CASE NUMBER 22-1915

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

LEONARD COOPERMAN

PETITIONER

V.

SOCIAL SECURITY ADMINISTRATION

RESPONDENT

APPEAL FROM THE DECISION OF THE MERIT SYSTEMS
PROTECTION BOARD
MSPB CASE NUMBER CB-7521-16-0001-T-1

REPLY BRIEF OF PETITIONER

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STATEMENT OF RELATED CASES

Petitioner is unaware of any pending cases that would be affected by this Court's decision in this case.

NOTE TO READER

Because each side has filed its own appendix, to avoid confusion any references in this reply brief to the appendix are to the appendix filed by the *Respondent,* not the appendix filed by the Petitioner.

INTRODUCTION

The Respondent has implicitly confessed error regarding the two most serious charges against Petitioner, so minimal time will be spent in this brief discussing those.[1]

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[1]At pages 30-31 of its brief, Respondent says: "**Even if**, for the sake of argument, Mr. Cooperman and Amicus are correct and the Board misinterpreted SSA policy—thereby tainting its conclusion as to Specifications 1 and 2 of Charge I—removal is still sustainable and appropriate."(emphasis supplied)
SEE also pages 16-17 of the Respondent's brief where it says "**The SSA does not deny that POMS have applicability in certain circumstances**, but they are not intended as a primary source of guidance at hearings by an SSA ALJ." (emphasis added.)
For more than 7 years Petitioner has waited for this concession. Better late than never.
Any law clerk, lawyer, or Judge with more than minimal knowledge of Appellate procedure knows that when a party makes an "even-if" argument–-as in "even if my first two arguments are without merit, my other

Of much greater importance are the plethora of factual errors contained in Respondent's brief. Some are material and puzzling.[2] And others can only be considered material, malevolent, and intentional.

What should **most** concern the Court–because such conduct constitutes a direct threat to its decisional integrity[3]- are the substantial amount of material half-truths, material unjustified innuendo, and material outright lies that appear in Respondent's brief.

Advocacy is one thing. Dishonesty is something else. Legal briefs are supposed to be works of fact, not fiction. A substantial, but not complete, compendium of these lies and half-truths, and the evidence showing them to be just that, follows.

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arguments are sufficient to carry the day"-- it's tantamount to acknowledging those first two arguments are meritless. So too here, for the reasons discussed soon.

[2] See. e.g., page 24 of Respondent's brief where it states: "Mr. Cooperman has neither asked for en banc review, nor justified one with his arguments." Not so.

A petition for en banc review ***was*** filed on September 23, 2022 by Petitioner, and later denied. As concerns arguments providing justification for such review, based on the contents of this reply brief which include newly discovered authority, Petitioner renews his request for *en banc* review.

[3] "We emphasize that an effective judicial system depends on the honesty and integrity of lawyers who appear in their tribunals." *Matter of Finnerty,* 418 Mass.821(1994) This is so for any court, state or federal, trial or appellate.

These bogus assertions in Respondent's brief, and the evidence ***showing*** them to be either material half-truths, material unjustified innuendo, or material lies, comprise the first section of this reply brief[4].

The second section consists of refutation of Respondent's factually based, but legally incorrect, assertions.

Finally, the conclusion will suggest an appropriate resolution of this case which will prevent the miscarriage of justice that occurred here from ever happening again.

As the briefs previously filed herein demonstrate, this case vividly illustrates the urgent need for this Court to expressly state:

1) that it will not tolerate agents of the Government deliberately misleading an adjudicatory tribunal (either an administrative one such as the MSPB, or a judicial one such as this Court) as to the applicability or existence of a point of law.

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[4] It is Petitioner's view that *the conduct of each and every one of the lawyers* whose name appears on Respondent's original and corrected brief clearly violates the duty of a lawyer to refrain from knowingly making a false statement of fact or law to a tribunal (ABA rule 3.3 (a)(1), and violates a lawyer's duty to refrain from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, or is prejudicial to the administration of justice. (ABA rule 8.4) These are strong words, but Petitioner will back up all of them.
It is absolutely **outrageous** that after being given the normal amount of time to prepare its brief, *plus* one sixty day continuance, *plus* another sixty day continuance, *plus* the time permitted by the Court to correct a non-compliant brief, these serious errors still exist.

2) that it will not allow the MSPB to stop a litigant from defending himself by preventing him from introducing material and newly-discovered evidence into the record of a pending petition for review.
3) that it will not allow the MSPB to thwart this Court's review process by refusing to accept into the record a motion seeking admission of and containing material, newly discovered evidence, thus denying this Court a chance to evaluate the evidence in question regardless of the Board's ruling.
4) that it will not subject Federal employees to an ambiguous standard of discipline for speech-related activities, changeable at the whim of management, in violation of the First Amendment, and
5) it won't subject Federal employees to discipline for matters resolved amicably before the start of disciplinary proceedings.

SECTION ONE

RESPONDENT'S MISREPRESENTATION OF THE RECORD

` In this section, which does not purport to be all-inclusive, Petitioner will list the half-truths, distortive innuendo, and outright lies present in Respondent's brief.[5] Lies first, then half-truths, and finally distortive innuendo.

1) At page 4 of the Respondent's brief, this appears:

> "Under 20 C.F.R. § 404.1594, a 'claimant's statement their condition has improved is never sufficient to support a closed period of disability, without supporting evidence and analysis of the purported medical improvement.'"

This is a lie. The Court is urged to read this section of the code of federal regulations, and look for words like "purported" and "closed." Here's the hyperlink:https://www.ssa.gov/OP_Home/cfr20/404/404-1594.htm

[5] Petitioner notes, as he has previously, that use of the word "lies" is strong language indeed. However, when the Court considers that this case has been pending for more than 7 years, and that the primary Justice Department Attorney who wrote Respondent's brief had-as noted in footnote 4- **two** 60-day postponements **plus** the normal time given within which to file an accurate brief, and weighs those factors against the magnitude of the misrepresentations found in Respondent's brief, a reasonable person would assume that intentional, rather than inadvertent, misrepresentation, occurred.

When the Court reads this, it will see that what the Respondent says is in that regulation isn't there at all! In fact, *nothing remotely like* what Respondent says is there, is *actually* there. It appears Respondent made up this quoted material out of whole cloth.

2) At page 2, footnote 1 of its brief, Respondent says:

> "Mr. Cooperman filed his own appendix along with his brief and did not coordinate filing a joint appendix."

This is a half-truth. On August 19, 2022, Petitioner emailed Stephanie Fleming, Esq., the current Justice Department Attorney's predecessor, offering to discuss preparing a joint appendix. No response came. On October 18, 2022 at 11:48 AM, Petitioner emailed Jason Hamilton, Esq., the Justice Department Attorney *currently* primarily responsible for representing Respondent. The last sentence of that email-which Petitioner will provide to this Court on request- reads as follows:

> "And finally, assuming no settlement, would you like to work together on a joint appendix?"
>
> Attorney Hamilton never responded to Petitioner's overture.

3) Quoting the initial decision in this case, Respondent avers that claimants seeking benefits had alleged Petitioner was "pressuring them into accepting a CPOD determination in lieu of

his conducting a full hearing on their disability." See page 5-6 of Respondent's brief.

This is a half-truth. Fidelity to honesty would have caused Respondent to inform this Court that, despite these complaints, Petitioner was never charged by the Agency with improper conduct in this regard, let alone convicted of it.

4) At page 6 of it's brief, Respondent says:

> "In January 2011 a United States District Court Magistrate Judge issued an order remanding one of Mr. Cooperman's cases, finding that "contrary to the directives of the [SSA's] 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 reference here is to *Betancourt v. Astrue*, 824 F. Supp. 2d 211 (D.Mass.2011) referred to again in Respondent's brief at pages 18, 20, and 21. This assertion is both dishonest innuendo and a half-truth. Here is what Respondent left out of its brief:

If Petitioner's actions and decision in this case were clearly wrong, then the U.S. Attorney's Office, which represented the Commissioner of SSA, had an easy option. It could have simply asked the Court to remand the decision.

See https://www.ssa.gov/OP_Home/hallex/I-04/I-4-6-1.html (sentence 6 remand)

But it didn't do that.

Instead, it *vigorously defended* Petitioner's actions and decision in the Betancourt case. Appx276. And review of that decision shows Petitioner in fact did summarize on-the-record what had occurred off the record, but not to the Magistrate Judge's satisfaction.

5) At page 7-8 of the Respondent's brief, it says:

> "In October 2013, the SSA's Chief ALJ referred Mr. Cooperman's violations to the SSA's Office of the Inspector General (OIG) because of concerns about the possibility of fraud, waste, or abuse as related to Mr. Cooperman's emails with certain claimant's legal representatives. Appx283-284. The OIG concluded its investigation in February 2015, identifying numerous violations of SSA policy by Mr. Cooperman."

This is both an innuendo and a half-truth. What Respondent fails to tell this Court is that the OIG did **not** find any evidence of fraud, waste, abuse, or mismanagement, which is what it was tasked with finding.

6) At page 11 of Respondent's brief, referring to emails Petitioner sent to attorneys whose content was considered conduct unbecoming an ALJ, this appears:

> "In another, he told a claimant's counsel that 'if you are telling me as an officer of the court and my friend', that her client had a procedure, he would accept that without reviewing the medical evidence."

This is both an innuendo and a half-truth. In fact, Respondent omitted from his brief the fact that, as shown in Respondent's appendix at page 105, the attorney represented *she had mailed medical reports* to Petitioner about the claimant's condition, and Petitioner was willing to accept her word as an Officer of the Court in describing that evidence ***pending*** his receipt of the actual reports. This goes on every day in America and is not misconduct in any way but, rather, showed the collegiality expected of him.

7) At page 16, referring to Petitioner's citation of Social Security Ruling (SSR) 13-2p (15)a, Respondent says:

> "Specifically, Mr. Cooperman argues that Social Security Ruling (SSR) 13-2p(15)a binds all SSA adjudicators to abide by POMS, seemingly elevating it over the Social Security Act, the applicable regulations (regulations omitted) and HALLEX. Pet.Br. at 13. **In any event, by his own admittance, this SSR applies specifically to matters involving drug addiction and alcoholism and does not address CPOD decisions**. *Id."* (emphasis added)

The first paragraph above is a half-truth.

The bolded second paragraph above is a lie.

Nowhere in any of his submissions either to this Court or to the MSPB does Petitioner elevate POMS over any other type of Agency policy. Rather, as he has consistently maintained throughout this protracted

litigation, POMS explains, clarifies, and exists as a derivative of, not in contradiction to, regulations or other Agency policy.[6]

Respondent has not shown, nor could it show, any instance where POMS contradicts any Agency regulation.

As to the bolded section of Respondent's assertion, Petitioner never explicitly or implicitly "by his own admittance" limited SSR 13-2p(15) to matters involving drug and alcohol addiction.

Want proof?

[6]At page 17 of its brief, Respondent makes much of what it terms the "concession" of Amicus that "HALLEX articulates procedures for processing cases at the hearing level." But to say HALLEX applies to hearing-level cases **is certainly not to say** that POMS doesn't. There is nothing in HALLEX prohibiting an ALJ from ending a closed period based on the claimant's assertion that she is medically improved and able to work. Just take a second and think this through using common sense. Who better knows how a person feels, and what they can do, than the person herself? That is exactly *why* POMS 28010.015(A)(2) gives an ALJ the right to find medical improvement solely based on their symptoms (i.e., the claimant's report of what they are experiencing with their health).

Respondent also makes much of Amicus' "concession" that some of Petitioner's conduct constitutes serious offenses.(pg.29 of Respondent's brief). The ill-advised, gratuitous and, most importantly, entirely unfounded assertion of Amicus should be rejected as without basis in fact. The only conduct Petitioner engaged in that was wrong during the period at issue was sending PII to those entitled to see it, but doing so in an unencrypted email. As noted in his initial brief and in this one, he was advised of this mistake by management, apologized for it, and did not repeat it.

Simply refer to footnote 7 on page 13 of Petitioner's initial brief. It cautions the "careful reader" to recognize that SSR 13-2p(15) is of **general** applicability, and that it would make no sense to interpret it otherwise.

In light of this, for Respondent to tell this Court that Petitioner "by his own admittance" limited SSR 13-2p(15) only to drug and alcoholism situations is a straight-out lie. It can't be considered anything but that.

8) Respondent, in contending that the MSPB did not err in refusing to allow him to supplement the record, makes this astonishing statement at page 27 of it's brief:

"Therefore, the information"-sought to be added-"was already available to Mr. Cooperman."

This is a lie.

The information in question consisted of emails from the Chief ALJ of the USA touting the use of POMS, and also included the affidavit of a hearing office chief ALJ in the Buffalo, NY office indicating he utilized POMS in resolving cases. This material was surely available to the Respondent who simply had to ask the Chief ALJ, and all ALJs systemwide, for their emails related to POMS. Whether they did or did not ask is apparently something we will never know. But when the information was sought through discovery, <u>it was never provided</u>. So to say it was

"available" is simply false. And the MSPB compounded the error by refusing to allow Petitioner to supplement the record with this evidence, thus depriving *it* of the opportunity to independently review it and, more importantly, depriving *this Court* of a chance to evaluate it as well.

9) Respondent avers at page 6 of it's brief that, in a training meeting with SSA management, Petitioner said that "he did not 'see a need to corroborate [claimant's acceptance of a closed period] that he was a 'model judge' and that if SSA wanted to play hardball, [he'd get an attorney.]"

This is untrue. Petitioner never made those statements.

How do we know that?

Because Respondent failed to tell this Court that the statements above *allegedly* made by Petitioner do not appear in any trial testimony and were not subject to cross-examination, or in any document written by him.

Rather, they appear in notes taken by Barry Best, a management ALJ who attended the meeting, but who never testified at trial. All references by Respondent to the Appendix supposedly supporting these assertions are either in MSPB decisions (which appear to have relied on Best's notes) or in the notes themselves.

The management Judge who conducted the meeting **did** testify, and when asked at the trial if the notes Best took were accurate, he said "when

I read them at the time, they *seemed to reflect* what our conversation was[7]." This is hardly a ringing affirmation as to the accuracy of the notes. Petitioner submits the notes were inaccurate, and Respondent's failure to advise this Court of the source of these averments is, at best, a half-truth. There are other examples of Respondent's misconduct in its submission, but they are beyond the scope and permitted length of this brief. Suffice it to say that Respondent's picture of this case is wildly and, Petitioner submits, in a number of significant instances *intentionally* inaccurate.

SECTION TWO

RESPONDENT'S LEGAL ASSERTIONS ARE WITHOUT MERIT

THE "POMS" ARGUMENTS

As promised, because Respondent has essentially confessed error as to these points, little remains to be said. Suffice it to say that in the more than seven years this litigation has been pending it is only **now**, since the Respondent filed its brief in this Court, that it acknowledges the POMS can be used by ALJs[8]. Indeed, as pointed out in Petitioner's initial brief, he

[7] The testimony of the management Judge who did testify at the trial, Frank Cristaudo, is memorialized at Volume 2, page 124-141, esp. 133-34.

[8] Respondent's concession here is grudging, and it attempts to downplay the effect of POMS. See Respondent's brief at Pages 14-18. It falsely characterizes Petitioner's argument about POMS as asserting that POMS is superior to any other source of agency policy. But that is completely false. As Petitioner observed in his trial testimony, POMS clarifies and explains ambiguous agency regulatory policy, it does not contradict it.

notes that decisions of ALJs have been reversed by Federal Courts for failing to follow POMS[9].

THE "INADEQUATE SUMMARIZATION" ARGUMENTS

As Petitioner has emphasized throughout this multi-year litigation, and as Respondent for the first time concedes, while on the record Petitioner **did** summarize conversations with claimant's attorneys that took place off the record[10], and his actions were consistent with guidance provided by another ALJ. Appx238. Again, the issue here is *not* whether summarizations occurred. Rather, the issue is whether they were *adequate*, whatever "adequate" was supposed to mean.

[9] See the *KUBETIN, HESELTINE*, *FRAIN*, and *SHONTOS* cases at footnote 8, page 14, respectively, of Petitioner's initial brief.

[10] See page 29 of Petitioner's initial brief; see also page 19 of Respondents brief where it is stated that "Mr. Cooperman does not dispute that he did not include off-the-record conversations **in his summaries**."(emphasis added.) Of course such conversations were not *fully* included in his summaries because they were just that, summaries, and not verbatim recitations of what was said.

Respondent essentially argues that because Petitioner was so smart[11], he should have been able to figure out the quantum of information the term "summarize" required.

This would be hilarious, if it was not so serious.

The bottom line here is that the term "summarize" is nowhere defined in any agency policy. ALJs are, therefore, left to guess what is enough to bullet-proof a summary from management condemnation. This is both unconstitutional, and as a practical matter untenable.

THE "CONDUCT UNBECOMING" ARGUMENTS

Respondent's argument on this point, at pages 23-25 of its brief, amounts to asserting (1) that Petitioner's conduct in sending various emails constituted a violation of his duty to *be* impartial, and to *appear to be*

[11] Quoting the decision of the Board, Respondent says "Mr. Cooperman has advanced degrees and was an ALJ for 10 years…he should have no difficulty understanding SSA's requirement that he summarize such off-the-record discussions." Brief of Respondent at page 20. Petitioner appreciates the compliment, but intelligence and possession of advanced degrees don't guarantee one can comprehend SSA's "requirements". Indeed, one Federal court, though not the only one, observed that the Social Security system is a "byzantine labyrinth" of rules and procedures. *SCHWEIKER v.WALLSCHLAEGER* , 701 F.2d 191, 194 (CA 7 1983) ; another noted that "Within this administrative-state labyrinth lies many a trap for the unwary." *SCHOFIELD v. SAUL,* 950 F.3d 315(CA 5 2020), while the Supreme Court observed that "The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act `almost unintelligible to the uninitiated.'" *SCHWEIKER v. GRAY PANTHERS*, 453 U.S. 34, 43(1981).

impartial(pgs. 24-25); (2) that a panel of this Court cannot overturn previous Court precedent (page 24) ; (3) that a set of standards worded broadly and generally was sufficient to place him on notice of what "conduct unbecoming" specifically means and (4) that because Petitioner acknowledged he knew he must appear to be impartial, he ought to have known his questioned emails would show he was partial to certain lawyers appearing before him.

These assertions are dealt with in order.

1) With regard to the allegation that the questioned emails display partiality, Petitioner notes that no evidence, **none**, was presented from any witness who testified in this case indicating they believed they received inappropriate treatment.

   Petitioner further observes, as he did at footnote 13 of his initial brief, that Respondent's written policy obligates its employees to extend collegiality to those appearing before them. That is what Petitioner did here, and no more than that.

2) With regard to the Constitutionality of the "conduct unbecoming" standard, since filing his initial brief Petitioner has become aware of *BENCE v. BREIER*, 501 F.2d 1185 (CA 7 1974), affirming 357 F. Supp. 231 (E.D. Wisc. 1973). Both cases deserve a full reading, and

both declare the "conduct unbecoming" standard to be unconstitutionally vague. Petitioner relies on these cases, and on *FLYNN v. GIARRUSSO,* 321 F. Supp. 1295 (E.D. La 1971) and *O'BRIEN v. TOWN OF CALEDONIA*, 748 F.2d 403 (CA 7, 1984) as a basis for renewing his request that this Court grant en banc consideration of this case.

Petitioner also notes that, should en banc consideration not be granted, the panel deciding this case is free to determine whether **applying** the "conduct unbecoming" standards-such as they are-to innocuous emails like those in this case presents an "unconstitutional as-applied" question.

Petitioner also submits that, aside from the unconstitutionality of the "conduct unbecoming" standard on vagueness grounds, a plethora of free-speech cases, such as *BRESNAHAN v. CITY OF ST. PETERS*,[12] et.al, and cases collected therein, protects the speech contained in his emails from being used as a basis for disciplining him. Petitioner relies on these cases as well as the cases relating to vagueness.

3) As concerns the broad and general language which appears in various places-such as in the "general principles for ethical conduct"

[12] https://ecf.ca8.uscourts.gov/opndir/23/01/213910P.pdf?utm_medium=email

cited at page 23 of Respondent's brief-being sufficient to define what is permissible and what isn't, Petitioner says this: Take a look at the quoted phrase "general principles for ethical conduct." The word "**general**" ought to leap out at the reader.

And that is the point. These principles are "general", by which Petitioner contends they are aspirational, existing in order to guide federal employees in making sure they conduct themselves properly. But these principles, "general" as Respondent acknowledges they are, are Constitutionally insufficient to form a basis for discipline.

4) Finally, Petitioner's acknowledgment of his obligation to appear to be impartial in no way establishes that he knew or should have known his emails to various lawyers showed partiality. If anything, they showed collegiality, which is precisely what the SSA's policy required him to show.

THE "MISHANDLING OF PII" ARGUMENTS

Using misleading language designed to imply a hostile environment, Respondent asserts that Petitioner stopped sending unencrypted emails containing PII to claimant's attorneys only when he was "confronted" by his supervisor (Respondent's brief at page 21). But as the portion of Petitioner's (Page 25-26) brief cited by

Respondent shows, there was no confrontation but, rather, a collegial and congenial meeting to discuss the mistake, which was corrected and not repeated.

Respondent fails to discuss the HARRAH case cited at page 27 of Petitioner's brief where the Supreme Court observed that to establish a violation of a person's right to substantive due process in the employment context, the employee must show there is no rational connection between the government's interest, and the action the government takes to vindicate that interest.

As he did both before the MSPB and his initial brief to this Court, Petitioner again asks this: what is the rational connection between the government's interest in assuring PII remains confidential, and disciplining an employee who after erring in this regard was informally counseled to use encrypted channels to transfer PII, and did so? Respondent *didn't* answer this question because it *couldn't* answer this question.

THE "CONDUCT OF THE BOARD IN DENYING PETITIONER THE RIGHT TO DEFEND HIMSELF" ARGUMENTS

Helpfully and properly, Respondent acknowledges (pg. 22 of Respondent's brief) that "Public employees are entitled to …opportunity to present their side of the story."

However, Respondent once again resorts to a lie, stating that "Mr. Cooperman does not dispute that he…had the opportunity to present his side of the story." (pg. 23 of Respondent's brief.) This is comically wrong, ignoring what the past 7-plus years of this case has been about.

Keep three things in mind:

FIRST- How could Petitioner present his side of the story when material evidence was wrongfully withheld from him?

SECOND– It took a fortuitous FOIA request by Petitioner to uncover this evidence, some of which was in the possession of the Agency since this litigation began in October 2015. At any time during the more than 7 years since then, any attorney representing Respondent could have checked with its witnesses to determine the existence of evidence exculpating Petitioner. None, not one, appears to have done so.[13]

[13] The conduct of the Respondent's attorneys in this regard sadly resembles the conduct of Justice Department prosecutors in the case of the Federal prosecution of former Senator Ted Stevens. The withholding by prosecutors of evidence favorable to Stevens resulted in a determination by the Justice Department that two prosecutors engaged in "reckless professional misconduct" by withholding favorable evidence from him during the pendency of his trial. SEE letter from Ronald Welch, Assistance Attorney General, to the chairmen of the House and Senate Judiciary Committees, dated May 24, 2012 and reproduced here:https://www.documentcloud.org/documents/359786-5-24-12-doj-letter-to-chairmen-leahy-and-smith-2.html

THIRD- The panel should, for a moment, imagine it was the trial judge here charged with, among other things, evaluating the credibility of Agency witnesses.

Would knowing that, despite the testimony of Agency witnesses saying POMS didn't apply to ALJs, the Agency's Chief Judge was **touting its use** by ALJs, affect your assessment of the testimony of those witnesses in this area? In other areas? Put simply, had Petitioner enjoyed access to this readily available evidence there is little doubt the result of this case would have been different. Having access to that evidence would have allowed him to severely impeach the credibility of those witnesses. But because of the conduct of the Respondent's lawyers, he didn't have it.

CONCLUSION AND RELIEF SOUGHT

Put plainly, the action of the MSPB and the conduct of the Respondent's lawyers in this case constituted a perversion of justice.

Why does Petitioner make this claim? In order of significance, here's why:

–Because the MSPB **failed** to allow the Petitioner to introduce into the record exculpatory evidence he found on his own initiative, evidence which-had the government turned it over to Petitioner as it was obligated to do– would have materially affected the result in this case.

–Because the MSPB failed to give any weight to *NEWBOLD v. COLVIN,* a case from the 10th Circuit directly relevant to the POMS issue, without just cause.

–Because the MSPB failed to give any weight to SSA Policy (SSR 13-2p), subsection 15, that completely exculpated Petitioner of culpability for the POMS issue.

–Because the MSPB allowed Petitioner to be convicted of a charge (conduct unbecoming an ALJ) which was based on a clearly unconstitutional standard, unconstitutional both on its' face pursuant to *BENCE v. BREIER, supra,* and as applied to Petitioner, SEE *DODGE v. EVERGREEN SCHOOL DISTRICT #114*https://cdn.ca9.uscourts.gov/datastore/opinions/2022/12/29/21-35400.

pdf?utm_medium=email (opinion filed December 29, 2022) and cases collected therein.

This case is now only minimally about Petitioner. Rather, its central focus is on whether an Administrative Agency can run roughshod over the Constitutional rights of Judges, and whether deceitful tactics of Government counsel-antithetical to the judicial process- will be tolerated.

Petitioner requests that this Court summon to oral argument **each** and **every** Attorney listed on the cover page of Respondent's brief. At the argument, Petitioner suggests that the following questions be put to them:

–why did you include in your brief, and assert as true, material purportedly in a regulation which was not, in fact, in that regulation?

–why would you assert that Petitioner was pressuring claimants into accepting closed periods of benefits, when there is no evidence Petitioner was ever accused, let alone convicted, of such conduct by the SSA?

—in discussing the *Betancourt* case in your brief, why would you fail to mention that the U.S. Attorney's Office for Massachusetts, which represented the SSA in the Betancourt appeal, not only did not concede error, but vigorously defended Petitioner's actions?

–in describing Petitioner's being referred to the SSA Office of Inspector General, why would you fail to mention in your brief that the OIG found no evidence of waste, fraud, abuse, or mismanagement committed by Petitioner?

–do you acknowledge that your colleagues who tried this case failed to provide Petitioner with exculpatory evidence?

–do you believe it was proper for the MSPB to fail to accept Petitioner's motion to supplement the record, where that motion included exculpatory evidence?

–you mention at page 27 of your brief that the MSPB was entitled to reject Petitioner's proffered evidence because it was "duplicative." Since the proffered evidence consisted among other things, of email from the Chief ALJ endorsing the use of POMS by ALJ's, and of an affidavit from a hearing office chief Judge from Buffalo, NY noting he used POMS to resolve cases, please point us to what evidence in the record these are duplicative of.

–how can we, as a Court, conduct a proper review and evaluation of evidence where the MSPB prevents the Petitioner from placing that evidence in the record?

–can you provide any examples of how POMS 28010.015(A)(2) contradicts any SSA policy, rule, or regulation?

–Don't SSA employees have a duty to be collegial to those appearing before them?

What is at issue here is both (1) the legitimacy or, Petitioner submits, utter *lack* of legitimacy of each and every one of the charges sustained against him, and more importantly (2) whether a *government* attorney with all the power, trust, and prestige that office conveys, may with impunity materially misrepresent facts and law to a Federal Court. If such behavior is not to be repeated, some type of sanction is essential and Petitioner deserves full vindication.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL CIRCUIT RULE OF PROCEDURE 32(b)(1)

I hereby certify that this reply brief, while more than 15 pages, contains less than 7000 words.(word count is 4393)

/s/_____
LEONARD J. COOPERMAN