

No. _____

In the Supreme Court of the United States

DANIEL A. GROVER

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

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

APPENDIX

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September 16, 2019

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

DANIEL A. GROVER,
Appellant,

DOCKET NUMBER
CH-0831-13-2586-M-1

v.

OFFICE OF
PERSONNEL
MANAGEMENT,

DATE: April 26, 2018

Agency.

Karla W. Yeakle, Washington, D.C.,
for the agency.

Tiffany Slade, Washington, D.C.,
for the agency.

BEFORE

Michele Szary Schroeder
Chief Administrative Judge

INITIAL DECISION

INTRODUCTION

The Appellant, Daniel A. Grover, filed an appeal on August 19, 2013, alleging the Office of Personnel Management (OPM) incorrectly

calculated his civil service retirement annuity and failed to issue him a final decision. The appeal was initially dismissed for lack of jurisdiction, but was then remanded by the Board for further adjudication on March 7, 2014. On remand, the Appellant withdrew his request for a hearing and an initial decision was issued on the record, affirming OPM's decision. The Appellant appealed the decision to the Board, who affirmed the remand initial decision.

The Appellant then appealed the Board's decision to the Federal Circuit. On July 15, 2016, the Federal Circuit vacated the Board's decision and remanded the matter to the Board for a definitive calculation concerning the amount of overtime paid to the appellant. Remand File (RF), Tab 1, pp.2-3. After the mandate issued, the Board issued an order directing the parties to submit additional evidence pertaining to the Appellant's overtime wages that were pertinent to his retirement calculations. RF Tab 5. Both parties responded to the Order. RF Tabs 8, 9. On June 29, 2017, the Board remanded the matter to the Central Regional Office for an administrative judge to conduct further proceedings consistent with the Federal Circuit's July 15, 2016 decision. RF, Tab 10. The Board has jurisdiction over this appeal. See *Ramirez v. Office of Personnel Management*, 114 M.S.P.R. 511, ¶ 7 (2010). This decision is based on the written record.

For the reasons set forth below, OPM's decision is **AFFIRMED**.

Analysis and Findings

Background

Historical Information

The Appellant is a former customs officer who retired from the Department of Homeland Security, Customs and Border Protection (CBP) on August 2, 2008. For purposes of retirement, he was covered by the Civil Service Retirement System (CSRS). Annuities under CSRS are calculated pursuant to the provisions of 5 U.S.C. § 8339(a). By statute, the annuity must reflect the highest average pay based on three consecutive years of specified service, including overtime pay up to \$17,500 for customs officers.

Upon the Appellant's retirement in 2008, the National Finance Center (NFC) prepared and certified his Individual Retirement Record (IRR), upon which OPM relied in making its determination concerning the Appellant's average pay. Based on multiple errors in its calculations, OPM recalculated the Appellant's annuity several times. After receiving a decision on September 18, 2009, the Appellant appealed the decision to the Board. During processing of the appeal filed in 2009, OPM rescinded the final decision to address the Appellant's concerns. As a result of OPM's action to rescind its final decision, the assigned administrative judge dismissed the appeal for a lack of Board jurisdiction on November 10, 2009. As neither party filed a petition for

review, the decision became final on December 15, 2009 (CH-0831-10-0006-I-1).

The Appellant filed a second Board appeal on March 29, 2011. On the same day, the NFC certified a corrected breakdown of the Appellant's premium conversion retirement deductions, thereby resulting in a newly calculated average pay figure and decision by OPM on September 20, 2011. The assigned administrative judge dismissed the appellant's appeal for a lack of Board jurisdiction on December 9, 2011, given that OPM had not issued a reconsidered decision as requested by the Appellant (CH-0831-11-0458-I-1).

On September 10, 2012, OPM rescinded its September 20, 2011 decision, finding the Appellant's annuity remained improperly calculated. Specifically, OPM determined the latest computation failed to account for the Appellant's coverage under the Customs Officers' Pay Reform Act (COPRA), Public Law 103-66. OPM averred that a new decision with reconsideration rights would be forthcoming. On May 31, 2013, the Appellant requested OPM take action on the pending matter. After failing to receive a response from OPM, the Appellant filed an appeal with the Board on August 19, 2013. OPM filed a Motion to Dismiss the appeal, asserting it would be issuing a new initial decision, which it did on October 2, 2013. The Appellant did not request reconsideration of OPM's October 2013 decision and the appeal was dismissed for lack of

jurisdiction by the assigned administrative judge on December 2, 2013(CH-0831-13-2586-I-1).

After the December 2013 dismissal for lack of jurisdiction, the Appellant filed a Petition for Review with the Board. The Board found OPM's October 2, 2013 decision to be tantamount to a final decision. As a result, the Board remanded the matter back to the administrative judge for adjudication on the merits. On remand, OPM attempted to explain its October 2, 2013 decision to the Appellant via a letter on April 3, 2014. The administrative judge granted the Appellant's request for discovery in May 2014, which resulted in OPM producing approximately 1500 pages of documents. Despite the extensive number of documents in the Appellant's possession and his knowledge of the burden he was required to meet, the Appellant did not provide any additional information to the administrative judge to supplement or correct the information contained in the relied-upon IRR. After reviewing the information contained in the extensive record, the assigned administrative judge issued an initial decision affirming OPM's decision. The Board affirmed the initial decision (CH-0831-13-2586-B-1) and the Appellant filed an appeal with the Federal Circuit, resulting in this remand.

Current Proceeding

In its decision, the Federal Circuit noted that "neither OPM nor the Board recognized that the record was internally contradictory about what overtime pay [the Appellant] received." Grover v.

Office of Personnel Management , 828 F.3d 1378, 1379 (Fed. Cir. 2016). OPM agreed there was “internally conflicting information in the official record used by OPM for its calculation.” *Id.* The court noted the issue was whether the Appellant actually received overtime pay of \$17,500 from 2005-2008. *Id.* at 1381. Having found insufficient evidence in the record to determine the issue at hand, the court remanded the matter to resolve what allowable overtime pay was received by the appellant. *Id.* at 1384. According to the court, the inclusion of pay statements could be dispositive to this question, especially given the Appellant’s counsel’s statement “that he believed the pay stubs were in the record.”¹ *Id.* at p. 1384.

I held a status conference with the parties in September 2017. During the conference, I discussed the documents the parties had filed in response to the April 2017 Order. I also instructed the parties to provide any additional documents they wished me to consider by September 25, 2017 and to file closing arguments by September 29, 2017. RF, Tab 20. The record in this matter closed on September 30, 2017. Neither party filed any objections or additional documents after the status conference. *Id.*

¹ A review of the underlying record did not locate any such pay statements in the record prior to the Federal Circuit’s remand. However, OPM provided pay statements in its response to the Board after the court’s remand. RF, Tab 9, pp.25-36.

Analysis

An appellant has the burden of proving by preponderant evidence that he is entitled to the retirement annuity benefits he seeks. 5 C.F.R. § 1201.56(b)(2); *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1980), cert. denied, 470 U.S. 1037, 107 S.Ct. 891 (1987); *Sanderson v. Office of Personnel Management*, 72 M.S.P.R. 311, 317 (1996), aff'd, 129 F.3d 134 (Fed. Cir. 1997) (Table), cert denied, 522 U.S. 1115, 118 S.Ct. 1051 (1998). Preponderant evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

As noted throughout this case, payments of money from the civil service retirement fund are limited to those authorized by statute. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434, 110 S.Ct. 2465, 2467, 2476-77 (1990). There is no administrative discretion by OPM or the Board to determine the requirements for eligibility for a retirement benefit. See *Allen v. Office of Personnel Management*, 77 M.S.P.R. 212 (1998); *Andrada v. Office of Personnel Management*, 74 M.S.P.R. 226, 233 (1997).

There is no dispute concerning the Appellant's coverage under CSRS. Rather, the only question is whether the Appellant actually received the amount of overtime pay he claims, and whether his annuity should be adjusted as a result. *Grover*,

828 F.3d at 1381. If the Appellant did, in fact, receive such pay, the statutory standard “provides no room for ‘excluding from the calculation of average salary or retirement annuity purposes any pay, including overtime pay under COPRA, that is actually received and is properly part of the average salary computation.’” *Id.* at 1383.

The Appellant filed his W-2 forms for 2006 and 2007. RF, Tab 8, pp.10-11. These documents reflect the Appellant received \$126,150.36 in 2006 and \$100,816.48 in 2007. *Id.* The Appellant also submitted an IRR from OPM noting his base pay for each year from 2006 through 2008, which stated his “final salary” was \$103,591. *Id.* at p.12. The Appellant claims that, because only \$17,500 in overtime pay is allowable for retirement annuity purposes, his 2006 salary should be reduced to \$106,464.² *Id.* at p.4. Thus, according to the Appellant, the average of his highest three consecutive years of federal employment would be \$103,623.82.³ *Id.*

² The Appellant reaches this figure by adding \$17,500 to \$88,964, which he “accepts, for the purpose of finally ending his nearly nine years of trying to obtain the correct annuity from OPM” as his average pay. RF, Tab 8, p. 4. However, this amount is only an average and cannot be used to determine the amount to be used for retirement annuity calculations.

³ The Appellant reaches this figure by adding \$106,464 (2006), \$100,816.48 (2007), and \$103,591 (2008), and then dividing by 3.

In response, the agency submitted various documents, including the Appellant's Statements of Earnings and Leave (pay statements) for 2005 through 2008.⁴ RF, Tab 9, pp.33-36. The pay statements reflect the Appellant received gross pay of \$90,595.90 in 2005, \$128,820.60 in 2006, \$103,576.42 in 2007, and \$80,993.81 in 2008. *Id.* The gross pay received for both 2006 and 2007, as noted by the pay statements, are slightly higher than the W-2 income information submitted by the Appellant for both years. Compare RF, Tab 8, pp.10-11 with Tab 9, pp.34-35. According to the pay statements, the Appellant's gross pay included regular pay, Sunday differential, night differential, overtime, call back overtime, holiday pay, relocation allowance, leave usage, and time off awards. *Id.* Concerning overtime specifically, the pay statements clearly indicate the Appellant received \$5,359.44 in 2005, \$9,101.96 in 2006, \$3,799.96 in 2007, and \$3,712.51 in 2008.⁵ *Id.* The Appellant did not dispute the validity of these pay statements, nor did he argue they were not the final pay statements for the years in question. Accordingly, despite the Appellant's long-standing

⁴ Statements of Earnings and Leave are the official title for the pay statements issued to Federal employees.

⁵ These figures include the Appellant's pay for "OT Paid @ Double Rate," "Call Back OT Double RT," and "Commute OT Triple Rate." All three categories are allowable overtime for purposes of

claims, he did not reach the \$17,500 statutory cap in any of the years at issue, thereby explaining why OPM did not include the full amount in its determination of the Appellant's high-three average salary.

OPM submitted a declaration from Patrick Foret, the Branch Chief for the Office of the Chief Financial Officer at the NFC. RF, Tab 9, pp.11-14. Although Mr. Foret explains he was not "directly involved in the processing" of the Appellant's retirement case, he was able to review and verify the accuracy of the Appellant's IRRs. *Id.* Mr. Foret stated the average salary used by CBP was "significantly overstated because it includes pay that is excluded from basic pay for retirement." *Id.* at p.12. Relying on the most recent NFC review of the Appellant's documents in April 2017, Mr. Foret found no discrepancy "regarding COPRA overtime for retirement contributions. In accordance with regulations, COPRA overtime was included in the calculation of [the Appellant's] retirement deductions and those deductions were correctly included on the IRR submitted to OPM." *Id.* at p.13.

Specifically in reference to the Appellant's claims that his gross pay from his pay statements should be used, Mr. Foret persuasively asserted otherwise. *Id.* According to Mr. Foret, several types of gross pay totals are:

calculating the Appellant's retirement annuity. See 19 C.F.R. §§ 24.16(b)(4), (5), (13).

considered extra compensation or premium pay for employees under COPRA and are not base pay for retirement purposes. The most significant excludable types of pay from [the appellant's] E&Ls [pay statements] include: Sunday Differential, Night Differential, Holiday Pay, and Relocation Allowance. Those types of pay must be subtracted from the [gross pay] in order to arrive at an approximation of his retirement-eligible [base pay.]

Id. Regulations support Mr. Foret's assertions, which omit premium pay differential (work on holiday, Sundays, and at night) and relocation allowances from inclusion in determining federal retirement benefits. See 5 C.F.R. § 575.209(d) (stating relocation incentive not included in base pay, thereby removing from retirement calculations); 19 C.F.R. § 24.16(b)(14) (explicitly excluding premium pay differential from retirement benefits calculations).

OPM produced spreadsheets calculating the Appellant's base pay for each year from 2005 through 2008 with information garnered from the pay statements.⁶ RF, Tab 8, pp.25-32. The

⁶ An employee's retirement annuity is calculated based on their highest three years of consecutive service. The period is not a calendar year (January through December), but rather is based on the employee's retirement date. Given that the Appellant retired midway through August 2008, his annuity is calculated based on August 2005

spreadsheets indicate a total of \$89,664 that must be excluded from the Appellant's gross pay received during the period August 2005 through August 2008 to reach a retirement annuity estimate based on the type of pay received by the Appellant. *Id.* at pp.13, 25-32. Specifically, the Appellant's statements reflect excluded pay in the amount of \$10,732.47 in 2005, \$40,233.84 in 2006, \$17,003.67 in 2007, and \$21,693.70 in 2008. *Id.*

After removing the excluded categories, the Appellant's creditable salary for retirement purposes is \$79,868.43 for 2005, \$88,586.89 for 2006, \$85,941.11 for 2007, and \$59,299.23 for 2008. *Id.* at pp.25-32. OPM compared these amounts to the salary calculated with its initial method of using retirement deductions to calculate the Appellant's salary. The differences amounted to \$5 in 2005, (\$0.13) in 2006, \$631.64 in 2007, and \$0.88 in 2008, each of which was deemed immaterial to the Appellant's ultimate annuity calculation. *Id.* Also, the retirement deductions used to calculate the Appellant's salary were the same on both the IRR and the statements.

The Appellant offered no additional evidence or argument beyond two years of W-2 forms. However, use of the W-2 information for retirement annuity calculation purposes is entirely disingenuous. The W-2 form contains no information concerning the types of pay underlying

through August 2008, thereby explaining the need for all four years of pay statements.

the yearly gross salary paid to the Appellant. Rather, as noted by the Federal Circuit, the pay statements are much more likely to be dispositive in this regard, as the Appellant's income is categorized by pay type on the statements. This is crucial because, as discussed above, various types of income are not included when calculating pay for federal retirement benefit purposes.

Mr. Foret's declaration also addressed apparent contradictory remarks contained on the Appellant's IRR in Column 8. *Id.* at p. 13; see RF Tab 8, p. 12. He explained that the remark, "\$17,500 *COPRA/APS, PL 103-66, [. . .] is systematically generated without regard to the actual amount of COPRA earned within the year." RF, Tab 9, p. 13. Rather, "[t]he remark is reported on the IRR to alert/inform OPM that COPRA overtime is included in the calculation for deductions. The actual amount of COPRA overtime included for retirement-eligible base pay is a factor of the employee deductions." *Id.* Similarly, the Appellant's "final salary" listed in column 8 of the Appellant's IRR "pertains to life insurance, which does not fall within the scope of [OPM's] responsibilities." *Id.* at p. 14. Rather, the information is gathered from the "Agency Certification of Life Insurance Status." *Id.*

Given the evidence submitted by OPM, as well as the entirety of the underlying record, I find no evidence to dispute the calculations made by OPM. Contrary to the Appellant's long-standing assertions, there is no evidence in the record he

worked sufficient overtime to meet the statutory cap. He is not entitled to an amount of overtime in his retirement annuity calculation larger than what he actually received in overtime pay. The documentation clearly demonstrates the Appellant received additional compensation not includable as part of his base pay for retirement purposes, which led to the initial overestimation of his annuity by his employing agency (CBP). The record indicates the Appellant did receive some overtime pay during the period at issue. The record further reflects that creditable overtime pay was included in OPM's average salary calculation. As discussed above, any inconsistencies between the amount of the Appellant's gross salary after excluded income is removed and his salary as calculated through the agency's reliance on his deductions are immaterial.

The Appellant was aware of the evidence submitted by OPM during the pendency of this matter. Despite OPM's submissions, the Appellant failed to provide any additional evidence to rebut its calculations, its explanation for the apparent inconsistencies contained on the Appellant's IRR, or Mr. Foret's declaration.

Decision

The agency's action is AFFIRMED.

FOR THE BOARD:

Michele Szary Schroeder
Chief Administrative Judge

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

DANIEL A. GROVER,
Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent

2018-2102

Petition for review of the Merit Systems
Protection Board in No. CH-0831-13-2586-M-1.

Decided: April 24, 2019

NORMAN JACKMAN, Jackman & Roth, LLP,
Lincoln, NH, argued for petitioner.

ANTHONY F. SCHIAVETTI, Commercial
Litigation Branch, Civil Division, United States
Department of Justice, Washington, DC, argued for
respondent. Also represented by JOSEPH H. HUNT,
REGINALD THOMAS BLADES, JR., ROBERT
EDWARD KIRSCHMAN, JR.

Before TARANTO, SCHALL, and CHEN, *Circuit
Judges.*

SCHALL, *Circuit Judge*.

DECISION

Daniel A. Grover is a former customs officer with the Department of Homeland Security, Customs and Border Protection. He petitions for review of the initial decision of the Chief Administrative Judge (“AJ”) of the Merit Systems Protection Board (“MSPB” or “Board”) in *Grover v. Office of Personnel Management*, No. CH-0831-13-2586-M-1, 2018 WL 2018309 (M.S.P.B. Apr. 26, 2018) (“*Grover II*”). J.A. 1. The AJ’s initial decision became the final decision of the Board on May 31, 2018. In its final decision, the Board determined that Mr. Grover had failed to establish that the calculation of his retirement annuity by the Office of Personnel Management (“OPM”) was erroneous. *Grover II* followed our decision vacating a prior decision of the Board and remanding the case to the Board for further proceedings. See *Grover v. Office of Pers. Mgmt.*, 828 F.3d 1378 (Fed. Cir. 2016) (“*Grover I*”). We affirm.

DISCUSSION

I.

Pursuant to 5 U.S.C. § 8339(a), a retired federal employee, such as Mr. Grover, is entitled to an annuity based upon his length of service and his “average pay.” The statute defines “average pay” as “the largest annual rate resulting from averaging an employee’s . . . rates of basic pay in effect over any 3 consecutive years of creditable service.” 5 U.S.C. § 8331(4). The resulting figure is commonly

referred to as the “high-three average.” Grover I, 828 F.3d at 1380. At issue in this case is the calculation of the “basic pay” that, in turn, was used to calculate Mr. Grover’s “average pay.” As Grover I explains, 5 U.S.C. § 8331(3)(G) requires the inclusion in “basic pay” of certain authorized “compensation for overtime inspectional services” (overtime pay), “not to exceed 50 percent of any statutory maximum in overtime pay for customs officers which is in effect for the year involved.” *Id.* At the time of his employment, Mr. Grover was covered by the Customs Officer Pay Reform Act of 1993 (“COPRA”). COPRA was enacted as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 13811–13812, 107 Stat. 312, 668–71, which provided for overtime pay for customs officers like Mr. Grover up to a specified cap. See 19 U.S.C. § 267. For the years in question, the cap was \$35,000. Thus, if he actually received it, Mr. Grover was entitled to have up to \$17,500 in overtime pay included in the calculation of the basic pay for each of the years used in the calculation of his high-three average pay.

The issue in *Grover I* was whether, during the three-year period from August of 2005 to August of 2008, Mr. Grover received \$17,500 in overtime pay in one or more of the years at issue. Mr. Grover argued that he did. In calculating his high-three average, however, OPM did not include “anything close to that amount of overtime pay.” Grover I, 828 F.3d at 1381. As a result, OPM calculated a high-three average significantly lower than what the high-three average would have been if \$17,500 in

overtime pay had been included in each of the three years at issue. *Id.* In vacating the decision of the Board that had affirmed OPM's high-three calculation, Grover I held that further factual inquiry was required because the information on Mr. Grover's Individual Retirement Record was unclear and contained potentially internally contradictory information on the amount of creditable overtime pay that Mr. Grover received during the years in question. *Id.* at 1383–84. “[I]t is reasonable to expect,” we observed, “that pay stubs could be retrieved that would objectively resolve the factual issue.” *Id.* at 1383. We therefore remanded the case to the Board for further proceedings.

On remand, the AJ recognized that the only issue before her was the actual amount of overtime pay received by Mr. Grover during the 2005–2008 period. Grover II, J.A. 5. The AJ found that pay statements—considered pay stubs by the AJ—provided by OPM established that Mr. Grover received \$5,359.44 in overtime pay in 2005; \$9,101.96 in overtime pay in 2006; \$3,799.96 in overtime pay in 2007; and \$3,712.51 in overtime pay in 2008. *Id.* at 7. The AJ stated that “despite the Appellant's long-standing claims, he did not reach the \$17,500 statutory cap in any of the years at issue, thereby explaining why OPM did not include the full amount in its determination of the Appellant's high-three average salary.” *Id.* Accordingly, the AJ affirmed OPM's decision relating to Mr. Grover's retirement annuity. This

appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

II.

Our scope of review in an appeal from a decision of the Board is limited. Specifically, we must affirm the Board's decision unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. 5 U.S.C. § 7703(c); *Miller v. Fed. Deposit Ins. Corp.*, 818 F.3d 1361, 1365 (Fed. Cir. 2016).

III.

In calculating Mr. Grover's average pay for purposes of determining his retirement annuity, OPM included over-time pay in his basic pay, but it did not include premium pay differential (work on holidays, on Sundays, and at night) ("premium pay") or relocation allowances. *Grover II*, J.A. 7–8. The AJ concluded that those exclusions were consistent with governing regulations. *Id.* at 8; see 19 C.F.R. § 24.16(b)(14) (explicitly excluding premium pay differential from retirement benefits calculations); 5 C.F.R. § 575.209(d) (stating that a relocation incentive is not part of an employee's rate of basic pay for any purpose). Accordingly, the AJ affirmed OPM's decision relating to Mr. Grover's retirement annuity.

On appeal, Mr. Grover does not challenge the AJ's de-termination as to the amount of overtime pay he received during the 2005–2008 period.

Neither does he challenge OPM's calculation of his retirement annuity based upon that amount of overtime pay. Instead, he argues that the AJ erred in affirming OPM's exclusion of premium pay and relocation allowances from basic pay in the calculation of his annuity. In making this argument, he contends that the two regulations upon which OPM relied, 19 C.F.R. § 24.16(b)(14) and 5 C.F.R. § 575.209(d), are unlawful because they were adopted by OPM contrary to statutory authority. Pet'r's Br. 11–14. We do not agree.

Under 5 U.S.C. § 8331(3)(C), premium pay is included in basic pay if it is paid under 5 U.S.C. § 5545(c)(1). Premium pay under § 5545(c)(1) is paid to an employee required to remain at a work station “during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work.” Mr. Grover does not argue that the premium pay that he received was of this nature. Pet'r's Br. 11–12. What he does argue is that he was entitled to have premium pay included in his basic pay under 5 U.S.C. § 8331(3)(D). Section 8331(3)(D) provides that basic pay includes, “with respect to a law enforcement officer, premium pay under [5 U.S.C. § 5545(c)(2)].” The problem with this argument is that nothing in the record supports the proposition that Mr. Grover was a “law enforcement officer.” See 5 U.S.C. § 8331(20), (31). Rather, the premium pay that Mr. Grover received was that paid to customs officers under COPRA. Significantly, the statute that provides for overtime and premium pay for customs officers

states that “[p]remium pay provided for under this subsection may not be treated as overtime pay or compensation for any purpose.” 19 U.S.C. § 267(b)(4) (emphasis added). The regulation upon which OPM relied in this matter, 19 C.F.R. § 24.16(b)(14), is consistent with the statute. See *id.* (“Premium pay is not includable for Federal retirement benefit purposes.”).

As noted above, pursuant to 5 C.F.R. § 575.209(d), OPM also excluded relocation allowances from basic pay when it calculated Mr. Grover’s average pay. The statute upon which Mr. Grover relies on this point, 5 U.S.C. § 5724, provides authority for the payment of relocation expenses. It does not, however, provide for the inclusion of such allowances in basic pay for purposes of calculating an employee’s retirement annuity. Under these circumstances, we see no inconsistency between the regulation and the statute.

Finally, we have considered Mr. Grover’s remaining arguments, including the argument that OPM improperly relied on 5 C.F.R. § 844.102 when it calculated his retirement annuity. We find them to be without merit.

CONCLUSION

For the foregoing reasons, the decision of the Board in *Grover II* is affirmed.

AFFIRMED

COSTS

Each party shall bear its own costs.

AWARD LETTER TO APPELLANT



DEPARTMENT OF THE TREASURY
 CUSTOMS SERVICE
 WASHINGTON, D.C.

AUG 14 1990

EXC-1-IC:C JJQ

Mr. Charles Grover
 U.S. Customs Service
 555 Main Street
 Cincinnati, Ohio 45222

Dear Mr. Grover:

The Office of Inspection and Control has produced a belt buckle as an award for significant achievements relating to the mission of the Customs Service. This unique buckle was designed by inspectors, for inspectors. It is indeed a pleasure to present this buckle to you in recognition of your significant seizures.

Your efforts in the enforcement of currency regulations have directly contributed to the interception of \$1.7 million in undeclared currency, in just the past 12 months. Furthermore, during this same period, your conscientious exams have assisted this agency in identifying 195 undocumented and illegally documented individuals who have been referred to the Immigration and Naturalization Service for further investigation.

In pursuing Customs objectives, we have very high expectations of all inspectional personnel. Your seizures are an excellent example of the diligence and professionalism that is essential to the continued success of our organization.

Mr. Grover, please accept my compliments on a job well done and my best wishes for continued success.

Sincerely,

Charles W. Winwood
 Assistant Commissioner
 Office of Inspection and Control

APPELLANT'S POSITION DESCRIPTION

Classification & Qualifications

GENERAL SCHEDULE

QUALIFICATION STANDARDS

Customs and Border Protection Series, 1895

Individual Occupational Requirements

Series Definition:

This series covers two-grade interval administrative positions that supervise, lead, or perform work that involves detecting and preventing terrorists and instruments of terror weapons from entering the United States, and enforcing and administering laws relating to the right of persons to enter, reside in, or depart from the United States, Puerto Rico, Guam, and the U.S. Virgin Islands and the importation or exportation of merchandise. Customs and Border Protection Officers:

- interview persons and examine documents to determine citizenship and immigration status;

- make informed decisions regarding the admissibility of aliens into the United States and admitting, holding, or releasing merchandise;

obtain information about the description, characteristics, value, and country of origin of imported merchandise or agricultural products, by questioning and eliciting information from people;

search persons, baggage, cargo, and carriers for contraband;

monitor, examine, and process cargo containers at sea ports to facilitate importing merchandise; and

exercise sound judgment necessary to apprehend, detain, or arrest persons at the point of entry who are violating Federal immigration, customs, agriculture, or other laws.

Education

Refer to the "Group Coverage Qualification Standard for Administrative and Management Positions" for information about substitution of education.

or

Experience

General Experience for GS-5 Positions: Three years of general experience is required, one year of which must have been equivalent to the GS-4 level in the Federal service. Such experience may have been gained in the performance of substantive duties that required the ability to meet and deal with people and the ability to learn and apply a body of

facts. Examples of such duties include explaining administrative requirements and procedures to others, or screening forms to assure that they are completed properly in accordance with requirements. These duties may have been performed in customer service, claims adjustment, or information receptionist positions, for example. They may also have been performed in assistant, aid, and secretarial/clerical positions. Work experience involving lead and supervisory duties or operating a business may also have provided the required knowledge, skills, and abilities.

Judgments about the acceptability of experience should not be based solely on the title of the position held; rather, the actual duties performed should be evaluated to determine whether or not the experience is creditable. The performance of predominantly typing, filing, copying, or messenger duties, or other purely mechanistic tasks, is not creditable as general experience, nor is experience in trades and crafts or equipment operator work.

Specialized Experience for GS-7 Positions: One year of specialized experience comparable in level of difficulty and responsibility to the GS-5 level in the Federal service is required. This is experience that entailed the performance of substantive duties in inspections work at borders, seaports, airports, or other ports of entry and/or work involving preliminary screening of persons for entry and immigration status, or compliance/regulatory work. Inspections experience must have demonstrated the ability to apply specialized knowledge of the laws, regulations, and procedures for importing and

exporting merchandise to and from the United States and/or law enforcement work at the local, State or Federal levels, which included dealing with persons suspected of entering the United States illegally. Compliance/regulatory work experience must have demonstrated the ability to collect, develop, and evaluate facts, evidence, and pertinent data in assessing compliance with or violations of laws, rules, or regulations. Qualifying Experience for Positions above GS-7: Experience that demonstrated the ability to make rapid, accurate judgments and decisions with respect to the application of the regulations, instructions, and procedures for importing and exporting merchandise to and from the United States, or enforcement and administration of laws relating to the right of persons to enter, reside in, or depart from the United States, Puerto Rico, Guam, and the U.S. Virgin Islands. In addition, a minimum of one year of specialized experience at the next lower grade level is required.

Personal Qualities:

In addition to other qualifications, candidates must possess traits and characteristics that are important to success in customs inspection work. Among these qualities are alertness, ability to work effectively in stressful situations, ability in oral expression, tact, capacity for effective public relations, and good judgment. Candidates must give evidence that they are capable of representing the United States satisfactorily in contacts with persons from other countries.

Examination:

Applicants are required to pass a written test and a structured interview. The purpose of the structured interview is to observe and evaluate certain personal characteristics of applicants to determine whether they possess qualities essential to the successful performance of the duties of the position.

Other Requirements

Applicants must be willing and able to engage effectively in contacts with hostile persons, and to work independently under conditions of high accountability. A background investigation may also be employed in assessing applicants' suitability. Some positions may require the ability to communicate in a foreign language.

Driver's License

Applicants are required to have, or must obtain before appointment, an automobile driver's license currently valid in the State in which they are domiciled or principally employed.

Medical Requirements

General: The physical demands of the essential job tasks range from sedentary to arduous and are classified into the following categories: heavy lifting/carrying, crawling, kneeling, working in confined spaces, pushing/pulling, climbing, bending/stooping, running/walking, sitting, standing, driving, writing, vision, comprehension/reading, and communication. Incumbents are responsible for: lifting items to

inspect cargo and search for contraband; climbing ladders and climbing onto cargo; reading, comparing and reviewing shipping documents and itineraries to determine cargo and time of arrival of vessels and airplanes; communicating with citizens, passengers and exporters to exchange and gather information and testify at trials; driving vehicles; running to pursue suspects; making arrests; using firearms; conducting traffic control; and, operating computers, radios, and small hand tools. Environmental: Incumbents perform job tasks in a variety of environmental conditions. These conditions include working (1) in hot or cold outdoor temperatures (i.e., below 32 degrees or above 90 degrees), (2) at high elevations (i.e., 15 feet or greater above ground level), (3) near moving vehicles and aircraft, (4) in dusty conditions, (5) near fumes, (6) in stressful conditions, (7) for extended and irregular hours, (8) under variable lighting conditions, and (9) under high noise conditions. The possibility of exposure to various types of harmful chemical and/or biological agents by terrorists is real.

Vision: Applicants must meet the following requirements:

Near vision - must be at least 20/40 Snellen binocular (with or without corrective lenses). Binocular visual acuity must be at least 20/30 (corrected) and 20/100 (uncorrected).

Color perception - must be able to distinguish primary colors as defined by color perception Ishihara

Pseudoisochromatic plate tests. Use of an x-chrome lens is not acceptable.

Refractive surgery - individuals who have undergone refractive surgery (i.e., surgery to improve distant visual acuity) must meet approved requirements which include documentation that they have passed specific exam and protocol testing that may be required. Must be LASIK-free from residual effect three months post-procedure. For other procedures, must be free from residual effects one year after surgery.

Hearing: Uncorrected bilateral hearing loss must not exceed 25 dB for the average of the following frequencies: 500, 1000, 2000, and 3000 Hz; and must not exceed 45 dB loss at 4000 and 6000 Hz in either ear. The difference in hearing levels between the better ear thresholds and worse ear thresholds may not exceed 15 dB for the average of 500, 1000, 2000, and 3000 Hz only; and must not exceed 30 dB loss at 4000 and 6000 Hz only. Use of a hearing aid is not allowed.

Special Medical Requirements: The duties of this position are of a strenuous and hazardous nature. Additionally, the position requires a high degree of interaction and responsibility to the public. Therefore, any medical condition resulting from an injury or disease or any psychiatric condition may result in disqualification for appointment either: (1) if the condition(s) would affect the ability of the individual to perform the essential functions of the position; or (2) if recurrence of the condition(s)

cannot be medically ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm to the individual or to others, if the individual were appointed to the position.

Appointments will be contingent upon a candidate's passing a pre-employment medical examination and drug test to ascertain possession of the physical, emotional and mental requirements for the position. A direct relationship exists between specific medical requirements and the condition and the duties of the position. Any chronic disease or condition affecting the auditory, cardiovascular, endocrine and metabolic, gastrointestinal, genitourinary, integumentary, musculoskeletal, neurological, psychological, respiratory, and visual systems that would impair full performance of the duties of the position is disqualifying. These medical requirements must be met by individuals subsequent to appointment and for inservice placement actions, including reinstatement of former employees and transfers from positions not covered by this standard.

Use Of Firearms

For all positions, applicants must, after appointment, qualify and maintain proficiency with firearms.

RELATED INFORMATION

Associated Group Standard

Use the Group Coverage Qualification Standard for Administrative and Management Positions for this series in conjunction with the Individual Occupational Requirements described below.

U.S. OFFICE OF PERSONNEL MANAGEMENT

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