CASE NUMBER 22-1915

IN THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

LEONARD COOPERMAN,

Petitioner,

versus

SOCIAL SECURITY ADMINISTRATION,

Respondent.

PETITIONER'S MEMORANDUM IN LIEU OF ORAL ARGUMENT

LEONARD COOPERMAN
Petitioner-Unrepresented
178 Juniper Ridge Drive
Feeding Hills, MA 01030
786-252-7615
LennyJ1952@yahoo.com

MEMORANDUM OF PETITIONER IN LIEU OF ORAL ARGUMENT

This memorandum is presented in two parts.

Part one is a renewed request for oral argument, based on a material change in circumstances since the first request for oral argument (document 11) was made. SEE documents 53 and 55[1]. It also deals with why a failure to permit Petitioner and Amicus to make oral argument jeopardizes the employment conditions of over one thousand Social Security ALJs due to improper actions by the MSPB.

Part two addresses the substantive issues that overwhelmingly justify reversal of the MSPB's action in this case, and the peril in which a failure to do so places every one of Amicus' members.[2]

Part One-renewed request for oral argument based on changed circumstances.

Months after Petitioner, and several weeks after Amicus made written oral argument requests, and after all briefs had been filed electronically and

[1] Also, there's this. On March 23, 2023 the Court allowed the Respondent to file and make *substantive* changes to a fourth (third *corrected*) version of its response brief. Basic fairness dictates Petitioner get a chance to **address** these changes. As it is too late to do so with a Reply brief, Petitioner submits that oral argument is the only option left.

[2] The Association of Administrative Law Judges (AALJ/IFPTE) has, like Petitioner, requested oral argument in this case. Its members, Petitioner submits, are jeopardized by the conduct of the MSPB in this case, conduct unmoored from the most basic protections afforded to individuals by the Constitution.

in paper form, the Respondent made an astonishing, long-overdue, but grossly inadequate admission (document 53, Pgs. 3-5). In that admission Respondent admitted making no fewer than four major misrepresentations[3] to the Court, and expressly recognized the seriousness of these errors.

In sum, if, as it has, the Government acknowledges it can't get major things right, only oral argument can truly uncover what else it got wrong. Also, the slipshod opinion of the MSPB[4], with its manifold Constitutional violations and gross misinterpretations of Social Security policy, imperils the

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[3] As Petitioner has pointed out at document 55 Respondent could have, should have, but has not acknowledged making **additional** serious misrepresentations to this Court, two of which can only accurately be called **lies**. This conduct, of course, implicates the Rules of Professional Responsibility, SEE Rule of Professional Conduct 3.3(a)(1),(3); 8.4(c), and should be fleshed out at oral argument.

[4] Take two, but by no means the only, examples of the MSPB's major errors in this case: First, note its complete misunderstanding of an "acquiescence ruling" and that misunderstandings' impact-**unaddressed by the Government before this Court**- on this case. SEE page 16 of Petitioner's corrected principal brief. And second, consider the MSPB's authoritarian refusal to even *accept*, let alone *rule upon* Petitioner's motion to supplement the record with evidence the Justice Department now acknowledges was improperly withheld from him. Petitioner couldn't adequately defend himself. This Court was prevented from reviewing the evidence. How is that fair, to either Petitioner or to this Court?

Without oral argument, given the Labyrinthine and Byzantine nature of SSA Policy, how can this Court make sense of such policy without the guiding hand of oral argument from Amicus? The MSPB couldn't do so, made hash of it instead and, as a result, issued a materially flawed and dangerous decision. Why would this Court take that risk?

employment situation of every SSA ALJ. Only oral argument can adequately address and resolve these serious concerns.

Part two- Substantive issues that justify reversal of the decision of the MSPB

FIRST- As the briefs and pleadings, specifically documents 53 and 55, vividly illustrate, the Government admittedly, unethically, and unconstitutionally[5] withheld certain significant information from Petitioner, both prior to and during his trial, and during his MSPB appeal, making it impossible for him to adequately defend himself in his administrative proceedings.[6] This should shock the Court's conscience.

SECOND-Petitioner was subject to discipline based on ambiguous, impossible-to-quantify standards both regarding emails he sent to lawyers, and his summarizations while on-the-record, of off-the-record conversations with Counsel. No one can define, or has defined these standards with

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[5] Petitioner submits, as he has previously, that it is a fundamental denial of due process for a government prosecuting authority to withhold favorable material information from an opponent, as happened **and as the government has admitted here**. The favorable information withheld in this case was favorable *not only* to invalidate a major portion of the Respondents case against Petitioner. It was *also* favorable to Petitioner in that having it would have permitted him to engage in devastating cross-examination as to the credibility of the Respondent's witnesses whose testimony was refuted by the withheld evidence, as to every *other* issue on which they testified. SEE attachments to this memorandum.

[6] The precise impact of this illegal conduct is simply impossible to adequately explain in a five-page double-spaced memorandum, and requires oral argument to describe in adequate detail.

coherent precision and, as pointed out in the Reply brief, at least one Federal Appellate Court has held one of them unconstitutional.[7]

THIRD- The government has not set forth any cogent rationale for imposing discipline in the PII charges where the acknowledged improper behavior was, prior to the imposition of discipline, informally and amicably resolved.

FOURTH-The Board's factual finding that the Agency's Program Operations Manual (POMS) is not a prime source of policy at the hearing level is demonstrably incorrect. This error inextricably *infects* the Board's entire decision and invalidates both its factual and legal findings. As articulated in Respondent's and Amicus's briefs, the POMS contains the Agency's policy pronouncements applicable throughout the administrative process, including with respect to processing closed period of disability cases, and are entitled to deference (Docket Entries 13, 35, 46) . The Hearings, Appeals and Litigation Law Manual (HALLEX) articulates procedures for processing cases at the hearing level, **but** contains no procedural (or any other) guidance for resolving closed-period-of-disability cases. The HALLEX is not entitled to any particular deference. Indeed, instructing administrative law judges *not* to follow agency policy, such as

[7] SEE *BENCE v. BREIER*, 501 F.2d 1185 (CA 7, 1974), as cited in the Reply brief. Petitioner notes that exploring the exact implications the BENCE case has for the "conduct unbecoming" standard used by this Court is yet *another* reason why this case cries out for oral argument.

POMS, illegally interferes with their decisional independence. The Board's reliance on erroneous findings of fact and law, as described above, corrupts the penalty analysis and establishes that the Board's penalty is not supported by substantial evidence.

CONCLUSION

This appeal is not frivolous, does not involve dispositive issues that have been authoritatively decided, and the facts and circumstances in the case have not been, **and cannot be**, adequately expressed in the briefs and record. The decisional process would clearly be assisted by an opportunity for the Court to engage with Counsel.

A failure to correct the injustice set forth here affects Petitioner significantly, Amicus greatly, and the Court worst of all[8].

/S/_____
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[8] As noted in Petitioner's other pleadings, if the reprehensible misconduct of Government Counsel is not stopped here, and now, more of it is on the way. *Quis custodiet ipsos custodes*?
And one more thing. Lest anyone think Petitioner's appropriate vilification of such misconduct is an attempt to obscure *his own* conduct, think again. If that *were* the case, *why* would Petitioner be literally *begging* the Court to set the case for oral argument and, thereby, subject himself and his conduct to scrutiny by a panel of Judges?