No. 2022-1915

IN THE UNITED STATES COURTS OF APPEALS FOR THE FEDERAL CIRCUIT

LEONARD COOPERMAN,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Petition for review of the Merit Systems Protection Board in CB-7521-16-0001-T-1

THIRD CORRECTED BRIEF FOR RESPONDENT

BRIAN M. BOYTON
Principal Deputy Assistant Attorney General

PATRICIA MCCARTHY
Director

CLAUDIA BURKE
Assistant Director

JASON X. HAMILTON
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Washington, D.C. 20530
Tel: (202) 306-0326

Attorneys for Respondent

March 27, 2023

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent's counsel is also unaware of any cases currently pending before this Court that may be affected by the Court's decision in this case.

STATEMENT OF JURISDICTION

On May 27, 2022, the Merit System Protection Board (MSPB) issued a Final Order finding Good Cause to remove Mr. Cooperman from his position as an Administrative Law Judge (ALJ) at the Social Security Administration (SSA). SAppx152-153. Mr. Cooperman timely filed an appeal to this Court. Pursuant to 5 U.S.C. § 7521, the MSPB has authority to conduct proceedings to determine if there is good cause to take disciplinary action against Administrative Law Judges upon a request from the appointing Agency. *See Shapiro v. Social Sec. Admin*., 800 F.3d 1332, 1340 (Fed. Cir. 2015) (affirming MSPB decision removing Agency ALJ from federal service); *see also Abrams v. Social Sec. Admin.*, 703 F.3d 538 (Fed. Cir. 2012).

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STATEMENT OF THE ISSUES

1. Whether the Merit Systems Protection Board's decision sustaining the charge of neglect of duty is supported by substantial evidence.

2. Whether the MSPB violated Mr. Cooperman's Due Process or other constitutional rights.

3. Whether the Board's removal of Mr. Cooperman from his position as an administrative law judge was appropriate.

STATEMENT OF THE CASE

I. Nature Of The Case

Mr. Cooperman appeals a May 27, 2022, Final Order of the Board denying his petition for review, granting the Social Security Administration's cross-petition for review and request for his removal as an ALJ, and modifying the initial decision of the MSPB. SAppx152.[1] The Initial Decision of the MSPB held that, despite the deliberate and repeated misconduct of Mr. Cooperman, a 180-day suspension without pay would compel compliance with SSA policies. SAppx144. In its Final Decision, the Board upheld the Initial Decision, but rejected the analysis of some of the *Douglas* factors and found that the SSA had proven good cause for removal. SAppx171-175.

II. Statement Of Facts

A. Terminology Specific To The Social Security Administration

SSA ALJs may award benefits to disabled individuals under Titles II and XVI of the Social Security Act and the Agency's regulations. *Id.* at 9-10; *Barnhart v. Thomas*, 540 U.S. 20, 21-22 (2003); 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). "Disability" is "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a

continuous period of not less than 12 months." *Barnhart*, 540 U.S. at 23; 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(B). The SSA uses particular terminology to establish and describe both technical designations, as well as specific agency functions. These functions and their mechanics are codified in both regulation and internal rules, and are of particular importance to this case.

1. CPOD

The SSA defines CPOD as a "closed period" of temporary disablement and eligibility for benefits that a person may receive even though they subsequently become ineligible for because a medical improvement decreases the severity of their impairments and allows for a return to work. SAppx11. A CPOD allows a claimant to recover disability benefits for a window of time beginning when a disability precludes the claimant from working and ending when a recovery permits the claimant to once again work, but all occurring before the initially disability hearing. *See Pettaway v. Colvin*, 2014 WL 2526617 at *13 (E.D.N.Y. June 4, 2014) ("A closed period of disability refers to when a claimant is found to be disabled for a finite period of time which started and stopped prior to the date of the administrative decision granting disability status."). In the context of making a CPOD determination, the SSA "interprets the medical improvement regulations in 20 C.F.R. §§ 404.1594 and 416.994 to require that a finding of medical

[1] We mistakenly believed Mr. Cooperman had filed his own appendix with his

improvement be based upon more than a claimant's acknowledgment that his or her condition has medically improved, and to require supporting medical evidence." SAppx13. Per the regulations, "medical improvement" is "any decrease in the medical severity of [a claimant's] impairments," and that decrease "must be based on the changes in the symptoms, signs and/or laboratory findings associated with [the] impairment(s)." SAppx62, 20 C.F.R. §§ 404.1594(b)(1).

Section 404.1594 of Title 20 of the regulations is entitled "How we will determine whether your disability continues or ends." Section (b)(1) states that medical improvement is:

> any decrease in the medical severity of your impairment(s) which was present at the time of the most recent favorable medical decision that you were disabled or continued to be disabled. A determination that there has been a decrease in medical severity must be based on improvement in the symptoms, signs, and/or laboratory findings associated with your impairment(s).

Section b(6) states:

> Evidence and basis for our decision. Our decisions under this section will be made on a neutral basis without any initial inference as to the presence or absence of disability being drawn from the fact that you have previously been determined to be disabled. We will consider all evidence you submit and that we obtain from your medical sources and nonmedical sources. What constitutes evidence and our procedures for obtaining it are set out in §§ 404.1512 through 404.1518. Our determination regarding whether your disability

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brief, and therefore, filed our own supplemental appendix with ours.

> continues will be made on the basis of the weight of the evidence.

See also 20 C.F.R. § 416.994(b)(1)(i) and (vi) (containing nearly identical language).

2. HALLEX

HALLEX is the SSA's Hearings Appeals and Litigation Law Manual. SAppx10. It constitutes written SSA policy that is binding on ALJs, who have a duty to comply with it. SAppx10-11. As part of their duty to hold full and fair hearings on the record, the HALLEX requires that SSA ALJs make a complete record of hearing proceedings which includes summarizing, on the record, the "content and conclusion" of any off-the-record proceedings. SAppx14. Furthermore, the HALLEX requires that all SSA ALJ decisions "provide the rationale for the ALJ's findings of fact and conclusions of law," and provide "[a]n explanation of the finding(s) on each issue that leads to the ultimate conclusion, including citing and discussing supporting evidence." SAppx13, SAppx63.

3. POMS

The SSA's POMS (Program Operations Manual System) can be used for additional guidance, but is not a primary source of policy at the hearing level. SAppx66. It can be used in the absence of other regulatory or sub-regulatory guidance such as HALLEX, but its provisions are not binding at the hearing office (ALJ) level. *Id.* According to POMS DI 28010.015(A)(2) "improvement in

symptoms alone, without associated changes in signs or laboratory findings, *may* support a MI [Medical Improvement] determination."

POMS DI 28010.015(A)(2) https://secure.ssa.gov/poms.nsf/lnx/0428010015 (emphasis added).

B. Mr. Cooperman's Conduct

Mr. Cooperman was an ALJ appointed by the SSA on June 12, 2005, and assigned to work in the Office of Disability Adjudication Review (ODAR) in Springfield, MA. SAppx7. In 2010, SSA claimants lodged complaints that Mr. Cooperman was pressuring them into accepting a CPOD determination in lieu of his conducting a full hearing on their disability. SAppx17. This meant they would receive a nearly immediate lump sum disability payment for benefits payable until the date of their hearing rather than waiting for a decision at the end of the full adjudicatory process. However, this meant that they would forego the ongoing disability benefits to which they might be legally entitled. *Id.*

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.'" SAppx19. Mr. Cooperman subsequently received retraining addressing the need to fully

rationalize decisions and to ensure a complete record of discussions. SAppx19, SAppx238-239. Afterwards, at a SSA training meeting, Mr. Cooperman was explicitly advised that a claimant's verbal concession of being able to work was insufficient by itself for finding a CPOD. SAppx240-242. Mr. Cooperman responded that he did not "see a need to corroborate [claimants' acceptance of a closed period]," that he was "a model judge," and that if the SSA "want[ed] to play hardball, [he'd] get an attorney." SAppx20, SAppx183, SAppx271-272.

The SSA continued to receive complaints regarding Mr. Cooperman's decisions. *Id.* On December 5, 2011, Mr. Cooperman's supervisor issued him a formal directive to comply with the procedures for memorializing off-the-record conversations and deciding CPOD cases. SAppx21, SAppx240-242. Senior ALJ's at the SSA provided Mr. Cooperman with specific language that he could employ to ensure he captured off-the-record conversations and reflected that a claimant's acquiescence was supported by medical evidence of improvement. SAppx22-23, SAppx281-282.

However, a review of Mr. Cooperman's decisions between December 2011, and March 2012, led the SSA to conclude that he was not complying with the directive, and still failing to follow procedures. SAppx22-23, SAppx267-270. After an interview between senior SSA ALJs, the agency noted that Mr. Cooperman continued to make decisions "without following Agency Policy,"

despite multiple trainings, counseling, and the issuance of the directive. SAppx25-26, SAppx264-266. A review of Mr. Cooperman's cases from December 2011, through September 2013, by the agency's Appellate Operations section determined that he continued to disregard procedures for making CPOD decisions and memorializing off-the-record conversations. SAppx26, SAppx243-263. SSA officials also discovered that Mr. Cooperman had transmitted claimants' Personal Identifiable Information (PII) in unsecured emails, in violation of SSA requirements for safeguarding such information. SAppx235-236. 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. SAppx283-284. The OIG concluded its investigation in February 2015, identifying numerous violations of SSA policy by Mr. Cooperman. SAppx27.

C. The Complaint To Remove Mr. Cooperman

On October 2, 2015, the SSA filed a complaint with the MSPB to remove Mr. Cooperman from his position as an SSA ALJ for good cause based on two charges – 1) neglect of duties and 2) conduct unbecoming. SAppx2. The neglect of duty charge included eight specifications: failure to comply with SSA 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 PII (Specifications 5 and 6); and failure to act in a fair and impartial manner (Specifications 7 and 8). SAppx59.

The conduct unbecoming charge consisted of 16 specifications relating to Mr. Cooperman's email communications. SAppx95. All but 1 of the 16 specifications of conduct unbecoming stemmed from Mr. Cooperman's correspondence with various claimants' legal representatives that the SSA believed gave rise to a perception of partiality. SAppx96.

D. The MSPB's Initial Decision

An MSPB ALJ conducted a multi-day hearing with 14 witnesses, including Mr. Cooperman, and 231 documentary exhibits admitted into evidence. SAppx3. The MSPB issued a 144-page Initial Decision finding that the SSA proved its charges, but that a 180-day suspension, not removal, was the appropriate penalty. SAppx143. The MSPB sustained Specifications 1-6 of Charge I (neglect of duties) and Specifications 1, 3-12, and 14 of Charge II (conduct unbecoming). SAppx59-60, SAppx96.

The MSPB held that an SSA ALJ's primary duty is to hold hearings and to issue legally sufficient and defensible decisions. SAppx9. As an SSA ALJ, Mr. Cooperman was required to comply with Agency regulations and policy when issuing a decision awarding a CPOD, and had 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." SAppx11, SAppx61

The MSPB found that SSA reviews proved that Mr. Cooperman repeatedly issued decisions 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." SAppx72. In the Initial Decision, the MSPB cited multiple instances where decisions by Mr. Cooperman had "'no discussion of the claimant's medical improvement,'" had insufficient discussion of medical improvement, and contained "'no true discussion/explanation of medical improvement. . . .'" . SAppx74.

And the MPSB found that despite being aware of his undisputed duty to make a complete record of hearing proceedings in accordance with 20 C.F.R. §§ 404.951, 416.1451, Mr. Cooperman routinely failed to do so. SAppx78. In multiple cases, Mr. Cooperman's decisions referenced off-the-record conversations, but did not summarize them as explicitly required. SAppx80-81. The MSPB also found that as an SSA ALJ, Mr. Cooperman was aware of his responsibility for safeguarding PII, and was prohibited from transmitting emails containing it via/to a non-secure email channel. SAppx15, SAppx91. Yet Mr. Cooperman admitted to not encrypting his emails, despite his explicit training to

the contrary. SAppx92-93.

Furthermore, Mr. Cooperman was found to have sent multiple improper emails that created an appearance of partiality. SAppx96. Specifically, these emails sent to different claimants' representatives and were determined to express a pattern of "statements of affection, friendship, and flattery," indicating they "were favored by [Mr. Cooperman] and that they could expect or would receive special treatment from [him]." SAppx96-97. The MSPB reviewed each email, which included comments by Mr. Cooperman to various legal representatives. SAppx9-110. He told one attorney that "I protect my lawyers (at least those, like you, whom I like)," and admitted during his hearing that a supervisor ALJ could have concerns about his email statements. SAppx99, SAppx229. In another email he indicated that his solution to the case would provide the attorney, whom he praised in other emails "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." SAppx104-105, SAppx230-231. 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. (emphasis added) SAppx105-106; SAppx232.

E. Board Decision

Both parties appealed the decision to the Board.[2] SAppx152. The Board upheld the Initial Decision, sustained an additional specification of the conduct unbecoming charge, but found good cause to remove Mr. Cooperman. SAppx152, SAppx176.

In rendering its decision, the Board reviewed the evidence relied upon in the Initial Decision. The Board found that for each charge, the MSPB ALJ applied the correct analytical framework and relied on the extensive physical and testimonial evidence of the hearing/record. SAppx155-156, SAppx159-161, SAppx163. In modifying the penalty to removal, however, the Board determined that the MSPB had erred in the Initial Decision's evaluation of the *Douglas* factors regarding the notoriety of Mr. Cooperman's offenses and potential for rehabilitation. SAppx174. Thus, removal, was appropriate. *Id.* Mr. Cooperman's appeal to this Court followed.

SUMMARY OF THE ARGUMENT

The Board correctly sustained the charges of neglect of duties and conduct unbecoming based on the substantial evidence of the record. The record demonstrates that despite ample training and warnings, Mr. Cooperman repeatedly neglected his duty to apply SSA policy when making CPOD determinations and subsequently failed to fully memorialize the record of proceedings. It also

[2] Mr. Cooperman does not now raise before this Court all of those he had presented

documents his violation of his responsibility to safeguard PII in accordance with SSA policy, and that his communications with claimant's representatives were unbecoming conduct because they created an atmosphere of partiality.

Contrary to Mr. Cooperman's and the Amicus's contentions, the decision of the Board was not arbitrary, did not misapply the legal framework for SSA decisions, and did not violate Mr. Cooperman's Due Process rights. Furthermore, based on the evidence and analysis of the factors established in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), Mr. Cooperman's removal was proportional and warranted. Mr. Cooperman and Amicus offer no legal argument that would compel reversing any of the Board's findings and subsequent decisions.

STANDARD OF REVIEW

An MSPB decision must be affirmed unless it is found to be:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence.

5 U.S.C. § 7703(c); *Hayes v. Dep't of Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984). The question "is not what the court would decide in a de novo appraisal, but whether the administrative determination is supported by substantial evidence on

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to the Board.

the record as a whole." *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1115 (Fed. Cir. 1987).

In ascertaining whether sufficient relevant evidence exists, the Court's review of MSPB decisions is confined to the administrative record, *Rockwell v. Dep't of Transp*., 789 F.2d 908, 913 (Fed. Cir. 1986), and the judicial function is exhausted when there is found to be a rational basis for the conclusions reached by the administrative body. *Carroll v. Dep't of Health and Human Servs*., 703 F.2d 1388, 1390 (Fed. Cir. 1983). Ultimately, the burden of establishing reversible error in an MSPB decision rests upon Mr. Cooperman. *See Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

ARGUMENT

I. The Board Correctly Determined That Mr. Cooperman Neglected His Duty To Correctly Apply Policy, Memorialize His Hearings, And Safeguard PII

A. Mr. Cooperman Refused To Follow SSA Procedures For Issuing CPOD Decisions

The Board correctly adopted the determination in the Initial Decision that Mr. Cooperman was negligent of his duty to follow SSA procedures when conducting hearings. SAppx152. The SSA requires the cessation of disability benefits—including those pursuant to a CPOD—to be supported by substantial evidence of medical improvement. SAppx61-62. Mr. Cooperman, instead, made CPOD findings based upon off-the-record representations by claimants, with no

supporting medical evidence. SAppx255. In affirming the Initial Decision, the Board correctly found that Mr. Cooperman "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 [Mr. Cooperman] did not comply with SSA policy. SAppx157.

SSA makes CPOD decisions pursuant to the governing regulations and manuals such as HALLEX and POMS. *See* 20 C.F.R. § 404.1594; 20 C.F.R. § 404.1594(b)(6); *see also* Social Security Program Rules, https://www.ssa.gov/regulations/ (laying out the hierarchy of statutes, regulations, Social Security Rulings, and Employee Operating Manuals relied upon for decision making) (last visited November 17, 2022).

Per that framework, both HALLEX and POMS are subordinate to statute and regulation. HALLEX is defined as "instructions used by employees of SSA's Office of Disability Adjudication and Review [to which Mr. Cooperman belongs as an ALJ] in processing and adjudicating claims at the hearing, Appeals Council review, and civil actions levels of appeal," and is "written Agency policy that is binding on [ALJs]," mandates a weighing of the "various pieces of evidence," by an SSA ALJ. Id., SAppx63. POMS, however, are only "[i]nstructions used by employees and agents of SSA to carry out the law, regulations, and rulings," and not a "prime source of policy" at SSA hearings; they set forth policies for

proceeding at the district office level. *See* Social Security Program Rules, https://www.ssa.gov/regulations/; SA158. Therefore, Mr. Cooperman's main contention that his reading of the POMS should govern over the language of the regulation is incorrect.

Mr. Cooperman nevertheless asserts that he was authorized by the POM to make his CPOD decisions based on claimants' agreement to the CPODs that he proposed, or their statements of a medical improvement alone. Pet. Br. at 13. Mr. Cooperman offers no evidence that any other SSA ALJ has ever employed such a methodology instead of the aforementioned SSA framework. In fact, multiple SSA Chief ALJs testified that under this statutory and regulatory framework, contrary to Mr. Cooperman's assertions, a claimant's acknowledgement of medical improvement alone is insufficient. SAppx63-65; SAppx158.

While POMS DI 28010.015(A)(2) alone does say that "improvement in symptoms alone, without associated changes in signs or laboratory findings, *may* support a MI [medical improvement] determination," it cannot be read in the vacuum that Mr. Cooperman proposes. POMS DI 28010.015(A)(2) https://secure.ssa.gov/poms.nsf/lnx/0428010015 (emphasis added).

Mr. Cooperman's view, were it to prevail, would upend that order, placing the POMS above all other authorities. 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, (20 C.F.R. § 404.1594; 20 C.F.R. §§ 404.1594(b)(6), 416.994(b)(6)) 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.*

Contrary to Mr. Cooperman's and the Amicus's suggestion, no court has accorded the POMS greater authority than the aforementioned framework of the U.S.C, C.F.R. and HALLEX. 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. Social Security Program Rules, https://www.ssa.gov/regulations/.

In fact, Amicus concedes that it is *the HALLEX* that "articulates procedures for processing cases at the hearing level," (Amicus Br. at 4). In doing so, Amicus admits the applicability of the requirements of the HALLEX to "provide the rationale for the ALJ's findings of fact and conclusions of law, by including . . . [a] discussion of the weight assigned to various pieces of evidence." SAppx13. Indeed, a federal magistrate judge reversed one of Mr. Cooperman's CPOD decisions because he violated the requirements of the HALLEX in reaching his decision. SAppx19; *see Betancourt v. Astrue*, 824 F. Supp. 2d 211, 216-217 (D. Mass. 2011).

At most, courts recognize that both POMS and HALLEX are sub-regulatory guidance. *See Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) (merely noting that POMS are "the publicly available operating instructions for processing Social Security claims"); *see also Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002).

Amicus's reliance on *Avery v. Sec'y of Health and Human Svcs*, 797 F.2d 19 (1st Cir. 1986) and its progeny is also misplaced. In that case, the First Circuit held that "[w]hatever may be *the ordinary effect of POMS*, these instructions have been presented to us unequivocally as the Secretary's policy and interpretation." *Avery*, 797 F.2d 23 (emphasis added). That Court did not find that all POMS are inherently binding, but were for the particular issue presented in that case. *Id.* at 23-25. And in any event, the First Circuit did not elevate POMS above the medical evidence requirements of the statute and regulations. *See Marasco & Nesselbush, LLP v. Collins,* 6 F.4th 150, 157-158 (1st Cir. 2021) (noting that receiving SSA disability is based on a "detailed framework created by statute and regulations, and fleshed out in *two agency manuals*," POMS and HALLEX) (emphasis added).

Whatever the POMS requires, nothing in the provision empowered Mr. Cooperman to substitute a claimant's *off-the-record statements* for the statutorily and regulatory required findings. Thus, the Board's determination that Mr. Cooperman neglected his duty by failing to follow SSA requirements regarding

evidence and CPOD decisions is supported by substantial evidence. Mr. Cooperman has not met his burden of proof to overturn Specifications 1-2 of Charge I.

B. Mr. Cooperman Neglected His Duty To Make A Complete Record Of Hearing Proceedings

The Board sustained the MPSB AJ's finding that it is "undisputed that SSA ALJs are required to make a complete record of the hearing proceedings," and that Mr. Cooperman neglected that duty by failing to summarize off-the-record conversations. SAppx78, SAppx159. Both the MSPB in its Initial Decision and the Board cite to the regulations, testimony, and documentary evidence establishing that duty, and both found that Mr. Cooperman blatantly disregarded it after being repeatedly told of his responsibility. *Id.*

Mr. Cooperman does not dispute that he did not include off-the-record conversations in his summaries. Instead, he argues that the standard for "adequately" summarizing his proceedings was impermissibly vague, and that the SSA relied on too small a sample of his cases as evidence to support disciplinary action. Pet. Br. at 28-29. This argument is unpersuasive.

Based on the evidence presented, Mr. Cooperman knew or should have known what was required to make a complete record. In January 2011, a District Court Magistrate Judge remanded one Mr. Cooperman's cases, finding 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" that Plaintiff felt pressured to accept." *Astrue*, 824 F. Supp. 2d at 216-217 (emphasis added); see also SAppx19.

Mr. Cooperman subsequently received training on how to memorialize off-the-record discussions. *Id.* Based on his failure to do so, Mr. Cooperman was explicitly directed to "summarize on-the-record, all off-the-record discussions concerning amending claims involving closed periods of disability," and subsequently received language suggestions from his supervisor on how to do this. SAppx21-23. As the Board noted, Mr. Cooperman, "has advanced degrees and was an ALJ for nearly 10 years . . . [he] should have no difficulty understanding SSA's requirement that he summarize such off-the-record discussions." SAppx160. In light of this, Mr. Cooperman's claim that there was "no precise standard for what constituted an adequate summarization," rings hollow. Pet. Br. at 29.

Mr. Cooperman's takes issue with the number of deficient records relied upon by the SSA, but makes no argument or citations in support. Pet. Br. at 28-29. The record demonstrates Mr. Cooperman had failed to make complete records since at least 2010 and through 2013, and the record documents at least five records deemed incomplete. SAppx17, SAppx19-20, SAppx25-26, SAppx80. As noted by the MSPB in the Initial Decision, the OIG's 2014 report determined that

Mr. Cooperman's "summaries of the off-the-record discussions were not memorialized as required by HALLEX I-2-6-40." SAppx27, SAppx234. Furthermore, in *Astrue*, that court noted that Mr. Cooperman "appears *to make a practice* of discussing relevant matters off the record prior to the recorded hearing.). *Astrue*, 824 F. Supp. 2d at 216-217 (emphasis in original). Against this, Mr. Cooperman has provided no support to challenge the Board's finding. SAppx159.

Thus, the Board's determination that Mr. Cooperman neglected his duty by failing to make complete records of hearing proceedings is supported by substantial evidence. Mr. Cooperman has not met his burden of proof to overturn Specifications 3-4 of Charge I.

C. Mr. Cooperman's Mishandling Of PII Was A Proper Basis For Disciplinary Action Based On A Neglect Of Duty

The Board upheld the MSPB's determination in the Initial Decision that Mr. Cooperman neglected his duty to safeguard the PII of claimants. SAppx161. Mr. Cooperman admitted that he failed to encrypt emails containing PII sent to claimants' representatives, but claims that he corrected his conduct after being confronted by his supervisor. SAppx37-38; Pet. Br. at 26.

Citing the Board's decision in *Adamek v. U.S. Postal Serv*., 11 M.S.P.B. 482, 483 (1982), Mr. Cooperman now argues that since the underlying conduct "giving rise to [the] specifications . . . [has] been previously and amicably

addressed," he cannot be removed on that basis. Pet. Br. at 26-27. In *Adamek* the Board held that when the removal action in that case was based solely upon two incidents of misconduct for which appellant had previously been suspended, the agency is barred from combining the two actions under a new charge and taking a more severe adverse action based on those two incidents. *Adamek*, 11 M.S.P.B. at 483.

As the Board correctly concluded, there is no basis to extend *Adamek's* reasoning to this case where there was no prior adverse action. SAppx161. Indeed, this Court declined to apply *Adamek* even where an agency rescinded a removal action, reinstated an appellant with back pay, and then later brought a new removal action based on the same charges. *See Tawadrous v. Dep't of the Treasury*, 477 Fed. Appx. 735, 738-739 (Fed.Cir. 2012) (holding "*Adamek's* rule, by its own terms, does not apply to a case where the employee suffered no adverse consequence from the previous action.").

Thus, the Board's determination that Mr. Cooperman can be disciplined for neglecting his duty to follow SSA protocols for the safeguarding of PII is correct. Mr. Cooperman has not met his burden of proof to overturn Specifications 5-6.

II. Mr. Cooperman Was Not Denied Due Process And The Corresponding Findings Of The Board Are Supported By Substantial Evidence

Throughout his Brief, Mr. Cooperman repeatedly and broadly claims that he was denied his right to Due Process throughout these proceedings. *See e.g.,* Pet.

Br. at 18, 21, and 25.

Public employees are "entitled to oral or written notice of the charges against them, an explanation of the employer's evidence, and opportunity to present their side of the story. . . . [t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542-546 (1976); *see also Robinson v. Dep't of Veteran's Affairs*, 923 F.3d 1004, 1022 (Fed. Cir. 2019).

Mr. Cooperman was provided with notice and an opportunity to respond. The SSA served Mr. Cooperman with a complaint outlining two charges and 24 specifications. SAppx2. After engaging in discovery, Mr. Cooperman participated in a multi-day hearing during which he and 13 other witnesses testified, and he submitted 41 exhibits. SAppx3. Mr. Cooperman does not dispute that he received notice of the charges against him, an explanation of SSA's evidence, or had the opportunity to present his side of the story. Indeed, Mr. Cooperman's brief describes the nature of the charges against him in detail, acknowledges that he engaged in discovery, and describes how he "defended his actions" at trial. Pet. Bar. At 3-5.

A. The Charge of Conduct Unbecoming Is Not Impermissibly Vague

Charge II of the complaint against the Mr. Cooperman consisted of 16

separate specifications of conduct unbecoming stemming from his email communications. SAppx95. Ultimately, the Board sustained 14 of the 16 specifications. SAppx95.

In the Initial Decision, the MSPB relied on the Board's prior holding that "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," and determined that Mr. Cooperman breached (b)(8) (duty of impartiality) and (b)(14) (duty to avoid actions creating the appearance that they are violating the law or the ethical standards). SAppx95-96. *See Schifano v. Dep't of Veterans Affairs*, 70 M.S.P.R. 275, 281 (1996). The Board also agreed with the MPSB's view that conduct unbecoming is that which is "improper, unsuitable, or detracting from one's character or reputation." *Long v. Soc. Sec. Admin*, 113 M.S.P.R. 190, 208 (2010). *See Long v. Soc. Sec. Admin*, 635 Fed. 3d 526, 538 (Fed. Cir. 2011) (affirming the removal of an SSA ALJ for conduct unbecoming based on the Board's aforementioned definition); *see also Abruzzo v SSA*, 489 Fed. Appx. 449, 450 (Fed. Cir. 2012) (non-precedential opinion). The Board found no error with that framework. SAppx163.

Mr. Cooperman, however, argues these cases were wrongly decided and asks the Court to overturn them. Pet. Br. at 21-25. However, this Court's precedent is binding unless the Court changes an opinion sitting *en banc* or the

Supreme Court overturns a Federal Circuit decision. *Robert Bosch, LLC v. Pylon Mfg. Corp*., 719 F.3d 1305, 1316 (Fed. Cir. 2013). Mr. Cooperman's motion for an *en banc* hearing was denied on October 11, 2022. ECF 33.

Instead, he argues that conduct unbecoming is too vague a standard to justify discipline and claims "there was nothing to alert [him] that what he was doing was wrong." Pet. Br. at 22-23. Mr. Cooperman proposes an alternate standard whereby ALJs are "only subject to discipline for a violation of any Federal or State Law [sic], or any written policy expressly and specifically defining what constitutes a violation." Pet. Br. at 24.

Mr. Cooperman offers no legal reasoning or support for his attack on this Court's holdings in *Long* and *Abruzzo* other than un-specific references to the Supreme Court's consideration of vagueness in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("find[ing] no unconstitutional vagueness in the antinoise ordinance"), and *Airport Commission v. Jews For Jesus*, 482 U.S. 569 (1987) (finding an overly broad airport board resolution violated the First Amendment). Nor does he take issue with the usage of the 5 C.F.R. § 2635.101(b) framework which would alone justify the findings of the Board.

Further, the record belies the Mr. Cooperman's claim that he was ignorant that what he was doing was wrong due to the purported vagueness of "conduct unbecoming." Pet. Br. at 23. As noted by the MSPB ALJ, The Standards of

Ethical Conduct for Employees of the Executive Branch require all employees to act impartially and avoid any actions creating a contrary appearance. SAppx17. The SSA's Annual Personnel Reminders also inform all employees of their duty to avoid an appearance of a loss of impartiality while performing their official duties. *Id.* Mr. Cooperman testified that he had a duty to avoid even the appearance of a loss of impartiality and a duty not to give preferential treatment. SApp17, SAppx188. Thus, Mr. Cooperman's argument is unavailing, and he has not met his burden to overturn 14 of the 16 Specifications of Charge II.

B. The Board's Refusal To Supplement The Closed Record With Already Available Information Was Not A Due Process Violation

The Board properly rejected Mr. Cooperman's motion to supplement the closed record with additional documents presenting material deemed old and not material. SAppx154. After the record closes, the Board will not accept additional evidence or argument unless it is new and material. 5 C.F.R. § 1201.114(k); *Brenneman v. Office of Personnel Mgt.*, 439 F.3d 1325, 1328 (Fed. Cir. 2006). "New and material evidence" must be, "despite Mr. Cooperman's due diligence, [] not available when the record closed." 5 C.F.R. § 1201.115(d). To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable." *Id.*

The Board's decision to exclude evidence after the record closes is reviewed for an abuse of discretion. *Brenneman*, 439 F.3d at 1328; *see also Curtin v. Office*

of Pers. Mgmt., 846 F.2d 1373, 1378 (Fed. Cir. 1988) (noting that "[p]rocedural matters relative to discovery and evidentiary issues fall within the sound discretion of the board and its officials.").

In early 2022, Mr. Cooperman sought to add to the record emails he believed discussed Chief SSA ALJs referencing possible guidance from various POMS provisions. Pet. Br. at 19. Mr. Cooperman claims the documents were new and material because they were not provided during discovery, and show that SSA ALJs "could and should resort to the POMS" in certain instances. Pet. Br. at 20.

Further, the SSA's Associate Chief ALJ testified that ALJs *could* consider the POMS in the absence of other regulatory or sub-regulatory guidance, such as the HALLEX. SAppx10-11. This is the very same contention contained in the documents Mr. Cooperman sought to add. Thus, the Board's rejection of Mr. Cooperman's documents containing duplicative information was well within its discretion, and as discussed above, not a violation of his Due Process rights. *See Brenneman*, 439 F.3d at 1328. Thus, Mr. Cooperman has not offered any legal basis for overturning the Board's sustainment of Charges I and II.

III. The MSPB's Removal Order Is Appropriate

Mr. Cooperman contends that there should be no consequences for his actions, or alternatively, that the Board incorrectly held removal to be the appropriate remedy. *See* Pet. Br. The Amicus expands upon that, arguing that 1)

even if disciplinary action were warranted, removal is inappropriately disproportionate, and that 2) that the Board's purportedly erroneous take on POMs "vitiates" the decision. *See* Amicus Br. at 7, 12. Neither argument is persuasive.

A. The Board's Analysis of the Douglas Factors Supports Removal

The SSA sought Mr. Cooperman's removal. SAppx2. In determining the penalty, the MSPB, in its Initial Decision, relied on the 12 factors articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). *See Nagel v. Dep't of Health & Human Services*, 707 F.2d 1384, 1386 (Fed. Cir. 1983) (recognizing their applicability and that it is not a formulaic application.). SAppx130. The MSPB determined that Mr. Cooperman's misconduct was repeated, not inadvertent, and in defiance of the notice from the SSA as to proper procedures. SAppx132, SAppx139. It also undermined his supervisor's confidence in his abilities to perform his duties and reflected poorly on the position of an ALJ. SAppx139-140. However, the MSPB found that despite a District Court's acknowledgement of Mr. Cooper's failure to follow proper procedure, his misconduct was not detrimental to the reputation of the SSA. SAppx142. Although there were no mitigating circumstances to Mr. Cooperman's behavior, the MSPB AJ determined that a "substantial penalty" of a 180-day suspension without pay would deter future misconduct. SAppx143-144.

The Board agreed with the MSPB's application of the relevant *Douglas*

factors and its conclusion that Mr. Cooperman's conduct was "serious," "repeated," "directly pertain[ed] to [his] responsibilities as an ALJ," "negatively impact[ed] the legal sufficiency and defensibility of his . . . decisions," "directly affect[ed] his obligation to provide claimants with a full, due process hearing," and "reflected poorly on the ALJ position." SAppx174. However, it rejected the MSPB evaluation of Mr. Cooperman's potential for rehabilitation, overturned the order of suspension, and granted the removal requested by the SSA. SAppx175. In light of substantial evidence of the record and the application of the *Douglas* factors, the Board's decision that removal was the proper consequence was appropriate. *See Brennan v. Dep't of Health & Human Servs*, 787 F.2d 1559, 1563-1564 (Fed. Cir.1986) (the Board's penalty determination can be overturned only when it is grossly disproportionate to the offense so as to amount to an abuse of discretion); *see also SSA v. Steverson*, 2009 M.S.P.B. 143 (where the full Board modified an initial MSPB ALJ's suspension order into removal based in part on the prominence of the SSA ALJ position at that agency.).

Amicus's challenge to the Board's assessment of Mr. Cooperman's misconduct is unavailing. *See* Amicus Br. at 12. First, it concedes that "some of [Mr. Cooperman's] conduct during the period at issue constitutes serious offenses." *Id.* This admission as to the amount and severity of Mr. Cooperman's misconduct alone undercuts any argument as to the appropriateness of removal.

Secondly, the notoriety of the misconduct was well-evidenced by the MSPB's citation to the numerous complaints from the public about Mr. Cooperman's conduct. SAppx172. The Amicus argues that the Board's failure to consider the lack of prior discipline constituted an error, but offers no legal citations in support. In fact, this Court has determined that "[i]t is not reversible error if the Board fails expressly to discuss all of the Douglas factors. . . ." *Rodriguez v. VA*, 8 F.4th 1290, 1303 (Fed. Cir. 2021) (quoting *Kumferman v. Dep't of the Navy*, 785 F.2d 286, 291 (Fed. Cir. 1986)). Finally, the Board did not reject the "ALJ's demeanor based credibility determinations," as claimed. Amicus Br. at 15. Instead, it properly rejected the ALJ's reliance on statements within Mr. Cooperman's brief, because attorney statements are not considered evidence under *Hendricks v. Dep't of the Navy*, 69 M.S.P.R. 163 (1995) (holding that "statements of a party's representative in a pleading, however, do not constitute evidence."); see *Scott v. Department of Justice*, MSPB Docket No. SF-0752-94-0134-I-1, slip op. at 19 (December 19, 1995).

Thus, based on the evidence and the proper application of the relevant legal framework, there is no compelling legal reason to reverse the Board's decision. This Court should uphold Mr. Cooperman's removal.

B. Removal Is Still Appropriate Even If This Court Reverses The Board's Decision As To Specifications 1 And 2 Of Charge I

As discussed, the decision of the Board as to underlying hierarchy of SSA

decision making was accurate. Amicus and Mr. Cooperman contest that conclusion, and Amicus argues that the Board's alleged error in interpreting the interplay of POMS and SSA laws and regulations undercuts it reasoning and conclusions. Amicus Br. 7-9.

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. The complaint brought by the SSA consisted of two charges, with numerous specifications in each. SAppx2. The Final Order of the Board found that the SSA had proven both Charges; specifically, 6 of the 8 Specifications of Charge I and 14 of the 16 Specifications of Charge II. SAppx152. Even if this Court overturns Specifications 1 and 2 of Charge 1, there remains more than sufficient basis to sustain Charge I, say nothing of Charge II. *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). In that event, nothing in the record would necessitate a re-evaluation of the *Douglas* factors applied in this case, nor the conclusion of the Board. Removal of the Mr. Cooperman would still be appropriate and legally sustainable.

CONCLUSION

For these reasons, this Court should affirm the Board's decision.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA MCCARTHY
Director

/s/ Claudia Burke
CLAUDIA BURKE
Assistant Director

/s/ Jason X. Hamilton
JASON X. HAMILTON
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Washington, D.C. 20530
Tel: (202) 3070226

Attorneys for Respondent

March 27, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and Federal Circuit Rule 32(b), the undersigned certifies that the word processing software used to prepare this brief indicates there are a total of 7,134 words, excluding the portions of the brief identified in the rules. The brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

/s/ Jason X. Hamilton

JASON X. HAMILTON

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 27th day of March 2023, I caused to be sent by first class mail copies of the foregoing "Third Corrected Brief for Respondent" addressed to:

Leonard Cooperman
178 Juniper Ridge Drive
Feeding Hills, MA 01030

Sommattie Ramrup
3003 Purchase Street, Ste #385
Purchase, NY 10577-0385