

No. \_\_\_\_\_

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In the Supreme Court of the United States

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DANIEL A. GROVER

*Petitioner,*

v.

*OFFICE OF PERSONNEL MANAGEMENT,*

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Whether the deference standard regarding federal agencies interpretation of their own regulations must continue in the light of the admission by the Office of Personnel Management (OPM) that if its method of calculating Petitioner's average pay by use of its own devised "deduction method" not authorized by any statute ever passed by any Congress in the entire history of the United States, results in a figure that differs from actual average pay received by Petitioner then OPM's figure would be wrong.

The United States Court of Appeals decision in the earlier phase of this case, *Grover v. OPM*, 828 Fed. 3d 1383 (2016), a precedential decision, so held, and sent the case back to MSPB for calculation of damages. But when the case was heard by the Administrative Judge (AJ) OPM not only submitted the discredited CFR, being 5 C.F.R. 575.209(d) which differs from the statutes it purported to interpret, being 5 U.S.C. 8331(4) and (5), but it added 19 C.F.R 24.16(b)(14) which also differed from the statutes it purported to interpret, being 5 U.S.C. 8331 (3) and 5 U.S.C. 5545(c)(2).

For the reasons cited herein, must deference be given any longer to any regulation ever adopted by OPM unless OPM proves that the regulation is supported by the statute it pretends to interpret properly.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, a retired former employee of the United States Customs and Border Patrol, part of the Department of Homeland Security, “the largest law enforcement agency in the United States”, was a law enforcement officer (Appx24) who was decorated for his work by his agency, (Appx25). He retired in 2008 and has been trying to get Respondent to correct his annuity for more than ten years in the face of Respondent’s adoption of numerous CFR’s which were not authorized by any statute ever passed by any Congress in the entire history of the United States.

OPINIONS BELOW

The opinion of the MSPB Administrative Judge is reproduced in the appendix hereto (Appx1). The decision, which did not contain an opinion, of the Federal Circuit Court of Appeals was entered on April 24, 2019 and reproduced in the appendix hereto (Appx18).

JURISDICTION

Jurisdiction is by writ of certiorari to the United States Court of Appeals for the federal Circuit.

## STATUTORY PROVISIONS INVOLVED

5 U.S.C. 8331(3), (4) and (5) and 5 U.S.C. 5545(c)(2) describe exactly how to calculate the amount of a federal retirement annuity, and what must be included in said calculation. 5 C.F.R. 575.209(d) and 19 C.F.R. 24.16(b)(14) which differ from the statutes they purport to interpret.

## INTRODUCTION

The court below upheld the decision of the MSPB Administrative Judge without issuing an opinion, despite the fact that said opinion was specifically based on two C.F.R's that have no statutory authority and that contradict the very statutes that they purport to interpret. The court also ignored the fact that Respondent failed to include a very substantial amount of Petitioner's earnings based on its conclusion, unsupported by a shred of evidence, and totally in contradiction of evidence specifically accepted by the court below, in Petitioner's position description, Appx24, GS-1895, specifically included in Chapter 83, Civil Service Retirement Section 8331 by definition at 5 U.S.C. 8331(31) which specifically includes an individual (such as Petitioner) "who holds a position within the GS-1895 job series...."



## STATEMENT OF THE CASE

## ARGUMENT

The Initial Decision is also wrong because it is based on two OPM Regulations adopted without statutory authority from any Congress in the history of the United States, cited by the Administrative Judge at page 8 of the Initial Decision Appx8, and on the very same Regulation ruled wrong in the earlier iteration of this case, being the "deduction" method. These two are 5 C.F.R. 575.209(d) (stating relocation incentive not included in base pay, thereby removing from retirement calculations) and 19 C.F.R. 24.16(b)(14) (explicitly excluding premium pay differential from retirement benefits calculations) cited by the Administrative Judge (AJ) at page 8 of the Initial Decision as the reason for the decision that Daniel Grover had no damages. But a diligent search revealed that there never was any statute ever passed by any Congress authorizing either of these two Regulations both of which directly contradict the actual controlling statutes passed by Congress as follows.

5 U.S.C. 8331 (3) "basic pay" includes: (D):  
with respect to a law enforcement officer,  
premium pay under section 5545(c)(2)....

And 5 U.S.C. 5545(c)(2) specifically includes  
"regularly scheduled overtime, night, and Sunday  
duty, and for holiday duty all of which OPM  
illegally argued were not included in basic pay

citing only its own illegal Regulations to the AJ. 5 U.S.C. 5724(a) provides for "Relocation expenses of employees transferred or reemployed". 5 C.F.R. 575.209(d) states, in direct contradiction of the statute, that:

A relocation incentive is not part of an employee's rate of basic pay for any purpose (emphasis in original).

In so doing, the AJ allowed the reduction in Petitioner's High-Three (Appx 8, bottom paragraph) and found that there were no damages. But, \$67,969.00 must be added back to the High-Three in order to calculate properly Mr. Grover's annuity. Since the formula used to determine the basic average of the High-Three requires that the High-Three be divided by three in order to get the figure from which the annuity is calculated, it becomes clear that said Average was wrongfully reduced by \$22, 656.00. Therefore, the decision below must be overturned.

#### OPM FAILED TO FOLLOW THE REQUIREMENTS OF THE LAW

#### THE REAL DISPUTE

The Board made an erroneous interpretation of law when it failed to implement the provisions of 5 U.S.C. 8331(4), 5 U.S.C 8339(a) and 19 C.F.R 24.16(b)(13) and, instead, allowed OPM to calculate basic pay under one of its own regulations, cited

below, which was never authorized by any Congress of the United States in its entire history. 5 C.F.R. 844.102 which defines basic pay differently from the applicable statute says:

Basic pay means the pay an employee receives that is subject to deductions under FERS

Thus, OPM totally ignores the requirement of the law cited above which the Federal Circuit reversed in the earlier phase of this case, and substitutes instead two more of its own regulations which have never been authorized by any Congress in the history of the United States, are not the law and which must be overturned by this court. Clearly, the provisions of a federal statute prevail over an agency regulation that fails to comply with it. The Executive Branch has no authority to change a law passed by the Congress of the United States. It is noteworthy, as we show here, that the Executive Branch is under the law, not above it, that just recently, the 800th anniversary of the signing of the Magna Carta was celebrated, which, for the first time, made the government under, not over the law.

As Justice Douglas pointed out in his concurring opinion in *Youngstown Sheet and Tube Co v. Sawyer*, 343 U.S. 579, 633-34 (1952):

The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend, and

that it is the function of the Congress to legislate. Article II, Section 3, also provides that the President "shall take care that the Laws be faithfully executed." But, as MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER point out, the power to execute the laws starts and ends with the laws Congress has enacted. ( emphasis added)

What has been done to Petitioner in this case is that he has been deprived of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States by OPM's failure to abide by the mandatory provisions of the duly passed statutes of Congress.

#### OUR HEADLESS FOURTH BRANCH OF GOVERNMENT

The collection of agencies housed outside the traditional executive departments including the Federal Communications Commission, is routinely described as the "headless fourth branch of Government" reflecting not only the scope of their authority but their practical independence. See, e.g., Administrative Conference of United States, D. Lewis & J. Selin, Sourcebook of United States Executive Agencies II (2012 ). Quoted with approval by Chief Justice John Roberts in *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013).

Further, the very idea that OPM, as part of the Executive Branch determines what the law means, contrary to the actual law passed by the Congress, without the judiciary stepping in to correct OPM's behavior, is exactly described by one of the principal authors of the Constitution who famously wrote that the

accumulation of all powers, legislative, executive, and judiciary, in the same hands,...may justly be pronounced the very definition of tyranny. The Federalist No.47, p.324, (J. Cooke ed. 1961) (J. Madison)

## II. CONCLUSION

This case turns well established assumptions on its head. In the past, lawyers, judges, professors and almost all members of the legal profession, always assumed that the Code of Federal Regulations were like laws, and they were treated as such. Now, however, this case has shown that this assumption is no longer true. The United States Court of Appeals for the Federal Circuit in *Grover v. OPM*, 828 Fed. 3d held, after an admission in open court by counsel, that where, as in the instant case, the particular C.F.R. differs from the statute that it purports to interpret (a situation that the entire profession never questioned) then the C.F.R. fails. Instead of accepting the validity of any particular C.F.R. this case shows the necessity of always questioning the validity of any Regulation adopted by OPM.

This case should be reversed and remanded to the Federal Circuit for a proper calculation of Respondent's annuity together with an Opinion advising the legal profession regarding how to handle OPM adopted C.F.R.'s in the future.

Respectfully submitted

A handwritten signature in cursive script that reads "Norman Jackman".

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