UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

SOCIAL SECURITY ADMINISTRATION,
Petitioner,

v.

LEONARD COOPERMAN,
Respondent.

DOCKET NUMBER
CB-7521-16-0001-T-1

DATE: March 16, 2017

BEFORE
D. Michael Chappell
Administrative Law Judge

INITIAL DECISION

Petitioner Social Security Administration ("SSA" or the "Agency"), pursuant to 5 U.S.C. § 7521, requests that the Merit Systems Protection Board ("MSPB" or "Board") find good cause to remove Leonard Cooperman ("Respondent") from the position of Administrative Law Judge ("ALJ"), and to suspend him from pay status from the date of the Complaint through the date of a final decision by the Board. The MSPB has jurisdiction over this matter pursuant to 5 U.S.C. § 7521.[1] For the reasons set forth below, good cause exists to discipline Respondent, and the appropriate penalty is suspension without pay for 180 calendar days. The Agency has failed to demonstrate that 5 U.S.C. § 7521 allows a retroactive application of a penalty.

[1] An agency may suspend an Administrative Law Judge "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521; *SSA v. Steverson*, 111 M.S.P.R. 649, 658 (2009), *aff'd*, 383 F. Appx. 939 (Fed. Cir. 2010); *SSA v. Long*, 113 M.S.P.R. 190, 210-11 (2010). Respondent does not challenge the Board's jurisdiction. Answer at 4.

I. INTRODUCTION

A. Statement of the Case

On October 2, 2015, the Agency filed a complaint against Respondent ("Complaint," Tab 1[2]). The Complaint contains one charge of neglect of duties ("Charge 1"), which is based upon 8 enumerated specifications and a second charge of conduct unbecoming ("Charge 2"), which is based upon 16 enumerated specifications. The Agency requests a determination by the Board that there is good cause to suspend Respondent from the date of the Complaint through the date of its final decision and to remove Respondent from the position of SSA ALJ (Complaint at 9-10). The Board's Acknowledgement Order, dated October 6, 2015, delegated adjudication of this matter to the undersigned Administrative Law Judge (Tab 2).

Pursuant to the Acknowledgement Order, Respondent was required to file his response to the Complaint, if any, by November 6, 2015. On November 5, 2015, Respondent filed a Motion for Partial Dismissal of the Complaint ("Motion to Dismiss"), asserting that the Agency failed to provide Respondent with sufficient notice of the charges pending against him in Charge 1 of the Complaint (Tab 12). The Agency filed an opposition to Respondent's Motion to Dismiss on November 16, 2015 (Tab 14). Respondent filed his Answer to the Complaint on November 5, 2015, denying that he breached any duty he may have had regarding the exercise of his duties as an ALJ with SSA, denying that he engaged in conduct unbecoming, and incorporating by reference the arguments in his Motion to Dismiss (Tab 13). Respondent's Answer also raised a defense of whistleblower retaliation. Respondent's Motion to Dismiss was denied by Order issued on November 23, 2015 (Tab 16).

[2] The "Tab" references herein refer to the location of the document in the case file, and reflect the order in which filings were docketed with the MSPB.

A Scheduling Order was issued on November 23, 2015, which set deadlines for completing discovery and exchanging witness and exhibit lists, and set a hearing date of March 2, 2016 (Tab 17). Upon motion filed by the Parties requesting additional time to resolve discovery requests and to accommodate the schedules of witnesses, an Order revising the Scheduling Order was issued on February 26, 2016 (Tab 44). The hearing began on June 21, 2016. To accommodate the Parties' request for additional time and counsel's and the witnesses' schedules, the hearing resumed on July 19, 2016 and concluded on July 21, 2016.

At the hearing, 14 witnesses testified, including Respondent. In addition, the record includes 50 documentary exhibits, to which neither party objected, which were admitted into evidence as Joint Exhibits; 140 documentary exhibits offered by the Agency and admitted into evidence; and 41 documentary exhibits offered by Respondent and admitted into evidence.[3] The Parties also submitted joint stipulations of certain facts (JX 65).

By Order issued on July 25, 2016, the Parties were directed to file post-hearing proposed findings of fact and conclusions of law, legal memoranda in support thereof ("Post-Hearing Briefs"), and replies to the opposing party's Post-Hearing Briefs ("Reply Briefs") (Tab 92). Pursuant to MSPB Practices and Procedures Rule 1201.58, 5 C.F.R. § 1201.58, the record in this matter remained open for the limited purpose of receiving the Parties' Post-Hearing Briefs and Reply Briefs.

The Parties filed their Post-Hearing Briefs on September 22, 2016, and their Reply Briefs on November 21, 2016 and November 23, 2016 (Tabs 111-112; 115-116).

B. Evidence

Pursuant to Rule 1201.111(b), and in order to provide an adequate basis for

[3] By Order dated December 15, 2016, Respondent's Motion to Strike Exhibits was denied (Tab 120).

appellate review, each initial decision must contain findings of fact and conclusions of law on all material issues presented and the reasons or bases for those findings and conclusions. 5 C.F.R. § 1201.111(b)(1), (2); *Spithaler v. OPM*, 1 M.S.P.R. 587, 589 (1980) (holding that Rule 1201.111 requires that an initial decision must, *inter alia*, resolve all material issues of fact and disclose the evidentiary basis for factual findings, and resolve all material legal issues in a fashion that reveals the presiding official's conclusions of law, legal reasoning, and the authorities on which that reasoning rests). *See also SSA v. Burris*, 39 M.S.P.R. 51, 54 (1988) (stating, "only respondent's material exceptions will be addressed . . . despite the fact that all of respondent's exceptions have been considered . . ."). In accordance with the foregoing authorities, this Initial Decision contains findings on all material issues of fact and identifies the evidentiary basis for those findings. Citations to specific numbered findings of fact in this Initial Decision are designated by "F." In addition, this Initial Decision contains conclusions of law on all material legal issues, and identifies the legal reasoning and authorities supporting those conclusions.

The requirements for initial decisions set forth in Rule 1201.111(b) are virtually identical to those in Section 557(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(c). The Supreme Court has held that the APA does not require that an initial decision "make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). *See also Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company's exceptions, even if only some of the exceptions were discussed, and stating that "[m]ore than that is not demanded by the [APA] and would place a severe burden upon the agency").

Accordingly, findings of fact proposed by the Parties that are not included in this Initial Decision have been rejected, either because they were not sufficiently supported by the evidence, or because they were not dispositive or material either to the

determination of the charges or penalty at issue, or to Respondent's defenses. Similarly, legal contentions and arguments of the Parties that are not addressed in this Initial Decision have been rejected because they lacked support in fact or law, were not material, or were otherwise lacking in merit. All of the Parties' proposed findings of fact, contentions, and arguments contained in the Parties' Post-Hearing Briefs and Reply Briefs were reviewed and considered.[4]

C. Burden of Proof

To be sustained, the charges brought against Respondent must be supported by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(1)(ii); *Carr v. SSA*, 185 F.3d 1318, 1321 (Fed. Cir. 1999); *Brennan v. Dep't of Health & Human Services*, 787 F.2d 1559, 1561 (Fed. Cir. 1986); *SSA v. Long*, 113 M.S.P.R. 190, 196 (2010). "A preponderance of the evidence is specifically defined in 5 C.F.R. § 1201.56(c)(2) as 'that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.'" *Brennan*, 787 F.2d at 1561. Moreover, "[t]he burden of proving the charge by a preponderance of the evidence is and remains throughout the proceeding upon the agency. However, 'once an agency has made a *prima facie* showing, the burden of going forward with evidence to rebut that showing necessarily shifts to the employee. . . . Absent effective rebuttal, the agency must be held to have carried its burden of persuasion.'" *Id.* at 1563 (quoting *Schapansky v. Dep't of Transp.*, 735 F.2d 477, 482-83 (Fed. Cir. 1984)). Respondent bears the burden of proving any affirmative defenses by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(iii).

[4] References to the Agency's Post-Hearing Brief and Reply Brief will be cited as "Agency Brief" and "Agency Reply Brief," respectively. Similarly, references to the Post-Hearing Brief and Reply Brief of Respondent will be cited as "Respondent's Brief" and "Respondent's Reply Brief."

D. Summary of Initial Decision

As explained herein, the Agency has proven that Respondent neglected his duties (Charge 1) and that Respondent engaged in conduct unbecoming an ALJ (Charge 2). Respondent's whistleblower defense is without merit. Accordingly, there is good cause to discipline Respondent. Based on the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the appropriate penalty for Respondent's misconduct is a suspension without pay for 180 calendar days. The Agency has failed to demonstrate that 5 U.S.C. § 7521 allows a retroactive application of a penalty.

II. FACTS

A. Background

1. Respondent Leonard Cooperman ("Respondent") is an Administrative Law Judge ("ALJ") with the Social Security Administration ("SSA" or "the Agency"), who was appointed to his position by SSA as an ALJ on June 12, 2005. (Cooperman, Tr. 6:201; JX 65 (Joint Stipulation No. 3)).

2. After he was hired in 2005, the Agency provided four weeks of training to Respondent related to the performance of his duties. (Cooperman, Tr. 7:95-96; MacLean, Tr. 4:147; Masengill, Tr. 1:163).

3. Since 2005, the Agency has provided training for Respondent related to the performance of his duties at least every three years. (Cooperman, Tr. 7:96).

4. The Office of Disability Adjudication and Review ("ODAR") is the component of SSA that manages the hearing operations and appeals for claims under Titles II and XVI of the Social Security Act. (Bice, Tr. 4:208; Masengill, Tr. 1:158-159; JX 16).

5. ODAR is divided into ten regions. Region 1 includes the Boston Region. (Bice, Tr. 4:244-245; JX 65 (Joint Stipulation No. 2)).

6. There are eight hearing offices in the Boston Region, including the Springfield, Massachusetts Hearing Office. (JX 65 (Joint Stipulation No. 2)).

7. Since his ALJ appointment, Respondent has been assigned to work in the Springfield ODAR hearing office, located in Springfield, Massachusetts. (JX 65 (Joint Stipulation No. 3)).

8. Debra Bice has been the Chief Administrative Law Judge ("CALJ") of SSA since January 2011. (Bice, Tr. 4:188, 231; JX 65 (Joint Stipulation No. 1)).

9. CALJ Bice and her deputy direct a nationwide field organization, including three Associate Chief Administrative Law Judges ("ACALJs") and ten Regional Chief Administrative Law Judges ("RCALJs") who assist in the management of each Region. (Bice, Tr. 4:243-244).

10. CALJ Bice has the delegated authority to request that the Merit Systems Protection Board ("MSPB" or "Board") find good cause to suspend and remove Respondent. (Bice, Tr. 4:294).

11. Paul Lillios served as an ACALJ in and around 2012 and 2013. (Bice, Tr. 4:306-307; 5:334-336; 6:18, 39-40; Sax, Tr. 3:48).

12. Mark Sochaczewsky is an Associate Chief Administrative Law Judge within the Office of the Chief Administrative Law Judge ("OCALJ"). He has served as an ACALJ since November/December 2014. (Sochaczewsky, Tr. 5:32-34; Bice, Tr. 4:248).

13. ACALJ Sochaczewsky started with SSA in 1994 as an ALJ hearing and adjudicating cases with the New York office. Thereafter, he was the Hearing Office Chief Administrative Law Judge ("HOCALJ") for the Bronx hearing office, and then the RCALJ for the New York Region. (Sochaczewsky, Tr. 5:24, 34).

14. ACALJ Sochaczewsky's duties include reviewing Agency policies and proposed changes to policies. In addition, he periodically reviews rulings made by the Appeals Council,[5] at the request of ALJs whose cases have been remanded. ACALJ Sochaczewsky is also the liason for OCALJ to each Region's inline quality review process, which consists of attorneys within each region reviewing ALJ decisions for policy compliance prior to issuance. (Sochaczewsky, Tr. 5:34-47).

15. Carol Sax served as the RCALJ for Region 1 from February 2008 through July 2015. (Sax, Tr. 2:211).

16. Each hearing office is supervised by a Hearing Office Chief Administrative Law Judge. (Bice, Tr. 4:232; Sax, Tr. 2:212-213; JX 14).

17. Since March 2005, Addison Masengill has served as the HOCALJ of the Springfield, Massachusetts Hearing Office. (Masengill, Tr. 1:155, 158).

18. Since June 2005, HOCALJ Masengill has served as Respondent's first line supervisor. (Masengill, Tr. 1:158; JX 65 (Joint Stipulation No. 4)).

19. Claims under Title II of the Social Security Act are principally claims for retirement benefits, based upon the claimant's work under the Social Security system. Claims under Title XVI of the Social Security Act are commonly referred to as supplemental security income and encompass payments for the blind, aged, and disabled under Title XVI of the Social Security Act that are not based upon earnings under the Social Security system. (Bice, Tr. 4:207-210).

[5] The Appeals Council is a component of ODAR which reviews appeals of ALJ decisions. F. 22. *See also* F. 21, 23-24.

20. SSA ALJs hear cases where the claimant appeals a decision from a local office finding that the claimant was not disabled. The claimant then has a right to a formal oral hearing with an SSA ALJ. The ALJ assigned to a case reviews the case in electronic form and then has a formal hearing in which sworn testimony is taken. The hearing is recorded and there may be a medical expert or a vocational expert, depending on the case. The claimant attends the hearing, and if represented, the representative attends as well. The ALJ receives the testimony and reviews the evidence on the signs, symptoms, and laboratory findings that are associated with doctors' reports or other types of reports. The ALJ then makes a decision under the five-step sequential process defined in 20 C.F.R. § 404.1520 and 20 C.F.R. § 416.920 (*see* F. 36). (Masengill, Tr. 1:166-168, 170).

21. If an ALJ denies an individual's claim for disability, the claimant can appeal the unfavorable decision to the Appeals Council within ODAR, or submit another application for disability. (Masengill, Tr. 1:158, 198).

22. ODAR includes the Appeals Council, which reviews cases appealed from ALJs. (Masengill, Tr. 1:158-159).

23. In addition to hearing appeals of denied claims, the Appeals Council also reviews a subset of fully favorable decisions, which are not appealed, on what the Agency refers to as "own motion review." (Sochaczewsky, Tr. 5:91-92, 201).

24. The Appeals Council is made up of Administrative Appeals Judges ("AAJs") who have very similar qualifications to ALJs and receive similar training, although AAJs' training is slightly longer. (Bice, Tr. 4:285-286).

B. Duties of ALJs

1. Generally

25. SSA ALJ's duties are outlined in the position description. (JX 14; Complaint Exhibit 1; Bice, Tr. 4:211-213; Sax, Tr. 3:8; Masengill, Tr. 1:156).[6]

26. The primary duties of an SSA ALJ are to hold hearings and to decide cases under the programs administered by SSA, including Titles II and XVI of the Social Security Act. (JX 16; Bice, Tr. 4:207-208; Sochaczewsky, Tr. 5:24; Masengill, Tr. 1:156).

[6] JX 14 is a copy of the position description for an Administrative Law Judge, dated 1994. That version of the ALJ position description was in effect until December 2013. The current position description for an Administrative Law Judge, revised by OPM on November 26, 2013, is attached to the Complaint as Exhibit 1. (Bice, Tr. 4:213-214; Complaint Exhibit 1 at p. 19).

27. In hearing and deciding cases under the programs administered by SSA, including Titles II and XVI of the Social Security Act, an SSA ALJ's principal responsibilities are to hold a full and fair hearing and issue a legally sufficient and defensible decision. (JX 14; Complaint Exhibit 1; JX 16 (HALLEX[7] I-2-0-5 B)).

28. A legally sufficient decision is one that provides factual findings, a rationale that complies with the Social Security Act, Agency regulations, rulings, and policies, and an explanation of why a preponderance of the evidence supports the decision. (Sochaczewsky, Tr. 5:78 ("So unless you explain and expound and support the basis for your decision, you're not complying with the requirement to have a full and fair hearing and a legally sufficient decision"); JX 3; JX 16 (HALLEX I-2-8-25)).

29. SSA ALJs have a duty to issue decisions that are "legally sufficient" and "policy compliant," which means in compliance with the Social Security Act, regulations, rulings and Agency policies. (Bice, Tr. 4:278-279; 5:344; Sochaczewsky, Tr. 5:55-56; Sax, Tr. 2:216-217).

30. SSA ALJs have a duty to comply with Agency regulations found in the Code of Federal Regulations. (Sochaczewsky, Tr. 5:29, 137; Masengill, Tr. 1:173, 200-201; Cooperman, Tr. 6:231-232; PX 16 (Response to Request for Admission, No. 4)).

31. SSA ALJs have a duty to comply with Social Security Rulings. (Bice, Tr. 4:222-223; Sochaczewsky, Tr. 5:29, 31, 137; Masengill, Tr. 1:173, 201; Cooperman, Tr. Vol. 6:231-232).

32. SSA ALJs have a duty to comply with Acquiescence Rulings. (Bice, Tr. 4:225-227).[8]

33. HALLEX is the Hearing Appeals and Litigation Law Manual. It is designed to amplify and provide more specificity regarding regulations and rulings, and constitutes written Agency policy. HALLEX is binding on Administrative Law Judges. (Masengill, Tr. 1:190-192, 201; Bice, Tr. 4:220-222; Sax, Tr. 2:289-290).

34. In the absence of HALLEX or other regulatory or sub-regulatory guidance, the Program Operations Manual System ("POMS") can be utilized for guidance, but POMS is not a prime source of ODAR policy. The POMS sets forth internal

[7] HALLEX is the Hearing Appeals and Litigation Law Manual. F. 33.

[8] As an example of an Acquiescence Ruling, SSA might "acquiesce" to a ruling from a circuit court of appeals interpreting the Social Security Act as applying to the states in that circuit; but if the SSA Commissioner did not want to follow that interpretation in states outside that circuit, SSA would not be required to do so. (Masengill, Tr. 1:202).

policies for proceedings at the district office level, not for hearing operations, and its provisions are not binding on the hearing office level. HALLEX is Agency policy for ODAR. (Sax, Tr. 2:292; Sochaczewsky, Tr. 5:139-141, 147).

35. SSA ALJs have a duty to comply with HALLEX. (Bice, Tr. 4:220-222; Sochaczewsky, Tr. 5:32; Masengill, Tr. 1:201; 2:120; JX 4).

2. Closed period of disability decisions

36. The Agency has specific procedures for ALJs to follow in adjudicating cases. For disability cases, Social Security regulations require a five-step sequential evaluation process to evaluate whether a claimant is disabled under the Social Security Act. Step one of the process is a determination as to whether the claimant is working or not. At step two, the ALJ evaluates whether the claimant has a significant or severe condition. If the claimant has a significant or severe condition, at step three, there is a determination as to whether the condition is the same as a condition published in the regulations. If the condition is not one of the published conditions, at step four, the ALJ determines what the claimant can possibly do and whether the claimant could do his or her past work. If the conclusion is no, at step five, the ALJ determines whether the claimant can do any other work. If the answer is no, the claimant is considered disabled. (Bice, Tr. 4:248-252; Masengill, Tr. 1:168; 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920).

37. A closed period of disability decision (at times referred to by the Parties, the witnesses, and SSA documents as a "CPOD") is a decision finding a claimant was disabled and also finding that the claimant later experienced medical improvement in his or her medical condition such that the claimant was able to engage in some form of substantial gainful activity, and thus, was no longer disabled. As such, a closed period of disability decision finds that a claimant was disabled for a specific period of time and eligible for benefits, but that as of the end of that point in time, the claimant is no longer disabled and no longer eligible for disability benefits. (Masengill, Tr. 1:218; Sax, Tr. 2:220-225).

38. A finding of a closed period of disability requires the ALJ to undertake two separate analyses. The first step involves the five-step sequential evaluation process, referred to in F. 36, which is utilized to determine if a claimant is disabled. Once the ALJ has determined the claimant is disabled, for a closed period decision, the ALJ must then determine that the claimant has experienced medical improvement and is no longer disabled. (Sochaczewsky, Tr. 5:87-90).

39. Part of the analysis of whether a claimant is no longer disabled involves the ALJ evaluating a claimant's residual functional capacity ("RFC") on a function-by-function basis and determining the claimant is no longer disabled. This is referred

to in the record at times as the "second RFC." (Sax, Tr. 2:220-225; Sochaczewsky, Tr. 5:87-89, 97-98, 151-152; PX 61 at SSA0000614).

40. The assessment of a claimant's residual functional capacity requires the adjudicator to find the most that the claimant can do functionally with the claimant's exertional/non-exertional limitations, as well as environmental limitations and mental limitations. The adjudicator must then tie the finding as to residual function capacity of the claimant to the record, by providing support from the record for that residual functional capacity. (Brens, Tr. 4:83).

41. As an SSA ALJ, Respondent is required to comply with Agency regulations and policy when issuing a decision awarding a closed period of disability. (PX 16 (Response to Request for Admission, No. 27)).

42. The Division of Quality Services ("DQS"), at the direction of CALJ Bice, performs analyses of ALJ decisions to determine whether they are legally sufficient and policy compliant. (Sax, Tr. 2:269-270).

43. DQS, in its report of a focused review of Respondent's decisions issued from December 5, 2011 through June 30, 2013 (*see* F. 107), stated:

> Section 223(f) of the Social Security Act, 42 USC 423(f), requires that cessation [of disability benefits] be supported by substantial evidence of medical improvement and the ability to work. The regulations require an ALJ to follow the medical improvement review standard (MIRS), a two-part evaluation of evidence of medical improvement, as it relates to the ability to work, which is demonstrated by a decrease in severity (changes in symptoms, signs, or laboratory findings) and which requires a comparison of the claimant's RFC prior to and following the date of cessation. (20 CFR 404.1594 and 416 .994).

(JX 19 at SSA0006406; *see* 20 C.F.R. § 404.1594; 20 C.F.R. § 416.994; Bice, Tr. 4:248-249).

44. When issuing a decision for a closed period of disability, an SSA ALJ must find medical improvement relating to the claimant's ability to perform work at substantial gainful activity ("SGA") levels, as defined by Agency regulations, rulings, and policies. (Bice, Tr. 6:77; JX 19 at SSA00006406; Sochaczewsky, Tr. 5:86-89).

45. Medical improvement is something that every ALJ has to consider in any case involving a closed period of disability. There is initial training, OCEP training (ODAR Continuing Education Program), and quarterly training on this issue, and

the Agency has provided more than one training specifically focused on how to evaluate medical improvement. (Sochaczewsky, Tr. 5:90-91).

46. The Agency interprets the medical improvement regulations in 20 C.F.R. §§ 404.1594 and 416.994 to require that a finding of medical improvement be based upon more than a claimant's acknowledgment that his or her condition has medically improved, and to require supporting medical evidence. (Sochaczewsky Tr. 5:95-96; Bice, Tr. 7:287-288; Masengill, Tr. 1:219-222, 243 (stating that 20 C.F.R. §§ 404.1594 and 416.994 require that a finding of medical improvement be based upon signs, symptoms, laboratory findings, and similar medical evidence, and that medical evidence is required to back up a claimant's assertion that his or her medical condition has improved)).

47. The Agency interprets SSA regulations in 20 CFR chapters 404 and 416 to require a closed period of disability decision to be based upon objective medical evidence of medical improvement, including evidence that the claimant's residual functional capacity has improved to the point where the claimant can return to work. (Sax, Tr. 2:220-222, 227-228).

48. Under HALLEX, all ALJ decisions must "provide the rationale for the ALJ's findings of fact and conclusions of law, by including" as applicable, "[a]n explanation of the finding(s) on each issue that leads to the ultimate conclusion, including citing and discussing supporting evidence" and "[a] discussion of the weight assigned to various pieces of evidence . . . ." (JX 16 (HALLEX I-2-8-25)).

49. A closed period of disability decision must describe the medical improvement that occurred. Where medical improvement occurs, the ALJ must further determine the claimant's new residual function capacity in the medically improved state, which is a key determination in a claimant's ability to work and a "core, critical responsibility" of Agency policy and of adjudication. (Sochaczewsky, Tr. 5:84-89).

50. A finding of medical improvement related to the ability to do work that recites only the claimant's acknowledgement of medical improvement fails to describe the medical improvement or explain what has occurred. (Sochaczewsky, Tr. 5:93-94).

51. Under the rubric required by 20 C.F.R. § 404.1594, a claimant's statement that his or her condition has improved is "never" sufficient to support a closed period of disability, without supporting evidence and analysis of the purported medical improvement. The regulations contemplate a description and explanation of medical improvement, supported by the record evidence, and a function-by-function analysis. (Sochaczewsky, Tr. 5:95-98, 112-115; Bice, Tr. 7:287-288).

3. Complete record of hearing

52. SSA ALJs have a duty to hold full and fair hearings on the record. (Bice, Tr. 4:269; JX 2).

53. SSA ALJs "must obtain a clear and concise record, containing all relevant facts, while excluding all immaterial matters." (JX 14 at SSA000005 (ALJ position description)). *See also* Complaint Exhibit 1 at 20 (An SSA ALJ "must timely develop a clear and concise record, containing all relevant facts, while excluding all immaterial matters.").

54. SSA ALJs must make a complete record of the hearing proceedings. (Sochaczewsky, Tr. 5:218; Bice, Tr. 4:277; Cooperman, Tr. 7:106-107; JX 2; JX 16 (HALLEX I-2-6-40): "The administrative law judge (ALJ) must make a complete record of the hearing proceedings. Therefore, the ALJ or designee will make a verbatim audio recording of the entire hearing.").

55. SSA ALJs must summarize, on the record, the content and conclusion of any off-the-record discussions. (Bice, Tr. 4:241-243; JX 2; Cooperman, Tr. 7:109; PX 16 (Response to Request for Admission, No. 40) (admitting that as an SSA ALJ, Respondent is required to summarize on the record the content and conclusion of any off-the-record discussions); Masengill, Tr. 1:192; Sax, Tr. 2:239-240; JX 16 (HALLEX I-2-6-40)).

56. A complete hearing record helps to guarantee due process rights to the claimants, so that a reviewer can ascertain what happened off the record. (JX 2; Sax, Tr. 2:239).

57. HOCALJ Masengill's practice for memorializing an off-the-record conversation, should one occur, is to specify on the record what the discussion entailed, and then ask the claimant or claimant's representative whether his description of the conversation is consistent with his or her understanding. HOCALJ Masengill believes his practice is consistent with HALLEX. (Masengill, Tr. 1:193).

58. DQS, in its report of a focused review of Respondent's decisions issued from December 5, 2011 through June 30, 2013 (*see* F. 107), stated:

> The regulations at 20 CFR 405.330, as well as HALLEX I-2-1-75, require that a record of prehearing conferences be made and that the ALJ issue an order stating all agreements and actions resulting from the conference. Additionally, HALLEX I-2-6-40 requires that the "content and conclusion" of any off-the-record discussion conducted with the

> claimant or representative be summarized on the record. Notably, this provision states that the ALJ may decide to discuss and resolve questions that arise during the course of the hearing that are "not relevant to the issues in the claimant's case."

(JX 19 at SSA0006395).

4. Personally Identifiable Information

59. Personally Identifiable Information ("PII") is defined in the Annual Reminder on Safeguarding Personally Identifiable Information for SSA Employees as: "information which can be used to distinguish or trace an individual's identity, such as his/her name, social security number, biometric records etc., alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual such as date and place of birth, mother's maiden name, etc." (PX 5 at SSA0000042).

60. PII is defined in the Administrative Instructions Manual System as: "any information about an individual maintained by an agency, including (1) any information that can be used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information." (PX 5 at SSA0000594).

61. SSA employees handle PII on a regular basis. SSA ALJs handle PII relating to claimants and beneficiaries. (Bryant, Tr. 3:115-116; Masengill, Tr. 1:204).

62. Agency policies related to PII are set forth in the Administrative Instructions Manual System, the Information Systems Security Handbook/Information Security Policy, and the Annual Reminder for Safeguarding Personally Identifiable Information for SSA Employees. (Bryant, Tr. 3:98).

63. Agency policy prohibits employees from sending or forwarding an email containing PII to a non-secure email communication channel. (Bryant, Tr. 3:113-114; PX 4 at SSA0000398 ("Do not send or forward PII (or other information that requires confidentiality or protection from disclosure) using a non-SSA (or non-secure) email account to anyone.")).

64. Agency employees may send or forward an email containing PII using a secure email communication channel. (Bryant, Tr. 3:113-114; PX 4 at SSA0000396 ("Only send email containing PII or other sensitive information to email addresses that are secure . . .")).

65. Agency employees may send or forward an email containing PII to an unsecure email account only after taking steps to encrypt the email. (Bryant, Tr. 3:113-114, 280-281, 303-304; Sax, Tr. 2:244, 314-316; Bice, Tr. 6:53-54; PX 4 at SSA0000398).

66. Emails sent from Agency email accounts to outside, unsecure email accounts are not automatically encrypted. (Bryant, Tr. 3:279).

67. When replying to an email that contains PII, Agency employees are required to either remove the PII from the email, or ensure that their reply is encrypted. (Bryant, Tr. 3:281; PX 4 at SSA0000399 ("Do not include sensitive or protected information in an email reply unless the recipient has secure email or the information is protected by an encrypted attachment.")).

68. Agency policy prohibits employees from forwarding emails containing PII from their work email account to their personal email account. (Bryant, Tr. 3:281; PX 4 at SSA0000398 ("Do not copy (i.e., cc or bcc) work related email to your personal non-SSA email account.").

69. Agency policy prohibits employees from sending PII obtained in the course of their employment from their personal email account. (Bryant, Tr. 3:280-281; PX 4 at SSA0000398 ("Do not send or forward PII (or other information that requires confidentiality or protection from disclosure) using a non-SSA (or non-secure) email account to anyone.")).

5. Fairness and impartiality

70. The ALJ position description identifies impartiality as one of the inherent demands of the ALJ position. (JX 14 at SSA0000004; Complaint Exhibit 1 at p. 19).[9]

71. SSA ALJs have a duty to act in a fair and impartial manner. (Bice, Tr. 6:74; 5:290; MacLean, Tr. 4:185-186; Cooperman, Tr. 7:93-94; JX 15 at SSA0000096).

72. SSA ALJs have a duty to provide fair and impartial hearings for claimants. (Cooperman, Tr. 7:93-94; PX 16 (Response to Request for Admission, No. 24); *see also* Bice, Tr. 5:300).

73. SSA ALJs have a duty to maintain the appearance of impartiality. (Bice, Tr. 6:74; 5:290; Cooperman, Tr. 7:93-94; MacLean, Tr. 4:185-186; PX 16 (Response to Request for Admission, No. 26)).

[9] *See* n. 6.

74. SSA ALJs shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards applicable to members of the executive branch of the federal government. (Bice, Tr. 6:150; Cooperman, Tr. 7:93-94; JX 15 at SSA0000103; 5 C.F.R. § 2635.101(b)(8), (14)).

75. The Standards of Ethical Conduct for Employees of the Executive Branch require, among other things, that executive branch employees, including ALJs, act impartially and avoid any actions creating the appearance that they are not acting impartially. (5 C.F.R. § 2635.101(b)(8), (14)).

76. The SSA Annual Personnel Reminders, dated October 2013, reminded all Agency employees of the duty to take appropriate steps to avoid an appearance of a loss of impartiality while performing official duties. (JX 15 at SSA0000096). *See also* Bice, Tr. 7:19, 298 (SSA issues annual personnel reminders to remind ALJs of the duty of impartiality).

C. Chronology

77. In 2010, the Springfield Hearing Office, which is part of Region 1 (F. 5-6), was hearing and deciding cases from Mansfield, Ohio, which is part of the Central Ohio Region (Region 5), in order to assist Region 5 with an overwhelming caseload. Respondent decided some of those cases. (Sax, Tr. 2:218).

78. In the later part of 2010, Region 5 notified Region 1 of complaints it had received regarding Respondent's handling of closed period of disability decisions. The complaints involved assertions that claimants had been pressured into accepting a closed period of disability, rather than having a full hearing. After issuance of the closed period of disability decision, claimants were almost immediately reapplying for benefits, which increased the workload for Region 5. Region 5 referred 11 cases handled by Respondent to Region 1 for investigation. (Masengill, Tr. 1:210-214, 216-217; Sax, Tr. 2:218-220, 249).

79. A "complaint," as that term is used by the Agency, typically constitutes a letter written as part of an appeal of a decision, and may originate from a claimant or claimant's representative. (Masengill, Tr. 1:209, 259).

80. In response to complaints about the Ohio cases handled by Respondent that were referred to Region 1 (F. 77), an additional 35 of Respondent's cases were examined, and it was determined that there were "questionable" closed period of disability decisions. Although RCALJ Sax and HOCALJ Masengill wanted to

conduct a Weingarten interview of Respondent,[10] CALJ Bice decided to provide Respondent with retraining instead. (Sax, Tr. 2:249-251; Bice, Tr. 5:326-327; Masengill, Tr. 1:229-230).

81. On September 7, 2010, Respondent sent an email to ACALJ Frank Cristaudo, RCALJ Sax, and HOCALJ Masengill, regarding an Appeals Council remand Respondent had received. The Appeals Council remanded Respondent's decision in part because of deficiencies in the stated evidentiary bases for the closed period of benefits. (PX 158).

82. In the September 7, 2010 email referenced in F.81, Respondent wrote: "As you can see, the claimant represented by competent counsel agreed that a closed period would be an appropriate way of resolving her case, and I entered a decision awarding her a closed period in this title 2-16 case on October 21, 2009. As the matter was resolved in this manner, I saw no need in my decision to go through the extensive analytic process I would ordinarily go through, say, in an unfavorable decision." Respondent characterized the Appeals Council's decision as finding "fault with the fact that I did not write my decision to their satisfaction," although Respondent also acknowledged that the evidentiary basis recited in the closed period decision remanded by the Appeals Council was "brief." (PX 158).

83. In his September 7, 2010 email referenced in F. 81, Respondent specifically asked for guidance as to the level of detail he was required to provide in order to support a closed period of disability decision when the claimant agrees to resolve the case in that manner, stating: "In a case that is resolved pursuant to an agreed-to closed period, am I obligated to write a decision that exhaustively canvasses all of the medical evidence, and provides painstaking rationale as the AC demands?" Respondent stated he would do so if required, but that this would "surely" "negatively affect [his] productivity." (PX 158).

84. In response to Respondent's email request for guidance (F. 83), HOCALJ Masengill replied: "My best advice has always been to adequately rationalize the favorable aspect of any decision, but to pay extra special attention to fully rationalize the cessation of any benefits, even in an 'agreed to' Closed Period situation." Explaining the bases for his advice, HOCALJ Masengill described two potential scenarios. In the first scenario, "claimant with counsel is offered a CPD; claimant accepts CPD; ALJ issues a 'favorable' CPD decision; the day after the hearing the claimant changes his mind and/or alleges that counsel or [the] ALJ did not fully explain . . . [; and] appeal is taken regarding only the cessation of benefit." Without an adequate rationale in the decision, the Appeals Council "has

[10] A Weingarten interview is an investigative interview conducted by management with an employee, in which the employee is entitled to representation and which may result in disciplinary action being taken against the employee. F. 102.

no ammunition/basis to deny appeal" and the U.S. Attorney cannot or will not "defend [a] case in [f]ederal [c]ourt that is not adequately rationalized (even in an 'agreed to' situation)" and ultimately the case "is returned to ODAR." The second scenario outlined by HOCALJ Masengill described an offer to a claimant of a closed period decision, "with the possible implication that otherwise there may be an unfavorable result." The claimant accepts the offer and a decision is entered, but the "claimant walks into the District Office the next day and reapplies for benefits . . . ." HOCALJ Masengill closed by reiterating: "Again, my best advice is to fully rationalize any cessation, no matter what the claimant agrees to do. Within reason, assume you are an [Assistant U.S. Attorney] defending the cessation before a [f]ederal [j]udge." (PX 158).

85. On or about January 21, 2011, a U.S. District Court Magistrate Judge issued an order remanding a case adjudicated by Respondent, noting that "contrary to the directives of the regulations and the HALLEX manual, the record does not reflect what was discussed off the record prior to the hearing regarding a 'proposal' Plaintiff apparently felt pressured to 'accept' in lieu of a 'full hearing.'" The court's order required the Agency to provide Respondent a copy of the opinion, and when HOCALJ Masengill did so, Respondent indicated that he thought the opinion was incorrect. (PX 64 (*Betancourt v. Astrue*, 824 F. Supp. 2d 211, 216-17 (D. Mass. 2011)); Masengill, Tr. 1:232-233).

86. In June 2011, Respondent received two hours of retraining from ALJ Edward Brady, via video teleconference. ALJ Brady at the time was the ALJ in charge of national mentoring. The training addressed the necessary rationale to be included in closed period of disability decisions and the need to memorialize off-the-record discussions with claimants' representatives on the record, among other issues. (JX 1; Cooperman, Tr. 7:130; Masengill, Tr. 1:230).

87. ALJ Brady advised Respondent, as part of the training referred to in F. 86, that "the CFR dictates that where a closed period of disability is granted, even by consent, the decision needs to discuss the basis for that determination." Citing specific sections of the Code of Federal Regulations, ALJ Brady explained: "That is, the decision should include a discussion of medical improvement showing how the signs, symptoms, and objective testing show improvement under the medical improvement standard at the time the period closes . . . . [A]ny RFC, regardless of the agreement as to medical improvement must be married to corresponding medical evidence." ALJ Brady also discouraged Respondent from using off-the-record conversations for substantive matters, but advised that where there is any discussion off the record, it should be memorialized on the record, "while allowing the rep[resentative] to supplement or dispute the summary of that conversation." (JX 1).

88. On August 3, 2011, while at the Agency's annual ALJ training meeting, ACALJ Cristaudo and HOCALJ Barry Best (a HOCALJ in Region 1 attending the annual training meeting) had a meeting with Respondent, addressing the Agency's requirement for finding medical improvement in closed period of disability decisions and requirement for memorializing on the record any off-the-record discussions. ACALJ Cristaudo had been asked by CALJ Bice to speak with Respondent regarding complaints against him raising these topics. (PX 61; Cristaudo, Tr. 2:128-129; Sax, Tr. 2:258-259; Cooperman, Tr. 7:130).

89. At the meeting referred to in F. 88, ACALJ Cristaudo advised Respondent, among other things, that finding a closed period of disability requires a second RFC determination, and that the claimant's concession that he or she can work does not suffice. HOCALJ Best's notes of the meeting state that Respondent stated he does "closed period decisions to achieve justice . . . . If [the claimants] are lucid and say they want a closed period? I don't see a need to corroborate that. A second RFC? I cite the claimants' concession that they can work." In response, according to the notes, ACALJ Cristaudo reiterated: "There needs to be a second RFC." The notes report that Respondent further stated: "I've done everything right. I'm a model judge. Closed periods are good: They have a beneficial effect. In some cases they may involve giving some money to somebody who's not entitled, but it can be a good thing. . . . Why am I not getting plaudits? If you want to play hardball, I'll get an attorney." (PX 61 at SSA0000613-614; Cristaudo, Tr. 2:132-133).

90. In or around September 2011, the Agency received complaints regarding Respondent's closed period decisions that were issued after the training referred to in F. 86-89, which were reviewed by RCALJ Sax. In general, the claimants were dissatisfied with receiving a closed period of disability, notwithstanding having agreed to the closed period, and were refiling for benefits, claiming they were disabled. (Sax, Tr. 2:260-262).

91. On September 1, 2011, CALJ Bice sent a memorandum to all ALJs, reminding them that they "must make a complete record of the hearing proceedings" pursuant to 20 CFR 404.951 and 416.1451, and that "HALLEX I-2-6-40 provides: The Administrative Law Judge (ALJ) must make a complete record of the hearing proceedings. Therefore, the ALJ or designee will make a verbatim recording of the entire hearing. This is the official record of the hearing." CALJ Bice further explained:

> A complete record includes any conversation relevant to the case between the ALJ, parties to the hearing, and/or witnesses. If the conversation is not recorded, the ALJ must summarize on the record the content and conclusion of any off-the-record discussion. If an ALJ is

> going to go off the record, he or she should explain why he or she is going off the record.

(JX 2).

92. RCALJ Sax, in consultation with OCALJ, decided to issue a directive to Respondent regarding policy compliance. This directive was issued by HOCALJ Massengill on December 5, 2011. (Sax, Tr. 2:262-263).

93. A directive advises the ALJ of a problem with compliance, directs the ALJ to comply, and advises the ALJ that failure to follow the directive may lead to discipline. (Sax, Tr. 2:263-264; Masengill, Tr. 1:236).

94. A directive is "a pretty firm step" to take because it is directing an ALJ to follow particular provisions of the law. (Bice, Tr. 5:288).

95. On December 5, 2011, HOCALJ Masengill delivered a directive to Respondent directing him to comply with the requirements for issuing closed period of disability decisions and memorializing off-the-record discussions ("December 5, 2011 Directive"). (JX 7; Masengill, Tr. 1:235-236; Cooperman, Tr. 7:132-136).

96. The December 5, 2011 Directive stated in pertinent part:

> As a Social Security Administration (SSA or agency) Administrative Law Judge (ALJ), you are responsible for conducting hearings and issuing timely and legally sufficient decisions. See HALLEX I-2-0-5-B. A legally sufficient decision requires that you comply with SSA's laws, regulations, rulings, and policies. . . .
>
> In your decisions, you are required to analyze medical evidence that supports a finding of the claimant's medical improvement or to explain why the claimant's case falls within an exception to medical improvement. The decision also requires you to analyze the claimant's residual functional capacity (RFC) assessment and to explain how the RFC relates to a claimant's current work capacity and results in the claimant's ability to engage in substantial gainful activity (SGA). Many of your decisions involving closed periods of disability contain analytical deficiencies. Furthermore, in many of these cases, you had "off-the-record" discussions with the claimants and/or their representatives regarding the claimant's case and did not summarize the discussions on the record after the hearings resumed.

. . . You continue to hold hearings in which claimants amend their claims to a closed period based on off-the-record discussions. Your decisions in these cases contain analytical deficiencies including a lack of analysis to support a non-disability RFC and a lack of analysis to support a finding of medical improvement beyond the claimant's agreement to a closed period . . . . In addition, these decisions fail to summarize off-the-record discussions. . . .

To ensure that you provide claimants with legally sufficient and judicious decisions, I am directing you to include in each of your written decisions a thorough analysis of a claimant's medical improvement and a claimant's RFC, and to comply with the applicable agency policies and procedures, as described in detail below.

Analysis to Support Medical Improvement and Increased RFC

Pursuant to 20 CFR § 404.1594 and § 416.994:

1. I direct you to determine whether there has been medical improvement. You must analyze any improvement by comparing the prior and current medical evidence and by illustrating any improvement in the signs, symptoms, or laboratory findings.

   Your analysis should discuss evidence that centers on the factors set forth at 20 CFR §404.1528 and §416.928 and that align with the guidance for evidence set forth at 20 CFR §404.1512-1518 and §416.912-918.

2. I direct you to determine if any medical improvement relates to the ability of the claimant to perform work.

   i. Compare the prior RFC with the increase in the current RFC, based on changes in signs, symptoms, or lab findings.

   ii. Analyze how the increased RFC reflects the improvement in the exertional and nonexertional basic work activities, as applicable, and in accordance with the requirements set forth at 20 CFR §404.1545 and §416.945. . . .

3. I direct you to explain how the medical improvement analyzed in number 2, above, now results in the claimant being able to engage in work at the SGA level. . . .

> I also direct you to summarize on the record, all off-the-record discussions concerning amending claims involving closed periods of disability, as well as any other discussions relevant to the issues in a claimant's case. HALLEX I-2-6-40, I-2-6-75, 20 CFR §404.951, §416.1451, §404.961, and §416.1461 mandate that the ALJ make a complete record of the proceedings. This applies both to hearings and to pre-hearing conferences.
>
> Although this directive does not constitute disciplinary action, please be advised that failure to follow this management directive may lead to disciplinary action.
>
> I urge you to accept this letter in the spirit in which it is given, as notice that it is essential that you comply with agency law, regulations, rulings, and policies. . . . I am available to discuss how we might further assist you.

(JX 7).

97. After the December 5, 2011 Directive, Respondent asked HOCALJ Masengill to review some of Respondent's decisions and asked for feedback as to deficiencies. HOCALJ Masengill reviewed four or five decisions and perceived a pattern, which caused him to generate a list of comments and suggestions that he provided to Respondent. These comments and suggestions were designed to apply to any closed period decisions that Respondent might write. HOCALJ Masengill's suggestions included specific language that Respondent could use in his decisions, as templates, that would detail any off-the-record conversation in which a claimant agreed to a closed period of disability and would identify specific medical evidence supporting a finding of medical improvement. (Masengill, Tr. 1:241-242; 2:56; PX 160).

98. Also included in HOCALJ Masengill's comments and suggestions referred to in F. 97 was HOCALJ Masengill's comment that "[c]losing the [p]eriod [of disability] on or about the date of the hearing (absent compelling evidence) is generally difficult to rationalize adequately." This is because "cessation of benefits is based on something called medical improvement, which is reflected in signs, symptoms, laboratory findings, medical evidence, [and] doesn't necessarily magically happen the day of the hearing or soon before or after." (PX 160; Masengill, Tr. 1:243; *see also* Tr. 1:227 ("[P]eople don't medically improve magically that day . . . they show up at a hearing with the judge.")).

99. On December 21, 2011, Respondent advised HOCALJ Masengill that Respondent would "strive to implement" HOCALJ Masengill's list of comments and

suggestions "where appropriate." Respondent asked HOCALJ Masengill whether, going forward, HOCALJ Masengill wanted to review Respondent's closed period of disability decisions before they are signed. HOCALJ Masengill responded that this was not necessary unless Respondent needed an opinion on a particular case, stating: "I think my suggestions should cover most of these types of situations." In addition, HOCALJ Masengill did not deem it necessary to continue to review Respondent's decisions after providing Respondent with the December 5, 2011 Directive because he believed that Respondent had received appropriate guidance and feedback regarding his decisions. (JX 40; Masengill, Tr. 1:245).

100. After issuance of the December 5, 2011 Directive and providing the list of comments and suggestions referred to in F. 97-98, HOCALJ Masengill declined Respondent's request to have additional "collegial meetings" on the issues raised in those documents. HOCALJ Masengill believed that at that point in time, Respondent only wanted such meetings in order to attempt to "convince [HOCALJ Masengill] that [Respondent's] process was correct; his method was correct; and that he didn't need to fully rationalize certain things or fully detail on the record things that happened off the record." (Masengill, Tr. 2:59).

101. Based on additional complaints received by the Agency after issuance of the December 5, 2011 Directive and a review of Respondent's decisions from December 6, 2011 through March 1, 2012, the Agency believed that Respondent was not complying with the December 5, 2011 Directive and decided to conduct a Weingarten interview with Respondent. HOCALJ Masengill conducted this Weingarten interview on October 25, 2012. (JX 49; Sax, Tr. 2:267-269; PX 196; Masengill, Tr. 1:252-253).

102. A Weingarten interview is an investigative interview conducted by management with an employee, in which the employee is entitled to representation and which may result in disciplinary action being taken against the employee. The purpose of a Weingarten interview is to gather information. It is not to be a counseling session. (Massengill, Tr. 1:228-229, 2:77-78; Sax, Tr. 3:89).

103. HOCALJ Masengill informed RCALJ Sax of the content of the Weingarten interview with Respondent via memorandum dated December 11, 2012, and RCALJ Sax, in turn, forwarded the memorandum to CALJ Bice. (Masengill Tr. 1:255; Sax, Tr. 3:41-42; PX 196).

104. HOCALJ Masengill reported to RCALJ Sax regarding the results of the October 25, 2012 Weingarten interview with Respondent (F. 101), stating:

> After reviewing the issues in this matter, it is clear to me that Judge Cooperman has failed to follow the Directive given to him on December

> 5, 2011. Specifically, Judge Cooperman has continued to have off-the-record Representative contact and discussions regarding possible . . . Closed Periods, details of which have not been fully memorialized on-the-record or in the Decisions. He has failed to follow Agency Policy as set forth in HALLEX. . . .
>
> Additionally, in my opinion, Judge Cooperman continues to fail to adequately rationalize the cessation of benefits in so called "agreed to" Closed Period cases. . . . This is also contrary to the December 5, 2011 Directive and Agency Policy. . . .

(PX 196).

105. In early 2013, HOCALJ Masengill was advised of at least two additional complaints concerning Respondent's decisions and was directed to conduct another Weingarten interview of Respondent. This second Weingarten interview took place on March 28, 2013. (Masengill, Tr. 1:270-271; JX 42).

106. In his report of the March 28, 2013 Weingarten interview (F. 105), HOCALJ Masengill concluded:

> After reviewing the issues in this matter, it is clear that Judge Cooperman continues to fail to follow the written Directive given to him on December 5, 2011 . . . . Specifically, Judge Cooperman continues to have off-the-record Representative contact and discussions regarding possible . . . Closed Periods, details of which have not been fully memorialized on-the-record or in the Decisions. He continues to fail to follow Agency Policy as set forth in HALLEX. . . .
>
> In my opinion, Judge Cooperman continues not to rationalize adequately the cessation of benefits in so called "agreed to" Closed Period cases. He believes that a claimant's assent (upon advice of competent counsel) to a Closed Period decision is sufficient evidence to demonstrate Medical Improvement. He appeared to be stating that there needed to be no medical evidence or rationale to justify his conclusions. . . .
>
> Judge Cooperman continues to express the rather strong belief that he is absolutely deciding his cases correctly, efficiently, and equitably. It appears that he continues his practice of significant Closed Period adjudication, without following Agency Policy. This is despite the history of multiple discussions (by me, the Springfield, MA Hearing Office Director, and other ALJs), training sessions (Judge Brady-then

> National ALJ Mentor), investigations (Ohio Cases) and counseling (both oral and written), a personal meeting with Judge Cristaudo (then Associate Chief ALJ), a formal Written Directive (December 5, 2011), and a prior Weingarten Meeting.

(JX 42 at SSA0008623-8624).

107. DQS, which is part of ODAR's Appellate Operations, conducted a focused review of Respondent's disability decisions issued from December 5, 2011 through June 30, 2013 and prepared a report, dated September 26, 2013 ("Focused Review"). CALJ Bice was invited to the meeting to discuss the Focused Review, and according to HOCALJ Masengill, CALJ Bice was present for the meeting. (JX 19; Bice, Tr. 4:319; 6:117-118, 120-122; Masengill, Tr. 2:88-89).

108. When a focused review is undertaken regarding a particular adjudicator at SSA, the only information given to DQS is the name of the adjudicator. No information is provided as to why the request for the focused review is being made. (Bice, Tr. 4:319).

109. The Focused Review findings with respect to Respondent's decisions included: agreed-upon closed period of disability decisions that were not supported by the evidence of record; off-the-record discussions or prehearing conferences that were not adequately summarized on the record; and unsecured email communications between Respondent and claimants or claimants' representatives that contained PII belonging to the claimants. (JX 19 at SSA0006395-6398, 6406-6408).

110. Although the normal practice by the Agency after conducting a focused review of an ALJ is to provide the ALJ with a copy of the review and self-directed training resources, CALJ Bice determined not to do this in the case of Respondent, for two reasons. First, the Agency had decided to refer Respondent to the Office of the Inspector General ("OIG"). Second, CALJ Bice believed that the Agency had covered substantially the same issues in the training and in the December 5, 2011 Directive previously given to Respondent in 2011. (Bice, Tr. 4:323-324; 6:124-125).

111. On October 2, 2013, CALJ Bice made a referral to OIG for investigation into the "possibility of fraud, waste and abuse, or mismanagement by ALJ Cooperman or the representatives appearing before him." CALJ Bice's concern grew out of the nature of some of Respondent's email communications with certain claimants' representatives and non-policy compliant awards of benefits for closed periods of disability. (JX 60; Bice, Tr. 6:30-31).

112. OIG conducted an investigation ("OIG Investigation"), pursuant to CALJ Bice's referral, which concluded on or about February 11, 2015. Respondent was interviewed as part of the investigation. (JX 6; JX 22; JX 23).

113. In a December 8, 2014 written report ("OIG Report"), OIG concluded there was no evidence of criminal wrongdoing by Respondent. However, OIG did find evidence that "summaries of the off-the-record discussions were not memorialized on the record as required by HALLEX I-2-6-40"; that certain decisions "lacked sufficient reference to medical evidence to support" the decision; and that Respondent sent "emails containing PII [that] were not encrypted or password protected . . . in violation of SSA policy." (JX 6 at SSA00002461-2463).

114. In a February 11, 2015 addendum to the OIG Report, OIG further stated that its investigation supported the findings of the Focused Review, and that its investigation further revealed violations of Agency policy concerning Respondent's use of email, but took "no position with respect to the imposition of SSA administrative actions against the employee." (JX 22 at SSA00002468).

115. It is ODAR's practice to hold in abeyance any administrative actions against an employee once a referral to OIG is made in order to allow the OIG's investigation to move forward. At the time CALJ Bice made her referral to OIG regarding Respondent, ACALJ Lillios had been working with the Region 1 DQS on potential discipline for Respondent. (Bice, Tr. 4:313-314).

116. After receiving the OIG reports, CALJ Bice began seriously considering charges for removal of Respondent. (Bice, Tr. 4:328-329).

117. In or around December 2014, at the request of CALJ Bice and the Office of General Counsel ("OGC"), ODAR attorney advisor Ms. Arlene Brens reviewed selected decisions of Respondent for policy compliance and prepared a report ("Ms. Brens' Review"). CALJ Bice wanted to determine if Respondent was continuing to engage in the behavior identified by OIG. (JX 20; Brens, Tr. 4:49, 57, 66-67, 72-73).

118. Ms. Brens has worked as a decision writer for ODAR in the Washington, D.C. hearing office. Decision writers are trained in all the regulations and policies applicable to disability adjudications. After becoming a senior attorney advisor/decision writer in 2011, Ms. Brens handled the more difficult and complex cases in the office, including cases involving multiple remands. Ms. Brens estimated that by the time she left the Washington, D.C. Hearing Office, she had written over 1,000 decisions, including many closed period of disability decisions. In approximately 2013, Ms. Brens was promoted to attorney advisor in the ODAR

headquarters, working directly for CALJ Bice and Deputy CALJ Jack Allen. (Brens, Tr. 4:50-57, 63, 71).

119. The purpose of Ms. Brens' Review was to determine if Respondent's decisions were in compliance with Agency policies, with respect to the decision and the conduct of the hearing, including whether Respondent's closed period of disability decisions were supported by the evidence of record. Ms. Brens prepared a report of her review, which addressed four cases. (JX 8; Brens, Tr. 4:71-74).

120. To conduct her review (F. 117), Ms. Brens identified which cases of Respondent's to review from a list provided to her by the Division of Workload Management, which was drawn from ODAR's case management and processing system. She also identified cases from emails she had reviewed between Respondent and claimants' representatives while assisting in the OIG Investigation on behalf of OCALJ. For each case she reviewed, Ms. Brens reviewed the case record, including the hearing recording, the medical record, any email correspondence, and the decision. (Brens, Tr. 4:67-71).

121. The Complaint in this matter was issued on October 2, 2015. (Tab 1).

122. After the Complaint was issued, at the request of CALJ Bice, through OGC, ACALJ Sochaczewsky reviewed certain of Respondent's cases, identified by OGC, for policy compliance (hereafter, "ACALJ Sochaczewsky's Review"). ACALJ Sochaczewsky was also provided a copy of the Complaint against Respondent. (Sochaczewsky, Tr. 5:70-72, 206).

123. ACALJ Sochaczewsky's Review consisted of reviewing the decisions, listening to some or all of the hearings, and for some cases, reviewing correspondence and some of the medical and other evidence in the case. (Sochaczewsky, Tr. 5:70-71).

124. PX 19 reflects the notes of ACALJ Sochaczewsky's Review of 20 of Respondent's cases. PX 19 was prepared by OGC based on ACALJ Sochaczewsky's notes. Some additional cases that were part of ACALJ Sochaczewsky's Review were not included in PX 19 because there was doubt as to whether those cases violated any policy. (PX 19; Sochaczewsky, Tr. 5:73-74, 207-210).

D. Charge One: Neglect of Duties

1. Specifications 1 and 2

125. The Agency uses a template called the Finding Integrated Template ("FIT") to help streamline the decision writing process. ALJs and decision writers are encouraged, but not required, to utilize the FIT template. (Bice, Tr. 4:196-199).

126. Respondent, in writing his own decisions, utilizes the FIT template. (Cooperman, Tr. 6:213-215).

127. Respondent's closed period of disability decisions typically recited the applicable law as follows, in pertinent part:

> If the claimant is found disabled at any point in the process, the undersigned must also determine if his disability continues through the date of the decision. . . . [T]he undersigned must show that medical improvement has occurred which is related to the claimant's ability to work, or that an exception applies (20 CFR 404.1594(a) and 416.994(a)). In most cases, the undersigned must also show that the claimant is able to engage in substantial gainful activity (20 CFR 404.1594(a) and 416.994(a)). In making this determination, the undersigned must follow an additional eight-step evaluation process for the Title II claim and a seven-step process for the Title XVI claim (20 CFR 404.1594 and 416.994). . . . Medical improvement is any decrease in medical severity of the impairment(s) as established by improvement in symptoms, signs or laboratory findings (20 CFR 404.1594(b)(1) and 416.994(b)(1)(i)).

(PX 32 at 3-4 of 8; *see also* PX 20, 23, 28, 30, 33-35, 37, 38, 40).

128. Respondent issued a closed period of disability decision in the *Hatcher* case on October 9, 2012. ACALJ Sochaczewsky's Review determined that there was no discussion of the claimant's medical improvement. (PX 19 at 1-2; PX 32).

129. Respondent issued a closed period of disability decision in the *Amaro* case on December 19, 2012. ACALJ Sochaczewsky's Review determined that the decision contained an insufficient discussion of medical improvement. The Focused Review conducted by DQS identified the *Amaro* decision as an agreed-upon closed period of disability decision that was not supported by the evidence in the record. (PX 19 at 2; JX 19 at SSA0006406, 6408; PX 20).

130. Respondent issued a closed period of disability decision in the *Young* case on January 4, 2013. ACALJ Sochaczewsky's Review determined that the decision contained an insufficient discussion of medical improvement. (PX 19 at 2; PX 40).

131. Respondent issued a closed period of disability decision in the *Rivera* case on January 4, 2013. (PX 37).

132. The Focused Review conducted by DQS identified the *Rivera* decision as one in which there was an agreed-upon closed period of disability that was not supported by the evidence of record. The Focused Review noted that the rationale for the finding of medical improvement was limited to a statement that "[a]t the hearing, the claimant acknowledged this is so." The Focused Review further noted that the record included a treating source opinion and the opinion of a nurse practitioner that the claimant was essentially disabled, with both of these opinions post-dating the date that Respondent determined the claimant's disability ceased. ACALJ Sochaczewsky's Review also determined that the decision in *Rivera* contained an insufficient discussion of medical improvement. (JX 19 at SSA0006406-6407; PX 19 at 2; PX 37).

133. Respondent issued a closed period of disability decision in the *Parslow* case on January 8, 2013. ACALJ Sochaczewsky's Review determined that the decision contained an insufficient discussion of medical improvement. (PX 19 at 2; PX 34).

134. Respondent issued a closed period of disability decision in the *Petracone* case on October 3, 2013. ACALJ Sochaczewsky's Review determined there was "no true discussion/explanation of medical improvement, other than claimant admitted he improved," and that the end date of the closed period was "suggested" to the claimant. (PX 19 at 3; PX 35).

135. Respondent issued a closed period of disability decision in the *Fernandez* case on April 25, 2014. (PX 30).

136. Ms. Brens' Review concluded that there were a number of deficiencies in the *Fernandez* decision, including that Respondent's finding of medical improvement was "conclusory." Ms. Brens' Review elaborated:

> ALJ Cooperman used the basic FIT general language for the medical improvement discussion[:] "[B]ecause the claimant no longer has a severe impairment or combination of impairments, the undersigned finds that the claimant's functional capacity for basic work activities has increased." There was no explanation with supporting medical evidence

> as to why the claimant had medically improved. He stated "it appears those problems have receded, however, and therefore the claimant believes her overall condition has improved enough to warrant a request for a closed period, rather than for ongoing benefits as she originally sought when she filed her application for benefits."

(JX 20 at SSA0010948-10949; Brens, Tr. 4:81-83; PX 30).

137. Ms. Brens' Review of the *Fernandez* decision concluded that the decision was also deficient because "[t]here is no support in the record for the closed period dates given that the claimant continued to have treatment and surgery after the closed period ended." (JX 20 at SSA00109490).

138. ACALJ Sochaczewsky's Review of the *Fernandez* decision concluded that there was "no explanation of basis for new RFC after closed period." (PX 19 at 1).

139. Respondent issued a closed period of disability decision in the *Daddario* case on August 27, 2014. (PX 28).

140. ACALJ Sochaczewsky, based on his review, concluded that the *Daddario* decision was not policy compliant because, among other reasons, the decision did not sufficiently discuss or establish medical improvement. (PX 19 at 1; Sochaczewsky, Tr. 5:101-103; PX 28).

141. ACALJ Sochaczewsky explained that the Respondent's findings of medical improvement in the *Daddario* decision do not "explain what got better and why it got better and why the evidence supports the finding. The judge does say there's no longer severe impairment, but the why is missing. And it appears to accept the claimant's saying I want a closed period to substitute for the medical improvement part." The regulations in 20 CFR part 400 and HALLEX I-28-25 require an explanation of medical improvement. Establishing medical improvement requires more than saying the "magic words . . . there's medical improvement." (Sochaczewsky, Tr. 5:112-118; F. 28, 50-51; JX 16 (HALLEX at I-28-25)).

142. In addition to the review done by ACALJ Sochaczewsky, Ms. Brens reviewed the *Daddario* case and found a number of deficiencies, including a "conclusory" finding of medical improvement that lacked any explanation with supporting medical evidence as to why the claimant had medically improved. (JX 20 at SSA0010946-10948; PX 28).

143. Ms. Brens concluded that there was no support in the record for the end-date of the closed period in the *Daddario* decision. "As ALJ Cooperman admitted at the [disability] hearing, it was an arbitrary date." (JX 20 at SSA0010947; PX 28).

See also Sochaczewsky, Tr. 5:111-112 ("[I]t's the rare instance where someone who has . . . a disabling impairment, no longer has any severe impairment at all.").

144. The Appeals Council vacated and remanded the *Daddario* decision for failing to support the closed period, stating that it was an error of law to provide no evidentiary support from the record for the finding of medical improvement. (Brens, Tr. 4:124-125).

145. Respondent issued a closed period of disability decision in the *Broussard* case on July 23, 2014. ACALJ Sochaczewsky's Review determined, among other things, that there was "no true discussion/explanation" of the finding of medical improvement. (PX 19 at 2; PX 23).

146. Respondent issued a closed period of disability decision in the *Lowe* case on July 24, 2014. ACALJ Sochaczewsky's Review determined, among other things, that there was "no true discussion/explanation of medical improvement, other than claimant admitted she could perform sedentary work . . . ." (PX 19 at 2; PX 33).

147. Respondent issued a closed period of disability decision in the *Simmons* case on August 28, 2014. (PX 38).

148. The *Simmons* case had been remanded to Respondent, after an Appeals Council "own motion" review (F. 23) of Respondent's previous closed period of disability decision. The Appeals Council found as to the earlier *Simmons* decision that: "The claimant's acknowledgment of medical improvement is not a determination made in accordance with the requirements of 20 C.F.R. 404.1594." (PX 38 n.3; Sochaczewsky, Tr. 5:91-92, 94-96).

149. In Respondent's decision on remand in *Simmons*, Respondent referenced the Appeals Council remand, stating: "The AC further faulted my decision by concluding that 'The claimant's acknowledgment of medical improvement is not a determination made in accordance with the requirements of 20 C.F.R. 404.1594.' . . . I summarily reject the AC position that a lucid claimant's acknowledgment of occupational capacity is insufficient to support a finding of medical improvement. The regulatory section which the AC cites, 20 C.F.R. [404].1594, states in pertinent part that medical improvement is any decrease in the severity of an impairment. Such a decrease in severity must be based, as the regulatory provision states, on changes in symptoms, signs or lab findings. Who better to report (and know) what a person's symptoms are than that person himself? Certainly not the doctor, not the nurse; indeed, no one is in a better position to know the severity of symptoms than the person who is suffering them. Thus, the regulatory provision cited by the AC in fact undermines their conclusion, and expressly supports mine." (PX 38).

150. ACALJ Sochaczewsky concluded that the *Simmons* decision on remand did not comply with Agency policy in a number of different ways, including that there was no medical improvement explanation or analysis, or a complete, second RFC. (Sochaczewsky, Tr. 5:83-84, 93-96; PX 19 at 1; PX 38).

2. Specifications 3 and 4

151. Respondent believes that he could not achieve the same degree of candor in a discussion on the record that he could achieve in a discussion off the record. (Cooperman, Tr. 6:270-271).

152. Paul Durkee is an attorney practicing Social Security disability law who maintains offices in Worcester, Massachusetts, with the law firm of McGuire & McGuire, where he has worked since 1980. Over the past eight years, Mr. Durkee has appeared before Respondent numerous times. He also has appeared before other ALJs at the Springfield Hearing Office. (Durkee, Tr. 3:155-161).

153. In Mr. Durkee's experience, Respondent's practice was to memorialize an off-the-record conversation by stating on the record the fact that there had been an off-the-record conversation and asking the claimant "if he or she was made aware that we had discussed their case." (Durkee, Tr. 3:164).

154. Bainbridge Testa is an attorney who has been practicing law for over twenty years. Mr. Testa currently has his own firm and handles primarily Social Security disability matters in Massachusetts and throughout New England. Over the past eight years, Mr. Testa has appeared before Respondent numerous times. He also has appeared before other ALJs at the Springfield Hearing Office and at other SSA hearing offices throughout New England. (Testa, Tr. 3:203-207).

155. In Mr. Testa's experience, it was not unusual to have off-the-record conversations with an ALJ during a hearing about a disability case. Mr. Testa has had off-the-record conversations about substantive issues in a case with ALJs during hearings, and in his experience, either he or the ALJ would memorialize the conversation by giving a summary on the record. (Testa, Tr. 3:214-215).

156. Respondent issued a decision in the *Amaro* case on December 19, 2012, after a hearing on December 18, 2012. The Focused Review conducted by DQS identified *Amaro* as a case in which a claimant agreed to a closed period of disability decision after an off-the-record conversation. ACALJ Sochaczewsky's Review determined that there was an insufficient summary of the off-the-record conversation. (PX 41; JX 19 at SSA0006395, 6397; PX 19 at 2).

157. Respondent issued a decision in the *Bond* case on October 12, 2012, after a hearing held on October 10, 2012. The Focused Review conducted by DQS identified *Bond* as a case in which a claimant agreed to an amended onset date after an off-the-record conversation. (JX 19 at SSA0006395, 6397; PX 22).

158. The Focused Review noted that at the *Bond* hearing, Respondent referenced an off-the-record discussion stating, "We talked about this by e-mail. [Your representative] and I have a very good relationship . . . she helps me make the right decision in a case. So we've talked about your situation and I know she's discussed what we've talked about with you." The Focused Review further noted that this off-the-record discussion "was not summarized on the record" and was followed by the claimant's agreement to an amended onset date. (JX 19 at SSA0006398, 6405).

159. ACALJ Sochaczewsky's Review determined that there was an insufficient summary of the off-the-record conversation in *Bond*. (PX 19 at 2).

160. Respondent held a hearing and issued a decision in the *Young* case on January 4, 2013. The summary of the hearing recording, contained in the case file, notes that the recording was stopped and restarted during the hearing. (PX 40; PX 60).

161. The Focused Review identified *Young* as a case in which the claimant agreed to an amended onset date and a closed period of disability decision after an off-the-record conversation. The Focused Review stated that "[a]t the beginning of the hearing, the ALJ referenced, but did not summarize, an off-the-record discussion with the representative concerning 'the pluses and minuses and different options we might have for resolving [the claim]'. . . . 'The bottom line is . . . we talked about the strengths and weaknesses of your case . . . [and] we discussed different ways of resolving the case . . . .'" (JX 19 at SSA0006396).

162. ACALJ Sochaczewsky's Review concluded that there was an insufficient summary of an off-the-record conversation in *Young*. (PX 19 at 2).

163. Respondent held a hearing and issued a decision in the *Parslow* case on January 8, 2013. The summary of the hearing recording, contained in the case file, notes that the recording was started several times at the beginning of the hearing and that there was a discussion prior to the commencement of the recording. (PX 34; PX 54).

164. The Focused Review identified *Parslow* as a case in which the claimant agreed to an amended onset date and a closed period of disability decision after an off-the-record conversation. The Focused Review states that "[t]he ALJ referenced, but did not summarize, an off-the-record discussion with the representative about the

case." After questioning of the claimant on the record, and "[a]t the end of the hearing, after an off-the-record discussion between the claimant and the representative and in answering the ALJ's questions concerning the proposed CPOD," the claimant stated that he "just want[ed] to settle this and go home." (JX 19 at SSA0006396-6397).

165. ACALJ Sochaczewsky's Review concluded that there was an insufficient summary of an off-the-record conversation in *Parslow*. (PX 19 at 2).

166. Respondent held a hearing in the *Simmons* case on July 30, 2014, and issued a decision on August 28, 2014. The summary of the hearing recording, contained in the case file, notes that the recording was stopped and restarted during the hearing. (PX 38; PX 58).

167. ACALJ Sochaczewsky, who reviewed the *Simmons* decision and listened to the hearing recording, concluded that this decision was not policy compliant, including because there was an incomplete summary of an off-the-record conversation. (PX 19 at 1; Sochaczewsky, Tr. 5:83-85).

3. Specifications 5 and 6

168. Information by itself that is not PII can become PII if combined with other information. (Bryant, Tr. 3:111; PX 5 at SSA0000042).

169. A person's last name combined with the last four digits of their Social Security Number ("SSN") is PII. (Bryant, Tr. 3:96, 111; PX 4 at SSA0000397).

170. A person's last name combined with medical information is PII. (Bryant, Tr. 3:96, 111; PX 5 at SSA0000594).

171. A secure communication channel is one that automatically encrypts emails sent through that channel. (Bryant, Tr. 3:275-276; *see also* PX 4 at SSA0000397).

172. Web-based email services such as Yahoo, Gmail, Hotmail, or Verizon.net are not, and have never been, secure email partners. Emails sent to such web-based email services from ssa.gov email accounts are not secure. No law firm is, or has ever been, a secure email partner. (Bryant, Tr. 3:248, 275-278; Bice, Tr. 6:53-54; PX 12 (identifying secure email partners)).

173. Agency policy, as stated in the Information Systems Security Handbook, directs: "Do not send or forward PII (or other information that requires confidentiality or protection from disclosure) using a non-SSA (or non-secure) email account to

anyone" and "[o]nly send email containing PII or other sensitive information to email addresses that are secure . . . ." (PX 4 at SSA0000396, SSA0000398).

174. Agency policies prohibiting employees from sending emails containing PII to unsecure accounts unless the PII is encrypted (F. 63-65) were in effect in fiscal year 2013 and fiscal year 2014. (Cooperman, Tr. 3:103-104; Bryant, Tr. 3:114-115).

175. Agency employees, including Respondent, have a duty to safeguard PII to protect an individual's privacy. (Bryant, Tr. 3:114-115; Masengill, Tr. 1:205-206; PX 5 at SSA0000042; *see* F. 62-69).

176. The Agency sends employees, including Respondent, annual personnel reminders regarding their duty to safeguard PII and the methods for doing so. (Bryant, Tr. 3:98-102; Masengill, Tr. 1:205; Sax, Tr. 2:244; Bice, Tr. 5:298; JX 15; PX 5; JX 13).

177. The Annual Reminder on Safeguarding Personally Identifiable Information for SSA Employees instructs: "Each SSA employee is responsible for properly safeguarding PII from loss, theft or improper disclosure, including inadvertent disclosure . . . [and must k]now, understand and follow all Agency policies and directives on security, privacy and confidentiality practices." (PX 5 at SSA0000042).

178. The Annual Reminder on Safeguarding Personally Identifiable Information for SSA Employees instructs: "Employees who fail to adequately safeguard PII or who violate Agency policies for safeguarding PII may be subject to disciplinary action up to and including removal from [f]ederal service or other actions in accordance with applicable law and Agency policy." (PX 5 at SSA0000042).

179. In addition to the annual personnel reminders, the Agency reminds employees about the duty to safeguard PII through periodic reminders and mandatory training. (Bryant, Tr. 3:97, 102, 116, 243; Masengill, Tr. 1:205; Sax, Tr. 2:244; PX 4; JX 13; PX 11).

180. On June 23, 2011, after taking the annual training on handling PII, Respondent sent an email to HOCALJ Masengill asking him if there were matters Respondent should omit from his emails with claimants' representatives. (Masengill, Tr. 1:206-207; PX 194).

181. HOCALJ Masengill responded to Respondent's June 23, 2011 email (F. 180) by email dated June 30, 2011, in which HOCALJ Masengill instructed Respondent not to include information such as SSNs, dates of birth, addresses, etc. in his emails to claimants' representatives. (Masengill, Tr. 1:206-207; PX 194).

182. In fiscal year 2013 and fiscal year 2014, Respondent received training related to the duty to safeguard PII. (Cooperman, Tr. 7:100-101).

183. In fiscal year 2013 and fiscal year 2014, Respondent was aware of his duty to safeguard PII and to encrypt emails sent to unsecure email accounts. (Cooperman, Tr. 7:103-104; 6:229).

a. Specification 5

184. Respondent did not encrypt emails he sent to claimants' representatives in fiscal year 2013. (Cooperman, Tr. 7:105).

185. Respondent did not know and did not ask if claimants' representatives with whom he communicated via email in fiscal year 2013 were considered SSA secure email partners. (Cooperman, Tr. 7:104).

186. On October 10 and 11, 2012, Respondent exchanged emails with Mr. Testa, a claimant's representative who was representing a claimant on a matter before Respondent. Mr. Testa's email to Respondent on October 10, 2012 included a claimant's full name. In a reply email sent by Respondent to Mr. Testa, Respondent asked Mr. Testa to provide the claimant's SSN. Mr. Testa sent a follow up email to Respondent on October 10, 2012 with the claimant's full name and SSN. In reply, Respondent sent an email on October 11, 2012 that contained PII, including the claimant's full name and a summary of the claimant's medical history. These emails were exchanged between Respondent's work email account and a yahoo.com email address. (PX 142).

187. On October 16, 2012, Respondent sent an email to Ms. Linda McGrail, a claimant's representative who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name, date of birth, and detailed medical history. (PX 135).

188. On November 14, 2012, Respondent exchanged emails with Ms. Bonita Porter, a claimant's representative who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name and SSN. These emails were exchanged between Respondent's work email account and a law firm's email address. (PX 185).

189. On November 23, 2012, Respondent sent an email to Mr. David R. Patterson, a claimant's representative who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name, month and year

of birth, and medical history. This email was sent from Respondent's work email account to a verizon.net email address. (PX 107).

190. On December 21, 2012, Respondent sent an email to "Attorney Spinola," a claimant's representative who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name, date of birth, and medical history. Respondent sent this email from his work email account to a verizon.net email address. (PX 110).

191. On December 4, 2012 and January 11, 14, and 17, 2013, Respondent exchanged emails with Ms. Michelle Begley, a claimants' representative who was representing several claimants on matters before Respondent, that contained PII, including the full names, dates of birth, and medical histories of three claimants. The emails were exchanged between Respondent's work email account and a lawyer's email address. (PX 111).

192. On February 14 and 15, 2013, Respondent exchanged emails with Ms. Porter, who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name, medical history, and last four digits of the SSN. These emails were exchanged between Respondent's work email account and a law firm's email address. (PX 129).

193. On May 15, 2013, Respondent exchanged emails with Ms. Tricia Jacobs, a claimant's representative who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name and SSN. These emails were exchanged between Respondent's work email account and a law firm's email address. (PX 112).

194. On August 7, 2013, Respondent exchanged emails with Mr. Durkee, a claimant's representative who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name and medical history. These emails were exchanged between Respondent's work email account and a verizon.net email address. (PX 131).

b. Specification 6

195. Respondent did not encrypt emails he sent to claimants' representatives in fiscal year 2014. (Cooperman, Tr. 7:105).

196. Respondent did not know and did not ask if claimants' representatives with whom he communicated via email in fiscal year 2014 were considered SSA secure email partners. (Cooperman, Tr. 7:104-105).

197. On November 18, 2013, Respondent sent an email to Mr. Testa, who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name and full SSN. These emails were exchanged between Respondent's work email account and a law firm's email address. (PX 116).

198. On November 22, 2013, Respondent exchanged emails with Ms. Porter, who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name, SSN, and medical history. These emails were exchanged between Respondent's work email account and a law firm's email address. (PX 117).

199. On December 18, 2013, Respondent exchanged emails with Ms. Porter, who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name, last four digits of the SSN, and medical history. These emails were exchanged between Respondent's work email account and a law firm's email address. (JX 34; Bice, Tr. 5:261-262; PX 130).

200. On February 25, 2014, Respondent exchanged emails with Ms. Porter, who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's last name and full SSN. These emails were exchanged between Respondent's work email account and a law firm's email address. (PX 119).

201. On March 6, 2014, Respondent exchanged emails with Ms. McGrail, who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's last name and full SSN. These emails were exchanged between Respondent's work email account and a hotmail.com email address. (PX 120).

202. On April 4 and 7, 2014, Respondent exchanged emails with Ms. Porter, who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's full name, SSN, date of birth, and medical history. These emails were exchanged between Respondent's work email account and a law firm's email address. (PX 122).

203. On May 29, 2014, Respondent exchanged emails with Ms. McGrail, who was representing a claimant on a matter before Respondent, that contained PII, including a claimant's last name and SSN. These emails were exchanged between Respondent's work email account and a hotmail.com email address. (PX 123).

4. Specifications 7 and 8

204. CALJ Bice acknowledged that the Appeals Council did not find that Respondent's decisions had been influenced by the identity of any particular claimants' representative. (Bice, Tr. 6:64-65).

205. CALJ Bice acknowledged that she was not aware of any cases where Respondent's decisions had been influenced by the identity of any particular claimants' representative. (Bice, Tr. 6:65, 69).

206. CALJ Bice acknowledged that the emails used to support the Complaint (including JX 26, JX 27, JX 31, and JX 35) show only the possibility of partiality or an appearance of a loss of impartiality, but do not show that Respondent acted impartially. (Bice, Tr. 6:65, 69).

a. Specification 7

207. On January 15, 2013, Respondent wrote an email to Ms. McGrail, a claimant's representative, in which he stated: "I just wanted to make sure your __ was covered[.] I protect my lawyers (at least those, like you, whom I like)[.]" (JX 26).

208. On May 30 and 31, 2013, Respondent wrote an email to Ms. McGrail, in which he stated: "You know, Linda, that my discretion has a floor and a ceiling, and you always get the ceiling, but to resolve this case without a hearing would require me to ascend to the stratosphere!" (JX 27).

209. On September 26, 2013, Respondent wrote an email to Mr. Testa, a claimant's representative, in which Respondent stated: "When I have attorneys like you to deal with, I will be the same open, inquiring person I have always been, and encourage free-wheeling debate and discussion like we've always had. Where I have attorneys I don't know before me, I'll ask no questions other than of the VE, and that will be that." (JX 31).

b. Specification 8

210. On April 16, 2014, Respondent wrote an email to Ms. Silva, a claimant's representative, in which he stated: "Kelli, you are one of a group (fairly small group) of attorneys who may always contact me, bidden or unbidden. I respect you immensely, and value your input consistently. Please remember this, and govern yourself accordingly." (JX 35).

E. Charge Two: Conduct Unbecoming an SSA ALJ

1. Specification 1

211. Ms. Linda McGrail is a claimants' representative who has appeared before Respondent on numerous occasions. (PX 84; Cooperman, Tr. 6:264).

212. On August 21, 2012, Ms. McGrail and Respondent had an email exchange between Ms. McGrail's hotmail.com account and Respondent's work email address. (JX 24).

213. On August 21, 2012, Ms. McGrail sent an email to Respondent summarizing her meeting with her client concerning the possibility of a closed period of Social Security benefits and asked Respondent if he would consider a closed period of benefits from February 17, 2011 until August 15, 2012. (JX 24).

214. Respondent replied to Ms. McGrail's email (F. 213) by email dated August 21, 2012: "Yes, given the liberal and inclusive way I am instructed to interpret the law (DOW v. ASTRUE, 2011 U.S. Dist LEXIS 94974, D Vt 2011)[.] Plus, the fact that it's you as his attorney doesn't hurt matters[.]" (JX 24; Cooperman, Tr. 6:264-265).

215. From the Agency's perspective, Respondent's August 21, 2012 email to Ms. McGrail (F. 214) is an improper communication because district court decisions are not precedential, the Agency does not apply district court law, and no one in the Agency has instructed ALJs to interpret the law in a liberal and inclusive way. (Bice, Tr. 4:346-347).

216. In an August 21, 2012 email subsequent to the email referred to in F. 214, Respondent wrote to Ms. McGrail: "You are one of the best attorneys it has been my privilege to know up here and I say that not because I always think your cases are meritorious (I don't) and not because you always agree to closed periods (you don't) and not because you always do what I want you to (you don't, you shouldn't, and it would bore us both if you did) but because you practice law the way I used to, realistically, energetically, and efficiently. What's not to like about you?" (JX 24).

217. From the Agency's perspective, Respondent's August 21, 2012 emails to Ms. McGrail (F. 214, 216) are improper communications because the statements – "[p]lus, the fact that it's you as his attorney, doesn't hurt matters"; and "what's not to like about you?" – reflect an appearance of lack of impartiality. (Bice, Tr. 4:345-346).

218. Respondent acknowledged that his emails show a degree of familiarity that would have been inappropriate in a courtroom setting. (Cooperman, Tr. 6:270-271).

2. Specification 2

219. On August 31, 2012, Ms. McGrail and Respondent had an email exchange between Ms. McGrail's hotmail.com account and Respondent's work email address. (JX 25).

220. On August 31, 2012, Ms. McGrail sent an email to Respondent summarizing her discussion with her client concerning the possibility of a closed period of Social Security benefits. (JX 25).

221. By email dated August 31, 2012, Respondent replied to Ms. McGrail's email (F. 220) that the claimant "could very well prevail[.] Or he may not, who knows?" Respondent also discussed with Ms. McGrail Respondent's personal recreation plans and the personal information of another SSA ALJ. (JX 25).

3. Specification 3

222. On January 15, 2013, Ms. McGrail and Respondent had an email exchange between Ms. McGrail's hotmail.com account and Respondent's work email address. (JX 26).

223. In his January 15, 2013, reply email to Ms. McGrail, Respondent wrote: "I just wanted to make sure your ___ was covered[.] I protect my lawyers (at least those, like you, whom I like)[.]" (JX 26).

224. From the Agency's perspective, Respondent's January 15, 2013 email to Ms. McGrail (F. 223) is an improper communication because it gives the appearance of a being partial to attorneys that he likes. (Bice, Tr. 5:225-226).

225. Respondent acknowledged that his statements in the January 15, 2013 email (F. 223) could "raise some eyebrows" and that he could "see where Judge Bice would have concern[s] about that . . . ." (Cooperman, Tr. 6:273-274).

4. Specification 4

226. On May 30 and 31, 2013, Ms. McGrail and Respondent had an email exchange between Ms. McGrail's hotmail.com account and Respondent's work email address. (JX 27).

227. In his May 30, 2013 email to Ms. McGrail, Respondent identified a claimant by last name and discussed the claimant's medical conditions, including the claimant's physician's name. Respondent asked Ms. McGrail: "How can I find someone disabled who is doing desk work? Indeed, why should I not regard such a claimant as a fraudster and refer her for possible prosecution." (JX 27; Bice, Tr. 5:227-228).

228. In her May 30, 2013 email to Respondent, Ms. McGrail asked Respondent if he would consider a closed period of disability in the case referenced in F. 227, to which Respondent replied: "Probably need to have a hearing on this one[.] You know, Linda, that my discretion has a floor and a ceiling, and you always get the ceiling, but to resolve this case without a hearing would require me to ascend to the stratosphere!" (JX 27; Bice, Tr. 5:229-230).

229. In an email subsequent to the emails referred to in F. 227 and F. 228, on May 31, 2013 Respondent wrote to Ms. McGrail: "[Y]our friends (of which [I] am flattered to consider myself one) care a lot about you." (JX 27).

230. From the Agency's perspective, Respondent's May 30 and 31, 2013 emails to Ms. McGrail (F. 227-229) are improper communications because he made a personal statement about how he feels about Ms. McGrail as a person and, by telling her, "you always get the ceiling," he showed a lack of impartiality. (Bice, Tr. 5:228-231).

5. Specification 5

231. Mr. Bainbridge Testa is a claimants' representative who has appeared before Respondent on numerous occasions. (Testa, Tr. 3:208).

232. On July 30, 2013, Mr. Testa and Respondent had an email exchange between Mr. Testa's law firm email account and Respondent's work email address. (JX 28).

233. On July 30, 2013, Respondent sent an email to Mr. Testa in which he began by stating, "[e]njoyed seeing you . . . at the party last Saturday." Respondent then advised Mr. Testa that Mr. Testa's name was not included on a list of law firms provided by SSA to claimants who ask for delays in hearings in order to obtain representation. (JX 28).

234. From the Agency's perspective, Respondent's July 30, 2013 email to Mr. Testa (F. 233) is an improper communication because it intermixed personal relations with a business discussion and, by telling Mr. Testa that his name was not on a list given to claimants seeking representation, it could create the impression of favoritism towards Mr. Testa. (Bice, Tr. 5:234-235, 237).

235. In Respondent's July 30, 2013 email to Mr. Testa, Respondent summarized his impressions of four pending cases. In discussing one claimant, Respondent detailed the claimant's drug use and commented, "I've gotta meet this guy." In discussing another claimant, Respondent asked Mr. Testa, "Why [did] you take this case?" (JX 28).

236. From the Agency's perspective, Respondent's July 30, 2013 email to Mr. Testa (F. 235) is an improper communication because Respondent's comments about a claimant's drug use were inappropriate and failed to show respect for the Agency's claimants. (Bice, Tr. 5:236).

6. Specification 6

237. On August 20, 2013, Mr. Testa and Respondent had an email exchange between Mr. Testa's law firm email account and Respondent's work email address. (JX 29).

238. On August 20, 2013, Mr. Testa sent an email to Respondent in which he summarized the medical conditions of one of his clients and wrote: "Bottom line: A closed period of 18 months would be a gift, and gladly accepted if you see fit to resolve the case in this manner. Client is already on board." (JX 29).

239. Respondent replied to Mr. Testa's email (F. 238) by email dated August 20, 2013 in which Respondent wrote: "Just to show you the amount of good will you've banked, I set aside a decision I was writing to attend to your email[.]" He then wrote: "Having reviewed your submission and the record, I think your suggestion has merit, and I will grant it upon receiving the standard letter[.]" (JX 29).

240. From the Agency's perspective, Respondent's August 20, 2013 email to Mr. Testa (F. 239) is an improper communication because by stating he will grant Mr. Testa's request in response to Mr. Testa's suggestion that a closed period of 18 months would be a gift, and by referencing the "goodwill" that Mr. Testa has "banked," Respondent indicates a special relationship with Mr. Testa and lack of impartiality. (Bice, Tr. 5:240).

7. Specification 7

241. On September 17, 2013, Mr. Testa and Respondent had an email exchange between Mr. Testa's law firm email account and Respondent's work email address. (JX 30).

242. On September 17, 2013, Respondent sent an email to Mr. Testa in which he wrote: "I will take no action on [one of Mr. Testa's client's cases] [un]til Friday to give you a chance to propose suggestions if you have any. You may present one, or more than one, option for resolving this case that would be acceptable to your client." (JX 30).

243. In his September 17, 2013 email to Mr. Testa (F. 242), Respondent also wrote: "It's always a treat to have a lawyer of your ability and dedication to work with." (JX 30).

244. From the Agency's perspective, Respondent's September 17, 2013 email to Mr. Testa (F. 242-243) is an improper communication because it creates an appearance of a lack of impartiality. (Bice, Tr. 5:241-242).

8. Specification 8

245. On September 26, 2013, Mr. Testa and Respondent had an email exchange between Mr. Testa's law firm email account and Respondent's work email address. (JX 31).

246. On September 26, 2013, Respondent sent an email to Mr. Testa in which Respondent described an arbitration involving Respondent. Respondent named Paul Lillios, an Associate Chief ALJ and "refer[ed] to him as the 'Chicago hit man' because (a) he comes from Chicago and (b) never-with the possible exception of the former [SSA] [C]ommissioner – have I seen a more anti-judge bureaucrat in my life." Respondent further wrote: "Lillios is an ex-AUSA, has a sterling CV, and is an intelligent and highly animated person. He is also, as noted earlier, the most anti-ALJ bureaucrat, save for [the former SSA Commissioner] Astrue, I've ever seen." (JX 31; Bice, Tr. 5:242).

247. From the Agency's perspective, Respondent's September 26, 2013 email to Mr. Testa (F. 246) is an improper communication because sharing personal information about other Agency officials and providing details about an arbitration involving Respondent personally to one of the representatives who appears before Respondent shows a lack of impartiality. (Bice, Tr. 5:244).

248. From the Agency's perspective, Respondent's September 26, 2013 email to Mr. Testa (F. 246) is an improper communication because expressing his negative opinions about an Associate Chief ALJ and the former Commissioner of SSA to a claimant's representative who does business with the Agency undermines public confidence in the Agency. (Bice, Tr. 5:243-244).

249. In his September 26, 2013 email (F. 246), Respondent, describing his own lawyer in the arbitration, told Mr. Testa that the lawyer is, "except for you, the best lawyer I've seen in action." Respondent further wrote: "No matter how this [arbitration] comes out, I will definitely be much less pro-active than I have been in handling cases. When I have attorneys like you to deal with, I will be the same open, inquiring person I have always been, and encourage free-wheeling debate and discussion like we've always had. Where I have attorneys I don't know before me, I'll ask no questions other than of the VE, and that will be that. I want to hang onto this job for 5 more years, and this seems like the best way to do it." Respondent concluded: "Thanks for your concern, Bain." (JX 31).

250. In an email subsequent to the email referred to in F. 246, on September 26, 2013 Respondent wrote to Mr. Testa: "Well, maybe you're not the best lawyer I've ever seen, but you certainly are one of the best. And I have no reason to say that other than that it is true." (JX 31).

251. From the Agency's perspective, Respondent's September 26, 2013 emails to Mr. Testa (F. 249-250) are improper communications because the compliments of Mr. Testa and the statements that Respondent will treat Mr. Testa and some other attorneys differently by encouraging more free-wheeling debate with them than with other attorneys reflect an appearance of a lack of impartiality. (Bice, Tr. 5:245-246).

9. Specification 9

252. On December 2, 2013 and December 6, 2013, Mr. Testa and Respondent had an email exchange between Mr. Testa's law firm email account and Respondent's work email address. (JX 32).

253. On December 2, 2013, Respondent sent an email to Mr. Testa in which Respondent summarized the merits of five cases that Mr. Testa had coming up, including by discussing the medical evidence, details of ailments, and Respondent's initial assessments of the cases. (JX 32).

254. In his December 2, 2013 email to Mr. Testa, Respondent began by writing: "First off, I hope you had a happy Thanksgiving. I had a couple of adventures during mine, about which I will tell you when we get a chance to get together." (JX 32).

255. From the Agency's perspective, Respondent's December 2, 2013 email to Mr. Testa (F. 254) is an improper communication because it gives the appearance of a lack of impartiality as it indicates a personal relationship with Mr. Testa. (Bice, Tr. 5:247).

256. In his December 2, 2013 email to Mr. Testa, in discussing the pending claim of a juvenile, Respondent wrote: "[M]om says the kid says God talks to him – don't you wish God would talk to you occasionally?" (JX 32).

257. From the Agency's perspective, Respondent's December 2, 2013 email to Mr. Testa (F. 256) is an improper communication because it demonstrates a lack of courtesy and respect. (Bice, Tr. 5:248).

258. Following up on his December 2, 2013 email (F. 253-254, 256), Respondent sent emails to Mr. Testa on Friday, December 6, 2013 stating: "I'll hang around until 2:30 for any communication you have" and tells Mr. Testa, "If you wish, you may always email me over the weekend at [_____]@yahoo.com." (JX 32).

259. From the Agency's perspective, Respondent's email exchange with Mr. Testa and invitation to contact him at home over the weekend through his personal email address (F. 258) are improper communications because Respondent conveys an appearance of loss of impartiality due to his personal relationship with Mr. Testa. (Bice, Tr. 5:249-250).

10. Specification 10

260. On February 10, 2014, Mr. Testa and Respondent had an email exchange between Mr. Testa's law firm email account and Respondent's work email address. (JX 28).

261. On February 10, 2014, Respondent sent an email to Mr. Testa in which Respondent summarized the claimant's injuries and provided his impressions of the evidence. Respondent wrote: "I think one – though not the only – appropriate resolution would be a fully favorable with an onset date of July 1, 2013. This accounts for his physical activity over the summer of 2013, discussed above, and takes into account the views of [two doctors]. It also provides you with a fee, which although cannot be my primary concern is nevertheless, given the effort you put forth in this case, a factor I must consider." (JX 33; Bice, Tr. 5:253).

262. The fee of the representative is never a consideration in making a decision as to whether or not a claimant is entitled to disability benefits or eligible for supplemental security income disability and should not enter into an ALJ's decision. (Bice, Tr. 5:253-254).

263. From the Agency's perspective, Respondent's February 10, 2014 email to Mr. Testa (F. 261) is an improper communication because, by considering whether Mr. Testa receives a fee, Respondent is showing partiality to Mr. Testa. (Bice, Tr. 5:254).

264. In a February 12, 2014 reply email from Mr. Testa to Respondent, Mr. Testa wrote: "I shared with my wife the information I wrote down during our post-hearing discussion yesterday. She was pleased to have it," to which Respondent replied by February 12, 2014 email: "Hope your wife takes action on that information." (JX 33).

265. From the Agency's perspective, Respondent's February 12, 2014 email to Mr. Testa (F. 264) is an improper communication because it intermixed personal relations with a business discussion, which gives the appearance of a lack of impartiality. (Bice, Tr. 5:255).

11. Specification 11

266. Ms. Bonita Porter is a claimants' representative who appears before Respondent. (PX 84; Cooperman, Tr. 6:277).

267. On December 18, 2013, Ms. Porter and Respondent had an email exchange between Ms. Porter's law firm email account and Respondent's work email address. (JX 34).

268. On December 18, 2013, Ms. Porter sent an email to Respondent in which she summarized medical evidence relating to one of her clients and stated that "these records are being submitted via ERE and you should have them momentarily." Ms. Porter concluded her email by writing: "It is my hope that once you review this, you may decide that an on the record fully favorable decision is appropriate." (JX 34).

269. Respondent replied to Ms. Porter's email (F. 268) by stating: "Bonnie, I don't have the latest stuff you sent me yet, but if you are telling me as an officer of the court and my friend that the claimant did indeed undergo a fusion in October 2013 then, as you have requested, I would give you an FF OTR effective 9/1/12, which is more favorable than what you presently seek but, in my view, more in accordance with the evidence." (JX 34).

270. In an email subsequent to the email referred to in F. 269, Respondent wrote: "Will be done today, Bon. Do me a favor and send me an email indicating that this is acceptable to you, you've talked with the claimant and it is acceptable to him, and that he makes the decision to change his AOD knowingly and voluntarily." (JX 34).

271. From the Agency's perspective, Respondent's December 18, 2013 emails to Ms. Porter (F. 269-270) are improper communications because by stating, "I don't

have the latest stuff you sent me," which refers to the medical records, and stating that he will decide the case without reviewing the medical evidence, but based instead on the assertions of an officer of the court and his friend, Respondent was appearing to provide a special favor to Ms. Porter and a lack of impartiality. (Bice, Tr. 5:262-263).

12. Specification 12

272. Ms. Kelli Silva is a claimants' representative who appears before Respondent. (PX 84; Bice, Tr. 5:264).

273. On April 16, 2014, Ms. Silva and Respondent had an email exchange between Ms. Silva's gmail.com account and Respondent's work email address. (JX 35).

274. On April 16, 2014, Respondent wrote an email to Ms. Silva, with regard to her claimant's case the day before, in which he stated he was "prepared to decide it but, before I do, I want your input on what the possible options are for me to choose from." (JX 35).

275. Ms. Silva responded to Respondent's email (F. 274): "Thank you for allowing me this opportunity. I was going to email yesterday, but wasn't sure if it was appropriate." (JX 35).

276. Respondent replied to Ms. Silva's email (F. 275): "Kelli, you are one of a group (fairly small group) of attorneys who may always contact me, bidden or unbidden. I respect you immensely, and value your input consistently. Please remember this, and govern yourself accordingly." (JX 35).

277. From the Agency's perspective, Respondent's April 16, 2014 emails (F. 274, 276) to Ms. Silva are improper communications because stating that he has a fairly small group of attorneys who he allows to contact him, bidden or unbidden creates an appearance of a loss of impartiality. (Bice, Tr. 5:265).

13. Specification 13

278. On September 5, 2014, Ms. Silva and Respondent had an email exchange between Ms. Silva's law firm email address and Respondent's work email address. (JX 36).

279. By email dated September 5, 2014, Ms. Silva stated, with respect to a claimant, that she has just submitted an OTR (on-the-record) via electronic records express and fax and asked Respondent if he would like her to email the OTR to him as well. (JX 36).

280. By email dated September 5, 2014, Respondent asked Ms. Silva to send him the OTR referenced in F. 279 via email and Ms. Silva did so. (JX 36).

281. By email dated September 5, 2014, Respondent informed Ms. Silva that she "may have an issue with fees" because another attorney had filed a Form 1696 as the claimant's representative and had not withdrawn as representative. He further wrote: "I suggest you either contact him and square this away, or prepare and file a fee petition." (JX 36; Bice, Tr. 5:267-268).

14. Specification 14

282. Mr. Paul Durkee is a claimants' representative who appears before Respondent. (Durkee, Tr. 3:159-161).

283. On September 27, 2013, October 1, 2013, and October 2, 2013, Mr. Durkee and Respondent had an email exchange between Mr. Durkee's verizon.net account and Respondent's personal yahoo.com email address and his work email address. (JX 37).

284. Respondent replied to Mr. Durkee's September 27, 2013 by email sent from his work email address in which Respondent commented on the medical opinion of one of the doctors and stated the doctor's "letter helps you, of course. But his longitudinal history with the claimant is minimal, and his report appears primarily a recitation of what the claimant told him." Respondent also wrote: "[_____] letter and notes also help you, but still leave to me the question of how credible, or incredible this woman is." (JX 37).

285. In his September 27, 2013 email to Mr. Durkee, Respondent wrote: "Let's have a hearing with her, and after taking testimony we'll figure out jointly what the best result is. . . . Plus, having a hearing with her will give me the pleasure of having a superlative lawyer before me, something I always relish." (JX 37).

286. In an email sent after the hearing, Respondent sent an email on October 1, 2013 from his personal yahoo.com account to Mr. Durkee in which Respondent wrote: "You are a dedicated advocate, Paul and, quite frankly, your passion for these cases reminds me of, well, me at a younger age. Except, unlike you, I was never fortunate enough to have the opportunity to appear before a Judge with whom I could have these types of 'out of court' dialogues." (JX 37; Bice, Tr. 5:273-274).

287. In his October 1, 2013 email from his personal yahoo.com account to Mr. Durkee, Respondent also wrote: "[T]he proper question is 'What is [the claimant] going to do to help herself, and when is she going to do it? And when is she going to stop

taking advantage of people like her aunt and grandparents (and maybe you?) who are trying to help her?' That, my good friend, is the question that needs to be answered. Whether it involves getting several alarm clocks, or getting a grip on her temper vis-a-vis her relatives, she needs to take responsibility and accountability for her actions." (JX 37).

288. In response to Respondent's October 1, 2013 email (F. 287), Mr. Durkee wrote: "Would you at least consider a closed period in this case where you have done so in so many cases before with much less evidence. Surely she should not be left with nothing. I thought your email prior to hearing suggested that we would jointly work something out post hearing. A closed period would obviously motivate her to get moving. I will encourage her. Won't you please soften your position a little and consider a closed period." (JX 37).

289. From the Agency's perspective, Respondent's September 27, 2013 and October 1, 2013 emails to Mr. Durkee (F. 284-287) are improper communications because the comments about having the pleasure of a superlative lawyer before him and about Mr. Durkee reminding Respondent of himself gives the appearance that Respondent may have granted a closed period determination based on his good relationship with the lawyer. (Bice, Tr. 5:275-276).

15. Specification 15

290. On July 8, 2013, Respondent sent an email to Ms. Porter. The subject line of the email states: "FW: Bice just violated federal law and thumbed nose at US Supreme Court." In his email to Ms. Porter, Respondent forwarded an email Respondent had received and wrote: "Thought you would enjoy seeing this email, received from one of my colleagues in another state. The names of most people have been removed to protect the innocent. 'Bice' is Debra Bice, the national chief judge of the ALJ's in this agency. I particularly enjoyed how the memo itself indicates that the Office of General Counsel (the lawyers within SSA whose job it is to give advice to the commissioner, which usually includes ways to take unfair advantage of the Judges) and the Justice Department are 'interpreting' the WINDSOR decision (the one in which the Defense of Marriage Act, or DOMA, was declared unconstitutional). . . . Anyway, thought you'd enjoy a little 'inside baseball' stuff." (JX 38).

291. In the email that Respondent forwarded to Ms. Porter (F. 290), the author wrote: "Bice is just a complete idiot. She sent out a memo which orders USA ALJS to violate federal law." (JX 38).

16. Specification 16

292. On April 25, 2012, Don Austin, of DA's Auto Rental, wrote to Respondent: "In regards to our discussion, here is the information," and provided a name, a date of birth, a Social Security number, and a phone number. Mr. Austin further wrote: "Any help will be appreciated." (JX 39; Bice, Tr. 5:280-282).

293. On July 8, 2013, Respondent wrote an email to Don Austin, of DA's Auto Rental, stating: "Hope all is well with you and the family. I regret not having rented any cars lately, but the social security administration is being tight with a buck (actually, they spend money where they shouldn't and fail to spend where they should) so, for the moment, that's that." He then wrote that he has a road trip planned and is considering renting a car to make the trip and asked: "Got a good rate for me that would justify me in leaving my car at home?" (JX 39; Bice, Tr. 5:280-282).

F. Whistleblower Defense

1. Grievances filed by Respondent

294. In 2010, Respondent filed a grievance regarding a counseling memorandum he received. The grievance went to arbitration and the arbitrator upheld Respondent's position that the counseling memorandum was not proper. (Masengill, Tr. 1:282-283).

295. After the 2010 grievance (F. 294), Respondent filed a second grievance regarding a letter of reprimand on four specific specifications. The grievance went to arbitration and the arbitrator upheld the Agency's position. (Masengill, Tr. 1:283).

296. HOCALJ Masengill was aware of both of Respondent's grievances (F. 294-295). (Masengill, Tr. 1:282-283).

297. CALJ Bice was aware that Respondent had filed at least one grievance at the time that she authorized the filing of the Complaint in this matter. (Bice, Tr. 6:198).

2. Statements regarding health and safety

298. In 2011 or 2012, Respondent stated to HOCALJ Masengill that there had been instances around the country in which ALJs had been physically attacked as they were leaving the office, that many claimants appearing before Respondent have severe mental problems, that the only barrier to entry to the ODAR offices in the Springfield building was a single armed guard, and that Respondent felt that the Agency was not adequately securing the office. (Cooperman, Tr. 7:72-74).

299. Respondent took a firearms course, received a certificate of competence from Smith & Wesson, and asked HOCALJ Masengill if he could carry a firearm on his person during business hours. HOCALJ Masengill declined to allow Respondent to bring his personal firearm to work. (Cooperman, Tr. 7:76).

300. RCALJ Sax and CALJ Bice were aware of Respondent's statements regarding security at the Springfield ODAR building and of Respondent's request to bring a personal firearm to work. In response to an email forwarded by RCALJ Sax, CALJ Bice requested that HOCALJ Masengill remind Respondent that he is not allowed to bring a firearm or weapon into the office. (Bice, Tr. 6:184-186).

301. On July 15, 2015, HOCALJ Masengill informed Nicholas LoBurgio, the Acting RCALJ for Region 1, that Respondent had been given a written directive not to bring a weapon to work. (RX 58).

3. Letter to the Office of Inspector General

302. Respondent wrote a letter, dated November 15, 2012, to Patrick O'Carroll, Jr., the Inspector General of SSA ("November 15, 2012 letter to OIG"). In this letter, Respondent described two cases that he had recently decided. In one of these cases, the claimant's counsel filed a motion to recuse Respondent, accusing Respondent of inappropriate conduct. In the other case, the claimant's counsel filed a complaint with ODAR management, seeking a reversal of Respondent's decision based in part on Respondent's alleged misconduct in the case. (Cooperman, Tr. 7:62-63; JX 53).

303. Respondent's November 15, 2012 letter to OIG stated that after receiving the motion to recuse Respondent and the complaint filed against Respondent described in F. 302, management of ODAR Region 1 decided to hold a Weingarten meeting with Respondent, which occurred on October 25, 2012 (F. 101). Respondent's letter further stated that Respondent believed that management's decision to hold a Weingarten meeting in connection with these two instances was "serious mismanagement." (JX 53).

304. Respondent does not know whether or not his chain of command knew about his November 15, 2012 letter to OIG. (Cooperman, Tr. 7:63-64).

305. CALJ Bice was not aware of the November 15, 2012 letter to OIG at the time that she authorized the filing of the Complaint in this matter. (Bice, Tr. 6:197).

4. Complaint to the Office of Special Counsel

306. In 2013, Respondent filed a complaint with the Office of Special Counsel ("OSC") in which he complained that the Agency was engaging in mismanagement and interference with Respondent's qualified decisional independence. (Cooperman, Tr. 7:65-66; *see* RX 23 (September 11, 2013 letter from OSC summarizing Respondent's complaint to OSC)).[11]

307. In a September 11, 2013 letter from OSC to Respondent, OSC summarized Respondent's complaint to OSC as follows: "[Y]ou alleged that officials with the Social Security Administration Office of Disability Adjudication and Review (ODAR) have threatened to take disciplinary action against you in reprisal for disclosing ODAR management's misuse of disciplinary proceedings in order to coerce you into 1) deciding cases differently and 2) not speaking with counsel about a case prior to the commencement of a hearing." (RX 23).

308. OSC's September 11, 2013 letter accurately summarized Respondent's complaint to OSC. (Cooperman, Tr. 7:66).

309. HOCALJ Masengill was not personally or directly aware that Respondent had filed a complaint with OSC, but learned of it through "rumor passed on to [him] by one of the judges in the office." (Masengill, Tr. 1:282).

310. On July 15, 2015, HOCALJ Masengill informed Acting RCALJ LoBurgio that Respondent had filed a complaint with OSC. (RX 58).

311. CALJ Bice was not aware that Respondent had filed a complaint with the OSC at the time that she authorized the filing of the Complaint in this matter. (Bice, Tr. 6:197).

5. Complaint to the MSPB

312. On or about April 4, 2013, Respondent filed a complaint with MSPB, *Leonard Cooperman v. SSA*, PH 1221-13-0298-W-1, alleging that the Agency had retaliated against him for engaging in protected whistleblower activity when it scheduled and conducted a Weingarten meeting with Respondent ("Respondent's MSPB complaint"). The case was dismissed on jurisdictional grounds. (PX 17 (Answer to Interrogatory No. 8); Cooperman, Tr. 7:69-70).

313. Respondent's MSPB complaint (F. 312) involved substantially similar allegations as those he raised with the OSC in 2013 (F. 306-307). (Cooperman, Tr. 7:69-70).

[11] Neither party has cited to the complaint filed by Respondent to OSC and a review of the exhibits indicates that Respondent's complaint to OSC is not in evidence in this case.

314. CALJ Bice was not aware that Respondent had filed a complaint with MSPB at the time that she authorized the filing of the Complaint in this matter. (Bice, Tr. 6:197-198).

6. Letter to members of Congress

315. Respondent wrote a letter, dated November 4, 2014, addressed to United States Senators Sherrod Brown and Pat Toomey, stating that he wished to call to their attention what Respondent called "serious misconduct by the senior management of the SSA (including the inspector general's office)." (RX 54 ("November 4, 2014 letter to members of Congress")).

316. In the November 4, 2014 letter to members of Congress, Respondent stated that he was contacted by the management of the Agency because, according to Respondent, someone within the Agency was concerned that (i) Respondent was awarding closed period of benefits in more cases than the Agency thought appropriate, and (ii) Respondent was negotiating with counsel about whether closed periods were appropriate. (RX 54).

317. In the November 4, 2014 letter to members of Congress, Respondent stated that he had complained to Patrick O'Carroll, the head of the SSA Office of Inspector General, but that other than interviewing Respondent in late 2012, OIG did nothing to investigate Respondent's concerns. (RX 54).

318. In the November 4, 2014 letter to members of Congress, Respondent stated that in October 2014, investigators from OIG appeared in Respondent's office to interview Respondent, but that because he had not had advance notice, Respondent declined to speak with the OIG investigators. (RX 54).

319. In the November 4, 2014 letter to members of Congress, Respondent stated his belief that he had been targeted by the management of the Agency and by OIG "for retaliatory action simply for attempting to have management misconduct addressed." (RX 54).

320. In the November 4, 2014 letter to members of Congress, Respondent noted what he referred to as the "rot which appears pervasive at the top levels of SSA management has spread to the inspector general's office. If Inspector General O'Carroll was not aware of what his employees were doing in this regard, he should have been. If he was aware of what they were doing, then a different situation presents itself." (RX 54).

321. CALJ Bice was not aware that Respondent had written the November 4, 2014 letter to members of Congress at the time that she authorized the filing of the Complaint in this matter. (Bice, Tr. 6:198).

G. Penalty

322. Because SSA administers a national program, SSA ALJs must follow the Social Security Act, regulations, rulings, and policies of the Agency to ensure consistent application of that program. (Bice, Tr. 4:333-334; Cooperman, Tr. 7:79-80).

323. It is important to the Agency for every ALJ to follow the regulations, rules, and policies of the Agency. (Bice, Tr. 4:333-334).

324. As an ALJ, Respondent holds a visible and public position that is subject to scrutiny. (Bice, Tr. 5:295).

325. An ALJ holds the highest-paid position in a hearing office. (Bice, Tr. 5:296).

326. CALJ Bice is not confident that Respondent will change his conduct to comply with Agency policies and adjudicate cases in accordance with the Social Security Act, regulations and policies, including the medical improvement standard contained in the Agency's regulations. (Bice, Tr. 4:333-334; 5:286, 288-289).

327. Respondent's repeated disclosures of PII and email communications conveying the appearance of a loss of impartiality has undermined CALJ Bice's confidence in Respondent. (Bice, Tr. 5:286, 290-291).

328. CALJ Bice has sought the removal of another ALJ for neglect of duty in failing to follow the sequential evaluation process required by Agency regulations. That case is pending. (Bice, Tr. 5:291-292).

329. CALJ Bice was unaware of any ALJs removed due to failure to safeguard PII, and acknowledged that no MSPB case has authorized removal of an ALJ for issuing decisions that were not policy compliant. (Bice, Tr. 6:145-147).

330. Respondent has been on administrative leave with pay since October 1, 2015. (Bice, Tr. 4:288; Cooperman, Tr. 6:211).

331. A district court magistrate was aware that Respondent violated Agency regulations and HALLEX by failing to summarize on the record at a hearing the content of an off-the-record conversation. That court held in a published decision that the hearing conducted by Respondent violated the claimant's due process rights. The court's order required the Agency to provide a copy of the opinion to Respondent,

and, when HOCALJ Masengill did so, Respondent indicated that he thought the opinion was incorrect. (PX 64 (*Betancourt v. Astrue*, 824 F. Supp. 2d 211, 215-17 (2011)); Masengill, Tr. 1:232-233).

332. Since late 2014 or early 2015, Respondent changed his email practices regarding PII to refer to claimants by their first name and last initial, and to use only the last four digits of claimants' Social Security numbers. (Cooperman, Tr. 6:261-262).

333. Over time, Respondent began to memorialize on the record more of the content of his off-the-record conversations than he had in the past. (Masengill, Tr. 2:65-66).

334. In the opinion of three claimants' representatives who have appeared before Respondent, Respondent is very intelligent and fair as a judge. (Durkee, Tr. 3:181; Testa, Tr. 3:210; *see also* DiScipio, Tr. 2:13-14 (opining that Respondent is a capable Judge)).

335. HOCALJ Masengill characterized Respondent as having a positive, good work ethic. (Masengill, Tr. 1:208).

336. Respondent has previously received a reprimand from the Agency for criticizing the Appeals Council. (Bice, Tr. 5:249).

337. One of HOCALJ Masengill's responsibilities is to deal with complaints made by individuals or claimant's representatives. HOCALJ Masengill estimated that 80 percent of his workload in this area of his duties involved complaints regarding Respondent's conduct of hearings or treatment of claimants. (Massengill, Tr. 1:209, 2:122).

338. Respondent has been an ALJ since 2005 and has been a productive ALJ. (Bice, Tr. 5:301).

III. ANALYSIS

A. Introduction

Petitioner Social Security Administration ("SSA" or the "Agency"), pursuant to 5 U.S.C. § 7521, requests that the Merit Systems Protection Board ("MSPB" or "Board") find good cause to remove Leonard Cooperman ("Respondent") from the position of Administrative Law Judge ("ALJ"), and to suspend him from pay status from the date of the Complaint through the date of a final decision by the Board. Respondent has been an ALJ with the SSA Office of Disability Adjudication and Review ("ODAR")[12] since 2005. F. 1. As an SSA ALJ, as discussed in further detail below, Respondent's primary duties are to hold hearings and to decide cases under the programs administered by SSA. F. 26.

An agency may impose disciplinary action on an Administrative Law Judge "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). There is no statutory definition of the "good cause" standard in 5 U.S.C. § 7521, "leaving the interpretation of the term to the adjudicatory process and the facts of each case." *SSA v. Long*, 113 M.S.P.R. 190, 196-97 (2010) (citing *Brennan v. Dep't of Health & Human Services*, 787 F.2d 1559, 1561-62 (Fed. Cir. 1986); *SSA v. Mills*, 73 M.S.P.R. 463, 467-68 (1996)). "The Board determined that the good cause standard must be construed as including all matters which affect the ability and fitness of the ALJ to perform the duties of office." *Abrams v. SSA*, 703 F.3d 538, 543 (Fed. Cir. 2012) (internal quotation marks omitted). Good cause must be proven by a preponderance of the evidence. *Brennan*, 787 F.2d at 1561; *Long*, 113 M.S.P.R. at 196-97.

In the instant case, the Agency contends that there is good cause to suspend and remove Respondent due to Respondent's alleged neglect of duties ("Charge 1") and conduct unbecoming an Administrative Law Judge ("Charge 2"). Respondent denies

[12] ODAR is the component of SSA that manages hearing operations and appeals for claims under Titles II and XVI of the Social Security Act, 42 U.S.C. chapter 7. F. 4.

both Charges. If it is determined that the Charges are supported by preponderant evidence, it must be determined whether such conduct constitutes good cause to impose the discipline proposed by the employing agency. *Brennan*, 787 F.2d at 1561-62.

The Analysis first addresses the proof of the Charges against Respondent (sections B and C). The Analysis next addresses Respondent's affirmative defense of whistleblower retaliation (section D). Finally, the Analysis addresses penalty (section E).

As explained below, the Agency has proven that Respondent neglected his duties (Charge 1) and that Respondent engaged in conduct unbecoming an ALJ (Charge 2). Respondent's whistleblower defense is without merit. Based on the factors set forth in *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981), the appropriate penalty for Respondent's misconduct is suspension without pay for a period of 180 calendar days. The Agency has failed to demonstrate that 5 U.S.C. § 7521 allows a retroactive application of a penalty.

B. Charge 1 – Neglect of Duties

Charge 1 alleges that Respondent neglected his duties as an SSA ALJ, based upon eight specifications that can be categorized as follows: failure to comply with Agency regulations and policy governing closed period of disability decisions (Specifications 1 and 2); failure to make a complete record of hearing proceedings (Specifications 3 and 4); failure to safeguard personal identifiable information ("PII") (Specifications 5 and 6); and failure to act in a fair and impartial manner (Specifications 7 and 8). A charge of neglect of duty requires that the Agency prove: (1) a duty; (2) the respondent's awareness of the duty; and (3) the respondent's breach of that duty. *Williams v. Dep't of Veterans Affairs*, 65 M.S.P.R. 612, 614-16 (1994).

As further explained in detail herein, the preponderance of the evidence supports Specifications 1 through 6, and accordingly, those Specifications are sustained. The Agency has failed to meet its burden of proof as to Specifications 7 and 8 and, therefore,

those Specifications are not sustained. However, Specifications 1 through 6 are more than sufficient to sustain the charge of neglect of duty by Respondent. It is well-established that "where more than one event or factual specification is set out to support a single charge, . . . proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge." *Burroughs v. Dep't of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990); *see Greenough v. Dep't of the Army*, 73 M.S.P.R. 648, 656-57 (1997) (sustaining charge despite finding failure to prove one of three specifications, and stating: "An agency is required to prove only the essence of its charge. It need not prove each factual specification supporting its charge. . . ."") (citations omitted). *Accord Diaz v. Dep't of the Army*, 56 M.S.P.R. 415, 418-20 (1993) (finding a charge proven based on eight specifications, four of which were sustained in part); *Crawford v. Dep't of the Treasury*, 56 M.S.P.R. 224, 232 (1993) (holding that partly sustained specification is sufficient to sustain a charge). Based on the proven specifications, the Agency has met its burden of proving Charge 1.

1. Specifications 1 and 2

The Agency alleges that Respondent breached his duty to comply with Agency regulations and policy in fiscal years 2013 and 2014 with regard to closed period of disability decisions (Specifications 1 and 2). A closed period of disability decision (at times referred to by the Parties, the witnesses, and SSA documents as a "CPOD") finds that a claimant became disabled at a point in time and is entitled to disability benefits, but further finds that the claimant, as of a subsequent date, experienced medical improvement in his or her medical condition related to the ability to work, such that the claimant can engage in substantial gainful activity ("SGA"). F. 37. That claimant is therefore deemed to be no longer disabled, and disability benefits cease. F. 37.

The Agency argues that Respondent breached his duty to issue policy compliant closed period of disability decisions by failing to provide the analysis required by Agency regulations and policy to support a finding of medical improvement related to the ability

to do work, including by relying solely on the claimant's acknowledgement of medical improvement and/or failing to support the determination with objective medical evidence. Respondent argues that the Agency has failed to prove the applicable standard of care by which to evaluate Respondent's closed period of disability decisions, or identify the specific regulations or policies with which he allegedly failed to comply. Respondent further argues that the Agency has failed to prove that Respondent was aware of the Agency's expectations regarding closed period of disability decisions, or that Respondent breached his duty to comply with Agency statutes, regulations, or rules with regard to his closed period of disability decisions.[13]

a. Duties applicable to the issuance of closed period of disability decisions

As an ALJ, Respondent's principal responsibilities are to hold a full and fair hearing and issue a legally sufficient and defensible decision. F. 27. A legally sufficient decision is one that provides findings, a rationale that complies with the Social Security Act, Agency regulations, rulings, and policies, and an explanation of why a preponderance of the evidence supports the decision. F. 28. Respondent, as an ALJ, has a duty to issue decisions that are "legally sufficient" and "policy compliant," meaning in compliance with the Social Security Act, regulations, rulings and Agency policies. F. 29. For shorthand purposes in this Initial Decision, and consistent with the usage in the record, the term "policy compliant" refers to Respondent's duty to issue decisions that comply with the Social Security Act, and Agency regulations, rulings, and policies.

With respect to closed periods of disability, Section 223(f) of the Social Security Act, 42 U.S.C. § 423(f), requires that a cessation of disability benefits be supported by substantial evidence of medical improvement and the ability to work in a substantially

[13] In addition, Respondent argues that the Agency failed to prove that Respondent had sufficient notice of his alleged failures to comply with Agency regulations and policy and that the Agency is attempting to discipline him for the content of his decisions, thereby impermissibly interfering with Respondent's qualified decisional independence. Because Respondent makes these arguments in defense to Specifications 1, 2, 3, and 4, they are addressed at the conclusion of the analysis of those Specifications at section 3 below.

gainful activity.[14] SSA's implementing regulations, specifically 20 C.F.R. §§ 404.1594 and 416.994, set out in detail how SSA determines whether a disability has ceased.[15] In general, this requires a determination of whether "there has been any medical improvement in [the claimant's] impairment(s) and, if so, whether this medical improvement is related to [the claimant's] ability to work." 20 C.F.R. § 404.1594(a).

Medical improvement is defined in the regulations as "any decrease in the medical severity of [the claimant's] impairment(s) . . . ." 20 C.F.R. § 404.1594(b)(1). "A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with [the] impairment(s) (*see* § 404.1528)." 20 C.F.R. § 404.1594(b)(1). *See also* 20 C.F.R. § 404.1594(c)(1) (providing that medical improvement is "determined by a comparison of prior and current medical evidence which must show that there have been changes (improvement) in the symptoms, signs or laboratory findings associated with that impairment(s)").

Medical improvement is related to the ability to work "if there here has been a decrease in the severity" of the impairment(s) and "an increase in [the claimant's] functional capacity to do basic work activities." 20 C.F.R. § 404.1594(b)(3). This requires a comparison of the claimant's "current functional capacity to do basic work activities (i.e., [the] residual function capacity)" with the "prior residual functional capacity." 20 C.F.R. § 404.1594(b)(7). *See also* 20 C.F.R. § 404.1594(c)(2) ("In determining whether medical improvement that has occurred is related to your ability to

[14] Section 223(f) provides, in pertinent part, that an individual who is determined to be disabled "may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by . . . (1) substantial evidence [demonstrating] there has been any medical improvement in the individual's impairment or combination of impairments . . . and (2) the individual is now able to engage in substantial gainful activity." 42 U.S.C. § 423(f).

[15] The material provisions of 20 C.F.R. § 416.994 are substantially identical to 20 C.F.R. § 404.1594. 20 C.F.R. § 416.994 governs "How we will determine whether your disability continues or ends, disabled adults." 20 C.F.R. § 404.1594 governs "How we will determine whether your disability continues or ends." Respondent's assertion that 20 C.F.R. § 404.1594 is a mere notice provision is rejected.

do work, we will assess your residual functional capacity . . . based on the current severity of the impairment(s) . . .”). However, even if there has been medical improvement related to the ability to do work, disability will not be found to have ended unless it is also shown that [the claimant is] currently “able to engage in substantial gainful activity.” 20 C.F.R. § 404.1594(b)(5).

In addition, the above-referenced regulations governing whether a disability has ended due to medical improvement related to the ability to work further require consideration of “all evidence” submitted, including evidence from “treating physician(s) and other medical or nonmedical sources” and a determination “made on the basis of the weight of the evidence.” 20 C.F.R. § 404.1594(b)(6). Similarly, the Agency’s Hearing Appeals and Litigation Law Manual (“HALLEX”), *see* F. 33, requires that all ALJ decisions must “provide the rationale for the ALJ’s findings of fact and conclusions of law, by including” as applicable, “[a]n explanation of the finding(s) on each issue that leads to the ultimate conclusion, including citing and discussing supporting evidence” and “[a] discussion of the weight assigned to various pieces of evidence . . . .” F. 48. HALLEX, which is designed to amplify and provide more specificity regarding regulations and rulings, constitutes written Agency policy that is binding on Administrative Law Judges. F. 33.

Moreover, as set forth below, Agency witnesses testified, consistently with the regulations summarized above, that the medical improvement standards in the regulations apply to the cessation of benefits pursuant to a closed period of disability decision. F. 44. Agency witnesses also explained what the Agency requires for an ALJ decision to meet the regulatory standards, including that the ALJ’s decision awarding a closed period of disability benefits describe, explain, and support a finding of medical improvement with medical evidence, and that a claimant’s acknowledgement of improvement alone is not sufficient. F. 46-47, 49-51. To the extent that the Agency’s requirements for closed period of disability decisions reflect the Agency’s interpretation of regulatory standards or HALLEX, “[p]olicies designed to insure a reasonable degree of uniformity among

ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged." *Nash v. Bowen*, 869 F.2d 675, 680 (2nd Cir. 1989). "It is, after all, the Secretary who ultimately is authorized to make final decisions in benefit cases." *Id.* (citing *Baker v. Heckler*, 730 F.2d 1147, 1150 (8th Cir. 1984)). "An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law." *Id.*

Associate Chief Administrative Law Judge ("ACALJ") Mark Sochaczewsky[16] explained that in order to find that a demonstrated disability ended on a certain date due to medical improvement, as is required to award a closed period of disability benefits, the decision that is issued must describe the medical improvement that occurred. F. 49. ACALJ Sochaczewsky further explained that where medical improvement occurs, the ALJ must further determine the claimant's new residual function capacity ("RFC") in the medically improved state, which is a key determination in a claimant's ability to work and a "core, critical responsibility" of Agency policy and of adjudication. F. 49. ACALJ Sochaczewsky's explanation of the requirements for closed period of disability decisions is consistent with that of the ODAR Division of Quality Services ("DQS"), which is charged with ensuring that ALJ decisions are legally sufficient and policy compliant. F. 42. A DQS memorandum to the ODAR Executive Staff regarding its September 26, 2013 Focused Review of Respondent's decisions (*see* F. 107) (discussed in detail below) expressly referred to 20 C.F.R. §§ 404.1594 and 404.994 as requiring that an ALJ determining a closed period of disability engage in "a two-part evaluation of evidence of medical improvement, as it relates to the ability to work," which is shown by "a decrease in severity (changes in symptoms, signs, or laboratory findings)" and "a comparison of the claimant's RFC prior to and following the date" the disability purportedly ended. F. 43.

ACALJ Sochaczewsky further testified that a finding of medical improvement related to the ability to do work that relies only on the claimant's acknowledgement of

[16] ACALJ Sochaczewsky has served as an ACALJ since November/December 2014. F. 12.

medical improvement fails to describe the medical improvement or explain what has occurred. F. 50. Moreover, ACALJ Sochaczewsky explained, the regulations contemplate a description and explanation of medical improvement, supported by the record evidence, and a function-by-function analysis. F. 51. A claimant's acknowledgement that his or her condition has medically improved, on its own, without further support from record evidence, is not sufficient for purposes of the medical improvement regulations in 20 C.F.R. §§ 404.1594 and 416.994. F. 46-47, 49-51.

Former Regional Chief Administrative Law Judge ("RCALJ") Carol Sax[17] also testified that SSA regulations in 20 C.F.R. chapters 404 and 416 require that support for a closed period of disability decision include objective medical evidence of medical improvement, including evidence that the claimant's residual functional capacity has improved to the point where the claimant can return to work. F. 47.

Hearing Office Chief Administrative Law Judge ("HOCALJ") Addison Masengill[18] further explained that 20 C.F.R. §§ 404.1594 and 416.994 require that a finding of medical improvement be based upon signs, symptoms, laboratory findings, and similar medical evidence, and that medical evidence is required to back up a claimant's assertion that his or her medical condition has improved. F. 46. The Chief Administrative Law Judge ("CALJ") Debra Bice also confirmed that the regulations set the standards for finding medical improvement in a closed period of disability case and that a finding of medical improvement must be explained based on the record evidence, in addition to the claimant's statements. F. 46.

The Agency's position – that a claimant's acknowledgement of medical improvement, on its own, without further support from record evidence, is not sufficient for purposes of the medical improvement regulations in 20 C.F.R. §§ 404.1594 and

[17] RCALJ Sax served as the RCALJ for Region 1 from February 2008 through July 2015. F. 15.

[18] HOCALJ Masengill has served as the HOCALJ of the Springfield, Massachusetts Hearing Office since March 2005. F. 17.

416.994 – is consistent with 20 C.F.R. § 404.1528, which states in pertinent part: "(a) Symptoms are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment." Although the language of 20 C.F.R. § 404.1528 refers to the establishment of an impairment, rather than medical improvement, section 1528 is directly referenced in 20 C.F.R. § 404.1594 with regard to the "symptoms, signs and/or laboratory findings" used to determine medical improvement. *See* 20 C.F.R. § 404.1594(b)(1). Finally, HALLEX, cited above, further supports the position that the Agency's requirement that medical improvement be supported by more than the claimant's agreement to a closed period of disability decision, by requiring that an ALJ decision clearly explain the rationale for all findings of fact, including by citing and discussing the supporting evidence. F. 48 (HALLEX I-2-8-25).

Respondent asserts that Agency policy contained in the Program Operations Manual System ("POMS") "specifically recognizes that a finding of medical improvement may be based on a claimant's statement alone." Respondent's Reply Brief at 15, citing POMS DI-20810.015(A)(2). The cited document was not offered into evidence. In addition, Respondent's citation failed to lead to the asserted provision. According to testimony that Respondent elicited at trial, the POMS provision states: "Improvement in symptoms alone, without associated changes in signs or laboratory findings, may support a medical improvement determination." Sochaczewsky, Tr. 5:146-147. However, POMS sets forth internal policies for proceedings at the district office level, not for hearing operations. F. 34. While POMS can be utilized for guidance in the absence of other regulatory or sub-regulatory guidance such as HALLEX, POMS is not a prime source of ODAR policy and its provisions are not binding at the hearing office level. F. 34. In any event, as interpreted by Respondent, the POMS provision would arguably conflict with the requirement in HALLEX that the adjudicator cite and discuss the evidence supporting a finding, including "the weight assigned *to various pieces* of evidence . . . ." F. 48 (emphasis added).

Based on the foregoing, the Agency has established that Respondent had a duty to comply with applicable law, regulations, and policy regarding closed period of disability decisions, and that such law, regulations, and policy required compliance with the medical improvement standards outlined in 20 C.F.R. chapters 404 and 416. In addition, the evidence demonstrates that the medical improvement regulations and HALLEX require a description and explanation of medical improvement, rationalized and supported by the record evidence, and a function-by-function analysis. Furthermore, the weight of the evidence supports the Agency's interpretation of the medical improvement regulations and HALLEX that a claimant's agreement to a closed period of disability decision, by itself, is not sufficient to explain, support, or rationalize the determination of medical improvement required for a closed period of disability decision. Accordingly, Respondent's arguments that the Agency failed to meet its burden of proving the applicable standards are belied by the evidence and are rejected. The analysis now turns to whether Respondent was aware of his duties regarding closed period of disability decisions.

b. Respondent's awareness of duties as to closed period of disability decisions

The evidence demonstrates that Respondent was aware of his duty to comply with Agency regulations and policies applicable to the issuance of closed period of disability decisions. F. 41. Moreover, Respondent was specifically aware of the requirements for supporting a determination of medical improvement, for purposes of a closed period of disability decision, as further explained below.

Medical improvement is something that every ALJ has to consider in any case involving a closed period. F. 45. There is initial training, annual OCEP (ODAR Continuing Education Program) training, and quarterly training on this issue, and the Agency has provided more than one training session specifically focused on how to evaluate medical improvement. F. 45. Indeed, Respondent's awareness of the standards

outlined in the regulations is demonstrated by Respondent's closed period of disability decisions themselves. Each of Respondent's closed period of disability decisions at issue in this case followed a template of applicable law, which included the following:

> If the claimant is found disabled at any point in the process, the undersigned must also determine if his disability continues through the date of the decision. The undersigned must show that medical improvement has occurred which is related to the claimant's ability to work, or that an exception applies (20 CFR 404.1594(a) and 416.994(a)). In most cases, the undersigned must also show that the claimant is able to engage in substantial gainful activity (20 CFR 404.1594(a) and 416.994(a)). In making this determination, the undersigned must follow an additional eight step evaluation process for the Title II claim and a seven-step process for the Title XVI claim (20 CFR-404.1594 and 416.994). . . . Medical improvement is any decrease in medical severity of the impairment(s) as established by improvement in symptoms, signs or laboratory findings (20 CFR 404.1594(b)(1) and 416.994(b)(1)(i)).

F. 127.

Moreover, the Agency provided Respondent ample notice of its requirements for closed period of disability decisions. In addition to Respondent's training on closed period of disability decisions referenced above, Respondent received further training on the Agency's requirements for closed period of disability decisions in 2011, at the direction of CALJ Bice. F. 80. CALJ Bice ordered the retraining in late 2010, after reviewing 11 complaints about Respondent's allegedly pressuring claimants into accepting closed periods of disability, and examining another 35 cases decided by Respondent. F. 78-80. Accordingly, in June 2011, ALJ Edward Brady, who at the time was the judge in charge of national mentoring, conducted a two hour training session via video conference, in which he advised Respondent that where a closed period of disability is granted, even by consent, SSA regulations dictate that the decision "include a discussion of medical improvement showing how the signs, symptoms, and objective testing show improvement under the medical improvement standard at the time the period closes . . . . [A]ny RFC, regardless of the agreement as to medical improvement must be

married to corresponding medical evidence." F. 86-87. In addition, on August 3, 2011, at a meeting during the Agency's annual ALJ training, then-ACALJ Frank Cristaudo and Region 1 HOCALJ Barry Best (who was also attending the annual training meeting) further advised Respondent that awarding a closed period of disability requires a second RFC determination, and that the claimant's concession that he or she can work is not enough. F. 88-89.

Notwithstanding the retraining sessions referenced above, in or around September 2011, the Agency received additional complaints regarding Respondent's closed period of disability decisions. F. 90. Therefore, RCALJ Sax, in consultation with the Office of the Chief Judge ("OCALJ"), decided to issue a policy directive to Respondent. F. 92. A directive advises the ALJ of a problem with compliance, directs the ALJ to comply, and advises the ALJ that failure to follow the directive may lead to discipline. F. 93. Respondent received the policy directive, dated December 5, 2011 and signed by HOCALJ Masengill (the "December 5, 2011 Directive") (F. 95), which stated in pertinent part:

> As a Social Security Administration (SSA or agency) Administrative Law Judge (ALJ), you are responsible for conducting hearings and issuing timely and legally sufficient decisions. See HALLEX I-2-0-5-B. A legally sufficient decision requires that you comply with SSA's laws, regulations, rulings, and policies. . . . In your decisions, you are required to analyze medical evidence that supports a finding of the claimant's medical improvement or to explain why the claimant's case falls within an exception to medical improvement. The decision also requires you to analyze the claimant's residual functional capacity (RFC) assessment and to explain how the RFC relates to a claimant's current work capacity and results in the claimant's ability to engage in substantial gainful activity (SGA). . . . Your decisions in these cases [involving claimant's amending their claims to a closed period] contain analytical deficiencies including a lack of analysis to support a non-disability RFC and a lack of analysis to support a finding of medical improvement beyond the claimant's agreement to a closed period . . . .

F. 96.

The December 5, 2011 Directive clearly and specifically addressed the level of analysis required to support medical improvement and increased RFC, stating in pertinent part:

> Pursuant to 20 CFR §404.1594 and §416.994:
>
> 4. I direct you to determine whether there has been medical improvement. You must analyze any improvement by comparing the prior and current medical evidence and by illustrating any improvement in the signs, symptoms, or laboratory findings.
>
>   Your analysis should discuss evidence that centers on the factors set forth at 20 CFR §404.1528 and §416.928 and that align with the guidance for evidence set forth at 20 CFR §404.1512-1518 and §416.912-918.
>
> 5. I direct you to determine if any medical improvement relates to the ability of the claimant to perform work.
>
>   j. Compare the prior RFC with the increase in the current RFC, based on changes in signs, symptoms, or lab findings.
>
>   ii. Analyze how the increased RFC reflects the improvement in the exertional and nonexertional basic work activities, as applicable, and in accordance with the requirements set forth at 20 CFR §404.1545 and §416.945.
>
>   . . .
>
> 6. I direct you to explain how the medical improvement analyzed in number 2, above, now results in the claimant being able to engage in work at the SGA level.

F. 96; *see also* F. 83-84 (HOCALJ Masengill advising Respondent on September 7, 2010, in response to Respondent's request for guidance on the level of detail required to support an agreed-to closed period of disability decision, to "fully rationalize the cessation of any benefits . . ." because without an adequate rationale in the decision, the Appeals

Council[19] "has no ammunition/basis to deny appeal" and the U.S. Attorney cannot or will not "defend [a] case in [f]ederal [c]ourt that is not adequately rationalized").

Based on the foregoing, the Agency has proven that Respondent was aware of his duties with respect to the issuance of closed period of disability decisions, including the requirements of the medical improvement standards and HALLEX. The Analysis next addresses whether the Agency has demonstrated that Respondent failed to meet those standards.

c. Respondent's failure to comply with Agency policy applicable to closed period of disability decisions

As analyzed above in section 1.a, in implementing the medical improvement regulations and HALLEX, the Agency requires a closed period of disability decision to describe and explain the medical improvement that occurred, and to support the finding of medical improvement with medical evidence, beyond the claimant's agreement or acknowledgement. The Agency contends that 11 of Respondent's closed period of disability decisions, consisting of 5 issued in fiscal year 2013 (*Hatcher, Amaro, Young, Rivera,* and *Parslow*) and 6 issued in fiscal year 2014 (*Petracone, Fernandez, Daddario, Broussard, Lowe,* and *Simmons*), lacked a policy compliant discussion regarding medical improvement. *See* Agency's Proposed Findings of Fact 42-48, 50-52.

Each of the decisions challenged herein by the Agency was reviewed for policy compliance by one or more ODAR employees. F. 128-150, 156-167. Specifically, DQS conducted a "focused review" of Respondent's disability decisions issued from the date of the December 5, 2011 Directive, through June 30, 2013 ("Focused Review"). F. 107. In addition, in or around December 2014, at the request of CALJ Bice and the Office of General Counsel ("OGC"), ODAR attorney advisor Ms. Arlene Brens reviewed selected decisions issued by Respondent for policy compliance ("Ms. Brens' Review"). F. 117. Furthermore, after the Complaint was issued, at the request of CALJ Bice, ACALJ Sochaczewsky also reviewed a selection of Respondent's cases for policy compliance

[19] The Appeals Council is a component of ODAR which reviews appeals of ALJ decisions. F. 22.

("ACALJ Sochaczewsky's Review"). F. 122. DQS, Ms. Brens, and ACALJ Sochaczewsky each memoralized their findings in writing. F. 107 (JX 19), 117 (JX 20), 124 (PX 19). ACALJ Sochaczewsky and Ms. Brens also testified at the hearing regarding some of their findings.

DQS, Ms. Brens, and ACALJ Sochaczewsky are each qualified to provide opinions as to the policy compliance of Respondent's closed period of disability decisions. DQS is the entity within ODAR that is responsible for performing analyses of ALJ decisions to determine whether they are legally sufficient and policy compliant. F. 42. Ms. Brens has been trained in all the regulations and policies applicable to disability adjudications, and has personally written over 1,000 decisions, including many closed period of disability decisions. F. 118. ACALJ Sochaczewsky has served as an ALJ and a HOCALJ. F. 13. His duties as an ACALJ within the OCALJ include reviewing Agency policies and periodically reviewing rulings made by the Appeals Council. F. 14. ACALJ Sochaczewsky is also the OCALJ liason to each Region's inline quality review process, which consists of attorneys within each region reviewing ALJ decisions for policy compliance prior to issuance. F. 14.[20]

The Agency's reviews and findings prove that Respondent issued decisions in fiscal year 2013 and fiscal year 2014 that did not comply with Agency requirements for supporting a closed period of disability; specifically, by failing to explain his findings of medical improvement, or to support these findings with medical evidence. F. 128-150.

For example, the *Daddario* decision, issued August 27, 2014 (F. 139), was reviewed by both ACALJ Sochaczewsky and Ms. Brens. ACALJ Sochaczewsky concluded that the *Daddario* decision was not policy compliant because, among other reasons, the decision did not sufficiently discuss or establish medical improvement. F. 140. ACALJ Sochaczewsky explained that Respondent's findings of medical

[20] Respondent's challenges to the Agency's evidence based on an alleged lack of qualifications of those reviewing his decisions, including Ms. Brens, lack evidentiary support and are rejected.

improvement failed to "explain what got better and why it got better and why the evidence supports the finding. The judge does say there's no longer severe impairment, but the why is missing. And it appears to accept the claimant's saying I want a closed period to substitute for the medical improvement part." F. 141. The regulations in 20 CFR part 400, and HALLEX I-28-25 require an explanation of medical improvement. Establishing medical improvement requires more than saying the "magic words . . . there's medical improvement." F. 141. Ms. Brens' Review also found a number of deficiencies in the *Daddario* decision, including a "conclusory" finding of medical improvement that lacked any explanation with supporting medical evidence. F. 141. In addition, Ms. Brens found there was no support in the record for the end date of the closed period in the *Daddario* decision and that Respondent admitted at the disability hearing that the end date was an arbitrary date. F. 143. Indeed, the Appeals Council vacated and remanded the *Daddario* decision for failure to support the closed period, stating that it was an error of law to provide no evidentiary support from the record for the finding of medical improvement. F. 144.

In addition, the *Rivera* decision, issued January 4, 2013 (F. 131), was reviewed by both DQS, as part of the Focused Review, and by ACALJ Sochaczewsky. The Focused Review found that *Rivera* was an agreed-upon closed period of disability that was not supported by the evidence of record, noting that the rationale for the finding of medical improvement was limited to a statement that "[a]t the hearing, the claimant acknowledged this is so." F. 132. ACALJ Sochaczewsky's Review also determined that the discussion of medical improvement in the *Rivera* decision was insufficient. F. 132.

Ms. Brens reached a similar determination regarding the *Fernandez* decision, issued on April 25, 2014, finding that the decision was deficient because there was no explanation, with supporting medical evidence, as to why the claimant had medically improved. F. 135-137. Instead, the decision appeared to rely on the fact that the "the claimant believe[d] her overall condition ha[d] improved enough to warrant a request for a closed period . . . ." F. 136. Ms. Brens' Review further noted that the record showed

that "the claimant continued to have treatment and surgery after the closed period ended." F. 137. *See also* F. 138 (ACALJ Sochaczewsky's Review concluding as to *Fernandez* that there was "no explanation of basis for new RFC after closed period").

Furthermore, Respondent issued a closed period of disability decision in the *Simmons* case on August 28, 2014, after a remand from the Appeals Council which specifically advised that "[t]he claimant's acknowledgment of medical improvement is not a determination made in accordance with the requirements of 20 C.F.R. 404.1594." F. 148-149. ACALJ Sochaczewsky reviewed Respondent's *Simmons* decision after remand and concluded that, notwithstanding the admonition from the Appeals Council, Respondent's decision still failed to include an explanation or analysis of medical improvement, and therefore failed to comply with Agency policy. F. 150.

Regarding the *Amaro* decision, issued on December 19, 2012, ACALJ Sochaczewsky's Review determined that the decision contained an insufficient discussion of medical improvement. F. 129. The Focused Review further found the *Amaro* decision was not supported by evidence in the record. F. 129.

The deficiencies identified by the DQS Focused Review, Ms. Brens' Review and/or ACALJ Sochacewsky's Review regarding lack of explanation of medical improvement or medical support therefor are also reflected in the decisions in *Hatcher*, F. 128 (ACALJ Sochaczewsky's Review finding there was "no discussion of the claimant's medical improvement"); *Parslow*, F. 133 (ACALJ Sochaczewsky's Review finding there was an "insufficient discussion of medical improvement"); *Petracone*, F. 134 (ACALJ Sochaczewsky's Review concluding there was "no true discussion/explanation of medical improvement, other than claimant admitted he improved"); *Young*, F. 130 (ACALJ Sochaczewsky's Review finding insufficient discussion of medical improvement); *Broussard*, F. 145 (ACALJ Sochaczewsky's Review finding there was "no true discussion/explanation" of the finding of medical improvement); and *Lowe*, F. 146 (ACALJ Sochaczewsky's Review finding "no true

discussion/explanation of medical improvement, other than claimant admitted she could perform sedentary work").

Based on the foregoing, the Agency has met its burden of proving that Respondent issued closed period of disability decisions in fiscal year 2013 and fiscal year 2014 that failed to comply with Agency regulations and policy regarding explanation and support for findings of medical improvement. The Analysis next turns to Respondent's defenses to Specifications 1 and 2.

d. Respondent's challenges to sufficiency of Agency's evidence on Specifications 1 and 2

Respondent contends that the Agency's evidence is insufficient to meet its burden of proof. Respondent argues that ACALJ Sochaczewsky's opinions as to the sufficiency of the medical improvement discussions in Respondent's closed period of disability decisions have only limited probative value because, according to Respondent: (1) ACALJ Sochaczewsky's Review was biased by OGC to achieve a particular outcome, and (2) ACALJ Sochaczewsky's opinions are conclusory and/or unsupported, including by lack of any reference to a standard of care. Respondent's arguments fail for two reasons, as discussed below.

First, even if ACALJ Sochaczewsky's opinions are given limited probative weight, the preponderance of the evidence still supports Specifications 1 and 2. Respondent does not point to any evidence contradicting ACALJ Sochaczewsky's conclusions or otherwise demonstrating that the medical improvement discussions in the closed period of disability decisions challenged herein were in fact policy compliant. As to the closed period of disability decisions in *Daddario, Rivera, Fernandez, Amaro,* and *Simmons*, ACALJ Sochaczewsky's opinions were largely cumulative to similar opinions by DQS and/or Ms. Brens. Thus, even without ACALJ Sochaczewsky's opinions, the totality of the proof as to these non-compliant closed period of disability decisions, two issued in fiscal year 2013 (*Amaro* and *Rivera*) and three issued in fiscal year 2014

(*Fernandez, Simmons,* and *Daddario*), is sufficient to prove the Specifications. In addition, regarding the closed period of disability decisions as to which ACALJ Sochaczewsky provides the only opinion, Respondent does not provide any evidentiary counterweight to ACALJ Sochaczewsky's opinions, such that the preponderance of the evidence still weighs in favor of the Agency.[21]

Second, Respondent's assertions of bias are not supported by the evidence. The evidence shows that CALJ Bice, through OGC, requested that ACALJ Sochaczewsky review a select group of cases, identified by OGC, for policy compliance. F. 122. This review was requested after issuance of the Complaint in this matter, and ACALJ Sochaczewsky received a copy of the Complaint in connection with this request. F. 122. Respondent emphasizes that PX 19, which was prepared by OGC from ACALJ Sochaczewsky's review notes, F. 124, did not include some reviewed cases. However, the omission of some reviewed cases from PX 19 was due to doubt as to whether those cases violated any policy. F. 124. The reasonable inference from the foregoing facts is that OGC was assisting the Agency in proving its claims against Respondent, and that ACALJ Sochaczewsky contributed to that effort. Such a scenario is hardly nefarious, and such facts are not sufficient to conclude that ACALJ Sochaczewsky's Review, or his opinions, should be rejected as biased.[22]

Respondent next argues that the Agency failed to meet its burden of proof because, according to Respondent, the Agency failed to prove the standard of care that

[21] Respondent maintains that proposed findings of fact that rely solely on ACALJ Sochaczewsky's notes reflected in PX 19 should be rejected, arguing that testimony is required. Respondent's position that a document is insufficient to establish a fact unless bolstered by testimony is not supported by legal authority and is rejected.

[22] Respondent similarly challenges Ms. Brens' Review as biased, contending that OGC provided the cases for Ms. Brens to review and "vetted" her findings. The evidence shows that Ms. Brens conducted her review at the request of CALJ Bice and OGC. F. 117. Ms. Brens identified which cases of Respondent's to review from a list provided to her by the Division of Workload Management, which was drawn from ODAR's case management and processing system. She also identified cases from emails she had reviewed between Respondent and claimants' representatives while assisting in the Office of the Inspector General Investigation on behalf of OCALJ. F. 120.

applies to supporting a finding of medical improvement in a closed period of disability decision. This argument is also without merit, as explained below.

Respondent relies on MSPB cases stating that a charge of culpable negligence in the performance of duties requires showing a failure to "exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation and with equal experience would not omit." Respondent's Brief at 49 (citing *Velez v. Dep't of Homeland Sec.*, 101 M.S.P.R. 650, 656 (2006)); *see also Mendez v. Dep't of the Treasury*, 88 M.S.P.R. 596, 607 (2001). However, Respondent is not charged with negligent performance of duties, but with a failure to perform specified duties. The cited cases do not indicate that, in addition to showing a failure to perform a duty, the employing agency must also show that the failure was "negligent."

In any event, the evidence supports a conclusion that Respondent was negligent in failing to issue policy compliant closed period of disability decisions. The evidence shows that Respondent had a duty to issue policy compliant decisions. The evidence further shows that Respondent was aware that a policy compliant discussion of medical improvement must describe and explain the medical improvement that occurred, and support the finding of medical improvement with medical evidence, beyond the claimant's agreement or acknowledgement. Such evidence amply supports the conclusion that an ALJ of ordinary prudence, with the same awareness as Respondent of the applicable regulations and HALLEX, and with the same advice and training as to the Agency's requirements, would not have failed to comply. *Cf. Mendez*, 88 M.S.P.R. at 606 (holding that a written policy can constitute the applicable standard of care, or the standard can be established by other factors, including training, knowledge, customary agency practice, and adequacy of agency procedures).

Respondent further argues that the Agency failed to show that Respondent violated the applicable standard of care because, according to Respondent, the evidence shows that Respondent's closed period of disability decisions were "similar in content

and evidence to the decisions issued by other SSA ALJs." Respondent's Brief at 42-43. Whether or not other ALJs wrote non-compliant closed period of disability decisions is not determinative of whether Respondent failed to issue policy compliant closed period of disability decisions. "The agency is not required to show, as part of its case in chief, that the respondent's errors were more egregious than those of other administrative law judges." *SSA v. Anyel*, 58 M.S.P.R. 261, 266 (1993).[23]

Based on the foregoing, Specifications 1 and 2 are sustained.

2. Specifications 3 and 4

Specifications 3 and 4 charge that Respondent failed to make a "complete record of hearing proceedings" in fiscal year 2013 and fiscal year 2014, respectively. The evidence shows that Respondent had a duty to make a complete record, which required him to summarize, on the record, the content and conclusion of any off-the-record discussions; that Respondent was aware of this duty; and that Respondent failed to perform such duty, as explained below.

It is undisputed that SSA ALJs are required to make a complete record of the hearing proceedings. F. 54; *see* 20 C.F.R. §§ 404.951, 416.1451. *See also* Respondent's Brief at 44. HALLEX I-2-6-40 states: "The administrative law judge (ALJ) must make a complete record of the hearing proceedings. Therefore, the ALJ or designee will make a verbatim audio recording of the entire hearing." F. 54. The ALJ "must obtain a clear and concise record, containing all relevant facts, while excluding all immaterial matters." F. 53. In furtherance of making a complete record of hearing proceedings, SSA ALJs are required to summarize, on the record, the content and conclusion of any off-the-record discussions. F. 55; *see* HALLEX I-2-6-40 (requiring that the "content and conclusion" of any off-the-record discussion conducted with the claimant or representative be

[23] Respondent's contention that Respondent's non-compliant closed period of disability decisions were not representative of Respondent's closed period of disability decisions generally is addressed in the context of penalty, *infra,* section E.2.a. *See Douglas*, factor 1 (whether the offense was intentional or inadvertent or was frequently repeated).

summarized on the record). Based on the foregoing, the evidence demonstrates that Respondent had a duty to make a complete record of hearing proceedings, which required Respondent to summarize, on the record, the content and conclusion of any off-the-record discussions.

The evidence further shows that Respondent was aware of his duty to make a complete record of hearing proceedings, and that this required him to summarize, on the record, the content and conclusion of any off-the-record discussions. The topics covered in the retraining of Respondent in June 2011 included the need for Respondent to memorialize off-the-record discussions with claimants' representatives on the record. F. 86. ALJ Brady, who conducted the June 2011 retraining, discouraged Respondent from using off-the-record conversations for substantive matters, but advised him that where there is any discussion off the record, it should be memorialized on the record and Respondent should then allow the claimant or the claimant's representative to supplement or dispute the on-the-record summary. F. 87. At the Agency's annual ALJ training meeting on August 3, 2011, then-ACALJ Cristaudo and Region 1 HOCALJ Best also advised Respondent about memorializing on the record any off-the-record discussions. F. 88.

Furthermore, on September 1, 2011, CALJ Bice sent a memorandum to all Administrative Law Judges reminding the ALJs that they "must make a complete record of the hearing proceedings" pursuant to 20 C.F.R. § 404.951 and § 416.1451 and HALLEX I-2-6-40. F. 91. CALJ Bice further explained:

> A complete record includes any conversation relevant to the case between the ALJ, parties to the hearing, and/or witnesses. If the conversation is not recorded, the ALJ must summarize on the record the content and conclusion of any off-the-record discussion. If an ALJ is going to go off the record, he or she should explain why he or she is going off the record.

F. 91.

Moreover, Respondent was notified in the December 5, 2011 Directive that "in many of [Respondent's closed period of disability] cases, you had 'off-the-record' discussions with the claimants and/or their representatives regarding the claimant's case and did not summarize the discussions on the record after the hearings resumed." F. 96. Respondent was expressly directed to:

> summarize on the record, all off-the-record discussions concerning amending claims involving closed periods of disability, as well as any other discussions relevant to the issues in a claimant's case. HALLEX I-2-6-40, I-2-6-75, 20 CFR §404.951, §416.1451, §404.961, and §416.1461 mandate that the ALJ make a complete record of the proceedings. This applies both to hearings and to pre-hearing conferences.

F. 96.

Finally, the evidence proves that Respondent failed to perform his duty to make a complete record by failing to summarize on the record the content and conclusion of off-the-record conversations, as required by Agency policy. The Agency relies on the hearing records in five of Respondent's cases: four from fiscal year 2013 (*Amaro*, *Bond*, *Young*, and *Parslow*) and one from fiscal year 2014 (*Simmons*). *See* Agency's Proposed Findings of Fact 64-72. ACALJ Sochaczewsky, who listened to the hearing recordings of these cases and heard Respondent's on-the-record summaries of off-the-record conversations, concluded that in each of the foregoing cases Respondent's summary was insufficient. F. 156, 159, 162, 165, 167. In addition, DQS, as part of its Focused Review, also concluded that Respondent failed to summarize off-the-record conversations. F. 156-157, 161, 164.

For example, regarding the *Parslow* hearing record, the Focused Review states that "[t]he ALJ referenced, but did not summarize, an off-the-record discussion with the representative about the case." F. 164. ACALJ Sochaczewsky's Review also concluded that the summary on the record in *Parslow* was insufficient. F. 165. Similarly, regarding the *Young* hearing, the Focused Review noted that "[a]t the beginning of the hearing, the

ALJ referenced, but did not summarize, an off-the-record discussion with the representative concerning 'the pluses and minuses and different options we might have for resolving [the claim]'. . . . 'The bottom line is . . . we talked about the strengths and weaknesses of your case . . . [and] we discussed different ways of resolving the case . . . .'" F. 161. ACALJ Sochaczewsky's Review also concluded this summary was insufficient. F. 162. *See also* F. 158 (Focused Review of *Bond* found that Respondent referenced off-the-record discussion with representative about claimant's "situation," but did not summarize that conversation on the record.); F. 156 (ACALJ Sochaczewsky's Review of *Amaro* found insufficient summary of the off-the-record conversation). With regard to the *Simmons* case, ACALJ Sochaczewsky testified persuasively, based on listening to the hearing recording, that Respondent's summary of an off-the-record conversation was incomplete. F. 167. Based on the foregoing, the Agency has met its burden of proving that Respondent failed to summarize on the record the content and conclusion of off-the-record conversations, as is required by Agency policy.[24]

Respondent argues that the Agency failed to prove the applicable standard for on-the-record summaries of off-the-record conversations, or that Respondent's summaries failed to meet that standard. Respondent asserts that ACALJ Sochaczewsky's opinions offered no specifics as to what Respondent was supposed to do regarding memorializing off-the-record conversations on the hearing record, or what Respondent did or failed to do in this regard. However, as noted above, the evidence shows that Respondent had a duty to make a complete record, and that, pursuant to Agency policy, this required Respondent to summarize, on the record, the content and conclusion of any off-the-record

[24] Respondent contends that the email discussion referenced on the record at the *Bond* hearing cannot be relied on to support Specification 3 because Specification 3 alleges a failure to make a complete record of hearing proceedings, while the off-the-record email discussion in *Bond* did not take place at the hearing. This distinction does not require rejecting the evidence. "[T]he purpose of an agency's notice of charges is to put an employee on notice of the allegations against him in sufficient detail to apprise him of the allegations he must refute or acts he must justify. *Brennan*, 787 F.2d at 1561." *Shapiro*, 800 F.3d 1332, 1337 (Fed. Cir. 2015). Even if the *Bond* case is not considered, the evidence is sufficient to sustain Specification 3.

discussions. Accordingly, contrary to Respondent's argument, the Agency proved what was required of Respondent.

Moreover, even if some of ACALJ Sochaczewsky's conclusions could be viewed as lacking in detail, ACALJ Sochaczewsky's Review was not the only evidence offered to prove that Respondent failed to summarize on the record the content and conclusion of off-the-record discussions. DQS's Focused Review also concluded that Respondent failed to summarize off-the-record conversations.[25] F. 156-157, 161, 164. As noted in section 1.c. above, DQS and ACALJ Sochaczewsky are qualified to make these determinations, and their conclusions are entitled to considerable probative weight.[26]

Respondent claims that the Agency has failed to prove Specifications 3 and 4 because, according to Respondent, the evidence shows that Respondent's practice after an off-the-record conversation was to memorialize "the substance" of the off-the-record conversation, ensure the claimant understood what had happened, and allow the claimant's representative an opportunity to add anything additional. Respondent's Brief at 45 (citing testimony provided by claimants' representatives Mr. Paul Durkee and Mr. Bainbridge Testa); *see also* Respondent's Proposed Findings of Fact 76, 78. However, the testimony of Mr. Durkee and Mr. Testa does not support Respondent's broad assertions, and does not support a conclusion that Respondent summarized the content and conclusion of off-the-record conversations in the cases at issue in Specifications 3 and 4. Mr. Durkee testified that, in his experience, Respondent would state on the record that he had had "communications" with the claimant's representative, and would ask the client if he or she was "made aware" that they had discussed the case (Durkee, Tr. 3:187). This is not proof that Respondent's practice was to summarize the content or the

[25] Although DQS did not review the *Simmons* case, ACALJ Sochaczewsky explained his opinions on the *Simmons* case in detail in his testimony. *See* F. 167.

[26] Respondent's assertion that ACALJ Sochaczewsky's opinions should carry no weight, because ACALJ's Sochaczewsky's Review was biased by OGC toward a particular outcome, has been fully considered and rejected. *See* section 1.d above. Respondent's contention that documents cannot constitute probative evidence unless bolstered by explanatory testimony has also been considered and rejected. *Id*. at n.21.

conclusion of such communications. Mr. Testa's testimony that, typically, ALJs, including Respondent, provide a summary of off-the-record conversations (Testa, Tr. 3:215, 249-250) only begs the question as to whether Respondent's typical summaries included, as required, the content and conclusion of such off-the-record conversations. In contrast to this testimony concerning Respondent's asserted practice, HOCALJ Masengill's practice for memorializing an off-the-record conversation, which is consistent with the regulations and HALLEX, is to specify on the record what the discussion entailed, and then ask the claimant or claimant's representative whether his description of the conversation is consistent with his or her understanding. F. 57.

Based on the foregoing, Specifications 3 and 4 are sustained.[27]

3. Respondent's defenses common to Specifications 1 through 4

a. Notice

Respondent contends that "[i]mplicit in demonstrating a breach of duty is the requirement that the Agency demonstrate Judge Cooperman was notified of the issues with his performance, given appropriate guidance and support and an opportunity to comply, and failed to do so." Respondent's Brief at 32. Thus, Respondent argues, the Agency must demonstrate that Respondent was given "sufficient, specific" notice of the deficiencies in his performance; that after providing him notice, Respondent was provided with "sufficient tools and feedback to comply," and that despite such specific notice and feedback, Respondent's decisions were still not compliant. Respondent's Brief at 33-38. To support this proposition as to the Agency's burden of proof, Respondent relies on *Abrams*, 703 F.3d at 543 and *Shapiro*, 800 F.3d at 1337. Neither case supports Respondent's argument.

[27] Respondent's assertion that, according to HOCALJ Masengill, Respondent improved his on-the-record memorialization of off-the-record conversations in the time period after the issuance of the 2011 written directive is considered in relation to penalty, *infra,* section E.2.b.

Abrams is inapposite here because the ALJ in that case was not charged with neglect of duty, and the case does not address the burden of proof for such a charge. Rather, the ALJ was charged with misconduct for failure to follow certain directives of SSA, and the ALJ did not dispute that the agency had met its burden of proof in this regard. 703 F.3d at 541. The charge of failure to follow instructions does not require meeting the heavy burden of proof described by Respondent. *See, e.g., Hamilton v. U.S. Postal Serv.*, 71 M.S.P.R. 547, 555-56 (1996) (holding that charge of failure to follow instructions requires the agency to prove: (1) proper instructions were given, and (2) the employee failed to follow those instructions, without regard to whether the failure was intentional or unintentional). Similarly, the *Shapiro* decision did not address the burden of proof for neglect of duty, because the charge had been previously dismissed by the Board. The court's discussion of the "ample notice" that the ALJ had received referred to the allegations of the complaint in that case, to rebut the ALJ's argument that the agency had failed to prove the "precise charge asserted." 800 F.3d at 1336-37. Accordingly, *Shapiro* does not support Respondent's argument as to the Agency's burden of proof.

In any event, as shown in sections 1.b and 2 above, the evidence proves that Respondent was given sufficiently specific notice of the deficiencies in his closed period of disability decisions and his failures to properly summarize off-the-record conversations. These topics were addressed in the training meetings held with Respondent in June and August 2011. F. 86-89. Thereafter, the December 5, 2011 Directive specifically told Respondent:

> I direct you to determine whether there has been medical improvement [in a closed period of disability decision]. You must analyze any improvement by comparing the prior and current medical evidence and by illustrating any improvement in the signs, symptoms, or laboratory findings.
>
> Your analysis should discuss evidence that centers on the factors set forth at 20 CFR §404.1528 and §416.928 and that align with the guidance for evidence set forth at 20 CFR §404.1512-1518 and §416.912-918.

F. 96. *See also* F. 84 (HOCALJ Masengill advising Respondent, in response to Respondent's 2010 email request for guidance (F. 83), that: "My best advice has always been to adequately rationalize the favorable aspect of any decision, but to pay extra special attention to fully rationalize the cessation of any benefits, even in an 'agreed to' Closed Period situation."). The December 5, 2011 Directive further clearly told Respondent:

> I also direct you to summarize on the record, all off-the record discussions concerning amending claims involving closed periods of disability, as well as any other discussions relevant to the issues in a claimant's case. HALLEX I-2-6-40, I-2-6-75, 20 CFR §404.951, §416.1451, §404.961, and §416.1461 mandate that the ALJ make a complete record of the proceedings. This applies both to hearings and to pre-hearing conferences.

F. 96. HOCALJ Masengill also provided Respondent with specific comments and suggestions as to how to comply with the December 5, 2011 Directive, including specific language that Respondent could use in his decisions, as templates, that would detail any off-the-record conversation in which a claimant agreed to a closed period of disability and would identify specific medical evidence supporting a finding of medical improvement. F. 97.

In addition, the evidence shows that Respondent had ample time after issuance of the December 5, 2011 Directive to correct the deficiencies in his performance identified by the Agency, with nearly four years passing between the December 5, 2011 Directive and the filing of the Complaint in this case. Respondent complains that he lacked notice during this period that his performance remained deficient because the Agency failed to provide ongoing feedback on his cases, even though the Agency had identified continued deficiencies during this period and both the Agency and the Office of the Inspector General ("OIG") had interviewed Respondent. However, as discussed above, Respondent's 2011 retraining and the December 5, 2011 Directive provided sufficient guidance and feedback regarding the deficiencies in his performance and how to bring his

performance into compliance. The December 5, 2011 Directive made clear that "failure to follow this management directive may lead to disciplinary action." F. 96. Weingarten interviews, to which Respondent refers, are investigative interviews, in anticipation of discipline, and are not designed for counseling. F. 102. Moreover, Respondent provides no evidentiary or legal support for the assertion that the OIG interview, which was also investigative in nature, should have been used to counsel Respondent on improving his performance. Nevertheless, there is persuasive evidence that Respondent's purported desire to receive additional feedback in order to bring his performance into compliance is illusory. As HOCALJ Masengill testified, Respondent was more interested in trying to convince the Agency that Respondent's process was correct; that his method was correct; and that he did not need to fully rationalize his findings or fully detail on the record conversations that were held off the record. F. 100.

For all the foregoing reasons, Respondent's assertion that the Agency failed to prove he breached his duties because of a purported lack of sufficiently specific notice or sufficient feedback to correct his performance is without merit, and is rejected.

b. Qualified right of judicial independence

Respondent argues that even if the evidence proves the allegations of Specifications 1 through 4, such findings cannot support a determination of good cause under Section 7521 because this would constitute discipline "for the content of [Respondent's] decisions," which impermissibly "infringes on his quasi-judicial independence." Respondent's Brief at 46.

The qualified right of decisional independence, which is given to Administrative Law Judges by the Administrative Procedures Act ("APA"), refers to "the increased independence from agency pressure to decide a particular case, or a particular percentage of cases, in a particular way." *Anyel*, 58 M.S.P.R. at 269. The independence granted to ALJs by the APA was intended to "result in a greater assurance of justice at the hands of administrative agencies." *Id.* at 268. However, granting ALJs independence in the form

of freedom to ignore binding agency interpretations of law and policy would not further the goal of justice, but "would lead to a system under which the outcome of a case before an [A]dministrative [L]aw [J]udge would depend on the identity of the [A]dministrative [L]aw [J]udge assigned, rather than on applicable law." *Id*. at 269.

To be sure, an Administrative Law Judge is not immune from discipline for failures in the performance of his or her duties. *In re Chocallo*, 1 M.S.P.R. 605, 610 (1980), *aff'd* No. 80-1053 (D.D.C. 1980), *aff'd in part, vacated in part on other grounds and case remanded, Chocallo v. Prokop*, 673 F.2d 551 (D.C. Cir. 1982). Adjudicatory errors can establish good cause for an action under 5 U.S.C. § 7521. *Anyel*, 58 M.S.P.R. at 268. Moreover, an ALJ may be disciplined for disruptive or insubordinate conduct. *Brennan*, 787 F.2d at 1563. Whether a disciplinary action based on judicial conduct constitutes improper interference with judicial independence is a question of fact, to be decided in the context of each specific case. *SSA v. Goodman*, 19 M.S.P.R. 321, 328 (1984).

Under Specifications 1 and 2, the Agency has demonstrated that Respondent breached his duty to issue policy compliant closed period of disability decisions; specifically, that Respondent's written decisions awarding closed periods of disability did not fully or adequately rationalize the cessation of benefits, as required under Agency regulations and policy. Contrary to Respondent's argument, Respondent is not being subjected to discipline under Specifications 1 and 2 because Respondent issued closed period of disability decisions, which Respondent claims the Agency disfavors. Respondent's Brief at 47-48. Respondent argues that if his decisions are erroneous or inadequately supported, then it is the job of the Appeals Council and/or the federal courts to address the issue. However, "while individual judgmental errors can be corrected on appeal, . . . the agency has a legitimate interest in having cases decided correctly at their earlier stages. . . . [A]ppellate review provides only a case-by-case remedy for those who choose to invoke it; it does not provide an adequate remedy for a continuing failure" to follow agency policy. *Anyel*, 58 M.S.P.R. at 269 (rejecting argument that disciplining an

ALJ for having a high reversal or remand rate would have an improper chilling effect on the decision-making independence of Administrative Law Judges).

Although Respondent might disagree with the Agency's requirement that a factual finding of medical improvement contained in a closed period of disability decision must set forth more supporting evidence than the claimant's acknowledgement of medical improvement, Respondent is not free to ignore that requirement. *Anyel*, 58 M.S.P.R. at 269. ALJs must comply with the Agency's interpretation of laws and policies. "An ALJ is a creature of statute and, as such, is subordinate to the [agency] in matters of policy and interpretation of law." *Nash*, 869 F.2d at 680; *see also Ass'n of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (stating that on matters of law and policy, "ALJs are entirely subject to the agency"). Based on the foregoing, Respondent has failed to demonstrate that imposing discipline for Respondent's conduct pursuant to Specifications 1 or 2 would infringe on Respondent's quasi-judicial independence.

Respondent has also failed to demonstrate that discipline for Respondent's conduct pursuant to Specifications 3 or 4 infringes on Respondent's quasi-judicial independence. The evidence demonstrates that Respondent breached his duty to maintain a complete hearing record by failing to adequately summarize off-the-record conversations, as required by Agency regulations and policy. Discipline for this conduct does not relate to the content of Respondent's decisions, or to his conduct of hearings in a way that infringes on Respondent's quasi-judicial independence. As noted above, Respondent is subordinate to the Agency's interpretations of law and policy.

Respondent's conduct at issue in Specifications 1 through 4 is markedly different than the conduct at issue in *Social Security Administration v. Burris*, 39 M.S.P.R. 51 (1988), upon which Respondent relies. In *Burris*, the ALJ had been charged with insubordination for failing to follow agency instructions "to stop discrediting the agency's evidence in cases" and to stop providing all claimants who appeared before him

with a copy of those admonitions. 39 M.S.P.R. at 60-61. In contrast to the instant case, the ALJ in *Burris* was not charged with neglect of duty, and the agency did not demonstrate that ALJ Burris' conduct violated his duties. Respondent's reliance on *Social Security Administration v. Glover*, 23 M.S.P.R. 57 (1984) is similarly misplaced. In that case, the Board reaffirmed that "an [A]dministrative [L]aw [J]udge can be removed on the basis of actions taken by him or her in the course of an adjudicatory proceeding," including "the inclusion of inappropriate statements in a decision." 23 M.S.P.R. at 76. The Board held, however, that the "single and relatively innocuous statement" made in *Glover* "was not sufficiently serious to constitute good cause." *Id.* at 77-78. Respondent's ongoing failure to follow Agency regulations and policy in conducting hearings and issuing decisions, as demonstrated under Specifications 1 through 4, is readily distinguishable from the single and relatively innocuous statement challenged in *Glover.*

Respondent further argues that there were disagreements about Agency policy and how it is to be applied, and that Respondent's efforts to apply Agency policy to the facts of a case constitute judicial decision-making with which the Agency cannot interfere. However, the Agency's requirements for complying with Agency regulations and policy were made clear to Respondent, and Respondent's disagreement with the Agency's interpretations of the regulations or Agency policy does not create an issue for judicial decision-making.

For all the foregoing reasons, Respondent has failed to prove his defense that disciplining Respondent for the conduct that is the subject of Specifications 1 through 4 would interfere with his qualified right of judicial independence.

4. Specifications 5 and 6

The Agency charges that Respondent breached his duty to safeguard Personal Identifying Information ("PII") in fiscal years 2013 and 2014 (Specifications 5 and 6). PII is any information about an individual maintained by an agency, including (1) any

information that can be used to distinguish or trace an individual's identity, such as name, social security number ("SSN"), date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information. F. 60. *See also* F. 59. Information by itself that is not PII can become PII if combined with other identifying information. F. 168. For example, a person's last name combined with the last four digits of their SSN or combined with identifying medical information is PII. F. 169. SSA employees handle PII on a regular basis. F. 61. SSA ALJs, in particular, handle PII of claimants and beneficiaries. F. 61.

The Agency asserts that Respondent had a duty to safeguard PII, that he was aware of this duty, and that he breached this duty when he sent emails containing PII through unsecured communication channels to various claimant's representatives. Agency Brief at 62-64. The Agency further argues that a "reasonable person," after having undergone training on the need to safeguard PII, would not have disclosed PII through unsecured email channels. Agency Reply Brief at 114-115.

Respondent contends that the Agency is required to demonstrate that Respondent failed "to exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation with equal experience would not omit" and to demonstrate that Respondent's acts of sending emails to claimants' representatives which contained PII "were not prudent and reasonable under the circumstances." Respondent's Brief at 49-50 (citing *Velez*, 101 M.S.P.R. at 656; *Horney v. U.S. Forest Service*, 29 M.S.P.R. 543, 546 (1985)).[28] Respondent further argues that he made a reasonable effort to understand and comply with Agency policy and, thus, did not engage in actionable misconduct. Respondent's Brief at 50.

[28] As noted in section 1.d above, the quoted law applies to a charge of negligence in the performance of duty. Respondent is charged with failure to perform a duty, and case law does not clearly indicate that, in addition to showing failure to perform a duty, the employing agency must also show that the failure was "negligent." In any event, as shown below, the Agency has demonstrated that a reasonable SSA employee in Respondent's position, with Respondent's knowledge and training, would not have sent emails containing PII through unsecured communication channels.

a. Duty to safeguard PII

Respondent's duty to safeguard PII is set forth in Agency policy. *See Mendez,* 88 M.S.P.R. at 606; *see* F. 62-69. Pursuant to written Agency policy, Agency employees, such as Respondent, are prohibited from sending or forwarding an email containing PII to a non-secure email communication channel. F. 63. Agency employees may send or forward an email containing PII using a secure email communication channel or to an unsecure email account only after taking steps to encrypt the email. F. 64-65. When replying to an email that contains PII, Agency employees are required to either remove the PII from the email, or ensure that their reply is encrypted. F. 67 (Information Systems Security Handbook: "Only send email containing PII or other sensitive information to email addresses that are secure . . ."). Agency policy also prohibits employees from forwarding emails containing PII from their work email account to their personal email account and from sending PII obtained in the course of their employment from their personal email account. F. 68-69. As an Agency employee, Respondent had a duty to comply with Agency policy relating to safeguarding PII. F. 175.

b. Respondent's awareness of duty to safeguard PII

The evidence shows that Respondent was aware of his duty to safeguard PII. The Agency sends employees, including Respondent, annual personnel reminders regarding their duty to safeguard PII, and the methods for doing so. F. 176-178. In addition to the annual personnel reminders, the Agency reminds employees about the duty to safeguard PII through periodic reminders and mandatory training. F. 179. The Annual Reminder on Safeguarding Personally Identifiable Information for SSA Employees instructs that "each SSA employee is responsible for properly safeguarding PII from loss, theft or improper disclosure, including inadvertent disclosure . . . [and must k]now, understand and follow all Agency policies and directives on security, privacy and confidentiality practices." F. 177. Respondent was repeatedly made aware of this duty through required annual training and annual personnel reminders. F. 176, 179, 180. Respondent admitted

that he received training related to the duty to safeguard PII in fiscal year 2013 and fiscal year 2014. F. 182.

Moreover, Respondent was specifically aware of his obligation not to send unencrypted emails containing PII to unsecured accounts. Respondent admitted that he was aware that Agency policy in fiscal year 2013 and fiscal year 2014 required that emails sent to unsecured accounts could not contain PII unless the email or attachment containing the PII was encrypted. F. 183. In addition, after Respondent attended Annual Security Awareness Training, Respondent asked HOCALJ Masengill whether there are any matters which he should omit from his email correspondence with claimants' representatives. F. 180. By email response on June 30, 2011, HOCALJ Masengill directly instructed Respondent not to include information such as SSNs, dates of birth, addresses, etc. in his emails to claimants' representatives. F. 181. To the extent Respondent is asserting that he did not understand his obligations in this regard, the argument is not supported by the evidence and is rejected.

c. Respondent breached his duty to safeguard PII

The evidence proves that Respondent breached his duty to safeguard PII, in violation of Agency policy, when Respondent used his Agency email account to send emails containing PII to claimant's representatives' unsecured email accounts and when he sent emails containing PII from his personal, unsecured email account to claimant's representatives' unsecured email accounts. F. 184-203. Neither private law firms nor web-based email service providers are "secure partners." F. 172. Respondent admitted in his testimony that in fiscal year 2013 and fiscal year 2014, he did not encrypt his email communications with claimant's representatives and he did not know, or ask, whether any of the claimant's representatives with whom he communicated via email were Agency secure partners. F. 184, 195.

While the Agency states that it introduced into evidence 19 emails in fiscal year 2013 and 14 emails in fiscal year 2014 between Respondent and various claimants'

representatives that contain unprotected PII, Respondent argues that the Agency offered only 2 emails which purportedly contain PII because, in the absence of testimony on the emails, the Agency argument that the exhibits "were in fact emails from Judge Cooperman containing unprotected PII . . . is nothing more than the Agency counsel's characterization of evidence without any support." Respondent's Reply Brief at 192. Respondent's position that a document, unchallenged as to authenticity, is insufficient to establish a fact unless bolstered by testimony is unpersuasive and is rejected.[29]

As summarized above, the evidence proves that Respondent breached his duty to safeguard PII, including by transmitting such information in unsecured email communications, which Respondent knew was prohibited by Agency policy. Moreover, Respondent engaged in this conduct despite receiving training on an annual basis, including in fiscal year 2013 and fiscal year 2014 (F. 180, 182) and direct instructions from HOCALJ Masengill in 2011. F. 181. As found in F. 186-194, Respondent sent 9 emails containing PII of claimants to unsecured email accounts in fiscal year 2013, and, as found in F. 197-203, Respondent sent 7 emails containing PII of claimants to unsecured email accounts in fiscal year 2014.[30] A reasonable SSA employee in Respondent's position, knowing his duty to safeguard PII, and having received regular training on his duty to safeguard PII, would not have sent emails containing PII through unsecure email channels. *Cf. Mendez*, 88 M.S.P.R. at 606 (written policy can constitute the applicable standard of care, or standard can be established by other factors, including training, knowledge, customary agency practice, and adequacy of agency procedures).

[29] Respondent's argument that the unredacted copies of the emails attached to the Complaint as Exhibits 6 through 19 cannot be used to prove the factual content of the emails relating to the PII charge (Respondent's Brief at 51-52 n.8) is irrelevant. The court ruled that PX 205-PX 221, consisting of unredacted copies of the exhibits to the Complaint, were admitted for reference only and would not support factual determinations in this case. (Tr. 7:185-187). As found in F. 184-203, PX 205-PX 221 are not relied upon to support Specifications 5 and 6. The exhibits used to support Specification 5 are: PX 107, PX 110, PX 111, PX 112, PX 129, PX 131, PX 135, PX 142 and PX 185. F. 184-194. The exhibits used to support Specification 6 are: PX 116, PX 117, PX 119, PX 120, PX 122, PX 123 and PX 130. F. 195-203.

[30] All of the exhibits offered in support of Specifications 5 and 6 have been reviewed. Because the record is unclear, no findings are made with respect to whether Respondent disclosed PII in the emails designated as PX 109, PX 115, PX 134, PX 156, PX 166, and PX 186 (Specification 5) or PX 118, PX 121, PX 128, PX 138 and PX 152 (Specification 6). In addition, no findings are made with respect to whether Respondent disclosed PII in emails designated as PX 105 and PX 146 because these same emails are included in PX 142.

Based on the foregoing, the Agency has met its burden of proving that Respondent breached his duty to safeguard PII in fiscal year 2013 and fiscal year 2014. Accordingly, Specifications 5 and 6 are sustained.

5. Specifications 7 and 8

Specifications 7 and 8 charge that Respondent failed "to act in a fair and impartial manner" in fiscal year 2013 and fiscal year 2014, respectively. The evidence shows that Respondent had a duty to act in a fair and impartial manner. F. 70-76. The evidence further shows that Respondent was aware of this duty. F. 71-72. However, the evidence does not show that Respondent failed to act in a fair and impartial manner.

In support of Specifications 7 and 8, the Agency cites to several emails between Respondent and certain claimant's representatives, which emails the Agency asserts display a lack of impartiality by Respondent as to these representatives. Agency Brief at 25-26, 65-66; *see also* F. 207-210. Importantly, though, the Agency did not cite to any evidence showing that Respondent actually *acted* impartially in the conduct of hearings or in rendering decisions. Indeed, CALJ Bice acknowledged that she could not point to any cases handled by Respondent in which the claimant received a more favorable disposition based on the identity of the claimant's representative. F. 204-205. Furthermore, CALJ Bice acknowledged that the emails used to support the allegations of Specifications 7 and 8 show only the *possibility* of partiality or an *appearance* of a loss of impartiality, but do not show that Respondent *acted* impartially.[31] F. 206. Accordingly, the Agency failed to meet its burden of proving that Respondent breached a duty to act in a fair and impartial manner.

Based on the foregoing, Specifications 7 and 8 are not sustained.[32]

[31] Whether Respondent sent emails that conveyed an appearance of a loss of impartiality is addressed in relation to Charge 2, *infra.*

[32] Respondent's argument that certain Specifications in Charge 2 are duplicative of, and should be merged with, Charge 1, Specifications 7 and 8 is discussed in section 3.a below.

C. Charge 2 – Conduct Unbecoming

1. Introduction

In Charge 2 of the Complaint, the Agency alleges that Respondent engaged in conduct unbecoming. This charge is based upon 16 Specifications of what the Agency alleges are improper communications between Respondent and claimants' representatives.[33] Each of the Specifications is based upon a separate email exchange, each of which was attached to the Complaint and entered into evidence. JX 24-JX 39.

Good cause to impose a disciplinary action on an ALJ can be supported by proof of conduct unbecoming. *Long*, 113 M.S.P.R. at 208. In general, "conduct unbecoming" is conduct that is improper, unsuitable, or detracting from one's character or reputation. *Long*, 113 M.S.P.R. at 208. The ordinary meaning of "unbecoming" is "unattractive; unsuitable . . . ; detracting from one's . . . character, or reputation; [or] creating an unfavorable impression." *Miles v. Dep't of the Army*, 55 M.S.P.R. 633, 637 (1992) (citing Webster's Encyclopedic Unabridged Dictionary of the English Language 1538 (1989 ed.)). In determining whether conduct is unbecoming, it is appropriate to consider that the position of ALJ is a position of prominence, whose incumbents usually engender great respect. *See SSA v. Steverson*, 111 M.S.P.R. 649, 659 (2009). At a minimum, ALJs are required to conform to generally accepted rules of conduct. *See Long*, 113 M.S.P.R. at 207 (citing *SSA v. Manion*, 19 M.S.P.R. 298, 302 (1984)).

Moreover, proof of a failure to follow 1 of the 14 general principles for ethical conduct contained in 5 C.F.R. § 2635.101(b) constitutes proof of conduct unbecoming. *Schifano v. Dep't of Veterans Affairs*, 70 M.S.P.R. 275, 281 (1996). Among other things, the Standards of Ethical Conduct for Employees of the Executive Branch require executive branch employees, including ALJs, to endeavor to avoid any actions that create

[33] Of the 16 emails at issue, 15 emails were between Respondent and claimants' representatives. The sixteenth email was between Respondent and an employee of an auto rental agency.

the appearance that they are violating ethical standards, which includes the obligation to "act impartially and not give preferential treatment to any private organization or individual." 5 C.F.R. § 2635.101(b)(8), (14); F. 74 (SSA ALJs shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards.). Respondent acknowledged that, as an ALJ, he is required to maintain the appearance of impartiality, and to avoid any actions creating the appearance of a loss of impartiality. F. 74; *see also* F. 76 (SSA Annual Personnel Reminders remind all agency employees of the duty to take appropriate steps to avoid an appearance of a loss of impartiality while performing official duties.). Whether particular circumstances create the appearance that an employee has violated a principle shall be determined from the perspective of a reasonable person with knowledge of the relevant facts. 5 C.F.R. § 2635.101(b)(14).

As explained in section C.2 below, the evidence proves Specifications 1, 3 through 12, and 14. The evidence proves that Respondent, in numerous email exchanges with claimants' representatives, made statements that created the appearance that Respondent had lost impartiality as to these claimants' representatives.[34] Respondent's conduct in communicating with claimants' representatives in this manner was improper. Accordingly, Specifications 1, 3 through 12, and 14 are sustained.

The Agency has failed to meet its burden of proof as to Specifications 2, 13, 15, and 16 and, therefore, those Specifications are not sustained. However, the proven Specifications are more than sufficient to sustain the charge of conduct unbecoming. *Burroughs*, 918 F.2d at 172 ("[W]here more than one . . . factual specification is set out to support a single charge, . . . proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge."). In the instant case, the proven Specifications show a pattern of Respondent's communicating to certain claimants' representatives, including through express statements of affection, friendship, and

[34] The finding that any particular email communication was improper is based on an evaluation of the entirety of the email, as well as any additional evidence in the record as to surrounding context.

flattery, that these claimants' representatives were favored by Respondent and that they could expect or would receive special treatment from Respondent. Such conduct is improper, unattractive and unsuitable for an ALJ, who must maintain the appearance of impartiality and avoid even the appearance of a loss of impartiality. Respondent's defenses to Charge 2, addressed in section C.3 below, are without merit. Accordingly, the Agency has met its burden of proving the charge of conduct unbecoming.

2. Specifications

a. Specification 1

Respondent exchanged emails with Ms. McGrail, a claimants' representative who appears before him in his official ALJ capacity. F. 211-212. On August 21, 2012, Ms. McGrail sent an email to Respondent summarizing her meeting with her client concerning the possibility of a closed period of Social Security benefits and asked Respondent if he would consider a closed period of benefits. F. 213. In an email dated August 21, 2012, Respondent responded: "Yes, given the liberal and inclusive way I am instructed to interpret the law (DOW v. ASTRUE, 2011 U.S. Dist LEXIS 94974, D Vt 2011)[.] Plus, the fact that it's you as his attorney doesn't hurt matters[.]" F. 214. In a subsequent August 21, 2012 email, Respondent wrote to Ms. McGrail: "You are one of the best attorneys it has been my privilege to know up here and I say that not because I always think your cases are meritorious (I don't) and not because you always agree to closed periods (you don't) and not because you always do what I want you to (you don't, you shouldn't, and it would bore us both if you did) but because you practice law the way I used to, realistically, energetically, and efficiently. What's not to like about you?" F. 216. CALJ Bice testified that Respondent's statements created the appearance that he was partial to Ms. McGrail. F. 217.

Respondent's statements in his August 21, 2012 email exchange created the appearance that Respondent was not impartial with respect to Ms. McGrail, or that Respondent's decision-making would be influenced by the fact that Ms. McGrail was the

claimant's attorney. Indeed, Respondent followed up his statement agreeing to grant the requested closed period of benefits by praising Ms. McGrail. Because Respondent's statements created the appearance of a loss of impartiality, Respondent's communication was improper. Therefore, Specification 1 is sustained.

b. Specification 2

On August 31, 2012, Ms. McGrail sent an email to Respondent summarizing her discussion with her client concerning the possibility of a closed period of Social Security benefits. F. 220. In an email dated August 31, 2012, Respondent responded that the claimant "could very well prevail[.] Or he may not, who knows?" Respondent also discussed with Ms. McGrail Respondent's personal recreation plans. F. 221.

The Agency argues that the August 31, 2012 email is an improper communication because Respondent mixed a discussion of his personal life with official business, and that this failure to distinguish between the two creates an appearance of a loss of impartiality with regard to Ms. McGrail. This argument is unpersuasive. Respondent's statements in his August 31, 2012 email did not create the appearance of a loss of impartiality. Therefore, the Agency has failed to prove that the email was improper because Respondent mixed a discussion of his personal life with official business.

The Agency raises two additional grounds for asserting that the email was an improper communication. The Agency first contends that the email disclosed PII, in violation of agency policy. The email in evidence, JX 25, contains redactions. CALJ Bice testified that the August 31, 2012 email contained the full name of one claimant and the last name of another claimant represented by Ms. McGrail. Such identifiers alone are not considered PII. *See* section C.4 above. Thus, the evidence fails to prove that Respondent's communication was improper because it improperly disclosed PII. The Agency next contends that the email is an improper communication because Respondent discussed the merits of the case, which the Agency asserts should have taken place on the

record at a hearing and/or violates the December 5, 2011 Directive. However, the evidence does not show that it is improper for an ALJ to have discussions about the merits of a case off the record. The evidence shows that, if such conversations occur, the ALJ must summarize on the record the content and conclusion of the conversation. F. 55. Furthermore, the December 5, 2011 Directive did not direct Respondent not to have off-the-record conversations, but "to summarize on the record, all off the-record discussions concerning amending claims involving closed periods." F. 96. Moreover, the evidence does not show that Respondent failed to summarize the content of these communications on the record. Thus, the Agency has failed to support its argument that the August 31, 2012 email was improper because it reflected off-the-record communications on the merits of a case or violated the December 5, 2011 Directive.

Based on the foregoing, the Agency has failed to prove that Respondent's August 31, 2012 email was an improper communication, as alleged in Specification 2. Therefore, Specification 2 is not sustained.

c. Specification 3

In a January 15, 2013 email to Ms. McGrail, Respondent wrote: "I just wanted to make sure your ____ was covered[.] I protect my lawyers (at least those, like you, whom I like)[.]" F. 223. CALJ Bice testified that Respondent's statement gave the appearance of being partial to attorneys that he likes. F. 223. Respondent acknowledged that his statements in the January 15, 2013 email could "raise some eyebrows" and that he could "see where Judge Bice would have concern[s] about that . . . ." F. 225.

In his January 15, 2013 email, Respondent clearly stated that he treats lawyers that he likes differently than others, which created the appearance that Respondent is not impartial with respect to lawyers that he likes, including Ms. McGrail. Because Respondent's statements created the appearance of a loss of impartiality, Respondent's communication was improper. Therefore, Specification 3 is sustained.

d. Specification 4

In a May 30, 2013 email to Ms. McGrail, in response to a question from Ms. McGrail asking if he would consider a closed period of disability in a case, Respondent replied: "Probably need to have a hearing on this one[.] You know, Linda, that my discretion has a floor and a ceiling, and you always get the ceiling, but to resolve this case without a hearing would require me to ascend to the stratosphere!" F. 228. In a follow-up May 31, 2013 email to Ms. McGrail, Respondent wrote: "[Y]our friends (of which [I] am flattered to consider myself one) care a lot about you[.]" F. 229. CALJ Bice testified that because Respondent made a personal statement about how he feels about Ms. McGrail as a person, and further told her, "you always get the ceiling," Respondent showed a lack of impartiality. F. 230.

Respondent's expressions of friendship toward Ms. Grail in conjunction with statements that he always gave Ms. McGrail the upper limits of his discretion created the appearance that Respondent was not impartial with respect to Ms. McGrail. Because Respondent's statements in his May 30 and 31, 2013 emails created the appearance of a loss of impartiality, Respondent's communication was improper. Therefore, Specification 4 is sustained.

e. Specification 5

Mr. Bainbridge Testa is a claimants' representative who has appeared before Respondent on numerous occasions. F. 231. In a July 30, 2013 email to Mr. Testa, Respondent began by stating: "Enjoyed seeing you . . . at the party last Saturday." Respondent then advised Mr. Testa that Mr. Testa's name was not included on a list of law firms provided by SSA to claimants who ask for delays in hearings in order to obtain representation. F. 233. Respondent's July 30, 2013 email to Mr. Testa summarized Respondent's impressions of four pending cases. F. 235. In discussing one claimant, Respondent detailed the claimant's drug use and commented: "I've gotta meet this guy." F. 235. In discussing another claimant, Respondent asked Mr. Testa: "Why [did] you

take this case?" F. 235. CALJ Bice testified that Respondent's statements mixed personal relations with a business discussion and that Respondent's telling Mr. Testa that his name was not on a list given to claimants seeking representation could create the impression of favoritism towards Mr. Testa. F. 234. CALJ Bice also testified that Respondent's comment about a claimant's drug use was inappropriate and failed to show respect for the Agency's claimants and that to ask a representative why he has taken a case is not a proper inquiry for a judge. F. 236.

In his July 30, 2013 email, Respondent blurred the distinction between a personal and professional relationship. In addition, telling Mr. Testa that his name was not on a list given to claimants seeking representation created the appearance of favoritism toward Mr. Testa. Taken together, Respondent's email statements created the appearance of a loss of impartiality with regard to Mr. Testa. Furthermore, Respondent made disrespectful comments to Mr. Testa regarding claimants scheduled to appear before Respondent. For all these reasons, Respondent's July 30, 2013 email was an improper communication. Therefore, Specification 5 is sustained.

f. Specification 6

On August 20, 2013, Mr. Testa sent an email to Respondent in which he summarized the medical conditions of one of Mr. Testa's clients and wrote: "Bottom line: A closed period of 18 months would be a gift, and gladly accepted if you see fit to resolve the case in this manner. Client is already on board[.]" F. 238. In a reply email dated August 20, 2013, Respondent wrote: "Just to show you the amount of good will you've banked, I set aside a decision I was writing to attend to your email[.]" He then wrote: "Having reviewed your submission and the record, I think your suggestion has merit, and I will grant it upon receiving the standard letter[.]" F. 239. CALJ Bice testified that Respondent's statements indicated a special relationship with Mr. Testa and lack of impartiality. F. 240.

Respondent's statements in his August 20, 2013 email exchange created the appearance that Respondent was not impartial with respect to Mr. Testa, or would be influenced by the fact that Mr. Testa was the claimant's representative. In responding to Mr. Testa's request, which Mr. Testa characterized as "a gift," Respondent explicitly remarked on the good will Mr. Testa had banked and later stated he would grant Mr. Testa's request. Because Respondent's statements created the appearance of a loss of impartiality, Respondent's communication was improper. Therefore, Specification 6 is sustained.

g. Specification 7

On September 17, 2013, Respondent sent an email to Mr. Testa in which he wrote: "I will take no action on [one of Mr. Testa's client's cases] [un]til Friday to give you a chance to propose suggestions if you have any. You may present one, or more than one, option for resolving this case that would be acceptable to your client." F. 242. Respondent further wrote: "It's always a treat to have a lawyer of your ability and dedication to work with." F. 243. CALJ Bice testified that Respondent's praise of Mr. Testa created an appearance of a lack of impartiality. F. 244.

Respondent's statements in his September 17, 2013 email praising Mr. Testa's abilities and dedication created the appearance that Respondent was not impartial with respect to Mr. Testa. Because Respondent's statements created the appearance of a loss of impartiality, Respondent's communication was improper. Therefore, Specification 7 is sustained.

h. Specification 8

On September 26, 2013, Respondent sent an email to Mr. Testa in which Respondent described an arbitration involving Respondent. Respondent named Paul Lillios, an Associate Chief ALJ, and "refer[ed] to him as the 'Chicago hit man' because (a) he comes from Chicago and (b) never - with the possible exception of the former

[SSA] [C]ommissioner - have I seen a more anti-judge bureaucrat in my life." Respondent further wrote: "Lillios is an ex-AUSA, has a sterling CV, and is an intelligent and highly animated person. He is also, as noted earlier, the most anti-ALJ bureaucrat, save for [the former SSA Commissioner] Astrue, I've ever seen." F. 246.

In his September 26, 2013 email, Respondent, in describing his own lawyer in the arbitration, told Mr. Testa that the lawyer is, "except for you, the best lawyer I've seen in action[.]" F. 249. Respondent further wrote: "No matter how this [arbitration] comes out, I will definitely be much less pro-active than I have been in handling cases. When I have attorneys like you to deal with, I will be the same open, inquiring person I have always been, and encourage free-wheeling debate and discussion like we've always had. Where I have attorneys I don't know before me, I'll ask no questions other than of the VE, and that will be that. I want to hang onto this job for 5 more years, and this seems like the best way to do it." F. 249. Respondent concluded: "Thanks for your concern, Bain." F. 249. In a subsequent email on September 26, 2013 to Mr. Testa, Respondent wrote: "Well, maybe you're not the best lawyer I've ever seen, but you certainly are one of the best. And I have no reason to say that other than that it is true." F. 250. CALJ Bice testified that by sharing personal information about other Agency officials, providing details about an arbitration involving Respondent personally to a representative who appears before Respondent, and praising the representative, Respondent showed a lack of impartiality with respect to Mr. Testa. F. 247, 251.

Respondent's statements in his September 26, 2013 email exchange created the appearance that Respondent was not impartial with respect to Mr. Testa and attorneys like Mr. Testa because Respondent explicitly stated his intention to treat them differently than other attorneys. Indeed, Respondent followed up his statement that he would treat Mr. Testa differently than other attorneys by effusively praising Mr. Testa. Because Respondent's statements created the appearance of a loss of impartiality, Respondent's communication was improper. Therefore, Specification 8 is sustained.

i. Specification 9

On December 2 and 6, 2013, Respondent exchanged emails with Mr. Testa in which Respondent summarized the merits of five cases that Mr. Testa had coming up. F. 252, 253. Respondent began his December 2, 2013 email by writing: "First off, I hope you had a happy Thanksgiving. I had a couple of adventures during mine, about which I will tell you when we get a chance to get together." F. 254. In discussing the pending claim of a juvenile, Respondent wrote: "[M]om says the kid says God talks to him – don't you wish God would talk to you occasionally?" F. 256. Following up on his December 2, 2013 email, Respondent told Mr. Testa in an email on December 6, 2013: "I'll hang around until 2:30 for any communication you have" and also, "If you wish, you may always email me over the weekend at [_____]@yahoo.com." F. 258. CALJ Bice testified that Respondent's statements failed to show courtesy and respect. F. 257. CALJ Bice further testified that Respondent's statements indicated a personal relationship with Mr. Testa that demonstrated an appearance of the lack of impartiality. F. 255.

Respondent's statements in his December 2 and 6, 2013 email exchange created the appearance that Respondent was not impartial with respect to Mr. Testa because Respondent mixed a discussion of his personal life with official business and invited Mr. Testa to contact him over the weekend through his personal email address. In addition, Respondent made a flippant, disrespectful remark relating to a claimant, to the claimant's representative. For these reasons, Respondent's communication was improper. Therefore, Specification 9 is sustained.

j. Specification 10

On February 10, 2014, Respondent sent an email to Mr. Testa summarizing Respondent's concerns with one of Mr. Testa's cases. In this email, Respondent summarized the claimant's injuries and wrote: "I think one - though not the only - appropriate resolution would be a fully favorable with an onset date of July 1, 2013. This accounts for his physical activity over the summer of 2013, discussed above, and takes

into account the views of [two doctors]. It also provides you with a fee, which although cannot be my primary concern is nevertheless, given the effort you put forth in this case, a factor I must consider." F. 261. In a February 12, 2014 reply email, Mr. Testa wrote: "I shared with my wife the information I wrote down during our post-hearing discussion yesterday. She was pleased to have it," to which Respondent replied: "Hope your wife takes action on that information." F. 264. CALJ Bice testified that Respondent's statement that in resolving a case, he would take into consideration the fee that Mr. Testa would receive, and Respondent's comingling personal relations with a business discussion, demonstrate an appearance of the lack of impartiality. F. 263, 265.

Respondent's statements in his February 10 and 12, 2013 email exchange create the appearance that Respondent is not impartial with respect to Mr. Testa. Respondent expressed concern for, and consideration of, Mr. Testa's potentially receiving a fee in connection with Respondent's disposition of a case, when the fee of the representative should not enter into an ALJ's decision as to whether or not a claimant is entitled to benefits. In addition, Respondent mixed personal relations with a business discussion which, in context, created the appearance of a loss of impartiality as to Mr. Testa. Accordingly, the evidence proves that Respondent's communication was improper. Therefore, Specification 10 is sustained.

k. Specification 11

Ms. Bonita Porter is a claimants' representative who appears before Respondent. F. 266. On December 18, 2013, Ms. Porter sent an email to Respondent in which she summarized medical evidence relating to one of her clients and wrote: "It is my hope that once you review this, you may decide that an on the record fully favorable decision is appropriate." F. 268. Respondent replied to Ms. Porter's email by stating: "Bonnie, I don't have the latest stuff you sent me yet, but if you are telling me as an officer of the court and my friend that the claimant did indeed undergo a fusion in October 2013 then, as you have requested, I would give you an FF OTR effective 9/1/12, which is more

favorable than what you presently seek but, in my view, more in accordance with the evidence." F. 269. CALJ Bice testified that Respondent's statement that he would decide a case without reviewing the medical evidence, but instead base his decision on the assertions of an officer of the court and his friend, showed that Respondent was appearing to provide a special favor to Ms. Porter and a lack of impartiality. F. 271.

Respondent's statements in his December 18, 2013 email created the appearance that Respondent was not impartial with respect to Ms. Porter because he states that he would take Ms. Porter's word "as an officer of the court" and his "friend" that certain evidence existed, and that he was willing to decide a case based on that representation, rather than seeing the actual evidence. Because Respondent's statements created the appearance of a loss of impartiality, Respondent's communication was improper. Therefore, Specification 11 is sustained.

l. Specification 12

Ms. Kelli Silva is a claimants' representative who appears before Respondent. F. 272. On April 16, 2014, Respondent wrote an email to Ms. Silva, with regard to her claimant's case the day before, in which Respondent stated that he is "prepared to decide it but, before I do, I want your input on what the possible options are for me to choose from." F. 274. Ms. Silva responded to Respondent's email, stating: "Thank you for allowing me this opportunity. I was going to email yesterday, but wasn't sure if it was appropriate." F. 275. Respondent replied: "Kelli, you are one of a group (fairly small group) of attorneys who may always contact me, bidden or unbidden. I respect you immensely, and value your input consistently. Please remember this, and govern yourself accordingly." F. 276. CALJ Bice testified that Respondent's statement that he has a fairly small group of attorneys who he allows to contact him, bidden or unbidden, created an appearance of a loss of impartiality. F. 277.

Respondent's statements to Ms. Silva in his April 16, 2014 email regarding his "immense" respect for her and her status as a member of a "small group" of favored

attorneys who could "always" reach him created the appearance of a loss of impartiality as to Ms. Silva. Accordingly, Respondent's communication was improper. Therefore, Specification 12 is sustained.

m. Specification 13

After an email exchange with Ms. Silva in which she stated she had submitted an OTR (on-the-record) to Respondent (F. 279-280), Respondent informed Ms. Silva by email dated September 5, 2014 that she "may have an issue with fees" because another attorney had filed a Form 1696 as the claimant's representative and had not withdrawn as representative. He further wrote: "I suggest you either contact him and square this away, or prepare and file a fee petition." F. 281.

The Agency argues that the September 5, 2014 email is an improper communication because Respondent gave advice to Ms. Silva on how to collect a fee. The Agency's argument that it is improper for an ALJ to provide procedural advice to attorneys is not persuasive. Respondent's statements in his September 5, 2014 email do not create the appearance of a loss of impartiality. Therefore, the Agency has failed to prove that the email was improper because Respondent provided procedural advice to an attorney.

The Agency raises one additional ground for asserting that the email was an improper communication. In his email to Ms. Silva, Respondent wrote: "This case should never have been denied." The Agency contends that, through this statement, Respondent criticized the state agency that made the initial disability determination in the case and that such criticism of the agency could undermine public confidence in agency programs, and thus violated the professional decorum expected of an ALJ. The Agency's position that an ALJ's criticism of a state agency should be deemed an improper communication is unpersuasive. Because the Agency has failed to prove that Respondent's September 5, 2014 email was improper, Specification 13 is not sustained.

n. Specification 14

Mr. Paul Durkee is a claimants' representative who appears before Respondent. F. 282. Respondent exchanged emails with Mr. Durkee on September 27, 2013, October 1, 2013, and October 2, 2013, including emails that Respondent sent from his personal yahoo.com email account. F. 283. In a September 27, 2013 email to Mr. Durkee, Respondent wrote: "Let's have a hearing with [Mr. Durkee's client], and after taking testimony we'll figure out jointly what the best result is. . . . Plus, having a hearing with her will give me the pleasure of having a superlative lawyer before me, something I always relish." F. 285. In an October 1, 2013 email sent after the hearing, Respondent wrote to Mr. Durkee: "You are a dedicated advocate, Paul and, quite frankly, your passion for these cases reminds me of, well, me at a younger age. Except, unlike you, I was never fortunate enough to have the opportunity to appear before a Judge with whom I could have these types of 'out of court' dialogues." F. 286. In an October 1, 2013 email from his personal yahoo.com account to Mr. Durkee, Respondent also wrote: "[T]he proper question is 'What is [the claimant] going to do to help herself, and when is she going to do it? And when is she going to stop taking advantage of people like her aunt and grandparents (and maybe you?) who are trying to help her?' That, my good friend, is the question that needs to be answered. Whether it involves getting several alarm clocks, or getting a grip on her temper vis-a-vis her relatives, she needs to take responsibility and accountability for her actions." F. 287. In response, Mr. Durkee wrote to Respondent: "Would you at least consider a closed period in this case where you have done so in so many cases before with much less evidence. Surely she should not be left with nothing. I thought your email prior to hearing suggested that we would jointly work something out post hearing. A closed period would obviously motivate her to get moving. I will encourage her. Won't you please soften your position a little and consider a closed period." F. 288. CALJ Bice testified that comments about having the pleasure of a superlative lawyer before him and about Mr. Durkee reminding Respondent of himself gave the appearance that Respondent may have granted a closed period of

disability based on his good relationship with the lawyer and thus created the appearance of a loss of impartiality. F. 289.

Respondent's statements in his September 27, 2013, October 1, 2013, and October 2, 2013 email exchange with Mr. Durkee created the appearance that Respondent was not impartial with respect to Mr. Durkee because he effusively praised Mr. Durkee and noted that Mr. Durkee is fortunate to be able to have out-of-court dialogues with him to jointly resolve claims. Because Respondent's statements created the appearance of a loss of impartiality, Respondent's communication was improper. Therefore, Specification 14 is sustained.

o. Specification 15

On July 8, 2013, Respondent forwarded to Ms. Porter an email that Respondent had received, using the subject line: "FW: Bice just violated federal law and thumbed nose at US Supreme Court." Respondent wrote: "Thought you would enjoy seeing this email, received from one of my colleagues in another state. The names of most people have been removed to protect the innocent. 'Bice' is Debra Bice, the national chief judge of the ALJ's in this agency. I particularly enjoyed how the memo itself indicates that the Office of General Counsel (the lawyers within SSA whose job it is to give advice to the commissioner, which usually includes ways to take unfair advantage of the Judges) and the Justice Department are 'interpreting' the WINDSOR decision (the one in which the Defense of Marriage Act, or DOMA, was declared unconstitutional). . . . Anyway, thought you'd enjoy a little 'inside baseball' stuff." F. 290.

The Agency asserts that Respondent's July 8, 2013 email was improper because, by criticizing the Agency and sharing an internal Agency instruction with a claimants' representative who does business with the Agency, Respondent's statements serve to undermine public confidence in the Agency. The Agency's argument that Respondent's email to one representative "undermines public confidence" in the Agency is

unpersuasive. Because the Agency has failed to prove that Respondent's July 8, 2013 email was improper, Specification 15 is not sustained.

p. Specification 16

On April 25, 2012, Don Austin, of DA's Auto Rental, wrote in an email to Respondent: "In regards to our discussion, here is the information." F. 292. Mr. Austin provided a name, a date of birth, a Social Security number, and a telephone number. Mr. Austin further wrote: "Any help will be appreciated." F. 292.

On July 8, 2013, Respondent wrote an email to Don Austin, of DA's Auto Rental, stating: "Hope all is well with you and the family. I regret not having rented any cars lately, but the social security administration is being tight with a buck (actually, they spend money where they shouldn't and fail to spend where they should) so, for the moment, that's that." Respondent wrote that he has a road trip planned and was considering renting a car to make the trip and asked: "Got a good rate for me that would justify me in leaving my car at home?" F. 293.

The Agency does not contend that Respondent's actions created the appearance of lack of impartiality. The Agency raises two grounds for asserting that the email was an improper communication. First, the Agency contends that the email disclosed PII, in violation of Agency policy. The email in evidence, JX 39, contains redactions. CALJ Bice testified, based on an unredacted copy of JX 39, that Mr. Austin's April 25, 2012 email to Respondent contained a name, a date of birth, a Social Security number, and a phone number of an individual. It is not apparent that Respondent's July 8, 2013 email to Mr. Austin repeated any PII contained in Mr. Austin's April 25, 2012 email to Respondent, and the Agency has not proven otherwise. Second, the Agency contends that Respondent's email was improper because it implied that Respondent was providing a personal favor to Mr. Austin. Nothing from the face of the email indicates that Respondent provided a personal favor to Mr. Austin and the Agency failed to present any testimony to prove this contention. Thus, the evidence fails to prove that Respondent's

communication was improper. Therefore, Specification 16 is not sustained.

3. Respondent's defenses to Charge 2

a. Merger

Respondent contends that the Agency's assertions that Respondent improperly communicated the appearance of a loss of impartiality are duplicative of Specifications 7 and 8 of Charge 1 (failure to act impartially) and that these assertions should therefore be "merged" with those Specifications. Similarly, Respondent asserts that the Agency's claim that Respondent, in certain email exchanges, improperly engaged in off-the-record discussions about the merits of a case and/or disclosed PII, in violation of Agency policy, is duplicative of and should be merged with Specifications 3 through 6 of Charge 1.

"The Board will 'merge' charges if they are based on the same conduct and proof of one charge automatically constitutes proof of the other charge." *Shiflett, v. DOJ*, 98 M.S.P.R. 289, 292 (2005) (merging charges of giving preferential treatment to an inmate by giving him unrestricted access to a telephone and violating agency policy by giving that inmate unrestricted access to a telephone). *E.g.*, *SSA v. Shapiro*, 120 M.S.P.R. 572, 2014 MSPB LEXIS 1361, at **35-37 (2014) (finding no error in the merger of two charges where specifications underlying each charge required a finding that the respondent did not provide timely hearings and dispositions and did not acceptably or adequately manage his cases). However, "[a] single set of actions can support more than one charge, as long as the charges constitute separate offenses, i.e., they entail different elements of proof." *Walker v. Dep't of the Navy*, 59 M.S.P.R. 309, 318 (1993); *Bross v. Dep't of Commerce*, 94 M.S.P.R. 662, 664 n.1 (2003) ("The Board has held that, while the same actions may support more than one charge, they may do so only if the charges constitute separate offenses with separate elements of proof.").

Respondent's reliance on the merger doctrine is misplaced because proving conduct unbecoming in this case does not depend on proving that Respondent acted

impartially, improperly engaged in off-the-record discussions, or improperly disclosed PII. Rather, the holding herein sustaining Charge 2 is based upon proof that Respondent improperly communicated the appearance of a loss of impartiality with regard to certain claimants' representatives. Specifications 7 and 8 of Charge 1 alleged that Respondent failed to act impartially, which is patently distinguishable from the Agency's assertion, and proof, that Respondent created the appearance of a loss of impartiality. Moreover, Specifications 7 and 8 were not sustained. While Specifications 3 through 6 of Charge 1 alleged that Respondent failed to follow Agency policy regarding off-the-record communications and disclosure of PII, those bases have not been relied upon in sustaining Charge 2. The fact that the Agency argued these additional reasons for finding an email exchange improper is not a basis for merger.

Indeed, it is not apparent that the merger doctrine even applies in the circumstances urged by Respondent. The merger doctrine refers to merger of charges. Respondent seeks to "merge" specifications, and/or the supporting arguments, evidence, and assertions, into other specifications. The parties do not cite a case applying the merger doctrine in such circumstances. Even if merger were appropriate, however, "the fact that a charge has been merged into another does not mean that the duplicative charge is not sustained, . . . or that the appellant's misconduct somehow becomes less serious by virtue of the merger." *Shiflett*, 98 M.S.P.R. at 294; *Mann v. Dep't of Health & Human Services*, 78 M.S.P.R. 1, 6-7 (1998).

b. Unbecoming conduct based upon statements

Respondent contends that the Agency has failed to prove Charge 2 because, according to Respondent, a charge of unbecoming conduct must be based on actions, while the charge of unbecoming conduct in the instant case is based on Respondent's statements. Absent proof that Respondent actually acted impartially in any of his decisions, Respondent argues, the charge of unbecoming conduct cannot be sustained. This contention is unsupported by law and is unpersuasive, as analyzed below.

In *Ryan v. Department of Homeland Security*, 123 M.S.P.R. 202 (2016), cited by Respondent, the employee was charged, *inter alia*, with the ethical violation of creating the appearance of a conflict of interest. *Id.* at 205. The Board expressly rejected the argument that in order to sustain the charge, the agency was required to prove an actual conflict of interest. Because creating the appearance of an ethical violation is itself a violation of the Ethical Standards, *see* 5 C.F.R. § 2635.101(b)(14), the Board held that "the agency could prove its charge by establishing that the appellant's conduct created the appearance of a conflict of interest under the standards of ethical conduct, even if it failed to prove an actual conflict of interest." *Id.* at 207. To prove the existence of an appearance of a conflict of interest, as charged by the agency, "an agency must show that the employee's interests or duties in one capacity would 'reasonably create an appearance' of having an effect on his interests or duties in the other capacity." *Id.* In *Ryan*, the only evidence regarding the employee's alleged appearance of conflict of interest was an email sent by the employee to his supervisor, stating that his wife's company, of which the employee was president, was working on a joint venture with a call center that would compete for the agency's call center contract. The email further inquired about whether, and how long, a conflict of interest would preclude business with the agency. *Id*. at 204-05. The Board found that this conduct was insufficient to conclude that the employee took any action creating the appearance of a conflict of interest. *Ryan* does not stand for the proposition that a charge of conduct unbecoming cannot be based on an employee's words, as argued by Respondent.

Respondent's reliance on *Abruzzo v. SSA*, 489 Fed. Appx. 449 (Fed. Cir. 2012) is also misplaced. In that case, contrary to Respondent's assertions, the charge of unbecoming conduct was based in part on his making insulting statements about co-workers and other agency personnel, including to their subordinates. *Id.* at 451. *See SSA v. Abruzzo*, 116 M.S.P.R. 561, 2011 MSPB LEXIS 4754, at **4 (2011) (holding that unbecoming conduct can include the respondent's use of "intemperate language"). *See also SSA v. White*, 119 M.S.P.R. 390, 2013 MSPB LEXIS 2145, at **7-9 (2013) (use of

argumentative statements and actions), *aff'd* White v. SSA, 2014 U.S. App. LEXIS 21538 (Fed. Cir. 2014).

In summary, Respondent fails to cite any case holding that a charge of unbecoming conduct must be based on actions and cannot be based on statements of an employee. Moreover, Respondent's attempt to characterize his email exchanges as inactionable "statements," rather than conduct is unpersuasive and is rejected. For all the foregoing reasons, Respondent's assertion that the Agency has failed to prove unbecoming conduct is rejected.

c. Notice

Respondent next contends that the Agency did not notify Respondent that his email exchanges raised any ethical concerns. Therefore, Respondent argues, the Agency has failed to show that a "reasonable person" would have known that the emails were problematic. This argument is without merit. Respondent knew he was communicating with claimants' representatives that appear before him. Respondent knew he had an obligation to avoid even the appearance of a loss of impartiality. As held above, a reasonable person in Respondent's position would view Respondent's statements in these exchanges as creating the appearance of a loss of impartiality, regardless of whether he was notified of this fact. Accordingly, Respondent's notice argument is rejected.

d. Opinion testimony

Respondent contends that the Agency has failed to prove that his email exchanges with claimants' representatives created the appearance of a loss of impartiality because, according to Respondent, the opinions of CALJ Bice in this regard are unsupported. However, the opinions of CALJ Bice, although given consideration, are not determinative. The determination herein that Respondent's email exchanges with claimants' representatives created the appearance of a loss of impartiality is amply

demonstrated by a review of the content of the emails themselves, as well as any and all evidence in the record as to the context surrounding these emails.

D. Whistleblower Defense

1. Legal framework

Having found that the Agency has proven the charge of neglect of duties and the charge of conduct unbecoming an ALJ, the next issue is whether Respondent has proven his affirmative defense. Respondent has raised a defense of reprisal for engaging in protected whistleblowing activities. Answer at 11-12; Respondent's Brief at 57-66. In original jurisdiction cases seeking discipline of an ALJ, the Board has treated claims of whistleblower reprisal as an affirmative defense. *See, e.g.*, *Carr*, 78 M.S.P.R. at 334. With respect to affirmative defenses, Respondent has the burden of proof, by a preponderance of the evidence. 5 C.F.R. §1201.56(a)(2)(iii).[35]

The Whistleblower Protection Act of 1989, as amended by the Whistleblower Protection Enhancement Act of 2012, prohibits a personnel action with respect to an employee because of

> (A) any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences –
> (i) any violation of any law, rule, or regulation, or
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . ; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee … reasonably believes evidences –

[35] As noted earlier, preponderance of the evidence is "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. §1201.56(c)(2).

> (i) any violation . . . of any law, rule or regulation, or
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(b)(8)(A) and (B) (2016).[36]

To make a *prima facie* case of whistleblower retaliation, Respondent must prove, by a preponderance of the evidence (1) that he made a disclosure protected under 5 U.S.C. § 2302(b)(8)[37] and (2) that the protected disclosure was a contributing factor in the Agency's personnel action. *Carr v. SSA*, 185 F.3d 1318, 1321 (Fed. Cir. 1999); *Webb v. DOI*, 122 M.S.P.R. 248, 251 (2015); *see also Strickland-Donald v. Dep't of the Army*, 2016 U.S. App. LEXIS 14568, at *7 (Fed. Cir. Aug. 9, 2016) (unpublished opinion).

If Respondent shows that he made a protected disclosure and that the disclosure was a contributing factor in the agency's personnel action, the burden of persuasion then shifts to the Agency to show by clear and convincing evidence that it would have taken

[36] The Whistleblower Protection Act of 1989 ("WPA"), Pub. L. 101-12, was enacted to protect federal employees who report agency misconduct. In 2012, Congress amended the WPA with the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), Pub. L. No. 112-199, § 108, 126 Stat. 1465, 1469 (2012). Congress identified and abrogated specific judicial decisions by the Federal Circuit that had concluded that disclosures made in certain contexts (for example, during the course of an employee's regular duties, or where the information disclosed was already known) would not be eligible for WPA protection. *Daniels v. MSPB*, 832 F.3d 1049, 1051-52 (Fed. Cir. 2016) (citing S. Rep. No. 112-155, at 4-5, 2012 U.S.C.C.A.N. at 592-93). "Congress concluded that such decisions impermissibly narrowed the scope of the WPA and clarified that it 'intend[ed] to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures' and 'that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future [Board] or court opinions.'" *Daniels*, 832 F.3d at 1051-52 (citing *Id*. at 5, 2012 U.S.C.C.A.N. at 593).

The WPEA was signed into law on November 27, 2012, with an effective date of December 27, 2012. The enhanced whistleblower protections do not apply to conduct that occurred earlier than the effective date. *Hooker v. Dep't of Veterans Affairs*, 120 M.S.P.R. 629, 636-37 (2014); *King v. Dep't of the Air Force*, 119 M.S.P.R. 663, 667-68 (2013). Although not all of the alleged protected disclosures in this case occurred before December 27, 2012, the provisions of the more expansive WPEA have been considered and make no difference to the outcome. *See Francis v. Dep't of the Air Force*, 120 M.S.P.R. 138, 140 n.1 (2013). For ease of reference, the terms "whistleblower protection" or "whistleblowing activities" are used in reference to all of the disclosures for which Respondent claims protection under either the WPA or the WPEA.

[37] Under WPEA, an appellant may also claim reprisal for whistleblowing based on engaging in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). Respondent's claims in this case were not raised under 5 U.S.C. § 2302(b)(9).

the same personnel action in the absence of any protected disclosure. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012); *Carr*, 185 F.3d at 1322.[38]

Because, as shown below, Respondent has failed to prove that he made any protected disclosures, his whistleblower retaliation defense fails.[39]

2. Standards for evaluating whether Respondent made any protected disclosures

Respondent asserts that he made protected disclosures in the following communications: (1) two union grievances; (2) a letter to OIG; (3) a complaint to the Office of Special Counsel ("OSC") and to MSPB; (4) a letter to Congress; and (5) expressions of danger to health or safety. Respondent's Brief at 61-62. Before addressing each of Respondent's alleged protected disclosures, an analysis of what constitutes a protected disclosure follows.

"Protected whistleblowing occurs when an appellant makes a disclosure that [he or] she reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety." *Mudd v. Dep't of Veterans Affairs*, 120 M.S.P.R. 365, 369 (2013). The term "disclosure" is statutorily defined as "a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee . . . reasonably believes that the disclosure evidences (i) any violation of any

[38] Clear and convincing evidence is statutorily defined as that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established, and is a higher standard than the preponderance of the evidence standard. 5 C.F.R. § 1209.4(e).

[39] On December 13, 2016, Respondent filed a Request for Notice requesting that the Board take notice of the recent decision of the U.S. Court of Appeals for the Federal Circuit in *Miller v. Department of Justice*, 2016 WL 7030359 (Fed. Cir. Dec. 2, 2016) (Tab 119). In *Miller*, the Board's determination that the employee's disclosures were WPA protected was not disputed. Rather, at issue in *Miller* was whether the government showed independent causation by clear and convincing evidence. In this case, Respondent has not made any protected disclosures. Therefore, the issues addressed in *Miller* are not relevant here.

law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(a)(2)(D).[40]

To establish that a protected disclosure has been made, the employee must first establish that he had a reasonable belief that his disclosure was protected under the WPA. *Langer v. Dep't of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). "A purely subjective perspective of an employee is not sufficient even if shared by other employees." *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). The test of a reasonable belief is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government being disclosed by the employee evidenced one of the types of wrongdoing listed in the WPA. *LaChance*, 174 F.3d at 1381; *Ayers v. Dep't of the Army*, 123 M.S.P.R. 11, 17-18 (2015).

"Ordinarily, to make a protected disclosure of a law, rule, or regulation, an employee must identify the specific law, rule, or regulation that was violated." *Ayers*, 123 M.S.P.R. at 21-22 (citing *Langer*, 265 F.3d at 1266). Although an individual need not identify a statutory or regulatory provision by a particular title or number, the statements and the circumstances surrounding the making of those statements must clearly implicate an identifiable violation of law, rule, or regulation. *Ayers*, 123 M.S.P.R. at 22; *Langer*, 265 F.3d at 1266. Furthermore, "[d]isclosures of trivial violations do not constitute protected disclosures." *Langer*, 265 F.3d at 1266 (citing *Herman v. DOJ*, 193 F.3d 1375 (Fed. Cir. 1999)). The aim is to encourage reporting of a "genuine violation of law" rather than "minor or inadvertent miscues occurring in the conscientious carrying out of a federal official or employee's assigned duties." *Herman*, 193 F.3d at 1380-81.

[40] The Board applies to pending cases the WPEA's clarification of the term "disclosure." *Day v. Dep't of Homeland Sec.*, 119 M.S.P.R. 589, 601 (2013); *O'Donnell v. Dep't of Agriculture*, 120 M.S.P.R. 94, 98-99 n.4 (2013), *aff'd* 561 F. App'x 926 (Fed. Cir. 2014).

"An erroneous agency ruling is not a 'violation of law.' Such rulings are corrected through the appeals process -- not through insubordination and policy battles between employees and their supervisors." *O'Donnell*, 120 M.S.P.R. at 99-100 (internal citations omitted). Furthermore, "[t]he Board has held that the statutory protection for whistleblowers is not a weapon in arguments over policy or a shield for insubordinate conduct. Even under the expanded protections afforded to whistleblowers under the Whistleblower Protection Enhancement Act of 2012 (WPEA), general philosophical or policy disagreements with agency decisions or actions are not protected unless they separately constitute a protected disclosure of one of the categories of wrongdoing listed in section 2302(b)(8)(A)." *Webb*, 122 M.S.P.R. at 252 (internal citations omitted).

It is noted as a preliminary matter that Respondent has not advanced the argument that he disclosed information which he reasonably believes evidences gross mismanagement. Respondent's Brief at 28-29; 57-66; Respondent's Reply Brief at 152-154; 169-174; 225-232. Instead, although Respondent asserts that some of his disclosures reveal "mismanagement" by the Agency, nowhere in his Post-Hearing Brief or Reply Brief does Respondent contend that he made a protected disclosure of "gross" mismanagement. Respondent's Brief at 28-29; 57-66. *See* Respondent's Proposed Findings of Fact 246-248 (Respondent sent a letter and filed complaints "reporting mismanagement in Region 1"; "complaining that the Agency was engaging in mismanagement"; and raising concerns "regarding Agency mismanagement"); Respondent's Brief at 61 (Respondent made protected disclosures when "he contacted the IG, OSC and MSPB regarding his belief that the Agency was engaging [in] mismanagement"); Respondent's Brief at 62 (Respondent "contacted Congress to raise his concerns about Agency mismanagement"). "In defining a protected disclosure, Congress in 1989 specifically chose to replace the 'mismanagement' standard in the prior law with a more stringent 'gross mismanagement' standard." *White v. Dep't of the Air Force*, 391 F.3d 1377, 1381-82 (Fed. Cir. 2004) (citations omitted).

In addition, Respondent makes no assertions and has not established that any of his disclosures reveal "a gross waste of funds or an abuse of authority . . . ." Respondent's Brief at 28-29; 57-66; Respondent's Reply Brief at 152-154; 169-174; 225-232. "An employee discloses an abuse of authority when he alleges that a federal official has arbitrarily or capriciously exercised power which has adversely affected the rights of any person or has resulted in personal gain or advantage to himself or to preferred other persons, *see McCollum v. Dep't of Veterans Affairs*, 75 M.S.P.R. 449, 455-56 (1997), and an employee discloses a gross waste of funds when he alleges that a more than debatable expenditure is significantly out of proportion to the benefit reasonably expected to accrue to the government, *see Embree v. Dep't of the Treasury*, 70 M.S.P.R. 79, 85 (1996)." *Webb*, 122 M.S.P.R. at 253 n.3. None of Respondent's disclosures meets these standards.

3. Respondent has not established that he made any protected disclosures

a. The union grievances were not protected disclosures

Respondent argues that he made protected disclosures in "two union grievances which resulted in arbitration hearings, protesting the Agency interference with his decisional independence." Respondent's Brief at 62. He does not otherwise explain how his union grievances constituted protected disclosures.

The evidence shows that Respondent filed a grievance in 2010 regarding a counseling memorandum he had received; the grievance went to arbitration; and the arbitrator upheld Respondent's position that the counseling memorandum was not proper. F. 294 The evidence also shows that Respondent filed a second grievance regarding a letter of reprimand on four specific specifications;[41] the grievance went to arbitration; and the arbitrator upheld the Agency's position. F. 295.

[41] Respondent does not indicate the date on which he filed his second grievance and a review of the Parties' briefs and the transcript does not reveal the date of Respondent's second grievance.

Respondent's grievances, in which he protested Agency "interference with his decisional independence," (Respondent's Brief at 62) fall short of the standards required to demonstrate that Respondent disclosed information which he reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See Ayers*, 123 M.S.P.R. at 21-22; *Langer*, 265 F.3d at 1266; *O'Donnell*, 120 M.S.P.R. at 99-100. Respondent's grievances do not refer to any law, rule, or regulation that has been violated and there are no surrounding circumstances from which an identifiable violation of law, rule, or regulation can be inferred. Furthermore, Respondent does not argue that the grievances disclosed any gross mismanagement by the Agency. Instead, the evidence shows only that Respondent filed two grievances because he disagreed with the Agency's decision to issue a counseling memorandum and a letter of reprimand. These are not protected disclosures under the Whistleblower Act. *See id.*

A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could not reasonably conclude that the actions disclosed evidenced one of the types of wrongdoing protected by 5 U.S.C. § 2302(b)(8). *See LaChance*, 174 F.3d at 1381. Accordingly, Respondent has not established by a preponderance of the evidence that he made disclosures protected under 5 U.S.C. § 2302(b)(8) in his union grievances.

b. The November 15, 2012 letter to OIG was not a protected disclosure

Respondent asserts that he made protected disclosures when he contacted the Inspector General claiming that the Agency was engaging in "mismanagement" by conducting a Weingarten interview with him without fully reviewing the hearing tapes from the hearings that were the subject of the Weingarten interview. Respondent's Brief at 61.

The evidence shows that Respondent wrote a letter, dated November 15, 2012, to Patrick O'Carroll, Jr., the Inspector General of SSA ("November 15, 2012 letter to OIG"). F. 302. In this letter, Respondent described two cases that he had recently decided. F. 302. In one of these cases, the claimant's counsel filed a motion to recuse Respondent, accusing Respondent of inappropriate conduct. F. 302. In the other case, the claimant's counsel filed a complaint with ODAR management, seeking a reversal of Respondent's decision based in part on Respondent's alleged misconduct in that case. F. 302. Respondent's November 15, 2012 letter to OIG stated that after receiving the motion to recuse Respondent and the complaint against Respondent, management of ODAR Region 1 decided to hold a Weingarten meeting on October 25, 2012. F. 303. Respondent's letter further stated that Respondent believed that management's decision to conduct a Weingarten interview in connection with these two instances was "serious mismanagement." F. 303.

Respondent's November 15, 2012 letter to OIG in which he expressed his belief that the Agency was engaging in mismanagement by conducting a Weingarten interview with him without fully reviewing the hearing tapes from the hearings that were the subject of the Weingarten interview (Respondent's Brief at 61) falls far short of the standards required to demonstrate that Respondent disclosed information which he reasonably believes evidences gross mismanagement. Disclosure of alleged "mismanagement" is not a protected disclosure.

Furthermore, the November 15, 2012 letter to OIG does not disclose "gross management." "Gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Francis*, 120 M.S.P.R. at 144 (finding "that the appellant merely expressed her disagreement over job-related issues, which the Board has not deemed sufficient for finding a protected disclosure under the WPA"). "A disclosure of gross mismanagement excludes management decisions which are merely debatable." *Webb*, 122 M.S.P.R. at 253 n.3 (citing *Ormond v. DOJ*, 118 M.S.P.R. 337, 342 (2012)).

"Mere differences of opinion between an employee and his agency superiors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement." *White*, 391 F.3d at 1381.

Respondent's November 15, 2012 letter to OIG reflects his disagreement with the Agency's decision to investigate two complaints lodged against him by attorneys who had appeared before him. This type of disagreement does not constitute a protected disclosure of gross mismanagement. *O'Donnell*, 120 M.S.P.R. at 99; *Webb*, 122 M.S.P.R. at 252 (statutory protection for whistleblowers is not a weapon in arguments over policy or a shield for insubordinate conduct).

A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could not reasonably conclude that the actions disclosed evidenced one of the types of wrongdoing protected by 5 U.S.C. § 2302(b). *See LaChance*, 174 F.3d at 1381. Accordingly, Respondent has not established by a preponderance of the evidence that he made a disclosure protected under 5 U.S.C. § 2302(b)(8) in his November 15, 2012 letter to OIG.

c. The 2013 complaints to OSC and MSPB were not protected disclosures

Respondent asserts that he made protected disclosures when he filed a complaint with OSC and with MSPB both claiming that the Agency was engaging in mismanagement by inappropriately intervening with his decisional independence. Respondent's Brief at 61.

The evidence shows that in 2013, Respondent filed a complaint with OSC alleging that the Agency was engaging in mismanagement and interference with Respondent's qualified decisional independence. F. 306. In a September 11, 2013 letter from OSC to Respondent, OSC summarized Respondent's complaint to OSC as follows: "[Y]ou alleged that officials with the Social Security Administration Office of Disability

Adjudication and Review (ODAR) have threatened to take disciplinary action against you in reprisal for disclosing ODAR management's misuse of disciplinary proceedings in order to coerce you into 1) deciding cases differently and 2) not speaking with counsel about a case prior to the commencement of a hearing." F. 307.

The evidence shows that on or about April 4, 2013, Respondent filed a complaint with MSPB alleging that the Agency had retaliated against him for engaging in protected whistleblowing activity when it scheduled and conducted a Weingarten meeting. F. 312. Respondent's MSPB complaint involved substantially similar allegations to those he raised with OSC. F. 313. The MSPB complaint was dismissed on jurisdictional grounds. F. 312.

Respondent's complaints to OSC and MSPB in which he expressed his belief that the Agency "was inappropriately intervening with his decisional [in]dependence" (Respondent's Brief at 61) fall far short of the standards required to demonstrate that Respondent disclosed information which he reasonably believes evidences a violation of any law, rule, or regulation, or of gross mismanagement. *Ayers*, 123 M.S.P.R. at 21-22 (requiring employee to clearly implicate an identifiable violation of law, rule, or regulation). Further, "[t]he Board requires an appellant to provide more than vague and conclusory allegations of wrongdoing by agency officials." *McCorcle v. Dep't of Agriculture*, 98 M.S.P.R. 363, 374 (2005) (*citing Carr v. Dep't of Defense*, 61 M.S.P.R. 172, 181 (1994)).

Rather, Respondent's complaints to OSC and MSPB restate Respondent's disagreements with the Agency's decision to investigate him and with the Agency policies underlying the Agency's decision to investigate. "The Board has held that the statutory protection for whistleblowers is not a weapon in arguments over policy or a shield for insubordinate conduct." *Webb*, 123 M.S.P.R. at 252; *see also O'Donnell*, 120 M.S.P.R. at 100 ("There are a large number of federal agencies, from the Department of Agriculture to the Department of Veterans Affairs to the Social Security Administration

to the Merit Systems Protection Board, that rule on citizens' applications for benefits or redress every day. The orderly administration of these agencies requires that, for better or for worse, supervisors and managers have the final say in such rulings.").

In addition, Respondent's complaints to OSC and MSPB in which he expressed his disagreement with the Agency's policies and decision-making, do not constitute protected disclosures of gross mismanagement. *White*, 391 F.3d at 1381 (holding that differences of opinion as to the most appropriate course of action do not rise to the level of gross mismanagement); *Webb*, 123 M.S.P.R. at 252 (holding that management decisions that are merely debatable do not constitute gross mismanagement).

A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could not reasonably conclude that the actions disclosed evidenced one of the types of wrongdoing protected by 5 U.S.C. § 2302(b). *See LaChance*, 174 F.3d at 1381. Accordingly, Respondent has not established by a preponderance of the evidence that he made disclosures protected under 5 U.S.C. § 2302(b)(8) in his 2013 complaints to OSC and MSPB.

d. The November 4, 2014 letter to members of Congress was not a protected disclosure

Respondent asserts that he made protected disclosures in his November 4, 2014 letter to Congress wherein Respondent "raise[d] his concerns about Agency mismanagement relating to inappropriate interference with his decisional independence and the failure of the Inspector General to both investigate his complaint and its apparent targeting [of] him . . . for retaliatory investigation because of his original complaint to the IG." Respondent's Brief at 62.

The evidence shows that Respondent wrote a letter, dated November 4, 2014, to U.S. Senators Sherrod Brown and Pat Toomey stating that he wished to call their attention to what Respondent called "serious misconduct by the senior management of

the SSA . . . ." F. 315 ("November 4, 2014 letter to members of Congress"). In the November 4, 2014 letter to members of Congress, Respondent wrote that he had been contacted by the management of the Agency because the Agency was concerned that (i) Respondent was awarding a closed period of benefits in more cases than the Agency thought appropriate, and (ii) Respondent was negotiating with counsel about whether closed periods were appropriate. F. 316. Respondent further wrote that he complained to the SSA Office of Inspector General, but that, other than interviewing Respondent in late 2012, OIG did nothing to investigate Respondent's concerns. F. 317. The November 4, 2014 letter to members of Congress also stated that Respondent has been targeted by the management of the Agency and by OIG "for retaliatory action for attempting to have management misconduct addressed." F. 319. In the November 4, 2014 letter to members of Congress, Respondent noted his concern with what he referred to as the "rot which appears pervasive at the top levels of SSA management has spread to the inspector general's office. F. 320. If Inspector General O'Carroll was not aware of what his employees were doing in this regard, he should have been. If he was aware of what they were doing, then a different situation presents itself." F. 320.

The November 4, 2014 letter to members of Congress falls far short of the standards required to demonstrate that Respondent disclosed information which he reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement. *See Ayers*, 123 M.S.P.R. at 21-22; *Langer*, 265 F.3d at 1266; *O'Donnell*, 120 M.S.P.R. at 99-100. Respondent does not identify any law, rule or regulation that has been violated and there are no surrounding circumstances from which an identifiable violation of law, rule, or regulation can be reasonably inferred. Respondent's allegations of misconduct by the Agency merely express Respondent's disagreement over debatable management decisions and thus do not rise to the level of gross mismanagement. *Webb*, 122 M.S.P.R. at 253 n.3; *White*, 391 F.3d at 1381.

In the November 4, 2014 letter to members of Congress, Respondent again restated his disagreements with the Agency's interpretations of policy and the Agency's

decision to investigate complaints lodged against him by attorneys who appeared before him. Respondent criticized Agency investigations that questioned his actions and implied conspiracies when OIG investigators failed to validate his complaints about the Agency's investigations into Respondent's conduct. Respondent's own self-interest in avoiding disciplinary action weighs against the reasonableness of his belief that management targeted him for investigation because he engaged in protected activity. *See LaChance*, 174 F.3d at 1380-81 ("[W]e also would expect the board to consider personal bias or self-interestedness in" evaluating whether "it was reasonable to believe that the disclosures revealed misbehavior described by section 2302(b)(8).").

A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could not reasonably conclude that the actions disclosed evidenced one of the types of wrongdoing protected by 5 U.S.C. § 2302(b). *See LaChance*, 174 F.3d at 1381. Accordingly, Respondent has not established by a preponderance of the evidence that he made disclosures protected under 5 U.S.C. § 2302(b)(8) in the November 4, 2014 letter to members of Congress.

e. Expressions of danger to health or safety were not protected disclosures

Lastly, Respondent asserts that he made protected disclosures when he raised "health and safety concerns with HOCALJ Massengill regarding the inadequate security in the ODAR office building, and inquired about the possibility of bringing a firearm to work for protection." Respondent's Brief at 61.[42] The evidence shows that in 2011 or 2012, Respondent expressed concerns to HOCALJ Masengill that there had been instances around the country in which Administrative Law Judges had been physically attacked as they were leaving the office, that many claimants appearing before

[42] The Agency asserts that Respondent waived the claim that he disclosed protected "health and safety" concerns because he did not raise this claim in his Answer to the Complaint and did not identify "health and safety" disclosures in his answers to the Agency's interrogatories asking for identification of all claims of protected activity (PX 17 at 13). Agency Reply Brief at 123. Notwithstanding the foregoing, Respondent's claim is addressed herein.

Respondent have severe mental problems, that the only barrier to entry to the ODAR offices in the Springfield, Massachusetts building is a single armed guard, and thus, Respondent felt that the Agency was not adequately securing the office. F. 298.

"[T]he inquiry into whether a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA is guided by several factors, among these: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, *i.e.*, the potential consequences." *Chavez v. Dep't of Veterans Affairs*, 120 M.S.P.R. 285, 295 (2013) (quoting *Chambers v. DOI*, 602 F.3d 1370, 1376 (Fed. Cir. 2010)). In *Chambers*, the Federal Circuit explained that "the outcomes of past cases . . . have depended upon whether a substantial, specific harm was identified, and whether the allegations or evidence supported a finding that the harm had already been realized or was likely to result in the reasonably foreseeable future." *Chambers*, 602 F.3d at 1376. "'[S]pecific allegations or evidence either of actual past harm or of detailed circumstances giving rise to a likelihood of impending harm' are needed to demonstrate that a disclosure evidences a substantial and specific danger to public health or safety." *Aquino v. Dep't of Homeland Sec.*, 121 M.S.P.R. 35, 43 (2014) (quoting *Chambers*, 602 F.3d at 1376).

"Disclosure of an imminent event is protected, but disclosure of a speculative danger is not." *Schoenig v. DOJ*, 120 M.S.P.R. 318, 323 (2013) (citing *Miller v. Dep't of Homeland Sec.*, 111 M.S.P.R. 312, (2009)); *Sazinski v. Dep't of HUD*, 73 M.S.P.R. 682, 686 (1997) ("[R]evelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing, is not protected."). Thus, in *Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, 661-62 (2004), the appellant's disclosure that security guards' lives and the lives of those they protected could have been in danger if they were attacked because their weapons were not fully loaded was held not to be a protected disclosure of a substantial and specific danger to public health or safety.

The evidence in this case contains no specifically identified harm or detailed circumstances giving rise to a likelihood of impending harm. Respondent's general expression of concern regarding the inadequate security at the ODAR building only identified the possibility of danger at some point in the future.

A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could not reasonably conclude that the actions disclosed evidenced one of the types of wrongdoing protected by 5 U.S.C. § 2302(b). *See LaChance*, 174 F.3d at 1381. Accordingly, Respondent has not established by a preponderance of the evidence that his expressions of concern regarding the inadequate security at the ODAR building is protected under 5 U.S.C. § 2302(b)(8).

4. Conclusion

Respondent has failed to prove by a preponderance of the evidence that he had a reasonable belief that any of his disclosures evidenced a type of wrongdoing listed at 5 U.S.C. § 2302(b)(8). Therefore, Respondent's defense that he was retaliated against for engaging in protected whistleblowing activities fails.[43]

Having determined that the Agency has proved Charge 1 and Charge 2 and that Respondent's affirmative defense of whistleblower retaliation is without merit, the analysis turns next to penalty.

[43] Because Respondent has failed to prove that he made any protected disclosures, this Initial Decision need not, and does not, analyze whether such disclosures were a contributing factor to the Agency's personnel action, or whether the Agency has proven that it would have taken the same personnel action against Respondent absent the disclosures. *E.g.*, *White*, 2013 MSPB LEXIS 2145, at **24. *See also Webb*, 122 M.S.P.R. 248; *O'Donnell*, 120 M.S.P.R. at 99.

E. Penalty

1. Introduction

In an original jurisdiction case under 5 U.S.C. § 7521, it is the Board, rather than the employing agency, that determines penalty. *Steverson*, 111 M.S.P.R. at 658; *Dep't of Commerce v. Dolan*, 39 M.S.P.R. 314, 317 (1988) (citing *Glover*, 23 M.S.P.R. at 78 and *SSA v. Davis*, 19 M.S.P.R. 279, 282-83 (1984)). The Board looks to the factors articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981) (the "*Douglas* factors") for guidance in determining whether a proposed penalty is reasonable under all relevant circumstances of the case. *Nagel v. Dep't of Health & Human Services*, 707 F.2d 1384, 1386 (Fed. Cir. 1983). *Douglas* listed 12 factors[44] that are "generally recognized as relevant" in determining an appropriate penalty. *Id.* However, "[n]ot all of these factors will be pertinent in every case." *Douglas*, 5 M.S.P.R. at 306. Indeed, "[t]he [B]oard never intended that each factor be applied mechanically, nor did it intend mandatory consideration of irrelevant factors in a particular case . . . ." *Nagel*, 707 F.2d at 1386; *Davis*, 19 M.S.P.R. at 283 (stating it is not necessary to consider "each and every factor . . ."). Rather, all that is required is that "the penalty selected be reasonable when considered against the relevant factors." *Davis*, 19 M.S.P.R. at 283.

[44] The *Douglas* factors are: (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Douglas*, 5 M.S.P.R. at 305-06.

2. Analysis of *Douglas* factors

a. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated (*Douglas* factor 1)

In evaluating whether a penalty is reasonable, "the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities." *Steverson*, 111 M.S.P.R. at 658. In the instant case, the evidence shows that Respondent negotiated or "resolved" certain disability claims pending before him, including through off-the-record discussions with claimants' representatives, that resulted in closed period of disability decisions. As engaged in by Respondent, this practice resulted in repeated violations of Agency regulations and policy. First, Respondent's written decisions failed to fully rationalize his finding of medical improvement, a necessary component of a closed period decision, with objective medical evidence, relying instead on the claimant's agreement to a closed period. Second, Respondent failed to memorialize on the hearing record the content and conclusion of his off-the-record discussions. Third, Respondent improperly disclosed PII in unsecured email communications with claimants' representatives. Respondent also engaged in unbecoming conduct, by repeatedly making statements in email communications with a certain group of claimants' representatives that created the appearance that Respondent favored and/or was not impartial regarding these representatives. The misconduct demonstrated in this case is serious.

Moreover, this serious misconduct directly pertains to Respondent's responsibilities as an ALJ. Respondent's principal responsibilities as an ALJ are to hold full and fair hearings and issue legally sufficient and defensible decisions. F. 27. Without an adequate rationale for a decision, the Appeals Council has no "ammunition" to defend an appeal, and the U.S. Attorney cannot or will not defend a case in court that

is not adequately rationalized, even if the claimant agreed to the closed period. F. 84. Thus, Respondent's violations of Agency policy in failing to fully rationalize the cessation of benefits in his closed period decisions, including by reference to objective medical evidence, negatively impacts the legal sufficiency and defensibility of his decisions. In addition, Respondent's failure to properly memorialize on the hearing record the content and conclusion of off-the-record discussions directly affects Respondent's obligation to provide claimants with a full, due process hearing. F. 56, 331. Moreover, Respondent was under a duty to safeguard PII, which ALJs receive in the course of their duties, in order to protect claimants' privacy, F. 61, 175, yet Respondent repeatedly disclosed claimants' PII through unsecured emails. *See* section B. 4 above.

The evidence further shows that Respondent's neglect of his duties and unbecoming conduct was repeated, which belies the notion that the Respondent's misconduct was inadvertent. Respondent's assertion that his non-compliant closed period of disability decisions were not representative of his decisions as a whole, even if true, does not compel a finding that his issuance of non-compliant closed period of disability decisions was inadvertent. To the contrary, Respondent's repeated failures to fully rationalize his closed period of disability decisions or adequately summarize his off-the-record conversations with claimants' representatives were ongoing issues that persisted notwithstanding retraining and a clear, express directive to Respondent, as further discussed in section 2.b below.

b. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question (*Douglas* factor 9); and the potential for the employee's rehabilitation (*Douglas* factor 10)[45]

As explained further below, the evidence demonstrates that Respondent was clearly on notice that he was violating Agency policies governing the issuance of closed period of disability decisions and memorializing off-the-record communications (*Douglas* factor 9). The evidence further shows that, with regard to Respondent's failure to adequately rationalize closed period decisions and failure to properly memorialize off-the-record conversations, Respondent persistently challenged and resisted Agency direction, maintaining that the Agency's policies were incorrect and that Respondent's practices were justified, as explained below (*Douglas* factor 10).

In September 2010, Respondent received advice from HOCALJ Masengill "to pay extra special attention to fully rationalize the cessation of any benefits, even in an 'agreed to' Closed Period situation." F. 84. HOCALJ Masengill provided this guidance at Respondent's request, after the Appeals Council remanded one of Respondent's cases in part because of deficiencies in the stated evidentiary bases for the closed period of benefits. F. 81-83. Respondent's email to his supervisors, although ostensibly requesting their guidance on how to improve his decisions in the future, took a defensive, if not oppositional, tone. Respondent asserted that where a claimant agrees to "resolve" a disability claim through a closed period of benefits, there should be "no need in [the] decision to go through an extensive analytic process." F. 82. Respondent criticized the Appeals Council's decision as a "finding of fault with the fact that I did not write my decision to their satisfaction," F. 82, and questioned why, in an agreed-to closed period of disability decision, he should be obligated to write a decision that "exhaustively canvasses all of the medical evidence and provides painstaking rationale as the [Appeals

[45] Because the analysis of a number of *Douglas* factors rely on similar and/related facts, where appropriate to avoid repetition, some factors are analyzed together.

Council] demands[.]" F. 83. Although Respondent indicated he would do so, if required, he took the opportunity to warn that such a requirement would "negatively affect" his productivity. F. 83.

On or about January 21, 2011, a U.S. District Court Magistrate Judge issued an order remanding a case adjudicated by Respondent, noting that "contrary to the directives of the regulations and the HALLEX manual, the record does not reflect what was discussed off the record prior to the hearing regarding a 'proposal' Plaintiff apparently felt pressured to 'accept' in lieu of 'a full hearing.'" *Betancourt v. Astrue*, 824 F. Supp. 2d 211, 216-17 (D. Mass. 2011) (holding that Respondent violated a claimant's due process rights when he engaged in off-the-record substantive discussions regarding whether the claimant wanted to receive a closed period of benefits). F. 85. The court's order required the Agency to provide a copy of the opinion to Respondent, and, when HOCALJ Masengill did so, Respondent indicated he thought the district court's opinion was incorrect. F. 331.

In June 2011 and August 2011, the Agency undertook to retrain Respondent on his handling of agreed-to closed period of disability decisions and off-the-record communications with claimant's representatives, after examining complaints against Respondent in connection with these issues, as well as an additional 35 of Respondent's cases. F. 80. In June 2011, ALJ Brady specifically advised Respondent that even where a closed period of disability is granted by consent, the decision needs to discuss medical improvement, "showing how the signs, symptoms, and objective testing show improvement under the medical improvement standard . . ." and that off-the-record conversations about substantive matters should be memorialized on the record. F. 87. At a training meeting with Respondent in August 2011, then-ACALJ Cristaudo specifically advised Respondent that the claimant's concession that he or she can work does not suffice for a closed period of disability decision, and that Respondent must determine a second RFC. F. 89.

Respondent's reaction to the directions he received at the August 2011 meeting was defensive and resistant. According to ACALJ Cristaudo's notes, Respondent stated, among other things: "I've done everything right. I'm a model judge. Closed periods are good: They have a beneficial effect. In some cases they may involve giving some money to somebody who's not entitled, but it can be a good thing. . . . Why am I not getting plaudits? If you want to play hardball, I'll get an attorney." F. 89. With regard to complaints received by the Agency concerning Respondent's handling of closed period decisions and off-the-record conversations, Respondent insisted that "Agency policy is gray . . . I do closed period decisions to achieve justice . . . . If [the claimants] are lucid and say they want a closed period? I don't see a need to corroborate that. A second RFC? I cite the claimants' concession that they can work." F. 89. Moreover, the fact that the Agency received more complaints regarding Respondent's handling of closed period of disability decisions in September 2011, F. 90, indicates that Respondent ignored the advice he had received.

Accordingly, in a further effort to obtain Respondent's compliance, the Agency issued a directive to Respondent. The December 5, 2011 Directive clearly notified Respondent of the Agency policies being violated and warned Respondent that failure to follow the instructions in the Directive "may lead to disciplinary action." *See* section B.1.b above; *see also* F. 95-96. Among other things, the December 5, 2011 Directive notified Respondent:

- As an ALJ, Respondent is "responsible for conducting hearings and issuing timely and legally sufficient decisions. See Hallex I-2-0-5B. A legally sufficient decision requires that you comply with SSA's laws, regulations, rulings, and policies."

- "In your decisions, you are required to analyze medical evidence that supports a finding of the claimant's medical improvement . . . . Many of your decisions involving closed periods of disability contain analytical deficiencies. Furthermore, . . . you had 'off-the record' discussions with the claimants and/or their representatives

regarding the claimant's case and did not summarize the discussions on the record . . . ."

- "Your continued failure to comply with the agency's policies and regulations directly affects the agency's mission to serve the public efficiently and effectively."

F. 96.

Furthermore, the December 5, 2011 Directive specifically ordered Respondent "[p]ursuant to 20 CFR § 404.1594 and § 416.994" to:

- "analyze any [medical] improvement by comparing the prior and current medical evidence and by illustrating any improvement in the signs, symptoms, or laboratory findings" and to discuss evidence in accordance with "the factors set forth at 20 CFR §404.1528 and §416.928" and the guidance "set forth at 20 CFR §404.1512-1518 and §416.912-918";

- "Compare the prior RFC with the increase in the current RFC, based on changes in signs, symptoms, or lab findings";

- "explain how the medical improvement . . . now results in the claimant being able to engage in work at the SGA level"; and

- "summarize on the record, all off-the-record discussions concerning amending claims involving closed periods of disability, as well as any other discussions relevant to the issues in a claimant's case. HALLEX I-2-6-40, I-2-6-75, 20 CFR § 404.951, § 416.1451, § 404.961, and § 416.1461 mandate that the ALJ make a complete record of the proceedings."

F. 96.

Respondent notes that, after receiving the December 5, 2011 Directive, Respondent requested that HOCALJ Masengill review a selection of Respondent's decisions and provide feedback, which Respondent argues demonstrates a lack of intent to violate the December 5, 2011 Directive. However, the evidence supports a conclusion that Respondent was less interested in receiving feedback than in attempting to convince HOCALJ Masengill that Respondent's practices were correct and that he was not

required to fully rationalize his closed period decisions or summarize on the record discussions that occurred off the record. F. 100, 106; *see also* F. 82-83, 85, 89.

After issuance of the December 5, 2011 Directive, the Agency received additional complaints about Respondent's handling of closed period cases and off-the-record conversations, which lead to a Weingarten interview on October 25, 2012 and a second Weingarten interview on March 28, 2013. F. 105. HOCALJ Masengill concluded in reports to his superiors on each interview that Respondent was continuing to have off-the-record discussions with claimants' representatives without fully memorializing the conversations on the record, was continuing to fail to adequately rationalize the cessation of benefits in agreed-to closed period disability decisions, and was failing to follow Agency policies or the December 5, 2011 Directive. F. 104, 106.

HOCALJ Masengill's report of the March 28, 2013 Weingarten interview further shows that Respondent remained convinced that his practices were correct and that Respondent was unwilling to conform his conduct to meet the requirements of the Agency:

> [Respondent] believes that a claimant's assent (upon advice of competent counsel) to a Closed Period decision is sufficient evidence to demonstrate Medical Improvement. He appeared to be stating that there needed to be no medical evidence or rationale to justify his conclusions. . . .
>
> Judge Cooperman continues to express the rather strong belief that he is absolutely deciding his cases correctly, efficiently, and equitably. It appears that he continues his practice of significant Closed Period adjudication, without following Agency Policy. This is despite the history of multiple discussions (by me, the Springfield, MA Hearing Office Director, and other ALJs), training sessions (Judge Brady-then National ALJ Mentor), investigations (Ohio Cases) and counseling (both oral and written), a personal meeting with Judge Cristaudo (then Associate Chief ALJ), a formal Written Directive (December 5, 2011), and a prior Weingarten Meeting.

F. 106.

Respondent's resistance to following the Agency's requirements is further exemplified in comments Respondent made in the text of his decision in the *Simmons* case, issued on August 28, 2014. F. 147. *Simmons* is among the closed period decisions found herein to have violated Agency policies by failing to cite adequate support for the finding of medical improvement and failing to sufficiently memorialize an off-the-record conversation. F. 150, 167. *Simmons* had previously been remanded to Respondent by the Appeals Council as unsupported by substantial evidence (F. 148), and Respondent took the opportunity in his remand decision to defend himself, stating:

> The AC [(Appeals Council)] further faulted my decision by concluding that "The claimant's acknowledgment of medical improvement is not a determination made in accordance with the requirements of 20 C.F.R. 404.1594." . . . I summarily reject the AC position that a lucid claimant's acknowledgment of occupational capacity is insufficient to support a finding of medical improvement. The regulatory section which the AC cites, 20 C.F.R. [404].1594, states in pertinent part that medical improvement is any decrease in the severity of an impairment. Such a decrease in severity must be based, as the regulatory provision states, on changes in symptoms, signs or lab findings. Who better to report (and know) what a person's symptoms are than that person himself? Certainly not the doctor, not the nurse; indeed, no one is in a better position to know the severity of symptoms than the person who is suffering them. Thus, the regulatory provision cited by the AC in fact undermines their conclusion, and expressly supports mine.

F. 149.

In addition, the record shows that Respondent was clearly on notice, through his ALJ training, Agency reminders, and a direct instruction from HOCALJ Massengill in 2011, that improperly disclosing PII, including through transmittals via unsecure email, was against Agency policy. F. 176-182. Respondent acknowledged that he had received training and was aware of his duty to safeguard PII and to encrypt emails sent to unsecure email accounts. F. 182-183. Furthermore, Respondent acknowledged that, as an ALJ, he is required to maintain the appearance of impartiality, and to avoid even the appearance of a loss of impartiality. F. 72-73; *see also* F. 76 (SSA Annual Personnel Reminders

remind all agency employees of the duty to take appropriate steps to avoid an appearance of a loss of impartiality while performing official duties).[46]

Respondent states that he is "able and willing" to adjust his behavior when the Agency policy is clearly articulated. Respondent's Brief at 70. In addition, the evidence shows that since late 2014 or early 2015, he adjusted his email practices regarding PII to refer to claimants by their first name and last initial, and to use only the last four digits of claimants' Social Security numbers. F. 332. The evidence further demonstrates that Respondent has been memorializing on the record more of the content of his off-the-record conversations than he had in the past. F. 333. The foregoing evidence of Respondent's improvement in the areas of safeguarding PII and memorializing off-the-record conversations has been considered.

The evidence also shows that Respondent was on notice of the regulations and/or policies governing his conduct and that the conduct violated Agency regulations and/or policies. Respondent's argument that he lacked notice because the Agency did not notify him that decisions Respondent issued after the December 5, 2011 Directive remained deficient is without merit. Respondent had ample notice of the Agency's requirements, which Respondent resisted, and which culminated in the December 5, 2011 Directive. It had become readily apparent that Respondent disagreed with the Agency's interpretation of certain regulations, to the point that Respondent's immediate supervisor, HOCALJ Masengill, believed further discussions with Respondent would have been ineffective. F. 100. "An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law." *Nash*, 869 F.2d at 680; *see also Ass'n of Administrative Law Judges*, 594 F. Supp. at 1141 (stating that on matters of law and policy, "ALJs are entirely subject to the agency").

[46] Respondent argues that the Agency failed to notify him that that it believed Respondent's emails with certain claimants' representatives were improper. However, the applicable rules governing Respondent's conduct were clear.

c. Effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform (*Douglas* factor 5)

The evidence shows that Respondent's demonstrated misconduct directly and adversely affects his ability to perform at a satisfactory level. As discussed in section 2.a above, Respondent's failure to fully rationalize closed period decisions and to properly memorialize off-the-record conversations, in particular, adversely affects Respondent's performance and Agency operations. As shown by the evidence, such conduct can cause, and has caused, complaints, appeals, re-filings by dissatisfied claimants, and remands. F. 78-79, 81, 84-85, 90, 101, 105, 144, 148.

The Federal Circuit has held that "an undermining of confidence occurs where the conduct creates doubts in the ALJ's ability to carry out his responsibilities . . . ." *Long v. SSA*, 635 F.3d 526, 537 (Fed. Cir. 2011). The evidence shows that Respondent's misconduct has adversely affected his supervisors' confidence that Respondent will fulfill his responsibilities in the future. F. 326-327.

d. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position (*Douglas* factor 2)

Respondent's failures to follow Agency policies in the performance of his duties, as well as Respondent's unbecoming conduct with regard to his email communications with claimant's representatives, is particularly serious given an ALJ's prominent position (*Douglas* factor 2). An ALJ holds the highest-paid position in a hearing office. F. 325. The ALJ position is a one of "prominence, whose incumbents usually engender great respect and whose cooperation within the office should be taken for granted." *Steverson*, 111 M.S.P.R. at 659. *See also* F. 324 (As an ALJ, Respondent held a visible and public position that is subject to scrutiny). Because ALJs "occup[y] a high and prominent federal office, one requiring that its incumbents conduct themselves in a fitting manner," *Manion*, 19 M.S.P.R. at 319, ALJs are held to a high standard.

Respondent's misconduct in repeatedly neglecting his duties to fully rationalize CPODs, maintain a complete hearing record, and safeguard PII, combined with his unbecoming conduct in improper communications with claimant's representatives, falls far below the standard expected of an ALJ, and reflects poorly on the ALJ position.

e. The employee's past disciplinary record (*Douglas* factor 3) and the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability (*Douglas* factor 4)

Respondent has been an ALJ since 2005 and has been a productive ALJ. F. 338. HOCALJ Masengill characterized Respondent as having a positive, good work ethic. F. 335. In the opinion of the three testifying claimants' representatives who have appeared before Respondent, Respondent is very intelligent and fair as a judge. F. 334. However, the evidence also shows that, since at least 2010, the Agency has received numerous complaints regarding Respondent's handling of closed period of disability decisions and off-the-record conversations, including assertions that claimants had been pressured into accepting a closed period of disability, rather than having a full hearing. F. 78, 90, 101, 105. HOCALJ Masengill estimated that 80 percent of his workload in dealing with complaints against ALJs involved complaints regarding Respondent. F. 337. The evidence also shows that Respondent received a reprimand in the past, in connection with an unrelated matter. F. 336.

In addition, as discussed in section 2.b above, Respondent's failure to modify his practices required the Agency to issue a directive to Respondent.

f. Consistency of penalty with those imposed upon other employees for the same or similar offenses (*Douglas* factor 6)[47]

CALJ Bice has sought the removal of another ALJ for neglect of duty in failing to follow Agency regulations regarding the sequential evaluation process required by Agency regulations. That case was pending and unresolved at the time of CALJ Bice's testimony in the instant case. F. 328. CALJ Bice was unaware of any ALJs removed due to having issues with PII, and acknowledged that no MSPB case has authorized removal of an ALJ for issuing decisions that were not policy compliant. F. 329. A review of Board precedent does not reveal a case presenting facts comparable to the instant case.

g. The notoriety of the offense or its impact upon the reputation of the agency (*Douglas* factor 8)

The evidence shows that a district court was aware of Respondent's failure to follow Agency policies with regard to memorialization of off-the-record conversations. F. 331. *See Betancourt*, *supra.* In addition, the *Betancourt* decision was a published decision. F. 331. Although CALJ Bice speculated that the claimants and claimants' representatives were aware of Respondent's misconduct, the evidence does not support CALJ Bice's assertion. The evidence does not show that Respondent's misconduct was notorious or that it adversely impacted the reputation of Agency.

h. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter (*Douglas* 11)

Respondent argues that his 10 years of employment as an ALJ and his productivity should be viewed as mitigating factors. Those factors have been considered in relation to the Respondent's past work record, in section 2.e above. The record does not show the existence of mitigating circumstances such as unusual job tensions, personality problems,

[47] *Douglas* factor 7 considers the consistency of the penalty with any applicable agency table of penalties. *See* n. 44 above. The record does not include any applicable table of penalties.

mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

i. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others (*Douglas* factor 12)

Respondent has not been previously sanctioned in connection with the misconduct demonstrated in this case. The December 5, 2011 Directive, although it warned of possible discipline, was not itself a disciplinary action. The record does not show that removal, as requested by the Agency, rather than a lesser sanction, would be more effective to deter Respondent or others from engaging in similar conduct.

3. Conclusion

Respondent's misconduct demonstrated in this case was serious, and was repeated, notwithstanding clear notice and guidance from the Agency. In addition, Respondent's misconduct has adversely affected his supervisors' confidence that Respondent will comply with Agency policy in the future. Furthermore, Respondent's misconduct reflects poorly on the ALJ position. Such misconduct merits a substantial penalty. However, a number of factors weigh against authorizing removal of Respondent, as requested by the Agency. These factors include Respondent's 10 years of productive service, his fairness and intelligence, and his positive work ethic. In addition, although Respondent was resistant to the Agency's policies regarding the medical improvement standard for closed period of disability decisions, Respondent has nevertheless demonstrated a potential for rehabilitation by improving his conduct with respect to both memorialization of off-the-record conversations and safeguarding PII. Moreover, the Agency has not previously sought Board authority to discipline Respondent. The record does not support a conclusion that Respondent *cannot* do his job and follow Agency policies, such that removal is the only reasonable penalty. It is also not clear that Respondent *will* not do his job after some form of discipline is imposed. A substantial penalty, short of removal, such as a significant period of suspension without pay, is

appropriate to deter Respondent and obtain his compliance with Agency policies in the future. In conclusion, based on a weighing of the applicable *Douglas* factors and consideration of the evidence as a whole, a suspension of 180 calendar days without pay[48] is a reasonable penalty in the instant case.

In addition to seeking removal, the Agency seeks suspension from the date of the Complaint through final Board Order. Complaint at 1; Agency Brief at 105-108. Respondent has been on administrative leave with pay since October 1, 2015. F. 330. The Agency argues that although 5 U.S.C. § 7521 does not expressly allow a retroactive application of a penalty, the statute is properly interpreted to allow such retroactive application. The Agency cites no authority supporting its interpretation. Respondent argues that the Board has no statutory authority to order a retroactive suspension, or to enforce it by requiring him to pay back the salary and benefits he has received while on administrative leave with pay. Respondent's Brief at 76-77. The Agency's argument that 5 U.S.C. § 7521 can be properly interpreted to allow a retroactive application of a penalty in this case is unsupported by precedent, is unpersuasive, and is rejected.

FOR THE BOARD:

D M Chappell
D. Michael Chappell
Administrative Law Judge

[48] In cases finding good cause to suspend an ALJ, the Board routinely authorizes suspension without pay. *E.g.*, *SSA v. Carter*, 35 M.S.P.R. 485, 495 (1987) (in case against ALJ, concluding, "[t]he Social Security Administration is authorized to suspend respondent without pay for a period of up to 70 days"); *SSA v. Arterberry*, 15 M.S.P.R. 320, 326 (1983) (in case against ALJ, finding that the agency has established good cause for employee "to be suspended without pay for 30 days").

NOTICE TO APPELLANT

This initial decision will become final on **April 20, 2017**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and

may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice to the Appellant Regarding Your Further Review Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the Administrative Law Judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the

Board will give deference to an Administrative Law Judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The Administrative Law Judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1 inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the Administrative Law Judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of this decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this decision only after it becomes final by filing in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date on which this decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website,

http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for your court appeal, that is, representation at no cost to you, the Federal Circuit Bar Association may be able to assist you in finding an attorney. To find out more, please click on this link or paste it into the address bar on your browser:

https://fedcirbar.org/Pro-Bono-Scholarships/Government-Employees-Pro-Bono/Overview-FAQ

The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SOCIAL SECURITY ADMINISTRATION,
Petitioner,

v.

LEONARD COOPERMAN,
Respondent.

DOCKET NUMBER
CB-7521-16-0001-T-1

DATE: May 27, 2022

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Leonard Cooperman, Feeding Hills, Massachusetts, pro se.

Sharese M. Reyes, Esquire, Atlanta, Georgia, for the petitioner.

Kathryn A. Miller, Esquire, and Meeka S. Drayton, Esquire, Seattle, Washington, for the petitioner.

Patrick W. Carlson, Chicago, Illinois, for the petitioner.

BEFORE

Raymond A. Limon, Vice Chair
Tristan L. Leavitt, Member

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

FINAL ORDER

¶1 The respondent has filed a petition for review, and the Social Security Administration (SSA) has filed a cross petition for review of the initial decision, which sustained charges of neglect of duties and conduct unbecoming, concluded that the respondent did not make whistleblowing disclosures, found good cause under 5 U.S.C. § 7521 to suspend the respondent for 180 days, and denied SSA's request to suspend the respondent from the date of the complaint through the Board's final decision in this matter. This case was assigned to an administrative law judge (ALJ) for adjudication. 5 C.F.R. § 1201.140(a)(1). We DENY the respondent's petition for review and GRANT SSA's cross petition for review. We MODIFY the initial decision to additionally sustain specification 15 of the conduct unbecoming charge, but we agree with the ALJ that SSA proved the neglect of duties and conduct unbecoming charges as set forth herein. We FURTHER MODIFY the initial decision to find that the respondent's November 15, 2012 correspondence to the Office of Inspector General (OIG) constituted activity protected by 5 U.S.C. § 2302(b)(9)(C) but that he did not prove the correspondence was a contributing factor in SSA's decision to file the complaint against him. We FIND that SSA has shown good cause to remove the respondent. We DENY SSA's request to suspend the respondent from the date the complaint was filed through the issuance date of this Order.

BACKGROUND

¶2 The following facts, as recited in the initial decision, are generally undisputed. Initial Appeal File (IAF), Tab 149, Initial Decision (ID). The respondent has held the position of an SSA ALJ since June 2005. ID at 7; IAF, Tab 96 at 20. On October 2, 2015, SSA filed a complaint that sought to remove the respondent based on charges of neglect of duties (8 specifications) and conduct unbecoming (16 specifications) and to suspend the respondent from the date of the complaint through the date of the Board's final decision in this matter.

ID at 1, 54-55; IAF, Tab 1. The respondent raised a claim of reprisal for whistleblowing disclosures. ID at 2; IAF, Tab 84 at 5, 14-18. A multiple-day hearing was held. ID at 3; Hearing Transcripts (HTs) 1-7. The ALJ issued a 150−page initial decision, which included 338 findings of fact. ID at 7-57. The ALJ sustained both charges, including 6 of 8 specifications of the neglect of duties charge and 12 of 16 specifications of the conduct unbecoming charge. ID at 58-115. The ALJ found that the respondent did not make any whistleblowing disclosures. ID at 120-29. The ALJ also determined that there was good cause to suspend the respondent for 180 days, but he denied SSA's request to suspend the respondent from the date of the complaint through the date of the Board's final decision in this matter. ID at 130-44.

¶3 The respondent has filed a petition for review, SSA has filed a response, and the respondent has filed a reply. Petition for Review (PFR) File, Tabs 1, 20−21. On petition for review, the respondent challenges the ALJ's decision to sustain specifications 1-6 of the neglect of duties charge and to sustain specifications 1, 3-12, and 14 of the conduct unbecoming charge. PFR File, Tab 1.

¶4 SSA has filed a cross petition for review, and the respondent has filed a response. PFR File, Tabs 5, 15. In its cross petition for review, SSA argues it proved specifications 7 and 8 of the neglect of duties charge; it proved specifications 2, 13, and 15 of the conduct unbecoming charge; and removal is the appropriate penalty. PFR File, Tab 5. SSA also reiterates its request to suspend the respondent from the date the complaint was filed through the Board's final decision in this matter. *Id.* at 29-32.

¶5 The respondent also has filed a motion for oral argument, and SSA has filed a response. PFR File, Tabs 2, 9. The regulation at 5 C.F.R. § 1201.117(a)(2) states that the Board "may" hear oral arguments in any case. We find that oral argument will not assist the Board significantly in deciding the petition for

review and cross petition for review, and we deny the respondent's request. *Special Counsel v. Environmental Protection Agency*, 70 M.S.P.R. 41, 49 (1996).

¶6 Additionally, the respondent has filed several motions for leave to file an additional pleading. PFR File, Tabs 11, 18, 22, 24, 26, 29, 31. The Board's regulations do not provide for pleadings other than a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review. 5 C.F.R. § 1201.114(a)(5). Once the record closes on review, the Board will not accept any additional evidence or argument unless it is new and material. 5 C.F.R. § 1201.114(k). The respondent has made no such showing in his submissions. We therefore deny his motions.

¶7 The Association of Administrative Law Judges also has filed two separate requests to file an amicus curiae brief. PFR File, Tabs 34, 37. We deny these requests because an amicus curiae brief will not contribute materially to the disposition of this matter. 5 C.F.R. § 1201.34(e). Additionally, the respondent has filed a motion to supplement the record. PFR File, Tab 43. He has not persuaded us that the proffered evidence, even if new, is material. 5 C.F.R. § 1201.114(k). We therefore deny this request.

DISCUSSION OF ARGUMENTS ON REVIEW

Standard of Review

¶8 The Board has original jurisdiction to adjudicate actions against ALJs. *Social Security Administration v. Long*, 113 M.S.P.R. 190, ¶ 12 (2010), *aff'd*, 635 F.3d 526 (Fed. Cir. 2011). An agency may take an action against an ALJ only for "good cause," as determined after a hearing by the Board. 5 U.S.C. § 7521(a). SSA must prove good cause by preponderant evidence. *Long*, 113 M.S.P.R. 190, ¶ 12. Congress has not defined the term "good cause" for purposes of section 7521. *Id.* The Board, however, has adopted a flexible approach in which good cause is defined according to the individual

circumstances of each case. *Department of Labor v. Avery*, 120 M.S.P.R. 150, ¶ 5 (2013), *aff'd sub nom.*, *Berlin v. Department of Labor*, 772 F.3d 890 (Fed. Cir. 2014).

SSA proved the neglect of duties charge.

¶9 In specifications 1 and 2 of the neglect of duties charge, SSA alleged that the respondent had a duty to comply with agency regulations and policy when issuing decisions for a closed period of disability[2] (CPOD) and he breached that duty in fiscal years 2013 and 2014. IAF, Tab 1 at 11. In the initial decision, the ALJ found that SSA proved these specifications because the respondent did not explain his findings of medical improvement or support his findings with medical evidence. ID at 60-78.

¶10 On review, the respondent asserts that, contrary to the initial decision, he was authorized to decide a CPOD based only on a claimant's statement regarding his/her symptoms. PFR File, Tab 1 at 8-17. He asserts that this contention was supported by the regulation that defines "medical improvement" as "'any decrease in the medical severity of [a] claimant's impairments[]'" and provides that "'[a] determination that there has been a [medical improvement] must be based on changes (improvement) in the symptoms, signs *and/or* laboratory findings associated with [the] impairment(s).'" *Id.* at 9; 20 C.F.R. § 404.1594(b)(1) (emphasis in original). He further asserts that the ALJ's decision contradicted the relevant regulation and case law from the appellate courts and ignored SSA's Program Operations Manual System. PFR File, Tab 1 at 9-17.

¶11 Although the regulation uses the disjunctive "and/or," the ALJ concluded—and the record reflects—that SSA's policy required more evidence than a

[2] A closed period of disability occurs when a claimant, who was found to be disabled and entitled to disability benefits, subsequently experiences medical improvement related to the ability to work such that the claimant can engage in substantial gainful activity, the claimant is deemed to be no longer disabled, and disability benefits cease. ID at 60; *see* 42 U.S.C. § 423(f)(1).

claimant's subjective statements to find medical improvement for a CPOD. ID at 13, 63; HT 1 at 219-22, 243 (testimony of the Hearing Office Chief ALJ (CALJ), who was also the respondent's first-line supervisor); HT 2 at 220-22, 227-28 (testimony of the Regional CALJ, who was also the respondent's second−line supervisor); HT 5 at 95-96 (testimony of the Associate CALJ), 287−88 (testimony of the CALJ); IAF, Tab 94 at 14-15 (explaining in HALLEX I−2-8-25[3] that any "decision will provide the rationale for the ALJ's findings of fact and conclusions of law by including . . . [a]n explanation of the finding(s) on each issue that leads to the ultimate conclusion, including citing and discussing supporting evidence" and a "discussion of the weight assigned to various pieces of evidence . . .").

¶12 Moreover, the record reflects that the respondent was advised by multiple agency officials of SSA's policy regarding the analysis required for CPOD decisions. For instance, in a September 7, 2010 email, the respondent's first-line supervisor advised him "to *fully* rationalize any cessation, no matter what the claimant agrees to do." IAF, Tab 102 at 74 (emphasis in original). In a June 2011 retraining with a senior ALJ, he was provided the following guidance: "[A]ny [residual functional capacity (RFC) assessment], regardless of the [claimant's] agreement as to medical improvement[,] *must* be married to corresponding medical evidence."[4] IAF, Tab 93 at 5-6 (emphasis in original). The senior ALJ explained that a decision "should include a discussion of medical improvement showing how the signs, symptoms *and* objective testing show [i]mprovement under the medical improvement standard at the time the period

[3] The ALJ found in the initial decision that HALLEX, the Hearing Appeals and Litigation Law Manual, was designed to amplify and provide more specificity regarding regulations and rulings, it constituted written agency policy, and it was binding on ALJs. ID at 10.

[4] An individual's RFC is "the most [s/he] can still do despite [his/her] limitations" and will be assessed "based on all the relevant evidence in [the individual's] case record." 20 C.F.R. § 416.945(a)(1).

closes." *Id.* (emphasis in original). In an August 3, 2011 meeting, the respondent stated to an Associate CALJ that he did not "see a need to corroborate" a "lucid" claimant's statement that s/he wants a CPOD, and he was advised that there still needed to be a second RFC assessment. IAF, Tab 105 at 48.

¶13 Most significantly, in a December 5, 2011 directive, the respondent's first-line supervisor noted that the respondent's decisions "contain analytical deficiencies including a lack of analysis to support a non-disability RFC and a lack of analysis to support a finding of medical improvement beyond the claimant's agreement to a closed period. . . ." IAF, Tab 93 at 21-22. The respondent was explicitly directed to determine whether there had been medical improvement by comparing prior and current medical evidence and by illustrating any improvement in the signs, symptoms, or laboratory findings. *Id.* at 22. The respondent's first-line supervisor subsequently advised him that he should "pick and cho[o]se some items from the record, aside from the claimant's statement" to document medical improvement. IAF, Tab 108 at 5; *see* HT 1 at 241-42, HT 2 at 60 (testimony of the first-line supervisor). Because the respondent was on notice that, during the relevant time period, SSA policy required more than a claimant's statement alone to support a finding of medical improvement, and the respondent did not comply with SSA policy, we agree with the ALJ that SSA proved these specifications.

¶14 We have considered the respondent's reliance on the U.S. Court of Appeals for the Tenth Circuit's decision in *Newbold v. Colvin*, 718 F.3d 1257, 1263-64 (10th Cir. 2013), which stated that a finding of medical improvement may be based on symptoms alone. PFR File, Tab 15 at 10-13. The respondent's citation to *Newbold* does not warrant a different outcome because the court's decision is not binding on the Board or SSA. Importantly, as pertaining to the merits of the charge, decisions of the U.S. Court of Appeals for the Federal Circuit are controlling authority for the Board, whereas other circuit courts' decisions are

persuasive, but not controlling, authority. *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987). Additionally, the ALJ made findings of fact that SSA ALJs have a duty to comply with the Social Security Act, regulations, rulings, agency policies, HALLEX, and Acquiescence Rulings.[5] ID at 10-11. There is no evidence that SSA issued an Acquiescence Ruling after *Newbold*, and thus, SSA and its ALJs did not have to follow the court's decision.

¶15 Finally, we have considered the respondent's contention that Program Operations Manual System provision 28010.015(A)(2) controls this issue because it advises adjudicators that improvement in symptoms alone, without associated changes in signs or laboratory findings, "may support" a medical improvement determination. PFR File, Tab 1 at 15-17. This argument is unavailing. Notably, the ALJ relied on the testimony of various SSA officials and found that the Operations Manual is not a prime source of policy at the Office of Disability Adjudication Review (ODAR) because it sets forth internal policies for proceedings at the district office level, not for hearing operations. ID at 10-11. The respondent's reference to *Draper v. Colvin*, 779 F.3d 556 (8th Cir. 2015)—which affirmed a district court decision that deferred to an Operations Manual provision regarding liens, adjustments and recoveries, and transfers of assets—does not warrant a different outcome because SSA did not issue an Acquiescence Ruling as to that matter. PFR File, Tab 1 at 16-17.

¶16 In his reply brief, the respondent contends that he complied with the position description that was in place until December 2013, which authorized him to "take[] into account all applicable Federal, State, and foreign law[s], statutes,

[5] An Acquiescence Ruling is issued when a circuit court has issued a decision contrary to SSA policy but SSA agrees to acquiesce to the circuit law. HT 1 at 202 (testimony of the first-line supervisor); HT 3 at 78 (testimony of the second-line supervisor); HT 4 at 225-29 (testimony of the CALJ); HT 5 at 65-66 (testimony of the Associate CALJ); IAF, Tab 93 at 12-13; 20 C.F.R. § 404.985.

regulations, rulings, *and decisions of the Federal court*."[6] PFR File, Tab 21 at 14−15 (emphasis in original); IAF, Tab 93 at 62-67. The respondent argues that, until this date, he could "expressly . . . take Federal court decisions from whatever jurisdiction into account, and after that date[,] [he] was not prohibited from doing so as long as the Federal Court decision did not conflict with [SSA] policy." PFR File, Tab 21 at 15. This argument is unavailing. Indeed, in the absence of any evidence that SSA issued an Acquiescence Ruling regarding *Newbold*, *Draper*, or any circuit court decision that was inconsistent with SSA policy, such decisions could not constitute "applicable" decisions, as described in the earlier position description.

¶17 In specifications 3 and 4, SSA alleged that the respondent had a duty to "make a complete record of hearings proceedings," and he breached this duty in fiscal years 2013 and 2014. IAF, Tab 1 at 11. In the initial decision, the ALJ relied on the relevant regulations, HALLEX I-2-6-40, a June 2011 retraining, an August 3, 2011 meeting with the respondent, a September 1, 2011 memorandum to all ALJs from the CALJ, a December 5, 2011 directive, and testimony regarding hearing records from five of the respondent's cases; the ALJ concluded that SSA proved that the respondent had a duty to make a complete record, which included a summary of the content and conclusion of any off-the-record discussions, and the respondent failed to do so. ID at 14-15, 78-83; IAF, Tab 93 at 7, 21-23, Tab 94 at 10-11. On review, the respondent challenges, among other things, the ALJ's reliance on testimony regarding a "focused review" of only five of his hundreds of cases and the December 5, 2011 directive. PFR File, Tab 1 at 18-19. He further asserts that neither the ALJ nor SSA adequately defined the requirement that he "adequately summarize" any off-the-record discussions, and thus, SSA's action violates his due process rights. *Id.* We disagree. Rather,

[6] The revised position description did not include such language. IAF, Tab 1 at 15-21; HT 4 at 213 (testimony of the CALJ); ID at 9 n.6.

consistent with HALLEX I-2-6-40,[7] the December 5, 2011 directive instructed the respondent to "summarize on the record, all off-the-record discussions concerning amending claims involving CPODs, as well as any other discussions relevant to the issues in a claimant's case." IAF, Tab 93 at 23. The respondent, who has advanced degrees and was an ALJ for nearly 10 years, ID at 7; HT 6 at 202 (testimony of the respondent), should have no difficulty understanding SSA's requirement that he summarize such off-the-record discussions. Moreover, we are not persuaded that SSA's review of a small portion of the respondent's cases warrants a different outcome. We therefore discern no error with the ALJ's conclusion that SSA proved specifications 3-4.

¶18 In specifications 5 and 6 of the neglect of duties charge, SSA alleged that the respondent had a duty to safeguard personally identifiable information (PII), and he breached this duty in fiscal years 2013 and 2014. IAF, Tab 1 at 11. On review, the respondent contends that, either in late 2014 or early 2015, his first−line supervisor directed him to stop sending PII to unsecured partners, and he complied with that request. PFR File, Tab 1 at 20; HT 6 at 261-62 (testimony of the respondent). As support for his contention that he should not be disciplined for this misconduct, the respondent discusses *Adamek v. U.S. Postal Service*, 13 M.S.P.R. 224, 226 (1982), in which the Board barred an agency from taking an adverse action against an employee when it already had imposed a disciplinary action because of the employee's misconduct. PFR File, Tab 1 at 21. The respondent recognizes that his first-line supervisor's counseling regarding PII did not constitute a disciplinary or an adverse action, but he argues that the Board's reasoning in *Adamek* should be extended to cases in which the underlying behavior "has been previously and amicably *addressed*, *discussed*, and *resolved*"

[7] HALLEX I-2-6-40 states, "If a question arises during the course of a hearing that is not relevant to the issues in the claimant's case, the ALJ may decide to discuss and resolve it off-the-record. However, the ALJ must summarize on the record the content and conclusion of any off-the-record discussion." IAF, Tab 94 at 10-11.

between the agency and employee, and the behavior was not repeated. *Id.* (emphasis in original). We are not persuaded that it is appropriate to extend *Adamek*'s reasoning to a case such as this when there was no prior adverse action. *See, e.g.*, *Tawadrous v. Department of the Treasury*, 477 F. App'x 735, 738 (Fed. Cir. 2012) (declining to extend *Adamek* to a situation when the agency rescinded the June 2010 removal before there was a judgment on the merits and provided the appellant with back pay and finding that the prior rescinded action "presents no obstacle to Treasury's November 2010 effort to remove [him] on the same charges").[8] Because the respondent does not dispute that he failed to safeguard PII as described during the timeframe identified in the complaint, we affirm the ALJ's decision to sustain specifications 5-6 of the neglect of duties charge. ID at 100-02.

¶19 In specifications 7 and 8 of the neglect of duties charge, SSA alleged that the respondent had a "duty to act in a fair and impartial manner" and that he breached this duty in fiscal years 2013 and 2014. IAF, Tab 1 at 11. SSA relied on several emails between the respondent and various claimants' representatives to support these specifications. IAF, Tab 111 at 29, 68-69. In the initial decision, the ALJ found that the respondent had a duty to act in a fair and impartial manner and that the respondent knew of this duty, but SSA did not prove that he failed to act in a fair and impartial manner because, among other things, the CALJ could not point to any cases in which a claimant received a more favorable outcome based on the identity of the claimant's representative. ID at 16, 94. In its cross petition for review, SSA argues, among other things, that the ALJ took "an unreasonably circumscribed view" of the respondent's duty of impartiality, arguing that this duty extended beyond his interaction with claimants and beyond his conduct during hearings. PFR File, Tab 5 at 23-26. We need not

[8] The Board may follow a nonprecedential decision of the Federal Circuit when, as here, it finds its reasoning persuasive. *LeMaster v. Department of Veterans Affairs*, 123 M.S.P.R. 453, ¶ 11 n.5 (2016).

resolve this issue on review because, even if we affirmed the ALJ's decision not to sustain these specifications, we would still sustain the neglect of duties charge based on our decision to affirm the ALJ's finding that SSA has proven specifications 1-6 by preponderant evidence. *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990) (finding that when more than one event or factual specification supports a single charge proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge).

SSA proved the conduct unbecoming charge.[9]

¶20 In the complaint, SSA alleged that the respondent engaged in various "improper communication[s]" with several claimants' representatives, which constituted conduct unbecoming. IAF, Tab 1 at 11-12. The ALJ sustained specifications 1, 3-12, and 14 of the conduct unbecoming charge and the charge itself. ID at 95-115. Both the respondent and SSA challenge the ALJ's findings regarding the specifications.

¶21 Regarding specifications 1, 3-12, and 14, the respondent contends that the ALJ erred by imposing discipline for his "collegial" and "flattering" language in correspondence with counsel. PFR File, Tab 1 at 22. He asserts that SSA is not represented at hearings and, because the only parties appearing before him are the claimant and his/her representative, collegial ALJ-counsel relations are an "essential lubricant" that allows the judicial gears to turn efficiently. *Id.* at 23. He also asserts that the ALJ applied a "broad and standardless" rule; the ALJ overlooked the "cardinal principle" that one who alleges bias must overcome a presumption of honesty and integrity; and a reasonable person with knowledge of the relevant facts would not find that the communications create an appearance that the law or these standards have been violated. *Id.* at 22-26. These arguments are unavailing.

[9] SSA does not challenge the ALJ's conclusion that it did not prove specification 16 of the conduct unbecoming charge. ID at 110-11; PFR File, Tab 5 at 22 n.11. We therefore affirm the ALJ's finding in this regard.

¶22 The Board has described conduct unbecoming an ALJ as "conduct which was improper, unsuitable, or detracting from one's character or reputation." *Long*, 113 M.S.P.R. 190, ¶ 42. The Board also has held that an agency has proven a charge of conduct unbecoming if it proves that the employee violated one of the 14 general principles contained in 5 C.F.R. § 2635.101(b). *Schifano v. Department of Veterans Affairs*, 70 M.S.P.R. 275, 281 (1996). The ALJ relied on the regulation at 5 C.F.R. § 2635.101(b)(8), (b)(14) in his analysis of these specifications.[10] ID at 95-97. We discern no error with the analytical framework used by the ALJ.

¶23 We also affirm the ALJ's finding that SSA proved that the communications described in specifications 1, 3-12, and 14 constituted conduct unbecoming because they give the appearance of a lack of impartiality. For example, in specification 1, the respondent, in agreeing to a CPOD, told the claimant's representative that "the fact that it's you as [the claimant's] attorney doesn't hurt matters," and that the claimant's representative was "one of the best attorneys it has been [his] privilege to know." IAF, Tab 1 at 11, 40. He also said that she "practice[d] law the way [he] used to, realistically, energetically, and efficiently," commenting "What's not to like about you?" *Id.* at 40. In specification 3, the respondent told the claimant's representative, "I just wanted to make sure your ___ was covered[.] I protect my lawyers (at least those, like you, whom I like)." *Id.* at 42. In specification 4, the respondent told the claimant's representative that the respondent's "discretion has a floor and a ceiling, and [the representative] always get[s] the ceiling, but to resolve this case without a

[10] The regulation at 5 C.F.R. § 2635.101(b)(8) states that employees "shall act impartially and not give preferential treatment to any private organization or individual." Subsection 2635.101(b)(14) states that employees "shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part." Subsection 2635.101(b)(14) further advises that "[w]hether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts."

hearing would require [the respondent] to ascend to the stratosphere!" *Id.* at 43. In a follow-up email, the respondent also stated that he was "flattered" to consider himself one of the claimant's representative's "friends." *Id.* On their face, the emails described in specifications 1, 3-4 give the appearance of a lack of impartiality. We affirm the ALJ's decision to sustain these specifications.

¶24 The respondent further asserts that specifications 5-10, involving email correspondence with the same claimant's representative, do not warrant the conclusion that these communications created an appearance of impropriety. PFR File, Tab 1 at 24. We are not persuaded by these arguments. Rather, we find that a reasonable person would conclude that each of these communications was improper and/or created an appearance of preferential treatment. For example, in the email described in specification 5, the respondent made improper comments about claimants' cases. IAF, Tab 1 at 12, 46-47. In the email described in specification 6, the respondent states, "Just to show you the amount of good will you've banked, I set aside a decision I was writing to attend to your email." *Id.* at 12, 47. In the email described in specification 7, the respondent states, "It's always a treat to have a lawyer of your ability and dedication to work with." *Id.* at 12, 49. In the email described in specification 8, the respondent discussed an arbitration hearing that he (the respondent) was involved in, referred to an Associate CALJ as the "Chicago hit man," and called him an "anti-judge bureaucrat." *Id.* at 12, 52. The respondent also stated in this email that he would treat attorneys like the recipient differently than other attorneys. *Id.* at 53 ("When I have attorneys like you to deal with, I will be the same open, inquiring person I have always been, and encourage free-wheeling debate and discussion like we've always had. Where I have attorneys I don't know before me, I'll ask no questions other than that of the [vocational expert] . . . ."). In specification 9, the respondent made an inappropriate remark about a juvenile claimant to the claimant's representative and invited the representative to contact him over the weekend on his personal email account. *Id.* at 12, 54, 56. In specification 10, the

respondent explicitly acknowledged that his disposition would result in the claimant's representative receiving a fee for his work in that matter, and he noted the "effort" that the representative put into the case. *Id.* at 12, 63. We discern no error with the ALJ's analysis of specifications 5-10 or his conclusion that each of these emails gave the appearance of a lack of impartiality and constituted conduct unbecoming. ID at 100-05.

¶25 In the email described in specification 11, the respondent told the claimant's representative, "if you are telling me as an officer of the court and my friend that the claimant did indeed undergo a fusion in October 2013," then he would decide the case based on her representation. IAF, Tab 1 at 12, 65. In the email described in specification 12, the respondent told the claimant's representative that she was "one of a group (fairly small group) of attorneys who may always contact [him], bidden or unbidden" and that he "respect[ed] [her] immensely, and value[d] [her] input consistently." *Id.* at 12, 68. We agree that both of these emails are evidence of conduct unbecoming, and we affirm the ALJ's analysis of these specifications. ID at 105-07.

¶26 In the email described in specification 14, the respondent used his personal email address and told the claimant's representative, among other things, that the representative reminded him of himself and that he (the respondent) was "never fortunate enough to have the opportunity to appear before a Judge with whom [he] could have these types of 'out of court' dialogues" regarding a particular matter. IAF, Tab 1 at 12, 74-79. We agree with the ALJ that this communication constituted conduct unbecoming. ID at 108-09.

¶27 On review, the respondent contends that the ALJ erred because one who alleges bias must overcome a presumption of honesty and integrity. PFR File, Tab 1 at 24-25. Although this is an accurate proposition of law, *see, e.g.*, *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980), SSA did not allege in the conduct unbecoming specifications—and the ALJ did not find—that the respondent *was* biased in favor of or against the claimants whose

representatives were communicating with the respondent. Moreover, the respondent even acknowledged that the communications described in the conduct unbecoming specifications are "capable of being interpreted *nefariously*." PFR File, Tab 1 at 26 (emphasis in original). For these reasons, we agree with the ALJ's decision to sustain specifications 1, 3-12, and 14.

¶28 Turning to SSA's cross petition for review, we agree with SSA that the ALJ should have sustained specification 15 of the conduct unbecoming charge. PFR File, Tab 5 at 28-29. In this specification, SSA alleged that the respondent forwarded an email to a claimant's representative with the subject line "[the CALJ] just violated federal law and thumbed nose at U[.]S[.] Supreme Court." IAF, Tab 1 at 12, 80-82. The forwarded email, from a colleague of the respondent, called the CALJ a "complete idiot" and included a bulletin which allegedly "orders SSA ALJs to violate federal law." *Id.* at 80-82. In the initial decision, the ALJ found unpersuasive SSA's argument that the respondent's decision to forward the email to a claimant's representative would undermine public confidence in SSA; however, he did not provide any explanation for his decision or cite to any legal authority or the CALJ's testimony regarding the effect of the respondent's distribution of this email. ID at 109-10; PFR File, Tab 5 at 28-29. We disagree with the ALJ's assessment of this email. Rather, the respondent's decision to forward to a claimant's representative an internal SSA email with commentary that was critical of the CALJ and discussed "inside baseball" topics creates an appearance of a lack of impartiality and constitutes conduct unbecoming. HT 5 at 279-80 (testimony of the CALJ). We modify the initial decision in this regard.

¶29 We have considered SSA's arguments regarding specification 13 of the conduct unbecoming charge wherein SSA charged that the respondent expressed concern for a favored attorney's receiving a fee in a case she was handling before him and suggested how she might go about securing that fee. PFR File, Tab 5 at 27-28; IAF, Tab 1 at 12, 70-73. We have also considered SSA's argument

regarding specification 2 wherein the agency charged that the respondent's decision to use a claimant's full name and another claimant's last name in an August 31, 2012 email to a claimant's representative constituted improper transmission of PII and, therefore, conduct unbecoming. PFR File, Tab 5 at 26−27. However, we need not resolve either of these issues because we find that SSA proved the conduct unbecoming charge based on our decision to affirm the ALJ's decision to sustain specifications 1, 3-12, and 14, and our separate decision to sustain specification 15. *See Burroughs*, 918 F.2d at 172.

We modify the initial decision to find that the respondent's November 15, 2012 letter to OIG constituted protected activity, but he did not prove that the protected activity was a contributing factor in SSA's decision to file a complaint against him.

¶30 As noted above, in the initial decision, the ALJ determined that the respondent did not prove that he made any whistleblowing disclosures.[11] ID at 115-29. In particular, the ALJ found that the respondent's November 15, 2012 letter to OIG[12] did not constitute a protected disclosure because, among other things, his allegations of "mismanagement" did not rise to the level of "gross mismanagement" under 5 U.S.C. § 2302(b)(8).[13] ID at 121-23; IAF,

[11] Neither party challenges the ALJ's analysis of the respondent's claim of reprisal for whistleblowing as an affirmative defense or his finding that the respondent did not make any whistleblowing disclosures. ID at 115-29. Except as modified to discuss the respondent's November 15, 2012 correspondence to OIG, we affirm the initial decision in this regard.

[12] In this letter, the respondent reported two instances of "serious mismanagement." IAF, Tab 95 at 39-40. He described how counsel for a disability claimant in one case filed a motion to recuse and how counsel for a disability claimant in another case complained about him to ODAR management. *Id.* at 40. He further described how SSA sought to take disciplinary action against him during an October 25, 2012 interview, but his first-line supervisor, who was present during the meeting, failed to listen to the complete version of the hearings in those matters. *Id.*

[13] During the pendency of this appeal, the National Defense Authorization Act for Fiscal Year 2018 (NDAA), Pub. L. No. 115-91, 131 Stat. 1283, was signed into law on December 12, 2017. Section 1097 of the NDAA amended various provisions of title 5

Tab 95 at 39−40. Although not explicitly raised by the respondent on review, we modify the initial decision to address this finding.

¶31 Under the law in effect at the time SSA filed this complaint in October 2015,[14] an employee may establish a prima facie case of retaliation for whistleblowing disclosures and/or protected activity by proving by preponderant evidence[15] that: (1) he made a disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) the whistleblowing disclosure or protected activity was a contributing factor in the agency's decision to take a personnel action against him. 5 U.S.C. § 1221(e)(1); *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 12 (2015); *Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 6 (2015). If the employee makes both of these showings by preponderant evidence, the burden of persuasion shifts to the agency to prove by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. *Alarid*, 122 M.S.P.R. 600, ¶ 14.

¶32 It appears that the ALJ analyzed this claim under 5 U.S.C. § 2302(b)(8)(B)(ii), which states that it is a prohibited personnel practice (PPP) to take a personnel action against an employee because of "any disclosure . . . to the Inspector General . . . of information which the employee . . . reasonably believes evidences . . . gross mismanagement." The ALJ's reliance on this statutory provision was in error. We need not remand the appeal, though, because the

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of the U.S. Code. Our disposition of this matter would be the same under both pre- and post-NDAA law.

[14] Although the respondent's correspondence to OIG predated the December 27, 2012 effective date of the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, § 202, 126 Stat. 1465, the Board may consider the provisions of the WPEA because SSA's complaint was filed after that date, *Carney v. Department of Veterans Affairs*, 121 M.S.P.R. 446, ¶ 2 n.1 (2014).

[15] Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

record is fully developed on this issue. Instead, we conclude that the respondent's claim is more appropriately analyzed under 5 U.S.C. § 2302(b)(9)(C), which states that it is a PPP to take an action against an employee because that employee "disclos[ed] information to the Inspector General . . . of an agency . . . in accordance with applicable provisions of law." The respondent's November 15, 2012 letter satisfies the criteria under section 2302(b)(9)(C) and constitutes protected activity. *See, e.g.*, *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991) (finding that section 2302(b)(9)(C) covers employee disclosures to OIG that do not meet the precise terms of the actions described in section 2302(b)(8)), *recons. denied*, 52 M.S.P.R. 375, *aff'd*, 981 F.2d 1237 (Fed. Cir. 1992).

¶33 We must next determine whether the respondent's November 15, 2012 letter to OIG was a contributing factor in SSA's decision to file the complaint against him. One way of proving that the respondent's protected activity was a contributing factor in the personnel action is the "knowledge/timing test." *Alarid*, 122 M.S.P.R. 600, ¶ 13 (citing *Shibuya v. Department of Agriculture*, 119 M.S.P.R. 537, ¶ 22 (2013)). The knowledge/timing test allows an employee to demonstrate that the protected activity was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the protected activity and that the personnel action occurred within a period of time such that a reasonable person could conclude that the protected activity was a contributing factor in the personnel action. *Alarid*, 122 M.S.P.R. 600, ¶ 13; *see* 5 U.S.C. § 1221(e)(1). The ALJ found—and the respondent does not contest—that the CALJ who signed the complaint was not aware of the respondent's November 15, 2012 letter to OIG when she authorized the filing of the complaint in this matter. ID at 53. Thus, the knowledge component of the knowledge/timing test is not satisfied.

¶34 There are, however, other ways to satisfy contributing factor, such as evidence pertaining to the strength or weakness of the agency's reasons for taking

the action, whether the protected activity was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the respondent. *Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 15 (2012); *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 156 (1995). As noted above, there is strong evidence to support SSA's charges. The November 15, 2012 letter identified the respondent's first-line supervisor by name and criticized ODAR's region one management, IAF, Tab 95 at 39-40, but there is no evidence that the respondent's first-line supervisor, or anyone in ODAR region one management, had any knowledge of the respondent's November 15, 2012 letter to OIG prior to the complaint being filed or that any of these individuals had a desire or motive to retaliate against the respondent. *E.g.*, HT 1 at 281 (testimony of the respondent's first-line supervisor); HT 2 at 277 (testimony of the respondent's second-line supervisor). Finally, we have considered whether the CALJ had constructive knowledge of the respondent's OIG letter, *Bradley v. Department of Homeland Security*, 123 M.S.P.R. 547, ¶ 15 (2016), but we are not aware of any evidence in this regard.

¶35 Because we have found that the respondent failed to prove that his protected activity was a contributing factor in SSA's decision to file the complaint seeking to remove him, it is unnecessary to determine whether SSA proved by clear and convincing evidence that it would have filed the complaint in the absence of the respondent's protected activity. *See Clarke v. Department of Veterans Affairs*, 121 M.S.P.R. 154, ¶ 19 n.10 (2014), *aff'd*, 623 F. App'x 1016 (Fed. Cir. 2015).

We find that there is good cause to remove the respondent.

¶36 The ALJ correctly noted that, in evaluating the penalty in an original jurisdiction case under 5 U.S.C. § 7521, the Board looks to the factors articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). ID at 130; *Long*, 113 M.S.P.R. 190, ¶ 47. In the initial decision, the ALJ evaluated the *Douglas* factors, finding, among other things, that the sustained misconduct was "serious, and . . . repeated notwithstanding clear notice and guidance" from

SSA, and the misconduct merited a "substantial" penalty. ID at 130-43. However, the ALJ concluded that a 180-day suspension was a reasonable penalty. ID at 143-44. On cross petition for review, SSA asserts that the ALJ improperly considered the following penalty factors as mitigating factors: (1) the respondent's past work record; (2) the consistency of the penalty; (3) the notoriety of the offense; (4) the respondent's potential for rehabilitation; and (5) the availability of alternative sanctions. PFR File, Tab 5 at 11-22; ID at 143−44.

¶37 We disagree with SSA's arguments regarding the ALJ's evaluation of the respondent's past work record. SSA challenges the ALJ's finding that the respondent's productivity and intelligence were mitigating factors, and it asserts that the ALJ ignored the fact that SSA referred the respondent to the OIG for investigation in 2013. PFR File, Tab 5 at 12-15; ID at 133-39, 141. In the initial decision, the ALJ cited the testimony of others regarding the respondent's productivity and intelligence and found that the respondent had a positive work ethic and was viewed as intelligent and fair by representatives who appeared before him. ID at 141-43. SSA argues that the respondent's high productivity is illusory given his failure to abide by agency policy, PFR File, Tab 5 at 12-13, but this fact, even if true, does not warrant a different outcome. The ALJ also noted, among other things, that SSA received numerous complaints against the respondent, and his supervisor estimated that 80% of his workload in dealing with complaints against ALJs involved complaints submitted against the respondent. ID at 141. It therefore appears that the ALJ identified the relevant evidence regarding this factor. Even if the ALJ did not discuss the OIG referral in his analysis of the particular penalty factor, he discussed it in his findings of fact. ID at 26-27. Additionally, the ALJ's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985).

¶38 However, we agree with SSA's argument that the ALJ did not properly evaluate the notoriety of the respondent's offense. PFR File, Tab 5 at 12-15. The ALJ acknowledged that a district court decision in *Betancourt v. Astrue*, 824 F.Supp.2d 211 (D. Mass. 2011), discussed the respondent's failure to memorialize off-the-record conversations, ID at 142, but the ALJ was not persuaded by SSA's speculation that claimants and their representatives were aware of the respondent's misconduct, and he concluded that the evidence did not show that the misconduct was notorious or adversely impacted SSA's reputation. *Id.* Yet, as the ALJ noted just paragraphs earlier in his decision, that very same handling of off-the-record conversations admonished in *Betancourt* had been the subject of numerous complaints since at least 2010, resulting in the aforementioned testimony from the first-line supervisor that 80% of his workload in dealing with complaints against ALJs involved complaints submitted against the respondent. ID at 140-41. We therefore agree with SSA that, as an ALJ, the respondent held a prominent, visible, and public position that is subject to scrutiny, perhaps more so than many other types of agency officials who do not routinely interact with the public, and that his misconduct, even if not technically notorious, did reflect negatively on SSA's reputation.

¶39 We also are persuaded that the ALJ erred in his analysis of the consistency of the penalty, the respondent's potential for rehabilitation, and the availability of alternative sanctions. For instance, regarding the consistency of the penalty with those imposed upon other employees for the same or similar offenses, we agree with SSA that the ALJ took a narrow view of this factor by failing to mention any of the misconduct relating to the conduct unbecoming charge. PFR File, Tab 5 at 16; ID at 142. Importantly, the CALJ testified that she sought removal of another ALJ for only "neglect of duty for failure to follow Agency policy," the appeal of which was then pending, and she stated that the respondent's misconduct was "very, very rare." HT 5 at 291-92 (testimony of the CALJ).

Given the unusual nature of the sustained misconduct, we find that the absence of comparator evidence is not a mitigating factor.

¶40 Regarding the respondent's potential for rehabilitation, the ALJ considered the fact that the respondent improved his practices regarding PII and also began memorializing "more" of the content of his off-the-record conversations and communications. ID at 139, 143. Although the degree to which the respondent may have improved his efforts to memorialize his off-the-record conversations is unclear, PFR File, Tab 5 at 19, the ALJ properly considered such evidence in his assessment of the respondent's potential for rehabilitation. However, the ALJ also cited to the respondent's brief that he was "'able and willing' to adjust his behavior" to support the conclusion that he had a potential for rehabilitation. ID at 139 (citing IAF, Tab 112 at 73). Statements of a party's representative in a pleading do not constitute evidence, *Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995), and it was error for the ALJ to rely on the representative's statements in this regard.[16] We find that there is not a strong potential for rehabilitation here, particularly given the respondent's failure to comply with SSA policy regarding CPOD decisions and his numerous improper communications with claimants' representatives that gave the appearance of a lack of impartiality. Indeed, as the ALJ found, the respondent "persistently challenged and resisted [SSA] direction, maintaining that [SSA's] policies were incorrect and that [his] practices were justified." ID at 133. Moreover, regarding his communications with claimants' representatives, there is no evidence whatsoever that he improved his communications or judgment in this regard; thus, we find that there is little potential for rehabilitation.

¶41 Finally, regarding the adequacy and effectiveness of alternative sanctions, the ALJ noted that the respondent previously had not been sanctioned in connection with the sustained misconduct, and he concluded that the record

[16] Although the respondent is pro se on review, PFR File, Tab 7, he was represented during the proceedings below, IAF, Tabs 5, 112.

did not show that removal, rather than a lesser sanction, would be more effective to deter the respondent or others from engaging in similar conduct. ID at 143. In its cross petition for review, SSA argues, in pertinent part, that the lack of prior discipline does not make removal inappropriate in this case. PFR File, Tab 5 at 20 (noting that, in cases such as *Long*, 113 M.S.P.R. 190, and *Social Security Administration v. Steverson*, 111 M.S.P.R. 649 (2009), the Board has found good cause to remove an ALJ even in the absence of prior discipline). Here, the respondent received the December 5, 2011 directive, which advised him that failure to follow the directive may lead to disciplinary action. IAF, Tab 93 at 23. Moreover, the ALJ made the following findings: (1) SSA referred the respondent to OIG in October 2013; (2) OIG conducted an investigation; (3) it was ODAR's practice to hold in abeyance any administrative actions against an employee once an OIG referral has been made; and (4) prior to the OIG referral SSA had been working on potential discipline for the respondent. ID at 26-27. Thus, the fact that SSA took no action against the respondent from the time of its October 2013 referral to OIG until after it received the OIG reports in December 2014 and February 2015, ID at 27, does not, under these circumstances, make this factor mitigating.

¶42 We agree with the ALJ's analysis of the nature and seriousness of the misconduct, which is the most significant *Douglas* factor, and his conclusion that the respondent's misconduct was "serious," "repeated," "directly pertain[ed] to [his] responsibilities as an ALJ," "negatively impact[ed] the legal sufficiency and defensibility of his [CPOD] decisions," "directly affect[ed] [the respondent's] obligation to provide claimants with a full, due process hearing," and "reflected poorly on the ALJ position." ID at 131-32, 143; *Murry v. General Services Administration*, 93 M.S.P.R. 554, ¶ 8 (2003), *aff'd*, 97 F. App'x 319 (Fed. Cir. 2004). We also agree with the ALJ that the sustained misconduct warrants a "substantial" penalty. ID at 143. Although a 180-day suspension is a significant penalty, *Colon v. Department of the Navy*, 58 M.S.P.R. 190, 204 (1993), we find

that, given the serious and repeated nature of the misconduct, the *Douglas* factors discussed herein, and the ALJ's assessment of the remaining factors, SSA has proven good cause to remove the respondent. *See, e.g.*, *Steverson*, 111 M.S.P.R. 649, ¶¶ 2-3, 6-12, 19-21 (finding good cause to remove the respondent ALJ based on charges of conduct unbecoming, lack of candor, misuse of Government equipment, and failure to follow agency policy).

We deny SSA's request to suspend the respondent from the date the complaint was filed through the Board's final decision.

¶43 SSA argued in its complaint that the respondent's neglect of duties and conduct unbecoming "fundamentally undermines public confidence" in the agency's adjudicatory process, and, therefore, good cause exists to suspend him from the date of the October 2, 2015 complaint through the Board's final decision in this matter. IAF, Tab 1 at 5, 12-13. In the initial decision, the ALJ noted that SSA cited no authority to support its request for a retroactive suspension, and he rejected SSA's request in this regard. ID at 144. In its cross petition for review, SSA challenges the ALJ's conclusion, emphasizing that, because Congress has not defined the term "suspension" in 5 U.S.C. § 7521, the Board can give it meaning. PFR File, Tab 5 at 29-32.

¶44 Other than citing to section 7521, SSA provides no legal basis for its request; rather, SSA only appears to focus on policy arguments. *Id.* We are not persuaded by SSA's arguments. Importantly, section 7521(a) advises that an agency may not take an action against an ALJ until the Board "establish[es] and determine[s]" that the agency has made a showing of good cause. 5 U.S.C. § 7521(a); *see, e.g.*, *Social Security Administration v. Boham*, 38 M.S.P.R. 540, 546-47 (1988) (finding that SSA proved good cause to discipline the respondent ALJ based on his refusal to comply with reasonable orders concerning case scheduling and authorizing SSA to suspend him for a period up to 75 days), *aff'd*, 883 F.2d 1026 (Fed. Cir. 1989) (Table). SSA is essentially asking the Board to approve a time-served suspension. However, the Board has held that the

imposition of a time-served suspension is arbitrary. *Milligan v. U.S. Postal Service*, 106 M.S.P.R. 414, ¶ 13 (2007); *see Greenstreet v. Social Security Administration*, 543 F.3d 705, 709 (Fed. Cir. 2008) ("[T]he length of a suspension is arbitrary when it is based solely on the suspended employee's 'time served' awaiting decision."). We are not persuaded that it is appropriate to interpret the statute at 5 U.S.C. § 7521 as authorizing a time-served or retroactive suspension, and we deny SSA's request.

ORDER

¶45 We have considered the parties' remaining arguments, but we find them unpersuasive. The Board authorizes the petitioner to remove the respondent for good cause shown, pursuant to 5 U.S.C. § 7521.

NOTICE OF APPEAL RIGHTS[17]

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

[17] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you

were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[18] The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

[18] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

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U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

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http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD: /s/ for
Jennifer Everling
Acting Clerk of the Board

Washington, D.C.