No. 09-543

# In the Supreme Court of the United States

ANTHONY W. LISANTI, PETITIONER

*v.*

OFFICE OF PERSONNEL MANAGEMENT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the income that petitioner, a federal court reporter, earned for the preparation of transcripts at the request of private parties appearing before the court falls outside the definition of "basic pay" as defined by 5 U.S.C. 8331(3).

2. Whether the Merit Systems Protection Board abused its discretion when it refused to certify petitioner's case as a class action on behalf of all similarly situated federal court reporters.

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## OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-19a) is reported at 573 F.3d 1334. The initial decision of the Merit Systems Protection Board (MSPB or Board) (Pet. App. 22a-29a) is unreported. The final order of the Board (Pet. App. 20a-21a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on July 29, 2009. The petition for a writ of certiorari was filed on October 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner was a court reporter for the federal court system from 1970 until his retirement in 2006. Pet. App. 2a. As a court reporter, he had two primary

duties: (1) recording judicial proceedings; and (2) producing transcripts of those proceedings for the courts and the parties upon request. *Ibid*.

Prior to 1984, court reporters were part-time federal government employees who negotiated their own rates for producing transcripts and engaged in freelance work outside of their federal court reporter duties. Pet. App. 2a-3a; *Cutright* v. *United States*, 953 F.2d 619, 622 (Fed. Cir.), cert. denied, 506 U.S. 821 (1992). After 1984, court reporters became full-time federal government employees with benefits and a larger annual salary. Pet. App. 3a. They continued to collect fees from parties for producing transcripts "at rates prescribed by the court subject to the approval of the Judicial Conference." 28 U.S.C. 753(f). Thus, federal court reporters receive a full-time, fixed salary from the court system and additional outside income from parties for transcript services. Pet. App. 3a.

Petitioner's retirement benefits are provided by the federal government under the Civil Service Retirement System (CSRS). Pet. App. 2a. During his employment, both petitioner and his employer, the Administrative Office of the United States Courts (Administrative Office), made periodic contributions to the Civil Service Retirement and Disability Fund (CSRS fund). *Id.* at 4a. The contributions were calculated using petitioner's "basic pay," as defined in 5 U.S.C. 8331(3). Pet. App. 4a. The agency considered his "basic pay" to be his annual salary, and not the larger amount of additional income he earned from private parties when he prepared transcripts. *Ibid*. When an employee retires, the Office of Personnel Management (OPM) also uses "basic pay" to calculate the employee's retirement annuity. *Id.* at 5a.

2. In 1996, in anticipation of retirement, petitioner and nine other court reporters sued the Administrative Office in the United States District Court for the Northern District of Illinois, asserting that the income earned from preparing transcripts for parties had been unlawfully excluded from the calculation of their retirement benefits. Pet. App. 5a. The district court dismissed the claim for lack of jurisdiction and held that there is an exclusive review process for challenging retirement benefits, consisting of adjudication by OPM, appeal to the MSPB, and petition for review in the United States Court of Appeals for the Federal Circuit. *Ibid*; *id*. at 43a-58a. Simultaneously, petitioner and the other court reporters raised their claim with OPM and appealed to the MSPB, which dismissed for lack of jurisdiction because none of the court reporters had yet retired and applied for retirement benefits. *Id*. at 5a.

3. When petitioner retired in 2006, he began receiving a retirement annuity calculated using his basic pay, which did not include the additional income he received from parties for preparing transcripts. Pet. App. 6a. He challenged the calculation before OPM. *Ibid*. In its initial decision, OPM determined that it had correctly calculated his annuity by using his annual salary as certified by the Administrative Office as his basic pay. *Ibid*. OPM further determined that it had no authority to include his transcript income in his basic pay because it did not fall within the definition of "basic pay" under 5 U.S.C. 8331(3). *Ibid*. In a reconsideration decision, OPM upheld its initial decision, stating that "there is no provision in the law for including" transcript income. *Ibid*.

4. Petitioner appealed OPM's decision to the MSPB and moved to certify the appeal as a class action on be-

half of himself and all other court reporters similarly situated. Pet. App. 6a. The MSPB administrative judge denied the class certification motion because petitioner did not assert that any of the putative class members had exhausted their administrative remedies and thus failed to establish that the MSPB had jurisdiction over them. *Ibid.* The Board also declined to waive the exhaustion requirement for the putative class members. *Ibid.*

On the merits, the Board held that it lacked authority to review OPM's reliance upon the Administrative Office's certification of petitioner's basic pay. Pet. App. 27a. The administrative judge stated that petitioner was required to seek redress from the Administrative Office in the form of an amended certification before OPM could properly adjust his annuity. *Id.* at 28a. Accordingly, the administrative judge affirmed OPM's reconsideration decision. *Ibid.*

Petitioner filed a petition for review with the full Board, which denied the petition, concluding that there was "no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affect[ed] the outcome." Pet. App. 21a.

5. Petitioner then appealed to the Federal Circuit, which affirmed the Board's holding. Pet. App. 1a-19a. The court disagreed with the MSPB's holding that OPM lacked authority to determine petitioner's basic pay and that the Board, therefore, lacked authority to review OPM's determination. *Id.* at 10a. The court held that although the employing agency must certify an employee's basic pay, OPM is required under the CSRS to review the agency's legal determination of which categories of income qualify as basic pay. *Ibid.* Further, an OPM decision that affects "the rights or interests of an

individual" may be appealed to the Board. *Id.* at 11a (quoting 5 U.S.C. 8347(d)(1)). The court noted that the Board's determination that petitioner could seek redress from only the Administrative Office would have effectively left him without a judicial remedy. *Ibid.*

Although the Board did not rely upon OPM's interpretation of "basic pay" as defined by 5 U.S.C. 8331(3), the court determined that it could address the correct interpretation of the statute because it was a question of law that OPM had decided in the first instance. Pet. App. 13a.

The court affirmed OPM's determination that the term "basic pay" does not include transcript income. The court held that, although 28 U.S.C. 753(f) sets forth the maximum amount that a court reporter may charge for transcripts, it is not pay "of the position as fixed by law or regulation" as base pay is defined. Pet. App. 15a (quoting 5 U.S.C. 8331(3), and citing 5 C.F.R. 550.103). The court noted that there is no statute or regulation that establishes the number of transcript orders a court reporter may receive, so his or her pay for those orders is not "fixed by law." *Id.* at 15a-16a. The court analogized transcript fees to bonuses and overtime pay, neither of which are included in "basic pay." *Id.* at 16a-17a.

The court further held that transcript income is not "similar" to a "special rate supplement" that is included in the definition of "basic pay" under 5 C.F.R. 550.103. Rather, transcript income is more similar to overtime pay, which is explicitly excluded from basic pay. Pet. App. 17a. The court noted that though the Internal Revenue Service (IRS) treated petitioner's pay as part of his earned income, the income categories defined by the IRS for taxation purposes are not relevant to the statu-

tory definition of "basic pay" for purposes of calculating pension annuities. *Id.* at 18a.

Finally, the court held that, because it found that petitioner's transcript income did not qualify as "basic pay," his request for class certification was moot. Pet. App. 19a.

**ARGUMENT**

Petitioner contends that the transcript income of federal court reporters should be considered "basic pay" for purposes of calculating pension annuities under 5 U.S.C. 8339(a) and that the Board abused its discretion when it denied petitioner's request for class certification. There is no merit to petitioner's claims and they do not warrant further review.

1. The Federal Circuit correctly held that the transcript income of federal court reporters does not constitute "basic pay." There is no reason for this Court to second-guess the Federal Circuit's well-reasoned holding, guided by its expertise in this area of law. See *United States* v. *Fausto*, 484 U.S. 439, 465 n.11 (1988) (Stevens, J., dissenting) ("Because of the unique character of the Federal Circuit, its conclusions are entitled to special deference by this Court. * * * The Federal Circuit's exclusive jurisdiction [to review MSPB decisions] renders it uniquely qualified to determine whether the CSRA implicitly works a partial repeal of Tucker Act/Back Pay Act jurisdiction.").

Petitioner argues that "basic pay" is defined as "pay fixed by law or administrative action for the position," Pet. 18 (quoting 5 C.F.R. 550.103, and citing 5 U.S.C. 8331(3)), and that transcript services fall within that definition because the Judicial Conference fixes the maximum rates that federal court reporters may charge

for transcript services. Pet. 18-19. The maximum *rates* for transcript services are certainly fixed by administrative action, but the *pay* that federal court reporters receive from transcript services is not. As the Federal Circuit noted, "the Administrative Office does not determine or control how much money a court reporter will earn from transcript orders." Pet. App. 16a. There is no statute or regulation that mandates that parties purchase transcripts or sets the number or length of the transcripts that a court reporter will produce in a given year. Moreover, the Judicial Conference fee schedule is a ceiling and court reporters are free to negotiate lower rates with the parties. Thus, the pay that federal court reporters earn from transcript services is not "fixed by law or regulation," but rather varies widely based on the demands of third parties.

Petitioner's argument that transcript income should be included in "basic pay" because it is income earned for performing the statutory functions of a court reporter is equally unavailing. Pet. 22. Job function is irrelevant to the definition of basic pay. Indeed, employees working overtime likely to perform the same functions that they perform during regular working hours, yet overtime pay is specifically excluded from "basic pay" in the statute. See 5 U.S.C. 8331(3).

Nor does the degree of control that an employer exercises over the tasks of an employee determine whether the pay for those tasks are considered "basic pay." Petitioner contends that the Administrative Office "controls nearly every aspect" of the production of transcripts (Pet. 24-25), but that has no bearing on whether the payment for those services constitutes "basic pay." After all, an agency exercises the same degree of control over the work of an employee working overtime as it does

over the same employee during regular working hours, yet overtime pay is not "basic pay." See 5 U.S.C. 8331(3).

Finally, petitioner notes that the IRS and the Social Security Administration categorized his transcript income as earned income, not as self-employment income. Pet. 15, 23. The statutory regime governing income taxation is entirely different from that governing pension benefits. Accordingly, the Federal Circuit correctly held that "the income categories defined by the Internal Revenue Code are not relevant to the definition of 'basic pay.'" Pet. App. 18a.

2. Contrary to petitioner's claims, the Federal Circuit's decision will neither threaten the pensions of other federal government employees nor undermine the employment rights of federal court reporters. The opinion is limited to the narrow holding that the transcript income of federal court reporters does not constitute "basic pay" for purposes of calculating pension annuities.

Petitioner's assertions about the far-reaching implications of this case are based on the mistaken assumption that the decision turns on the classification of federal court reporters as both federal employees and independent contractors. See, *e.g.*, Pet. i, 13-14, 19, 26. However the court did not hold that federal court reporters act as independent contractors when they perform transcript services, nor did it base its determination that transcript income is not part of "basic pay" on the employment status of federal court reporters. The Federal Circuit's decision was based entirely on the statutory and regulatory definition of "basic pay."

Further, the cases that petitioner cites (Pet. 23-24) holding that federal court reporters are federal government employees and not independent contractors are

fully consistent with the Federal Circuit's conclusion that transcript income is not "basic pay." Indeed, there are many types of income, including overtime pay, bonuses, and allowances, earned by other federal government employees that are excluded from "basic pay," 5 U.S.C. 8331(3), but that does not render those employees independent contractors.

The Federal Circuit's decision has nothing to do with whether federal court reporters are independent contractors or federal government employees. Accordingly, it neither authorizes the federal government to manipulate the pension benefits of its employees by classifying them as independent contractors nor leaves the employment rights of the federal court reporters in a "state of flux." Pet. 26. There are no significant precedential implications of this case that warrant this Court's review.

3. Even if this Court were to grant the petition and reverse the Federal Circuit's holding that transcript income is not "basic pay," review of the class certification issue is not warranted because the MSPB's decision not to grant class certification was largely fact-based, see Pet. App. 31a-32a, and this Court generally does not review factual findings made below. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985). Further, the MSPB enjoys broad discretion to grant class action status, *Certain Former CSA Employees* v. *Department of Health & Human Services*, 762 F.2d 978, 986 (Fed. Cir. 1985), and the MSPB did not abuse its discretion in denying class certification in this case.

The MSPB held that because petitioner did not assert that other members of the putative class had exhausted their administrative remedies, he did not meet his burden of establishing that the MSPB possessed ju-

risdiction over any of their claims, and thus had not met the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1). Pet. App. 31a-33a. Even setting aside the exhaustion issue, there is no evidence in the record to support petitioner's assertion that the potential class includes over 100 federal court reporters nationwide. Pet. 28.

Petitioner does not contend that the MSPB abused its discretion by failing to certify the class of federal court reporters. Instead, petitioner seeks to impose an unprecedented, less deferential standard of review by arguing that the MSPB's failure to grant class certification in this case should be reversed because it undermines the purpose of class certification as articulated in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) (*American Pipe*)—namely "the promotion of efficiency and economy of litigation." Pet. 28-31. Those cases cannot bear the weight of petitioner's argument. They established procedural rules about the tolling of statutes of limitations during pending class certification motions and justified those rules in part because they were consistent with judicial economy and efficiency. See *Crown, Cork & Seal*, 462 U.S. at 349; *American Pipe*, 414 U.S. at 554-555. In essence, petitioner attempts to transform a policy justification for a procedural rule into a legal standard under which to review individual class certification decisions. Pet. 29-30. His theory is entirely inconsistent with the discretion accorded to the MSPB in determining class action status. See *Certain Former CSA Employees,* 762 F.2d at 986.

The MSPB did not abuse its discretion when it decided not to waive the exhaustion requirement for the

putative class members and to deny class certification in this case. Further review by this Court is unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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