of certiorari;

(a) vacating the judgment for further consideration in light of two recent Federal Circuit decisions, where OPM's December 27, 2004 decision is New and/or Final, establishing MSPB jurisdiction and/or Moots SE-0731-01-0261-I-2:

- A. *Joseph v. MSPB*, Federal Circuit 2018-2241 (June 7, 2019), The Federal Circuit and MSPB held that it lacked jurisdiction, because **“OPM has not issued an initial or final decision”** in the matter. *See Joseph v. Office of Pers. Mgmt.*, No. PH-0841-16-0228-I-1, 2016 WL 6837492 (MSPB Nov. 15, 2016) or;
- B. Remanding the United States Court of Appeals for the Federal Circuit with instructions to dismiss Petitioner's 5 CFR §

731 et seq. case as moot (SE-0731-01-0261-I-2), under *U.S. v. Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). *Lim v. OPM*, 16 F.3d 419 (F. Cir. 1993); *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969); *Padgett v. Nicholson*, 473 F.3d 1364, ¶15 (F. Cir. 2007); In light of *Procopio v. Wilkie*, 17-21 (Fed. Cir. 2019); *Gray v. Wilke*, 17-1679 (2019) and *Blue Water Navy Vietnam Veterans v. Wilke*, 17-1693 (2019); or

(b) affirming the judgment for lack of jurisdiction and Dismissing SE-0731-01-0261-I-2 as Moot, *U.S. v. Munsingwear, Inc.*, 340 U. S. 36 (1950).

This appeal involves an important question of 5 CFR § 1201.3 and 5 USC § 7703 Appellate Jurisdiction, about which there is substantial grounds of conflicting and inconsistent jurisdiction opinions, and needs clarifications from this Court. In general, the Board has jurisdiction to hear appeals only from a **Final (Appendix A, A-2) or Reconsideration Decision Issued by OPM.** see *Easter v. OPM*, 102 MSPB 214, ¶5 (2006); *Richardson v. OPM*, 2006 MSPB 22, ¶3 (2006); *Luna v. OPM*, 89 M.S.P.R. 465, ¶8 (2001)

OPM's December 27, 2004 Final Decision established 5 CFR § 1201.3 MSPB jurisdiction. *Morgan v. Navy*, 28 M.S.P.R. 477, 478 (1985). In *Vincent*, the MSPB held it lacked jurisdiction, because "**it did not issue a Final OPM decision**". *Vincent v. OPM*, DC-0731-14-0481-I-1 (April 22, 2014). "Any doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction." *Bradley v. Homeland Security*, 2016 MSPB 30, ¶6 (2016). The Board was without

authority to broaden or narrow its appellate jurisdiction through exercise of inherent power, over OPM's 2004 Final Decision. *McNeese v. OPM*, 61 MSPR 70 (1994); *Shaw v. Navy*, 39 M.S.P.R. 586, 589 (1989).

Henry Gossage is seeking rehearing, 5 CFR § 1201 et seq. MSPB jurisdiction was removed when OPM issued its Final 5 CFR § 731 et seq. decision on December 27, 2004 (Appendix A, A-2). MSPB SE-0731-01-0261-I-2 became moot in 2004, while pending appeal before USDCWWa (C2004-5669RJB, October 8, 2004); and remained Moot on appeal before the F. Circuit (2005-3155), US Sup.Ct. (2005-1579), and F. Circuit (2009-3197), OPM amended its 2001 decision (Appendix B), and OPM's December 27, 2004 became its Final Decision (Appendix A).

MSPB argued, "ONLY a Final Order or Decision of the Board are appealable", see MSPB brief (Appendix C, A-4,5). Further, MSPB argued SE-0731-01-0261-I-2 became MSPB's initial and final decision jurisdiction purposes. MSPB inaccurately stated, "petitioner appealed SE-0731-01-0261-I-2 to the Federal Circuit Court of Appeals" (Appendix C, A-6). Petitioner appealed OPM Case 01-904-277, Initial May 16, 2001 Decision, and SE-0731-01-0261-I-2 directly to the USDCWWa (C2004-5669RJB) on October 8, 2004.

OPM's 2001 Initial Decision (Case 01-904-277), and MSPB SE-0731-01-0261-I-2 decisions were pending appeal before the U.S. District Court, OPM vacated and overturned its 2001 initial (Appendix A, A-2) decision. OPM's December 27, 2004 Amended decision (Appendix B, A-3) would constitute a New and/or Final OPM decision for appealability to the

MSPB, supporting MSPB and Court of Appeals jurisdiction.

As a result of OPM's 2004 decision, the parties lacked a legally cognizable interest in the outcome of the 5 CFR § 731 et seq. suitability case, the case is moot. *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969).

In the alternative, OPM's December 27, 2004, New and Final decision (Appendix A, A-2) would remove 5 CFR § 1201.3 MSPB jurisdiction and render SE-0731-01-0261-I-2 Moot. "Article III of the United States Constitution requires that there be a live case or controversy at the time that a Federal court of appeals decides a case"; *Frank v. Minnesota Newspaper Assn.*, 490 U.S.225, 227 (1989) (per curiam); *Burke v. Barnes*, 479 U.S.361, 363 (1987). "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review", **and not simply at the date the action is initiated.** *Roe v. Wade*, 410 U.S. 113, 125 (1973) citing *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

When a case is rendered moot on appeal, the decision below should be vacated with directions to dismiss the action as moot. *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936); *Smith International, Inc. v. Hughes Tool Co.*, 839 F.2d 663, 664 (Fed.Cir.1988); *Texas Instruments Inc. v. International Trade Commission*, 851_F.2d_342, 344 (Fed.Cir.1988).

OPM's "DO NOT DISCLOSE OUTSIDE OF OPM", lack of notification, and concealment of its

December 27, 2004 New and/or Final decision (Appendix A, A-2) from Petitioner, pursuant to 5 USC § 3318(b)(2) and 5 CFR § 731.304 rendering MSPB SE-0731-01-0261-I-2 moot.

Should the Court decide not to grant certiorari, it should apply the relief authorized by *U.S. v. Munsingwear*, 340 U.S. 36 (1950). In *Munsingwear*, the Court explained that “[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.” *Id.* at 39. By vacating this erroneous decision, the court “clears the path for future litigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *Id.* at 40. A *Munsingwear* order is the “normal” procedure for mootness, *Camreta v. Greene*, 563 U.S. 692, 713 (2011), and is “commonly utilized.” *Munsingwear*, 340 U.S. at 41. There is no reason not to follow that practice here.

CONCLUSION

For the foregoing reasons, pro se petitioner Henry Eugene Gossage prays that this Court (1) granting rehearing of the order denying petition for writ of certiorari in this case, vacate the Courts October 7, 2019 order denying certiorari, and redispensing this case by granting the petition for a writ of certiorari, (2) based on OPM’s December 27, 2004 Final (Case 01-904-277) Decision, and vacate SE-0731-01-0261-I-2 judgment, (3) or in the alternative, vacate the decision below and remand

with directions to dismiss MSPB SE-0731-01-0261-I-2 as moot, pursuant to *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Date: October 15, 2019

Respectfully submitted,



/s/

Henry Gossage, Pro se Veteran

No. 19-143

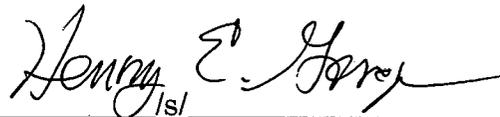
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PETITION FOR REHEARING

CERTIFICATE OF PETITIONER

Henry Eugene Gossage, certifies this petition for rehearing presents in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



Veteran Petitioner, Pro Se

**Additional material
from this filing is
available in the
Clerk's Office.**