

No. _____

**In the
SUPREME COURT
OF THE UNITED STATES**

HENRY E. GOSSAGE,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT (OPM),
Respondents.

Petition for 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 every appellate court has a special obligation to satisfy itself not only of its jurisdiction but also that of the lower courts in a cause under review and, the Constitution is the paramount law. The Federal Circuit has jurisdiction to review Petitioner's Constitutional claims and under 5 U.S.C. §§'s 702, 704, 7701, 7703; 28 U.S.C. § 1295(a)(9); 5 CFR § 300.104, 5 C.F.R. § 731.501, 5 C.F.R. § 1201 et seq., and Federal Rules of Civil Procedure 60.

On December 27, 2004, the Office of Personnel Management (OPM) amended, overturned, vacated Karen McCue's May 16, 2001, initial determination.

The Questions presented:

1. Whether the Federal Circuit has Jurisdiction or "lacks jurisdiction" to determine its original and lower court's jurisdiction in OPM Investigation Case 01-904-277 and its December 27, 2004 final decision, vacating/overturning OPM's May 16, 2001, initial decision?
2. Whether the Court entered a default judgment by substituting its own 5 C.F.R. § 731 et seq. decision for that of the Agency's (OPM) December 27, 2004 decision?
3. Whether Due Process is violated, when Petitioner is denied the right to appeal 5 C.F.R. § 300.104, an employment practice?
4. Whether 28 U.S.C. § 1295(a)(9) is a claim-processing rule superior over Petitioner's 5th Amendment Constitutional claims?

PARTIES TO THE PROCEEDINGS

Petitioner, Henry E. Gossage was the Petitioner in the Merit Systems Protection Board in OPM Case No. 01-904-277, SE-0731-01-0261-L-3; and in the U.S. Court of Appeals for the Federal Circuit in USCA Case No. 21-1026.

The Office of Personnel Management is the 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 Mandate and Orders of the United States Court of Appeals for the Federal Circuit (Appendix A 1-3) is unreported. The MSPB Western Regional Office May 8, 2020 Letter is unreported (Appendix B 1). The September 27, 2004, Merit Systems Protection Board (“Board”) Order is reported, 97 M.S.P.R. 366, and the April 22, 2002, Administrative decision is unreported (Appendix B 2-3).

JURISDICTION

The Order of the Court of Appeals dismissed for “lack of jurisdiction” was entered on December 18, 2020. That Court denied rehearing, rehearing en banc on February 5, 2020. The petition for a writ of certiorari was filed on April 20, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Appendix, *infra*, for pertinent text of statutes and regulations are reproduced at Petitioner’s Appendix E. U.S. Constitution V; 5 U.S.C. §§’s 702, 704, 1204, 2302(b), 7701-7703; 28 U.S.C. §§’s 1254, 1295, 2106, Appendix (FRCP 60); 5 U.S.C. §§’s 3318, 3330a (a)(1)(A); 38 U.S.C. §§’s 4311, 4324; 5 C.F.R. § 300.103-104, 5 C.F.R. § 332.406, 5 C.F.R. §§’s 731, 1201, 1208 et seq.

I. STATEMENT

This petition is about Petitioner's U.S. Constitutional Due Process rights in Office of Personnel Management (OPM) Investigation Case 01-904-277 and OPM's Lead Suitability Specialist Kimberly Truckley's (Appendix C, p. A 31, 36) December 27, 2004, final decision and the Lower Court's Jurisdiction. The MSPB and Federal Circuit long-standing refusal to acknowledge OPM's December 27, 2004, Final 5 C.F.R. § 731.501 OPM decision, Overturning and Vacating Karen McCue's May 16, 2001 (Appendix D-1, p. 38), initial negative suitability decision, removing 5 C.F.R. § 1201.3(a)(7) appellate jurisdiction. The Lower Court's may not substitute its Judgment for that of the agency. The Courts Original Jurisdiction attaches at the time an appeal is filed and remains open throughout the litigation.

Petitioner filed a new and independent appeal to MSPB on May 6, 2020. Petitioner appealed, OPM's December 27, 2004, Final 5 C.F.R. § 731 et seq. decision, Employment Practices, FRCP 60, 5 C.F.R. § 300.104; Prohibited Personnel Practices, 5 U.S.C. § 2302, VEOA, and USERRA MSPB on May 6, 2020. Petitioner has the right to judicial review and this Court and Lower Courts have jurisdiction. See U.S. Constitution, 5 U.S.C. § 702, § 704, § 706, § 7701, § 7703, Federal Rules of Civil Procedure 60, 5 U.S.C. § 4324, 5 C.F.R. § 1201 et seq.

Pro se Petitioner raises a question of bias from the Court below when the Lower Court have predicated all of its decisions on OPM recommendations. In the FIRST instance, OPM substituted a VACATED agency decision (App. D-1, p. A-38) in Federal Circuit 2005-3155 to obtain a favorable judgment,

“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.”

In the SECOND instance, Pro se Petitioner submitted OPM's December 27, 2004, new and material final decision (App. C, p. A 31, 36), Vacating the agency's May 16, 2001, 5 C.F.R. § 731.202(b) charges and initial decision establishing Petitioner's actual innocence. For the SECOND time, the Court of Appeals was in agreement with OPM's recommendation,

“we agree with OPM petitioner has not shown the court has Jurisdiction over his petition”,

in OPM Investigation Case 01-904-277 and Lead suitability Specialist Kimberly Truckley's December 27, 2004, final OPM decision. The Federal Circuit's inconsistency in its jurisdiction and pro agency bias towards the pro se litigants, used a claim processing procedure under 5 U.S.C. § 7703(b)(1), 28 U.S.C. § 1295(a)(9), and Fed. R. App. P. 25(a)(2)(A) to circumvent Review Jurisdiction of the Appellate Court and Lower Court's in this cause of action, is in direct conflict with Petitioner Constitutional 5th Amendment due process rights.

This Court has jurisdiction to review the 5 C.F.R. § 1201 et seq. jurisdiction at every level of the lower court's from OPM's Kimberly Truckley's December 27, 2004, final 5 C.F.R. § 731.501 decision (App. C, p. A 31, 36) in OPM Investigation Case 01-904-277, Federal Rules of Civil Procedure 60, and Petitioner's 5th Amendment due process violations. *See Cushman v. Shinseki*, 576 F.3d 1290 (F. Cir. 2009).

OPM subjected Gossage to double punishment (1998 and 2001) for the same 5 C.F.R. § 731.202 charges and 5 C.F.R. § 731.501 suitability determination in OPM Investigation Cases (97-900-648 and 01-904-277). OPM imposed disciplinary or adverse action more than once for the same misconduct, Petitioner's 1992 conviction. *Anderson v. U.S.P.S.*, 24 M.S.P.R. 488, 491 (1984), *aff'd*, 776 F.2d 1060 (Fed. Cir. 1985) (Table); *Adamek v. U.S.P.S.*, 13 M.S.P.R. 224, 226 (1982).

II. FACTUAL AND LEGAL BACKGROUND

A. May 8, 2020 - MSPB SE-0731-01-0261-L-3

Henry E. Gossage is an honorably discharged, service-connected disabled Vietnam Era veteran with a 1992 felony conviction. On January 27, 1998, OPM (OPM Case 97-900-648) disqualified and debarred Gossage until July 2000, from federal employment for (5 C.F.R. § 731.202) the 1992 conviction. After serving OPM's 1998 debarment, Petitioner reapplied for initial federal employment with OSHA. OPM's Suitability Specialist Karen McCue notified Petitioner (5 U.S.C. § 3318, 5 C.F.R. § 731.404, OPM Case 01-904-277, Appendix D, p. A 38-42) on May 16, 2001, was disqualified and debarred for a second time from federal employment on May 16, 2001, on the same 1992 conviction and 1998 OPM charges.

Petitioner appealed OPM's May 16, 2001 (5 C.F.R. § 731.501), negative suitability determination to the MSPB (SE-0731-01-0261-I-1). MSPB SE-0731-01-0261-I-2 (Appendix B 2-3, p. A 10-26) initial decision on April 22, 2002. The MSPB's initial decision became the split Board final decision on September 27, 2004.

ON April 21, 2011, Petitioner submitted a second Freedom of Information Act Request (FOIA) to OPM (Appendix C). On May 25, 2011, OPM Supervisory FOIA Specialist released new evidence, OPM Lead Suitability Specialist Kimberly Truckley (Appendix C, p. A 27-37) December 27, 2004, VACATED OPM's Karen McCue's May 16, 2001, initial negative suitability determination.

OPM's Lead Suitability Specialist Kimberly Truckley amended (Appendix C; p. A 31, 36) Suitability Specialist Karen McCue's May 16, 2001, 5 C.F.R. § 731.404 initial decision (Appendix D-1, p. A 38). The agency concealed Kimberly Truckley's December 27, 2004, amended 5 C.F.R. § 731.404 and final OPM determination, "Do Not Disclose Outside of OPM" (Appendix C, p. A 32, 37).

Truckley's new and final OPM suitability decision was discovered through Petitioner's April 21, 2011, Freedom of Information Act Request (FOIA) to OPM. On May 25, 2011, OPM Supervisory FOIA Specialist released OPM Lead Suitability Specialist Kimberly Truckley (Appendix C-1, p. A 26-31) amended OPM's Karen McCue's Investigation Record, included "DO NOT DISCLOSE OUTSIDE OF OPM". Truckley amended OPM's McCue's May 16, 2001, 5 C.F.R. § 731 et seq. suitability determination, vacating its two 5 C.F.R. § 731.202 charges. OPM DID NOT provide Petitioner with 5 C.F.R. § 731.404 or 5 U.S.C. § 3318 notification of Truckley's December 27, 2004, new and final suitability determination:

- a. OPM December 27, 2004, new suitability determination for OSH-00-87 and OSH-00-87-S-1 (Appendix C-1, p. A 27-32):
 - i. Final Determination Acceptable
 - ii. Eligibility reinstated during MSPB appeal
 - iii. Debarment rescinded during MSPB appeal

- b. OPM notified OSHA on December 27, 2004, of OPM's Truckley's new and final OPM determination (Appendix C-2, p. A 33-37):
 - i. Vacating Karen McCue's May 16, 2001, negative suitability decision and reinstating eligibility to all federal employment;
 - ii. Vacating OPM's Mark Enterline's November 30, 2000, pass over;
 - iii. Vacating OSHA November 17, 2000, request to pass over Gossage, a preference eligible veteran, 5 U.S.C. § 3318.

Petitioner filed a new and independent MSPB appeal on May 3, 2020, based on OPM Lead Suitability Specialist December 27, 2004, final decision, vacating OPM's Karen McCue's May 16, 2001, initial negative suitability decision in OPM Investigation Case 01-904-277. On May 8, 2020, the Western Regional Office referred its pending case, SE-0731-01-0261-L-3 to the Clerk of the Board, and this May 8, 2020 (Appendix B-1), the letter was appealed to the Federal Circuit on September 5, 2020. The Federal Circuit stated, "We agree with OPM that Mr. Gossage has not shown that this court has jurisdiction over his petition (Appendix A-1).

B. September 27, 2004 - MSPB SE-0731-01-0261-I-2^{1,2}

¹ OPM December 27, 2004, Final decision was concealed by OPM and OSHA and unavailable at the time OPM's May 16, 2001, decision was pending appeal. Lead Suitability Specialist Kimberly Truckley's New and Final OPM decision was discovered through Petitioner's April 21, 2011, Freedom of Information Act Request (FOIA) to OPM. On May 25, 2011, OPM Supervisory FOIA Specialist released OPM's December 27, 2004, Amended New and Final Decision, VACATING and reinstating Petitioner's Eligibility to all federal employment, including OSHA position OSH-00-87, and "DO NOT DISCLOSE OUTSIDE OF OPM". See Appendix C-1, p. A 26-31. OPM notified OSHA of its final December 27, 2004, VACATING Karen McCue's May 16, negative suitability decision.

² Lower Court Decision are all based on Karen McCue's VACATED May 16, 2001, initial negative suitability decision.

Petitioner appealed OPM's May 16, 2001, negative suitability determination to the MSPB (SE-0731-01-0261-I-1). MSPB SE-0731-01-0261-I-2 (Appendix B 2-3) initial decision on April 22, 2002, became the split board MSPB final decision on September 27, 2004, this decision was appealed to the United States District Court Western District of Washington at Tacoma on October 8, 2004 (04-5669RJB).

OPM argued and submitted to the USDCWWa, Karen McCue's May 16, 2001, in support of its 5 C.F.R. § 1201 et seq. jurisdiction transfer USDCWWa case to the Federal Circuit (2005-3155) on March 24, 2005.

On January 25, 2006, in abeyance with OPM's request, The Federal Circuit Court of Appeals stated, "we agree that remand of this appeal is appropriate. The dismissal is vacated and the case is remanded to the MSPB for further proceedings consistent with this opinion".^{1,2}

On July 8, 2008, on remand from the Federal Circuit, the MSPB entered judgment affirming OPM's Karen McCue's May 16, 2001, VACATED^{1,2} negative suitability determination, SE-0731-01-0261-I-5. The Board affirmed on March 24, 2009, stating, "we conclude that there is NO NEW, previously unavailable evidence" and affirmed the initial decision.^{1,2}

REASONS FOR GRANTING THE PETITION

"It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause". *Marbury v. Madison*, 5 U.S. 137, 175 (1803); *Brown v. Keene*, 33 U.S. 112 (1834). OPM's usurpation of power of the Lower Court's through trickery,

deception, or fraud by substituting a vacated decision to obtain a favorable judgment that is void. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

Jurisdiction is a threshold issue before the court and thus has broader power to decide its own right to hear the case than it has when the merits of the case are reached. *Bellecourt v. United States*, 994 F.2d 427, 430 (CA 8 1993). The federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review". *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 95 (1998); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). If the record discloses that the lower courts was without 5 C.F.R. § 731.501^{1, 2} jurisdictions, this court will notice the defect.

The Lower Court's waived and **did not** raise or consider 5 C.F.R. § 1201.3(a)(7) (2001) subject matter jurisdiction in its dismissal. The Lower Courts Jurisdiction DEFECTS³ remain, violating Petitioner's due process rights.

This court has jurisdiction to "set aside any agency action", 5 U.S.C. § 7703(c). *Billy G. Asberry v. U.S.P.S.*, 692 F.2d 1378 (F.Cir. 1982). Concealment of

³ "may not confer subject matter jurisdiction upon the federal courts by stipulation, and lack of subject matter jurisdiction cannot be waived by the parties or ignored by the court." *Pacific Nat'l Ins. Co. v. Transport Ins. Co.*, 341 F.2d 514, 516 (CA8), *cert. denied*, 381 U.S. 912, 85 S. Ct. 1536, 14 L. Ed. 2d 434 (1965). *See also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25, (1989) (Stevens, J., concurring) ("may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent," *Mitchell v. Maurer*, 293 U.S. 237, 244, (1934). invoke federal jurisdiction simply by consent," *Mitchell v. Maurer*, 293 U.S. 237, 244, (1934).

material evidence by the prevailing party, OPM's Truckley's December 27, 2004, final decision, resulting in a Judgment tainted by fraud, *Callen v. Penn. Railroad Co.*, 332 U.S. 625, 630 (1948); *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944).

IF the Lower Courts DID NOT had knowledge of OPM's December 27, 2004, 5 C.F.R. § 731.501 Final Decision, THEN OPM's "inequitable conduct" perpetrated Fraud on the Court. *Therasense, Inc. v. Becton, Dickinson and Co.*, 649 F.3d 1276 (F.Cir. 2011). The "Inequitable Conduct Doctrine" was developed by this Court, where OPM acted knowingly and deliberately with the purpose of defrauding the Petitioner and the Lower Courts. *See Precision*, 324 U.S. 806, 815-16 (1945) (assertion of patent known to be tainted by perjury); *Hazel-Atlas*, 322 U.S. 238, 245 (1944) (a "deliberately planned and carefully executed scheme to defraud" the PTO involving both bribery and perjury); *Keystone*, 290 U.S. 240, 246-47 (1933), (bribery and suppression of evidence).

IF the Lower Court had knowledge of OPM's December 27, 2004, 5 C.F.R. § 731.501 decision, then the Lower Courts are in error in substituting its judgment for that of the agency. The Lower Court, "**may not** supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). The reviewing court MAY NOT "substitute its judgment for that of the agency." Due Process is violated, when the Court substituted its judgment for OPM's Lead Suitability Specialist Kimberly Truckley's December 27,

2004, 5 C.F.R. § 731.501 decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

The Appellate Court failed to consider ALL bases for Federal Circuit, MSPB and USDC jurisdiction or lack thereof, resulting from OPM's December 27, 2004 decision. *Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1378 (F.Cir.2003); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); "we must be satisfied that the transferee court has jurisdiction to hear the case" *Gonzales & Gonzales Bonds and Insurance Agency v. Dept. Of Homeland Security*, 490 F.3d 940, 944 (F.Cir. 2007). The Appellate Court erred in failing to look beyond the inartful substance in Pro se pleadings to circumvent jurisdiction. *Brazos Elec. Power Coop. v. United States*, 144 F.3d 784, 787 (F.Cir.1998).

This Court strongly implied that certain due process protections apply to the adjudicative administrative proceedings, *Richardson v. Perales*, 402 U.S. 389, 401-02 (1971). The Lower Courts unexplained inconsistency between its OPM's McCue's May 16, 2001, and OPM's Truckley's December 27, 2004 decisions is an arbitrary and capricious change from agency practice under the Administrative Procedure Act. see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983). OPM is bound to follow and abide by its regulations. *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

Due process is violated when altered evidence is submitted in a proceeding where it infects the jurisdiction and proceedings with fundamental unfairness is supported, "Do Not Disclose Outside of OPM", 5 U.S.C. § 2302(b)(13). Concealment

evidence is sufficient to take a second look at Henry Gossage's administrative records and judgment of the Lower Court in OPM Investigation 01-907-277 and 98-900-645. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Cushman v. Shinseke*, 576 F.3d 1290, 1300 (F. Cir. 2009). *Cleveland Bd. of Educ. v Loudermill*, 470 U.S. 532, 541, 546 (1985).

A fundamentally fair adjudication within 5 C.F.R. § 731 et seq. framework is constitutionally required in all cases, and not just in the large majority. *Cf. Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994).

The Lower Courts Denying Petitioner's Constitutional "Right to review" (5 U.S.C. § 702) and Reopen (5 C.F.R. § 1201.117-118, 5 U.S.C. § 7703(c)) OPM's Kimberly Truckley's December 27, 2004, 5 C.F.R. § 731.501 decision. *Califano v. Sanders*, 430 U.S. 99, 109 (1977). This is not one of those rare instances where the Lower Courts denial of an appeal is challenged on jurisdiction and constitutional grounds.

CONCLUSION

A cursory review of the jurisdiction in the Lower Court's Judgment has NO mention of OPM's December 27, 2004, final suitability decision. The Lower Courts basis for its jurisdiction was OPM's May 16, 2001, initial determination, VACATED by OPM. The Appellate Court has a special obligation to notice defects in the jurisdiction from the Lower Courts. "If the record discloses that the lower court was without jurisdiction this court will notice the DEFECT. When the Lower Federal Court lack[s] jurisdiction, **we have jurisdiction on appeal**, not of the merits but merely for the purpose of correcting the error of the lower court in

entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936). Every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review", *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332 (1977) (standing).

In considering Writ for Certiorari, procedural latitude is appropriate in Pro se Veteran pleading are held "to less stringent standards than formal pleadings drafted by lawyers." *Matthews v. United States*, 13-5109 (Fed. Cir. 2014); *Roche v. United States Postal Serv.*, 828 F.2d 1555, 1558 (Fed. Cir. 1987) ("Pro se petitioners are not expected to frame issues with the precision of a common-law pleading."); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). The Federal Circuit jurisdiction conflicts with this Court's recent decision *Perry v. Merit Systems Protection Bd.*, Docket 16-399; 2017 U.S. LEXIS, 4044.

This Court has jurisdiction to review or reopen any Lower Court decision at any time. *see* FRCP 60(b), 5 U.S.C. § 7701(e)(1)(B), 5 C.F.R. § 1201.117-120 (2000). *Vesser v. Office of Personnel Management*, 67 M.S.P.R. 239, 242, 244, *aff'd*, 73 F.3d 381 (F. Cir.1995). The Lower Courts previous affirmance does not preclude consideration of Kimberly Truckley's December 27, 2004, final decision showing OPM perpetrated a fraud, where reopening, or reconsideration is appropriate. *Standard Oil Co. v. United States*, 429 U.S. 17, 19 (1976) (per curiam).

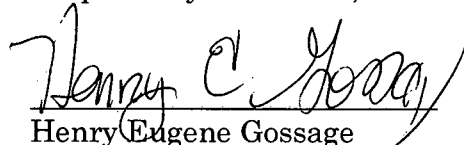
The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our

decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *Camreta v. Greene*, 563 U.S. 692 (2011); *Bancorp v. U.S. Bonner Mall*, 513 U.S. 18 (1994).

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

April 19, 2021

Respectfully submitted,


Henry Eugene Gossage
Pro se Veteran