

No. _____

In The
Supreme Court of the United States

HENRY E. GOSSAGE,
Petitioner,
v.

OFFICE OF PERSONNEL MANAGEMENT,
U.S. DEPARTMENT OF LABOR
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the
NINTH CIRCUIT

Henry E. Gossage
Petitioner, Pro Se
9421 Johnson Pt. Lp. NE
Olympia, WA 98516
360-438-1069
hegossage@gmail.com

QUESTIONS PRESENTED

1. Whether this appeal is frivolous, based on OPM's new, material, and final December 27, 2004, "Request for Suitability Determination"?
2. Whether the Merit Systems Protection Board, Ninth Circuit Court of Appeals, or the U.S. District Court has Statutory Jurisdiction to Reopen MSPB SE-0731-01-0261-I-2 Final Decision at any time, pursuant to 5 U.S.C. §7701(e)(1)(B) or 5 C.F.R. § 1201.118?
3. Whether the Office of Personnel Management's (OPM) Agency's December 27, 2004, "Request for Suitability Determination" amending OPM's May 16, 2001 "Request for Suitability Determination" is new, material, and an undisclosed final determination constituting an "unusual or extraordinary circumstances" warranting reopening MSPB SE-0731-01-0261-I-2?
4. Whether Henry Gossage's April 25, 2011, Freedom of Information Act (FOIA) Request to OPM disclosing for the first time the Agency's Amended Decision on December 27, 2004, constitutes an "unusual or extraordinary circumstances" sufficient explanation for the untimeliness in seeking an extension of time to file his Pro se brief or the motion?

PARTIES TO THE PROCEEDINGS

Petitioner, Henry E. Gossage is the Pro Se Veteran Appellant in Ninth Circuit Court of Appeals 2022-35643..

Office of Personnel Management and U.S. Department of Labor is the Respondents in the case and actions noted above. No other relevant parties are represented in the instant matter.

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PETITION FOR A WRIT OF CERTORARI

Petitioner Henry Eugene Gossage respectfully petitions for a writ of certiorari to review the NINTH Circuit Court of Appeals reopening and a review of the complete record, Henry Gossage's opening brief received on and response to the court's October 12, 2022 order. The lower court's concluded Henry Gossage's appeal is frivolous.

OPINIONS BELOW

The U.S. Court of Appeals for the Ninth Circuit 2022-65643 (December 9, 2022); U.S. District Court Western Washington at Tacoma, 2004-cv-05569RJB (Dkt. 69, Dkt. 47); and Merit Systems Protection Board SE-0731-01-0261-I-2 (September 27, 2004) initial/final ORDERS; and November 27, 2019, LETTER from the Merit Systems Protection Board is attached.

STATEMENT OF JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

The United States Court of Appeals for the NINTH Circuit denied Petitioner's Constitution and Statutory right to reopen this 5 C.F.R. 731 et seq. suitability case, based on new and material discovered evidence obtained through Henry Gossage Freedom of Information Act Request to OPM, that changes the jurisdiction and outcome of this 5 C.F.R. 731 et seq. suitability case from inception.

The Court December 9, 2022, ORDER concluded, Henry Gossage's "appeal is FRIVOLOUS", and no further filing will be entertained in this closed case. **DISMISSED**

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. CONSTITUTION 5TH AMENDMENT

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law, without just compensation."

5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 706 - Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S. Code § 7701

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.

(e)(1)(B) the Board reopens and reconsiders a case on its own motion.

5 U.S. Code § 7702

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who— (A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and (B) alleges that a basis for the action was discrimination prohibited by— (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or (v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph, the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section

5 U.S. Code § 7703

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

28 U.S.C. Appendix- Federal Rules of Civil Procedure 60

60(b) Grounds for relief, on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (2) newly discovered evidence;
- (3) fraud; misrepresentation, or misconduct;
- (4) the judgment is void;
- (6) any other reason that justifies relief.

60(d) other powers to grant relief:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
- (3) set aside a judgment for fraud on the court.

5 U.S.C. § 3318

When the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office. In the case of a preference eligible described in paragraph of this subsection, the functions of the Office under this subsection may not be delegated.

5 U.S.C. 1204

The Merit Systems Protection Board shall—, (1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation.

5 C.F.R. § 731.304

The decision shall be in writing, dated, and inform the respondent of the reasons for the decision. The respondent shall also be informed that an adverse decision can be appealed in accordance with subpart E of this part. OPM shall also notify the respondent's employing agency of its decision.

5 C.F.R. § 731.501(a)

Appeal to the Merit Systems Protection Board. An individual who has been found unsuitable for employment may appeal the determination to the Merit Systems Protection Board.

5 C.F.R. § 1201.3

(a)(7) MSPB Jurisdiction, disqualification of an applicant because of a suitability determination, § 731.501(a). (2000 Edition)

(b)(1) Appeals under the Uniformed Services Employment (USERRA) and Reemployment Rights Act and the Veterans Employment Opportunities Act (VEOA). (2000 Edition)

5 C.F.R. § 1201.118

Board reopening of case and reconsideration of initial decision. The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part. (2000, 2004, 2011 Edition)

I. STATEMENT OF THE CASE

Henry Gossage has a statutory right to review OPM's December 27, 2004 (Appendix C, D, E), amended and new final decision under the U.S. Constitution V due process clause, takings clause, and liberty interests. OPM's new and finale decision supports reopening, 5 U.S.C. §7701(e)(1)(B) or 5 C.F.R. § 1201.118.

Given that the United States Office of Personnel Management (OPM) has exclusive 5 U.S.C. §3318 statutory authority to render an employment eligibility and suitability determination of a preference eligible veteran under 5 C.F.R. § 731 et seq. ONLY OPM has this sole authority to amend its own 5 C.F.R. § 731.304 suitability decision at any time. In fact, OPM AMENDED Karen McCues' May 16, 2001 (Appendix E), "Request for Suitability Determination" on December 27, 2004 (Appendix C,D, and E).

The MSPB has appellate jurisdiction under 5 C.F.R. § 731.501 and 5 C.F.R. § 1201.3 to review OPM's suitability decisions, 5 C.F.R. § 731.304. The MSPB has jurisdiction and authority to reopen **any MSPB decision at any time**, 5 U.S. Code § 7701(e)(1)(B) or 5 C.F.R. § 1201.118. The MSPB has additional jurisdiction to judicially review OPM's December 27, 2004, amended, new and final decision and take corrective action is subject to review for which there is no other adequate remedy, 5 U.S. Code § 704.

The U.S. District Court and the Ninth Circuit Court of Appeals has the authority to review the September 27, 2004, MSPB final SE-0731-01-0261-I-2 decision (Appendix A and C), including review of **all aspects** of an agency's procedures and decision, including OPM's December 27, 2004, amended and new decision, and reopening SE-0731-01-0261-I-2 at any time, 5 U.S. Code § 7703(a)(1).

What is before the Court is OPM's December 27, 2004 (Appendix C-E), new and final "Request for Suitability Determination" decision, amending, overturning and vacating Karen McCues' May 16, 2001

(Appendix E), OPM's 5 C.F.R. § 731.304 negative "Request for Suitability Determination", employment disqualification and debarment of a preference eligible veteran (5 U.S. Code § 3318).

The government failed to disclose this December 27, 2004, amended and new OPM decision to the U.S. District Court, MSPB, Petitioner, and Henry Gossages' counsel Aaron Owada. The government obtained its judgment against Petitioner that were based on an overturned and vacated May 16, 2001 (Appendix E), "Request for Suitability Determination" OPM decision. The Merit Systems Protection Board, U.S. District Court Western Washington Judge Bryan, and the Ninth Circuit Court of Appeals refused to consider this new and material OPM decision by the agency's Kimberly Truckley's December 27, 2004, final OPM decision or take corrective action under 5 U.S. Code § 7703(e)(1)(B) or 5 C.F.R. 1201.118 (2004, 2011), where the MSPB, U.S. District Court Western Washington at Tacoma, and Ninth Circuit Court of Appeals has the statutory authority to reopen any decision at any time.

OPM suitability supervisor Kimberly Truckley on December 27, 2004 (Appendix E), amended Karen McCues' May 16, 2001 (Appendix E), 5 C.F.R. 731 suitability decision. This is a new and material decision by OPM's Kimberly Truckley, changing the outcome of this 5 C.F.R. 731 suitability case jurisdiction and Kimberly Truckley's amended determination is not part of the official record of appeal below (see Appendix C, pgs. A56-a66).

Petitioner has a right to judicial review from OPM's December 27, 2004, "Request for Suitability Determination" (Appendix C-E) and the record of appeal below by this Court,

5 U.S. Code § 702, Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S. Code § 7703(1), Any employee or applicant for employment adversely affected or aggrieved by a final order or

decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

This Supreme Court has the same statutory authority as the Court of Appeals, U.S. District Court, and MSPB to reopen and take a second look at any decision at any time,

5 U.S. Code § 7701(e)(1)(B), the Board reopens and reconsiders a case on its own motion.

5 C.F.R. § 1201.118, Board reopening of case and reconsideration of initial decision. The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part. (2000, 2004, 2011, 2012 Editions)

The governments December 27, 2004, DO NOT DISCLOSE OUTSIDE OF OPM" (Appendix C and D) supports petitioner's claim, this amended OPM final determination is an undisclosed and material OPM decision constituting a Brady violation, supporting certiorari and reopening this case and the underlying September 27, 2004, SE-0731-01-0261-I-2 MSPB final decision.

II. FACTUAL BACKGROUND

OPM's Investigation Case 01904277 on Petitioner, resulted in two separate and completely different "Request for Suitability Determination" OPM 5 CFR § 731 et seq. decisions. Appellate Jurisdiction is GRANTED in Karen McCues' May 16, 2001, 5 CFR § 731 et seq. and 5 CFR § 1201 et seq. Appellate Jurisdiction is REMOVED in Kimberly Truckleys' December 27, 2004, 5 CFR § 731 et seq. and 5 CFR § 1201 et seq. Appellate Jurisdiction is removed

Karen McCues' May 16, 2001, "Request for Suitability Determination" employment disqualification and debarment (App. E) initial decision and, Kimberly Truckleys' December 27, 2004 (App. C-E) new and

final OPM "Request for Suitability Determination", employment eligibility reinstatement and overturning/vacating Karen McCues' May 16, 2001 (Appendix E), initial decision.

The factual and legal background in this case is based on OPM's Investigation Case 01904277 and is outlined in the lower court's prior decisions; *see* 1.) SE-0731-01-0261-I-2 (App. A and C) 2.) U.S. District Court Western Washington 2004-5669RJB (App. A-5, pg. a-12); 3.) Federal Circuit 2005-3155 (App. A-4, pg. a-7). These Court and MSPB decisions are based solely on OPM's Investigation Case 01904277 and Karen McCues' May 16, 2001, "Request for Suitability Determination" initial decision (Appendix E).

Petitioners' Freedom of Information Act (FOIA, Appendix C and D) to OPM on May 25, 2011, disclosed for the first time in OPM Investigation Case 01904277 an undisclosed new and material December 27, 2004, "Request for Suitability Determination" decision by OPM suitability supervisor Kimberly Truckley (KT).

On December 27, 2004, in OPM Investigation Case 01904277, OPM suitability supervisor Kimberly Truckley amended (App. C, D, E) Karen McCues' May 16, 2001 (Appendix E), decision. Kimberly Truckley (KT) overturned and vacated Karen McCues' May 16, 2001, "Request for Suitability Determination" decision on December 27, 2004 (Appendix C-E). OPM's KT reinstated Petitioner employment eligibility reinstated during MSPB appeal, debarment rescinded during MSPB appeal, with a final determination Acceptable. OPM notified USDOL, the requesting agency of this amended new and final decision, 5 U.S.C. § 3318. Petitioner was never notified by the agencies of this new OPM decision, "DO NOT RELEASE OUTSIDE OF OPM" (Appendix C-D), pursuant 5 U.S.C. § 3318 and 5 C.F.R. § 731.304. The Court has never made a decision on the MERITS in this case, based on OPM's December 27, 2004, new and final decision.

III. REASONS TO GRANT WRIT FOR CERTIORARI

These are the following reasons to grant this writ for certiorari for reopening under 5 U.S.C. §7701(e)(1)(B) or 5 C.F.R. § 1201.118.

- A. Henry Gossage appeal, based on OPM's Truckley's December 27, 2004, 5 C.F.R. § 731 et seq. amended and new "Request for Suitability Determination" does not meet the criteria as frivolous appeal;
- B. The MSPB (App. A) will not accept further filings related to OPM's May 16, 2001, "Request for Suitability Determination" appeal;
- C. OPM amended its May, 16, 2001 (Appendix E), initial decision on December 27, 2004 (Appendix C-E);
- D. OPM's "DO NOT DISCLOSE OUTSIDE OF OPM" (App. C-D), supports a Brady violation by concealment or non-disclosure of its final December 27, 2004, amended, new and final OPM decision;
- E. OPM's December 27, 2004 (App. C-E), "Request for Suitability Determination" decision is a new, material, and final OPM "Request for Suitability Determination", changing appellate jurisdiction and outcome of SE-0731-01-0261-I-2 and USDCWWa 2004-5669RJB;
- F. The Merit System Protection Board stated, "The Board's regulations do not provide for a request for reconsideration of the Board's final decision; thus, there is no further right to review of this appeal by the Board. As set forth in the last letter sent to you by this office on November 27, 2019, the Board will not respond to further requests to reconsider this matter."
- G. The USDCWWa, Court of Appeals for the Ninth Circuit stated this appeal is frivolous, even after Henry Gossage produced OPMS's December 27, 2004, new, material, and undisclosed "Request for Suitability Determination" evidence obtained from OPM (Appendix C-E).

This is a unique Pro se case where an agency makes an initial decision and subsequently amends that decision with a new decision, while the original appeal is pending before the court, without disclosing this new decision which affects the case and appellate jurisdiction.

What are the criteria to reopen any decisions 5 U.S.C. § 7701(e)(1)(B) or 5 C.F.R. § 1201.118, especially where appellate jurisdiction was originally invoked on appeal and where MSPB and Court's appellate jurisdiction is now in question, based on its December 27, 2004, new and material "Request for Suitability Determination" (Appendix C-E). Whether this new uncovered OPM decision after a court opinion has been rendered or "DO NOT DISCLOSE OUTSIDE OF OPM" constitutes an unusual or extraordinary circumstances warranting reopening or a second look?

Petitioner produced evidence from a May 25, 2011, OPM FOIA request to the Agency, the Agency misrepresented OPM's December 27, 2004, "Request for Suitability Determination" final decision on appeal. See *Hundley v. Office of Personnel Management*, 40 M.S.P.R. 162, 166 (1989). "when a claimant presents a non-frivolous allegation that the marriage on which OPM based its first determination was invalid, the Board may look behind OPM's or original annuity determination). After OPM Amended and VACATED/OVERTURNED Karen McCues May 16, 2001, "Request for Suitability Determination" initial decision by OPM Supervisor Kimberly Truckley on December 27, 2004, MSPB Appellate Jurisdiction was removed. After December 27, 2004, pursuant 5 C.F.R. § 1201.3, the Merit Systems Protection Board, U.S. District Court Western Washington, and the Court of Appeals for the Ninth Circuit had/no appellate jurisdiction to review OPM's May 16, 2001, "Request for Suitability Determination" initial decision.

Congress explicitly granted the full Merit Systems Protection Board, U.S. District Court Western Washington, Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court statutory authority to **reopen any initial decision** upon its own motion. **See 5 U.S.C. § 7701(e)(1)(B) (1988).**

This Court's statutory authority is the same authority as the Merit Systems Protection Board, implemented in 5 C.F.R. § 1201.118 which states that the full board may reopen an appeal and reconsider a decision of an administrative judge on its own motion at any time. *See Dunning v. National Aeronautics and Space Admin.*, 231 U.S. App. D.C. 132, 718 F.2d 1170, 1173 (CADC 1983) (Scalia, J.); *Brenneman v. OPM*, 439 F.3d 1325, 1328 (F.Cir. 2006).

The Supreme Court has held that the affirmance of a district court's judgment by an appellate court does not restrict the district court's authority to entertain a Rule 60(b) reopening or extension of time. *Standard Oil Co. v. United States*, 429 U.S. 17, 19 (1976) (per curiam), **"the mandate of the appellate court, because that mandate relates only to the record and Issues that were before the appellate court, and does not purport to deal with possible later events"**.

The Court's authority to reopen an appeal has uniformly been held to be discretionary, and required only in unusual or extraordinary circumstances. *Blackmer v. Department of the Navy*, 47 M.S.P.R. 624, 632 (1991). Moreover, the Board will exercise its discretion to reopen only if good cause is shown, such as an **intervening event** (court, Board or Office of Workers' Compensation Programs decision), or the discovery of misrepresentation or fraud after the issuance of the initial decision. See, e.g., *Payne v. U.S. Postal Service*, MSPB Docket Nos. CH-0752-91-0557-R-1 and CH-0752-92-0577-R-1, slip op. at 4 (Feb. 8, 1996) (reversal of the appellant's conviction, after the Board's decision sustaining his removal based on the conviction, was sufficient to warrant reopening);

Nonetheless, finding that new and material evidence was available, the Board reopened the appeal on its own motion and reversed the initial decision. Specifically, it found that by decision dated August 21, 1990, OWCP had vacated its January 17, 1990 decision. Because it was that decision on which the administrative judge had based his finding of

entitlement. *Welber v. U.S. Postal Service*, 62 M.S.P.R. 98, 103 (1994)

Baugh v. Office of Personnel Management, 49 M.S.P.R. 58, 62-63 (1991) (reopening found warranted where applicant for survivor annuity demonstrated that her former husband misrepresented that he had remarried). "Clear and material legal error" based on a change in the controlling decision or law is accepted as a standard for granting reopening, see *Special Counsel v. Sullivan*, 7 M.S.P.R. 357, 360 (1981). A case may be reopened "in the interests of justice," *Parkinson v. U.S. Postal Service*, MSPB Docket No. BN0752880099-I-1, slip op. at 7 (July 16, 1993),

The MSPB, U.S. District Court, and Ninth Circuit has authority to reopen and reconsider a case on its own motion to reconsider this case because OPM's December 27, 2004, final "Request for Suitability Determination" is new, material, and undisclosed that implicates the appellate jurisdiction, particularly where the evidence is of such weight as to warrant a different outcome, see *Carey v. U.S. Postal Service*, 50 M.S.P.R. 359, 361 (1991); *Sanson v. Office of Personnel Management*, 8 M.S.P.R. 185, 188 (1981). See *Rysavy v. Department of Housing and Urban Development*, 28 M.S.P.R. 263 (1985). Similarly, reopening may be appropriate, in the interests of justice, where the evidence is of such weight as to warrant a different outcome. *Parkinson v. U.S. Postal Service*, 58 M.S.P.R. 393, 397 (1993).

This Court and other Circuits have HELD, a Court may not exceed its own Jurisdiction, any order that exceeds its authority is void, voidable, or a legal nullity, and can be attacked in any proceeding in ANY Court (Federal Rules of Civil Procedure 60); an agency must follow its own policy and procedures (*Accardi Doctrine*, U.S.C.A. 5). This Court, MSPB, and Ninth Circuit has conclusively and affirmatively held authority to sua sponte reopen ANY MSPB decision (5 C.F.R. § 1201.118, 5 U.S.C. § 7701(e)(1)(B)).

Under the MSPB's regulations, Henry Gossage may even now ask the MSPB, U.S. District Court, and Ninth Circuit to REOPEN, based on the expungement of OPM's May 16, 2001, "Request for Suitability Determination" on December 27, 2004 (Appendix C-E), or the Board may reopen "on its own motion." 5 CFR § 1201.118 (2001). *Postal Service v. Gregory*, 534 U.S. 1, 16 (2001). The Supreme Court stated in *Gregory*, "There is every reason to believe that the Board would

reopen to reconsider a decision that credited a prior disciplinary action later overturned in arbitration. Notably, the Postal Service agrees that the Board may invoke its provision for reopening "in the event that the employee's prior disciplinary record has been revised as the result of a successful grievance." Brief for Petitioner 28; see also Tr. of Oral Arg. 22 (counsel for the Postal Service confirmed Service's recognition that "the [B]oard's regulations permit the [B]oard to reopen any case at any time to reconsider it in light of a grievance which may have proved successful").

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.

Gregory did not bring to the Board's attention her successful grievance of the Postal Service's first disciplinary action, *i. e.*, a letter of warning dated May 13, 1997, based on the April 7, 1997, incident, see *ante*, at 4; App. 43, 47-48. Under the MSPB's regulations, she may even now ask the Board to reopen based on the expungement of that action, or the Board may reopen "on its own motion." 5 CFR § 1201.118 (2001); see Tr. of Oral Arg. 26 (counsel for the Postal Service acknowledged that successful grievance of first disciplinary action "could have been brought to the attention of the [B]oard and still could be today"). Gregory may also bring to the Board's attention any revision resulting from successful *17 grievances of the Postal Service's second and third disciplinary actions, *i. e.*, the seven-day suspension ordered on June 7, 1997, see *ante*, at 4; App. 41-42, 45-46, and the fourteen-day suspension ordered on August 7, 1997, see *ante*, at 4; App. 38-40.

The Supreme Court stated, "the reviewing court MAY NOT substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The MSPB and Courts below permitted the Agency to substitute Karen McCues' May 16, 2001, initial negative suitability 5 CFR § 731 et seq. decision (Appendix E) for Kimberly Truckleys' amended and final December 27, 2004, 5 CFR § 731 et seq. final decision (Appendix C-E). This prejudicial suppression of Kimberly Truckleys' favorable December 27, 2004, OPM's amended and final decision is a fundamental due process violation. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The alteration of OPM decisions (May 16, 2001, and December 27, 2004) for submission are material for due process purposes where there is a high "reasonable probability of a different result" absent those alterations. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

This Court stated, a fundamentally fair adjudication is constitutionally required in all cases, the admission of improper evidence is a denial of due process where it infects the proceedings with fundamental unfairness. *Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994). The presentation of improperly altered material evidence has been found to constitute a due process violation in analogous cases. *See, e.g., Grillo v. Caughlin*, 31 F.3d 53, 56-57 (CA2 1994)

The "Agency's Misrepresentation of facts on which an appellant might base an appeal constituted good cause for waiver of the time limit." (*see* Appendix E) *Shubinsky v. United States*, 488 F.2d 1003, 1006 (1973).

IV. CONCLUSION

It is without question OPM Lead Supervisor Adjudication Specialist Kimberly Truckley vacated and expunged Karen McCues' May 16, 2001 (Appendix E), negative "Request for Suitability Determination" with a new and amended decision by Kim Truckley on December 27, 2004 (Appendix C-

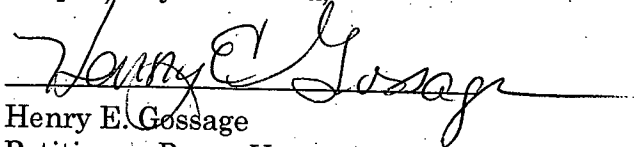
E), is a major change in the controlling facts warranting reopening. See *Payne v. U.S.P.S.*, 69 M.S.P.R. 503, 506 (1996); *Czubinski v. Treasury*, 76 M.S.P.R. 552 (1997); *Kissel v. U.S.P.S.*, 42 M.S.P.R. 154 (1989). This appeal IS NOT FRIVOLOUS as the Ninth Circuit and District Court and should be reversed

In Conclusion Four major U.S. Supreme Court cases support this writ of certiorari and reopening *Postal Service v. Gregory*, 534 U.S. 1 (2001); *Brady v. Maryland*, 373 U.S. 83 (1963); *Romano v. Oklahoma*, 512 U.S. 1 (1994); and *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

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

Dated: February 10, 2023

Respectfully submitted,



Henry E. Gossage
Petitioner, Pro se Veteran
9421 Johnson Pt. Lp. NE
Olympia, WA 98516
360-438-1069
hegossage@gmail.com