United States Court of Appeals, Third Circuit.

Reginald L. SYDNOR, Appellant
v.
Mark A. ROBBINS, Vice Chairman, et al.; United States Merit Systems Protection Board ("Board"), in their official Member Capacity, as well as Their Predecessors, Successors or Assigns

No. 20-1006
Submitted Under Third Circuit L.A.R. 34.1(a) on September 17, 2020(Filed: September 21, 2020)

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 2-18-cv-02631), District Judge: Hon. C. Darnell Jones, II

Attorneys and Law Firms

Reginald L. Sydnor, Esq., Pro Se

Stacey L.B. Smith, Esq., Office of United States Attorney, Philadelphia, PA, for Defendants-Appellees

Before: KRAUSE, RESTREPO, and BIBAS, Circuit Judges

OPINION*

KRAUSE, Circuit Judge.

Reginald Sydnor, formerly a federal administrative law judge, was terminated and debarred in late 1998. This is his fourth attempt to challenge that decision in federal court.[1] Perhaps unsurprisingly, the arguments he now advances are untimely and could have been or were resolved in previous decisions. We therefore will affirm the District Court's orders dismissing Sydnor's complaint and denying his motion for reconsideration.

DISCUSSION[2]

At bottom, this dispute is the same one Sydnor has been pressing for over two decades: that in finding him unsuitable for federal employment, the Merit Systems Protection Board (MSPB or the Board) wrongfully denied him substantive and procedural protections under 5 U.S.C. § 7521. The Board's final decision on that point came in December 1998. *Sydnor v. OPM*, Nos. PH-0731-98-0188-I-1 & PH-0752-98-0213-I-1, 1998 WL 974917 (MSPB Dec. 30, 1998). That poses a major problem for Sydnor's current efforts. Typically, a litigant in his position has at most two months to seek judicial review, *see* 5 U.S.C. § 7703(b)(1)–(2) (establishing thirty- and sixty-day periods depending on the nature of the claim), and even the more forgiving catch-all provision for suits against the United States allows for only six years, *see*28 U.S.C. § 2401(a). Using basic arithmetic, the District Court concluded Sydnor's claims were "untimely and must therefore be dismissed." App. 3a n.1. That conclusion could hardly have been a surprise, as it was not the first time a court rejected one of Sydnor's collateral attacks against the MSPB decision as untimely. *See Sydnor v. OPM*, No. 06-cv-0014, 2007 WL 2029300, at *4–6 (E.D.

Pa. July 11, 2007), *aff'd on other grounds*, 336 F. App'x 175 (3d Cir. 2009).

Trying to avoid that conclusion, Sydnor argues the District Court should have started the clock in April 2015, when—in response to his letter urging the MSPB to reopen the 1998 proceedings—the Clerk of the Board told him he had "no further right to review." App. 61. The District Court wisely rejected that argument, reasoning that Sydnor's claims against the Board accrued as of the 1998 decision denying his administrative appeal, not as of "[a] letter sent ... seventeen years later.... [that] merely reiterated the prior final decision and had absolutely no effect on [his] legal rights." App. 4a n.1. We agree. Accepting Sydnor's argument to the contrary would give all aggrieved litigants with time-barred claims the ability to solicit a pro forma statement from the agency that no more remedies were available and thereby revive long-expired periods to seek judicial review.

Even apart from the timeliness issue, Sydnor's claims were properly dismissed for an independent reason: They are precluded. Here, we need not reinvent the wheel. Faced in 2009 with similar claims by Sydnor about the Government's "failure to comply with 5 U.S.C. § 7521 in making its unsuitability ... determination," we held those claims were "barred by the doctrine of *res judicata*" because Sydnor was "attack[ing] the same decision challenged in his prior action[s] (albeit not on precisely the same grounds)." *Sydnor v. OPM*, 336 F. App'x 175, 180–81 (3d Cir. 2009). Now, as then, the "final judgment on the merits" in Sydnor's previous judicial actions "precludes ... relitigati[on] [of] issues that were or could have been raised" before. *Id.* at 181 (quoting *Federated Dep't*

Stores v. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)).

Again trying to skirt well-tread ground, **Sydnor** argues preclusion is inappropriate because he has sued the members of the MSPB rather than the Board itself. That argument runs aground on settled precedent. An official-capacity suit, "in all respects other than name, [is] treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). For that reason, our preclusion case law looks past such nominal distinctions among governmental defendants. *See, e.g., Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 288 F.3d 519, 527 (3d Cir. 2002) (holding that because "commissioners in their official capacity comprise the [agency]," the commissioners and agency are the "same parties" for preclusion purposes (capitalization altered)); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402–03, 60 S.Ct. 907, 84 L.Ed. 1263 (1940) ("[A] judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government.").

Sydnor's last resort is an argument that, he contends, he could not have raised before: that he is entitled to relief under *Lucia v. SEC*, — U.S. ——, 138 S. Ct. 2044, 201 L.Ed.2d 464 (2018), which the Supreme Court decided one day before he filed this lawsuit. We see at least three fundamental flaws with that argument. First, **Sydnor** failed to raise it before the District Court until his motion for reconsideration, which abandoned his previous lines of argument and was entirely based on the *Lucia* decision. While reconsideration may be appropriate upon "an intervening change in the controlling law," *Max's Seafood Cafe ex rel. Lou-Ann,*

Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999), Sydnor makes no effort to explain why he could not have raised it in his initial or corrected complaint, in a subsequent motion to amend, or in opposing the Government's motion to dismiss. Second, we question the basic premise of Sydnor's argument: that *Lucia* was a doctrinal sea change he could not have anticipated in his initial appeal and subsequent collateral attacks. *See, e.g.*, *Malouf v. SEC*, 933 F.3d 1248, 1258 (10th Cir. 2019) (reasoning that *Lucia* did not "change[ ] the law"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 257 (6th Cir. 2018) ("No precedent prevented [a litigant] from bringing the constitutional claim before then. *Lucia* itself noted that existing case law 'says everything necessary to decide th[e] case.' " (quoting 138 S. Ct. at 2053)). Third, whatever right the Court recognized in *Lucia*, it was limited to "one who makes a *timely challenge* to the constitutional validity of the appointment of an officer who adjudicates his case." 138 S. Ct. at 2055 (emphasis added) (citation omitted). As we have explained, a litigant who fails to present an Appointments Clause challenge in an appropriately timely manner will thereafter be "barred from doing so." *Cirko ex rel. Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 159 (3d Cir. 2020). Such is the case with Sydnor, whose current challenge against the appointment method for the officer who decided his suitability for employment in 1998 is anything but timely. The District Court therefore acted within its discretion in denying Sydnor's motion for reconsideration based on *Lucia*.

CONCLUSION

For these reasons, we will affirm the orders of the District Court.

Footnotes

*This disposition is not an opinion of the full Court and under I.O.P. 5.7 does not constitute binding precedent.

1*See Sydnor v. LaChance*, No. 00-1035, 2000 WL 331822 (4th Cir. Mar. 30, 2000) (per curiam), *cert. denied*, 531 U.S. 1014, 121 S.Ct. 572, 148 L.Ed.2d 490 (2000); *Sydnor v. OPM*, 336 F. App'x 175 (3d Cir. 2009); *Sydnor v. MSPB*, 466 F. App'x 907 (Fed. Cir. 2012) (per curiam).

2Because we write only for the parties, who are familiar with the background of this case, we need not reiterate the factual or procedural history. The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. We review the dismissal of Sydnor's complaint de novo, *Vallies v. Sky Bank*, 432 F.3d 493, 494 (3d Cir. 2006), and the denial of his motion for reconsideration for abuse of discretion, *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010) (per curiam).

12/3/19
CIVIL ACTION
NO. 18-2631

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

REGINALD L. SYDNOR
Plaintiff,

v.

MARK A. ROBBINS, *Vice Chairman*; and,
UNITED STATES MERIT SYSTEM
PROTECTION BOARD ("BOARD"),
in their official member capacity, as well as their predecessors, successors, or assigns
Defendants.

ORDER

AND NOW, this 3rd day of December 2019, upon consideration of Plaintiff's Motion for Reconsideration (ECF No. 13) and Defendants' Response thereto (ECF No. 15), it is hereby ORDERED that said Motion is DENIED.[1]

BY THE COURT:
/s/ C. Darnell Jones, II J.

Footnote

1 "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly

discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). "The scope of a motion for reconsideration, we have held, is extremely limited. Such motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence. 'Accordingly, a judgment may be altered or amended [only] if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion [ ]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.'" *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011) (quoting *Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)).

In this case, Plaintiff seeks reconsideration of this Court's prior Order based upon his assertion that the "agency adjudication [was] 'tainted' with an appointment violation." (Mot. Reconsideration 3.) In support of same, Plaintiff relies upon the Supreme Court's holding in *Lucia v. S.E.C.*, 138 S.Ct. 2044, 2055, 201 L. Ed. 2d 464, 475 (2018), which—in the context of Securities Exchange Commission ALJs— held that "ALJs are 'Officers of the United States' within the meaning of the Appointments Clause," therefore they must be duly appointed before rendering a decision regarding securities law violations.

Paragraphs 31 through 38 of Plaintiff's Complaint allege in part that the "Board" violated 5 U.S.C. §7521 by permitting an "attorney administrative judge" to process and adjudicate his case, thereby denying Plaintiff his right to due process. In sum, Plaintiff claims the "attorney administrative judge" did not permit Plaintiff to present certain testimony and did not base

the final decision on good cause. Moreover, Plaintiff claims he was never provided his right to have the adverse action reviewed by the board on appeal. (Compl. ¶¶ 31-38.)

In the initial decision of the MSPB, the Board specifically addressed Plaintiff's contention that he was entitled to the procedural protections of Section 7521 as follows:

> [A]cting within its delegated authority, OPM promulgated regulations governing suitability determinations as well as regulations governing the appointment and removal of an ALJ. *See* 5 C.F.R. Parts 731 and 930, Subpart B. The regulations provide an express exception to 7521 procedures in actions involving a suitability determination of an ALJ. OPM's regulations specifically state that the procedural protections afforded an ALJ by 7521 "do not apply in making dismissals or taking other actions requested by OPM under §§ 5.2 and 5.3 of this chapter..." 5 C.F.R. § 830.214(c).
>
> * * * *
>
> Consequently, despite the fact that the appellant is an ALJ, he has no entitlement to the additional procedural protections afforded to an ALJ in designated actions pursuant to 5 U.S.C. § 7521.

Sydnor v. Office of Personnel Management, Docket No. PH-0731-98-0188-1-1, at 5 (MSPB June 11, 1998).

Aside from the foregoing, the claims presented in Plaintiff's most recent Complaint have been previously litigated in various other forums, including the Third Circuit, where it was determined that Plaintiff's allegations that "the procedures through which he was deemed unsuitable and debarred did not comply with the

protections set forth in § 7521" were "barred by the doctrine of *res judicata*." *Sydnor v. OPM*, 336 F. App'x 175, 180 (3d Cir. 2009); *see also Sydnor v. Berry*, EEOC Appeal No. 0120101050, 2010 EEOPUB LEXIS 1662, at * 9-10 (June 3, 2010) ("[W]e are persuaded that the issues related to complainant's debarment and removal from his Administrative Law Judge position have been fully litigated before the MSPB and the Fourth Circuit Court of Appeals.").

Plaintiff now petitions this Court for reconsideration of its dismissal Order based upon the Supreme Court's holding in *Lucia*, which was issued one day before he filed his Complaint in this case. A reading of *Lucia* clearly reveals its inapplicability to the instant matter. As such. this most recent effort by Plaintiff to resuscitate issues that have been repeatedly assessed and rejected in both administrative and federal court forums for more than two decades, is of no avail.

6/28/2019
CIVIL ACTION
NO. 18-2631

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

REGINALD L. SYDNOR
Plaintiff,

v.

MARK A. ROBBINS, *Vice Chairman*; and,
UNITED STATES MERIT SYSTEM
PROTECTION BOARD ("BOARD"),
in their official member capacity, as well as their predecessors, successors, or assigns
Defendants.

ORDER

AND NOW, this 26th day of June 2019, upon consideration of Defendants' Motion to Dismiss (ECF No, 6) and Plaintiff's Response thereto (ECF No. 8), it is hereby ORDERED that said Motion is GRANTED.[1]

BY THE COURT:
/s/ C. Darnell Jones, II J.

Footnotes

1 Plaintiff's claims against Defendants are untimely and must therefore be dismissed. Plaintiff was required to seek judicial review of the Merit System Protection 12a

Board's ("MSPB") decisions in federal court "within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Plaintiff received a final decision from the MSPB denying his challenges to his termination and debarment on December 30, 1998. (ECF No. 6, Exhs. 1D-1E.) Plaintiff has since attempted to challenge the same decision in several administrative and federal courts (including the United States Supreme Court) under several theories, all of which have been rejected. (ECF No. 6, Exhs. 1A-1L.) Plaintiff now returns to the Eastern District of Pennsylvania to once again challenge the same termination and debarment (Compl. ¶ 81(b)), based on a misguided argument regarding exactly when the clock began to run on his claims.

In April 2015, Plaintiff wrote a letter to the Chairwoman of the MSPB in an effort to re-litigate his termination and debarment claims. (ECF No. 8, Exh. A.) The Board Clerk responded that the prior MSPB decisions were final and that pursuant to pertinent regulations, Plaintiff was not entitled to any further review of the claims. (ECF No. 8, Exh. B.) Plaintiff now maintains it was at this point (receipt of the MSPB's April 29, 2015 letter) that MSPB decisions from 1998 and 2010 (rejecting Plaintiff's appeal regarding the 1998 decision on the basis of res judicata) became final, therefore Plaintiff asserts he had six years from his receipt of said letter to bring a timely claim. (ECF No. 8 at 6.)

12/4/20
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1006

REGINALD L. SYDNOR, Appellant
v.
MARK A. ROBBINS, VICE CHAIRMAN, ET AL.; UNITED STATES MERIT SYSTEMS PROTECTION BOARD ("BOARD"), IN THEIR OFFICIAL MEMBER CAPACITY, AS WELL AS THEIR PREDECESSORS, SUCCESSORS OR ASSIGNS

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 2-18-cv-02631) District Judge: Hon. C. Darnell Jones, II

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having

voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Date: December 4, 2020
PDB/cc: All Counsel of Record

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD
2010 MSPB 163

Docket No. PH-0752-09-0619-I-1

Donald T. McDougall,
Appellant,
v.
Social Security Administration,
Agency.

August 13, 2010

Donald T. McDougall, Esquire, Friendsville, Maryland, pro se.

Robert Drum, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman Anne M. Wagner, Vice Chairman Mary M. Rose, Member

OPINION AND ORDER

The appellant has filed a petition for review of the administrative judge's initial decision that dismissed his alleged constructive removal appeal for lack of jurisdiction. For the reasons set forth below, we DENY the appellant's petition for review, REOPEN the appeal

on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REASSIGN the appeal to an administrative law judge for adjudication.

BACKGROUND

The appellant served as an administrative law judge at the agency's Morgantown, West Virginia, office. Initial Appeal File (IAF), Tab 1 at 1; Tab 6, Subtab 3. The appellant alleged that between July 2006 and August 2008, he had a series of five or six conflicts with his supervisor, the Chief Administrative Law Judge, which led him to announce that he would retire as of January 3, 2009. IAF, Tab 5, Subtab 1 at 7-18; *see* IAF, Tab 6, Subtab 3. On December 2, 2008, the appellant filed a formal complaint of discrimination with his agency's Equal Employment Opportunity (EEO) office. IAF, Tab 6, Subtab 1 at 1, Subtab 2 at 2. In his complaint, the appellant alleged that the Chief Administrative Law Judge subjected him to a hostile work environment and discriminated against him based on his mental and physical disabilities, forcing him to retire. IAF, Tab 6, Subtab 2 at 1-3. The appellant retired as scheduled on January 3, 2009. IAF, Tab 6, Subtab 3. On July 24, 2009, the agency issued its final EEO decision, finding that the agency had not discriminated against the appellant. IAF, Tab 6, Subtab 2 at 1, 13.

The appellant filed a timely appeal with the Board's Northeastern Regional Office. IAF, Tab 1. The administrative judge assigned to the case provided explicit notice to the appellant regarding how to establish Board jurisdiction over an alleged constructive removal appeal and directed him to file evidence and argument proving that the action at issue was within the

Board's jurisdiction. IAF, Tabs 2-3. The appellant and the agency filed responses. IAF, Tabs 5-6. In her initial decision, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to establish that his retirement was involuntary. IAF, Tab 9.

The appellant has filed a petition for review. Petition for Review File (PFR File), Tab 1. The agency has responded in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

The Board will grant a petition for review only when significant new evidence is presented or the administrative judge made an error interpreting a law or regulation. *Lopez v. Department of the Navy*, 108 M.S.P.R. 384, ¶ 16 (2008); 5 C.F.R. § 1201.115(d). The appellant has not met this standard. Therefore, we deny the appellant's petition for review. We reopen the appeal on our own motion under 5 C.F.R. § 1201.118, however, to address the issue of the administrative judge's authority to adjudicate this case.

The Board has original jurisdiction to adjudicate adverse actions against administrative law judges under 5 U.S.C. § 7521. *Social Security Administration v. Long*, 113 M.S.P.R. 190, ¶ 12 (2010); *see Tunik v. Merit Systems Protection Board*, 407 F.3d 1326, 1332-33 (Fed. Cir. 2005). An agency may take an action against 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); *see Long*,

113 M.S.P.R. 190, ¶ 12.

Furthermore, the procedures in an action against an administrative law judge differ from those in adverse action appeals by other federal employees because an administrative law judge is entitled to have his appeal adjudicated under the Administrative Procedures Act (APA), 5 U.S.C. § 551, *et seq.* *See Social Security Administration v. Dantoni*, 77 M.S.P.R. 516, 521, *aff'd*, 173 F.3d 435 (Fed. Cir. 1998) (Table); *Social Security Administration v. Goodman*, 28 M.S.P.R. 120, 124 (1985). The provisions for adverse action appeals under Chapter 75, Subchapter II, *see* 5 U.S.C. §§ 7511-7514, do not apply to adverse actions taken against administrative law judges, *see* 5 U.S.C. § 7512(E).

Under the APA, the taking of evidence and any hearing in an action against an administrative law judge must be presided over by the full Board, one or more Board members, or an administrative law judge. *See* 5 U.S.C. § 556(b). The Board's regulations specifically designate that "[a]n administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge." 5 C.F.R. § 1201.140(a)(1); *see also Dantoni*, 77 M.S.P.R. at 521. The assigned administrative law judge prepares the initial decision, pursuant to 5 U.S.C. § 557, that ultimately can be reviewed by the Board via a petition for review. 5 C.F.R. § 1201.140(a)(2). This same procedure applies when an administrative law judge brings an action affirmatively alleging constructive removal by the agency. 5 C.F.R. § 1201.142.

The appellant's appeal was adjudicated by the administrative judge as an adverse action appeal under

Chapter 75, Subchapter II. IAF, Tab 9. This was error because those provisions do not apply to adverse actions taken against administrative law judges, *see* 5 U.S.C. § 7512(E), and the administrative judge lacked authority to adjudicate the administrative law judge's appeal, *see* 5 U.S.C. § 556(b). Furthermore, given the special procedural rules which apply to actions against administrative law judges, a complaint should have been filed with the Clerk of the Board, rather than with a regional office, for special handling. *See* 5 C.F.R. §§ 1201.137(b), 1201.142.

Thus, it was error to assign the appellant's case to an administrative judge, and the appeal must be adjudicated anew by an administrative law judge under the APA. After the administrative law judge prepares an initial decision, the appellant can seek further review before the full Board. 5 C.F.R. § 1201.140(a)(2).

We therefore VACATE the initial decision and REASSIGN this aof the Board's administrative law judges for adjudication.

William D. Spencer
Clerk of the Board
Washington, D.C.

138 S.Ct. 2044
Supreme Court of the United States

Raymond J. LUCIA, et al., Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION.

No. 17–130.
Argued April 23, 2018.Decided June 21, 2018.

Justice KAGAN delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of the United States," a class of government officials distinct from mere employees. Art. II, § 2, cl. 2. This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such "Officers." In keeping with *Freytag v. Commissioner*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), we hold that they do.

I

The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. See 17 C.F.R. § 201.110 (2017). But the Commission also may, and typically does, delegate that task to an ALJ. See *ibid.*; 15 U.S.C. § 78d–1(a). The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all. See App. to Pet. for Cert. 295a–297a.

An ALJ assigned to hear an SEC enforcement action has extensive powers—the "authority to do all things necessary and appropriate to discharge his or her duties" and ensure a "fair and orderly" adversarial proceeding. §§ 201.111, 200.14(a). Those powers "include, but are not limited to," supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally "[r]egulating the course of" the proceeding and the "conduct of the parties and their counsel"; and imposing sanctions for "[c]ontemptuous conduct" or violations of procedural requirements. §§ 201.111, 201.180; see §§ 200.14(a), 201.230. As that list suggests, an SEC ALJ exercises authority "comparable to" that of a federal district judge conducting a bench trial. *Butz v. Economou*, 438 U.S. 478, 513, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

After a hearing ends, the ALJ issues an "initial decision." § 201.360(a)(1). That decision must set out "findings and conclusions" about all "material issues of fact [and] law"; it also must include the "appropriate order, sanction, relief, or denial thereof." § 201.360(b). The Commission can then review the ALJ's decision, either upon request or *sua sponte*. See § 201.360(d)(1). But if it opts against review, the Commission "issue[s] an order that the [ALJ's] decision has become final." § 201.360(d)(2). At that point, the initial decision is "deemed the action of the Commission." § 78d–1(c).

This case began when the SEC instituted an administrative proceeding against petitioner Raymond Lucia and his investment company. Lucia marketed a retirement savings

strategy called "Buckets of Money." In the SEC's view, Lucia used misleading slideshow presentations to deceive prospective clients. The SEC charged Lucia under the Investment Advisers Act, § 80b–1 *et seq.*, and assigned ALJ Cameron Elliot to adjudicate the case. After nine days of testimony and argument, Judge Elliot issued an initial decision concluding that Lucia had violated the Act and imposing sanctions, including civil penalties of $300,000 and a lifetime bar from the investment industry. In his decision, Judge Elliot made factual findings about only one of the four ways the SEC thought Lucia's slideshow misled investors. The Commission thus remanded for factfinding on the other three claims, explaining that an ALJ's "personal experience with the witnesses" places him "in the best position to make findings of fact" and "resolve any conflicts in the evidence." App. to Pet. for Cert. 241a. Judge Elliot then made additional findings of deception and issued a revised initial decision, with the same sanctions. See *id.*, at 118a.

On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. According to Lucia, the Commission's ALJs are "Officers of the United States" and thus subject to the Appointments Clause. Under that Clause, Lucia noted, only the President, "Courts of Law," or "Heads of Departments" can appoint "Officers." See Art. II, § 2, cl. 2. And none of those actors had made Judge Elliot an ALJ. To be sure, the Commission itself counts as a "Head[ ] of Department[ ]." *Ibid.*; see *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 511–513, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010). But the Commission had left the task of appointing

ALJs, including Judge Elliot, to SEC staff members. See *supra*, at 2049. As a result, Lucia contended, Judge Elliot lacked constitutional authority to do his job.

The Commission rejected Lucia's argument. It held that the SEC's ALJs are not "Officers of the United States." Instead, they are "mere employees"—officials with lesser responsibilities who fall outside the Appointments Clause's ambit. App. to Pet. for Cert. 87a. The Commission reasoned that its ALJs do not "exercise significant authority independent of [its own] supervision." *Id.*, at 88a. Because that is so (said the SEC), they need no special, high-level appointment. See *id.*, at 86a.

Lucia's claim fared no better in the Court of Appeals for the D.C. Circuit. A panel of that court seconded the Commission's view that SECALJs are employees rather than officers, and so are not subject to the Appointments Clause. See 832 F.3d 277, 283–289 (2016). Luciathen petitioned for rehearing en banc. The Court of Appeals granted that request and heard argument in the case. But the ten members of the en banc court divided evenly, resulting in a *per curiam* order denying Lucia's claim. See 868 F.3d 1021 (2017). That decision conflicted with one from the Court of Appeals for the Tenth Circuit. See *Bandimere v. SEC*, 844 F.3d 1168, 1179 (2016).

Lucia asked us to resolve the split by deciding whether the Commission's ALJs are "Officers of the United States within the meaning of the Appointments Clause." Pet. for Cert. i. Up to that point, the Federal Government (as represented by the Department of Justice) had defended the Commission's position that SEC ALJs are employees, not officers. But in

responding to Lucia's petition, the Government switched sides.[1] So when we granted the petition, 583 U.S. ——, 138 S.Ct. 736, 199 L.Ed.2d 602 (2018), we also appointed an *amicus curiae* to defend the judgment below.[2] We now reverse.

II

The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, § 2, cl. 2.[3] And as all parties agree, none of those actors appointed Judge Elliot before he heard Lucia's case; instead, SEC staff members gave him an ALJ slot. See Brief for Petitioners 15; Brief for United States 38; Brief for Court–Appointed *Amicus Curiae* 21. So if the Commission's ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not officers at all, but instead non-officer employees—part of the broad swath of "lesser functionaries" in the Government's workforce. *Buckley v. Valeo*, 424 U.S. 1, 126, n. 162, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). For if that is true, the Appointments Clause cares not a whit about who named them. See *United States v. Germaine*, 99 U.S. 508, 510, 25 L.Ed. 482 (1879).

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine* held that "civil surgeons" (doctors hired to perform various physical exams) were mere

employees because their duties were "occasional or temporary" rather than "continuing and permanent." *Id.*, at 511–512. Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Id.*, at 511. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." 424 U.S., at 126, 96 S.Ct. 612. The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the *amicus* and the Government urge us to elaborate on *Buckley* 's "significant authority" test, but another of our precedents makes that project unnecessary. The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments. See Brief for *Amicus Curiae* 14 (contending that an individual wields "significant authority" when he has "(i) the power to bind the government or private parties (ii) in her own name rather than in the name of a superior officer"); Reply Brief for United States 2 (countering that an individual wields that authority when he has "the power to bind the government or third parties on significant matters" or to undertake other "important and distinctively sovereign functions"). And maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one, because in *Freytag v. Commissioner*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. As we now

explain, our analysis there (sans any more detailed legal criteria) necessarily decides this case.

The officials at issue in *Freytag* were the "special trial judges" (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In "comparatively narrow and minor matters," they could both hear and definitively resolve a case for the Tax Court. *Id.*, at 873, 111 S.Ct. 2631. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to "prepare proposed findings and an opinion" for a regular Tax Court judge to consider. *Ibid.* The proceeding challenged in *Freytag* was a major one, involving $1.5 billion in alleged tax deficiencies. See *id.*, at 871, n. 1, 111 S.Ct. 2631. After conducting a 14–week trial, the STJ drafted a proposed decision in favor of the Government. A regular judge then adopted the STJ's work as the opinion of the Tax Court. See *id.*, at 872, 111 S.Ct. 2631. The losing parties argued on appeal that the STJ was not constitutionally appointed.

This Court held that the Tax Court's STJs are officers, not mere employees. Citing *Germaine*, the Court first found that STJs hold a continuing office established by law. See 501 U.S., at 881, 111 S.Ct. 2631. They serve on an ongoing, rather than a "temporary [or] episodic [,] basis"; and their "duties, salary, and means of appointment" are all specified in the Tax Code. *Ibid.* The Court then considered, as *Buckley* demands, the "significance" of the "authority" STJs wield. 501 U.S., at 881, 111 S.Ct. 2631. In addressing that issue, the Government had argued that STJs are employees, rather than officers, in all cases (like the one at issue) in

which they could not "enter a final decision." *Ibid.*But the Court thought the Government's focus on finality "ignore[d] the significance of the duties and discretion that [STJs] possess." *Ibid.*Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.*, at 881–882, 111 S.Ct. 2631. And the Court observed that "[i]n the course of carrying out these important functions, the [STJs] exercise significant discretion." *Id.*, at 882, 111 S.Ct. 2631. That fact meant they were officers, even when their decisions were not final.[4]

Freytag says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. See *id.*, at 881, 111 S.Ct. 2631. Indeed, everyone here—Lucia, the Government, and the *amicus*—agrees on that point. See Brief for Petitioners 21; Brief for United States 17–18, n. 3; Brief for *Amicus Curiae* 22, n. 7. Far from serving temporarily or episodically, SEC ALJs "receive[ ] a career appointment." 5 C.F.R. § 930.204(a) (2018). And that appointment is to a position created by statute, down to its "duties, salary, and means of appointment." *Freytag*, 501 U.S., at 878, 111 S.Ct. 2631; see 5 U.S.C. §§ 556–557, 5372, 3105.

Still more, the Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. *Freytag*, 501 U.S., at 878, 111 S.Ct. 2631. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial

judges. See *Butz*, 438 U.S., at 513, 98 S.Ct. 2894; *supra*, at 2049 – 2050. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission's ALJs (like the Tax Court's STJs) "take testimony." 501 U.S., at 881, 111 S.Ct. 2631. More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. 17 C.F.R. §§ 201.111(c), 200.14(a)(4); see 5 U.S.C. § 556(c)(4). Second, the ALJs (like STJs) "conduct trials." 501 U.S., at 882, 111 S.Ct. 2631. As detailed earlier, they administer oaths, rule on motions, and generally "regulat[e] the course of" a hearing, as well as the conduct of parties and counsel. § 201.111; see §§ 200.14(a)(1), (a)(7); *supra*, at 2049 –2050. Third, the ALJs (like STJs) "rule on the admissibility of evidence." 501 U.S., at 882, 111 S.Ct. 2631; see § 201.111(c). They thus critically shape the administrative record (as they also do when issuing document subpoenas). See § 201.111(b). And fourth, the ALJs (like STJs) "have the power to enforce compliance with discovery orders." 501 U.S., at 882, 111 S.Ct. 2631. In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. See § 201.180(a)(1). So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. 501 U.S., at 873, 111 S.Ct. 2631;

see *supra,* at 2052. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. See § 201.360(b); *supra,* at 2049 – 2050. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag,* a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. See 501 U.S., at 873, 111 S.Ct. 2631. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." § 201.360(d)(2); 15 U.S.C. § 78d–1(c); see *supra,* at 2049 – 2050. That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too.

The *amicus* offers up two distinctions to support the opposite conclusion. His main argument relates to "the power to enforce compliance with discovery orders"—the fourth of *Freytag* 's listed functions. 501 U.S., at 882, 111 S.Ct. 2631. The Tax Court's STJs, he states, had that power "because they had authority to punish contempt" (including discovery violations) through fines or imprisonment. Brief for *Amicus Curiae* 37; see *id.,* at 37, n. 10 (citing 26 U.S.C. § 7456(c)). By contrast, he observes, the Commission's ALJs have less capacious power to sanction misconduct. The *amicus* 's secondary distinction involves how the Tax Court and Commission, respectively, review the factfinding of STJs and ALJs. The Tax Court's rules state that an STJ's findings of fact "shall be presumed" correct. Tax Court Rule 183(d). In comparison, the *amicus* notes, the SEC's regulations

include no such deferential standard. See Brief for *Amicus Curiae* 10, 38, n. 11.

But those distinctions make no difference for officer status. To start with the *amicus*'s primary point, *Freytag* referenced only the general "power to enforce compliance with discovery orders," not any particular method of doing so. 501 U.S., at 882, 111 S.Ct. 2631. True enough, the power to toss malefactors in jail is an especially muscular means of enforcement—the nuclear option of compliance tools. But just as armies can often enforce their will through conventional weapons, so too can administrative judges. As noted earlier, the Commission's ALJs can respond to discovery violations and other contemptuous conduct by excluding the wrongdoer (whether party or lawyer) from the proceedings—a powerful disincentive to resist a court order. See § 201.180(a)(1)(i); *supra*, at 2053 – 2054. Similarly, if the offender is an attorney, the ALJ can "[s]ummarily suspend" him from representing his client—not something the typical lawyer wants to invite. § 201.180(a)(1)(ii). And finally, a judge who will, in the end, issue an opinion complete with factual findings, legal conclusions, and sanctions has substantial informal power to ensure the parties stay in line. Contrary to the *amicus*'s view, all that is enough to satisfy *Freytag* 's fourth item (even supposing, which we do not decide, that each of those items is necessary for someone conducting adversarial hearings to count as an officer).

And the *amicus*'s standard-of-review distinction fares just as badly. The *Freytag* Court never suggested that the deference given to STJs' factual findings mattered to its Appointments Clause analysis. Indeed, the relevant part of *Freytag* did not so much as mention the subject

(even though it came up at oral argument, see Tr. of Oral Arg. 33–41). And anyway, the Commission often accords a similar deference to its ALJs, even if not by regulation. The Commission has repeatedly stated, as it did below, that its ALJs are in the "best position to make findings of fact" and "resolve any conflicts in the evidence." App. to Pet. for Cert. 241a (quoting *In re Nasdaq Stock Market, LLC*, SECRelease No. 57741 (Apr. 30, 2008)). (That was why the SEC insisted that Judge Elliot make factual findings on all four allegations of Lucia's deception. See *supra*, at 2050.) And when factfinding derives from credibility judgments, as it frequently does, acceptance is near-automatic. Recognizing ALJs' "personal experience with the witnesses," the Commission adopts their "credibility finding[s] absent overwhelming evidence to the contrary." App. to Pet. for Cert. 241a; *In re Clawson*, SEC Release No. 48143 (July 9, 2003). That practice erases the constitutional line the *amicus* proposes to draw.

The only issue left is remedial. For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. See *supra*, at 2051. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder v. United States*, 515 U.S. 177, 182–183, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that

claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id.*, at 183, 188, 115 S.Ct. 2031. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard **Lucia's** case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before.[5] To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which **Lucia** is entitled.[6]

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.
It is so ordered.

Footnotes
1In the same certiorari-stage brief, the Government asked us to add a second question presented: whether the statutory restrictions on removing the Commission's ALJs are constitutional. See Brief in Response 21. When we granted certiorari, we chose not to take that step. See 583 U.S. ——, 138 S.Ct. 736, 199 L.Ed.2d 602 (2018). The Government's merits brief now asks us again to address the removal issue. See Brief for United States 39–55. We once more decline. No court has addressed that question, and we ordinarily await "thorough lower court opinions to guide our analysis of the merits." *Zivotofsky v. Clinton*, 566 U.S. 189, 201, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012).

2We appointed Anton Metlitsky to brief and argue the case, 583 U.S. ——, 138 S.Ct. 736, 199 L.Ed.2d 602 (2018), and he has ably discharged his responsibilities.

3That statement elides a distinction, not at issue here, between "principal" and "inferior" officers. See *Edmond v. United States*, 520 U.S. 651, 659–660, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997). Only the President, with the advice and consent of the Senate, can appoint a principal officer; but Congress (instead of relying on that method) may authorize the President alone, a court, or a department head to appoint an inferior officer. See *ibid.* Both the Government and **Lucia** view the SEC's ALJs as inferior officers and acknowledge that the Commission, as a head of department, can constitutionally appoint them. See Brief for United States 38; Brief for Petitioners 50–51.

4The Court also provided an alternative basis for viewing the STJs as officers. "Even if the duties of [STJs in major cases] were not as significant as we ... have found them," we stated, "our conclusion would be unchanged." *Freytag*, 501 U.S., at 878, 111 S.Ct. 2631. That was because the Government had conceded that in minor matters, where STJs could enter final decisions, they had enough "independent authority" to count as officers. *Ibid.* And we thought it made no sense to classify the STJs as officers for some cases and employees for others. See *ibid.* Justice SOTOMAYOR relies on that back-up rationale in trying to reconcile *Freytag* with her view that "a prerequisite to officer status is the authority" to issue at least some "final decisions." *Post*, at 2066 – 2067 (dissenting opinion). But *Freytag* has two parts, and its primary analysis explicitly rejects Justice SOTOMAYOR's theory that final decisionmaking authority is a *sine qua non* of officer status. See 501 U.S., at 881–882, 111 S.Ct.

2631. As she acknowledges, she must expunge that reasoning to make her reading work. See *post,* at 2066 – 2067 ("That part of the opinion[ ] was unnecessary to the result").

5Justice BREYER disagrees with our decision to wrest further proceedings from Judge Elliot, arguing that "[f]or him to preside once again would not violate the structural purposes [of] the Appointments Clause." *Post,* at 2064 (opinion concurring in judgment in part and dissenting in part). But our Appointments Clause remedies are designed not only to advance those purposes directly, but also to create "[ ]incentive [s] to raise Appointments Clause challenges." *Ryder v. United States,* 515 U.S. 177, 183, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995). We best accomplish that goal by providing a successful litigant with a hearing before a new judge. That is especially so because (as Justice BREYER points out) the old judge would have no reason to think he did anything wrong on the merits, see *post,* at 2064 — and so could be expected to reach all the same judgments. But we do not hold that a new officer is required for every Appointments Clause violation. As Justice BREYER suggests, we can give that remedy here because other ALJs (and the Commission) are available to hear this case on remand.See *ibid.* If instead the Appointments Clause problem is with the Commission itself, so that there is no substitute decisionmaker, the rule of necessity would presumably kick in and allow the Commission to do the rehearing. See *FTC v. Cement Institute,* 333 U.S. 683, 700–703, 68 S.Ct. 793, 92 L.Ed. 1010 (1948); 3 K. Davis, Administrative Law Treatise § 19.9 (2d ed. 1980).

6While this case was on judicial review, the SEC issued an order "ratif[ying]" the prior appointments of its ALJs. Order (Nov. 30, 2017), online at

https://www.sec.gov/litigation/opinions/2017/33-10440.pdf (as last visited June 18, 2018). Lucia argues that the order is invalid. See Brief for Petitioners 50–56. We see no reason to address that issue. The Commission has not suggested that it intends to assign Lucia's case on remand to an ALJ whose claim to authority rests on the ratification order. The SEC may decide to conduct Lucia's rehearing itself. Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification.

Hon. Susan Tsui Grundmann, April 10, 2015
Chairwoman
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

RE: Board's Refusal to Vacate Flawed Administrative Law Judge Adverse Action Board Decisions, Rendered Without 5 USC 7521 Due Process.

Docket No. PH-0752-98-0213-I-1
Docket No. PH-0731-98-0188-I-1
Docket No. CB-7521-10-0003-T-1

Dear Honorable Chairwoman Grundmann:

I am writing this letter to you because I am sure you appointment as Chairwoman by President Barrack Obama was in order to fix some of the obvious problems with the Merit System Protection Board (Board). Said obvious problem exists when a simple review of my Board appeal decisions in Docket Nos. PH-0752-98-0213-I-1 and PH-0731-98-0188-I-1, clearly demonstrates an on the face Board error in its statutory authority and jurisdiction.

The Board is well aware and condones a Board administrative judge usurping 5 USC 7521 mandated due process procedures and the adjudication of flawed Administrative Law Judge adverse action Board decisions in these appeals. My repeated petitions and motions to the Board to reopen these appeals and to vacate these flawed Board decisions have been systematically blocked, ignored, and quashed by the

Board, including the current Board on which you sit as the Chair.

As for my federal background, I am a U.S. honorably discharged disabled veteran with close to 20 years of federal civil and military service. I have served as a DEA Task Force Administrator and practice with the EEOC for over 15 years as an experience trial attorney, supervisor trial attorney, supervisor appeals judge and regional attorney. In March 1997, the Social Security Administration (SSA) appointed and employed me as an Administrative Law Judge in the SSA's Voorhees, New Jersey Appeals Office.

In late October 1997, the OPM unilaterally determined me unsuitable for federal employment and debarred from federal employment for three years. OPM instructed the SSA to remove me. (A questionable OPM practice that was banned by your Board's decision in Aguzie V OPM, 2011 MSPB 10.).

Up until this time, my federal record was void of any disciplinary problems, either military or civilian. I have always been a practicing attorney and a member in good standing with the Pennsylvania Bar, now for over 40 years.

I appealed the OPM determination to the then Board, as a clear 5 USC 7521 adverse action against an agency employed Administration Law Judge. Oddly, without explanation, the Board mysteriously channeled my Board appeals to a Board administrative judge for adjudication, rather than to assign them to the Board's Office of Administrative Law Judge.

Believing it was an administrative mistake, I immediately petitioned the Board to transfer my Board appeals to the Board's Office of Administrative Law Judge, pursuant to the due process statutory mandates of 5 USC 7521. When the Board blocked and ignored my

petition, it became clear the Board was intentionally circumventing 5 USC 7521, the Board's own regulations and established Board case law. The Board never gave an explanation for its unprecedented actions.

Ignoring the 5 USC 7521 due process procedures, the Board administrative judge administered an ad hoc Board proceeding, adjudicating me unsuitable for federal employment, ordering me debarred from federal service and removing me from my SSA Administrative Law Judge employment. In doing so, the administrative judge disregard the "for good cause" standard of review, mandated in the adjudication of an Administrative Law Judge's adverse action. (Board Docket Nos. PH-0732-98-0213-I-1 and PH-0731-98-0188-I-1).

In my petition to that Board for review, I again demanded my statutory due process rights and for the Board to vacate the flawed Board administrative judge's adjudication and decision. I requested the Board to remand my Board appeals to the Board's Office of Administrative Law Judge, for proper 5 USC 7521 due process procedure and adjudication.

On December 30, 1998, that Board, again without any explanation or comment, denied my petition for review, which automatically affirmed the flawed administrative judge's adjudication and decision. Effective December 30, 1998, the SSA cut a Form 50 removing me from my Administrative Law Judge employment, citing the flawed Board administrative judge's decision for its authority.

In early January 2001, following the end of the debarment, I immediately requested the SSA to reemploy me to my Administrative Law Judge position. I considered myself still employed as a SSA Administrative Law Judge, since the SSA, as my employing agency, never sought to procedurally remove

me "for good cause", pursuant to mandated procedures set forth by 5 USC 752L The SSA was well aware of the mandated 5 USC 7521 Board procedures needed for any agency adverse action against an employed Administrative Law Judge.

For the next seven years, the SSA and the OPM played "Monkey in the Middle" with me. They tossed the reemployment issue back and forth as to what would be the procedure? and what agency had to initiate the process to reemploy me? Even after the OPM finally made clear that the SSA could reemploy me, the SSA fabricated excuse after excuse to avoid my reemployment.

In a desperate effort to get the SSA to reemploy me, I even took the Administrative Law Judge examination again, so the SSA could select me as a newly hired Administrative Law Judge. Although I scored at the top of OPM's certification list for Administrative Law Judge selection, the SSA never selected me for reemployment.

Since the SSA never sought a procedural 5 USC 7521 Board removal of me and yet refused to reemploy me, I had to take early federal retirement in late 2009. I appealed the SSA's actions to the Board, which you now chair, as an adverse constructive removal and forced retirement, pursuant the procedures set forth in 5 USC 7521. (Board Docket No.CB-7521-10-0003-T-1).

Noting your Board's then recent decision in the McDougall V. SSA, 2010 MSPB 163, I likewise motioned your Board to also vacate the obvious flawed administrative judge's adverse action decision in my Board Docket Nos. PH-0732-98-0213-I-1 and PH-0731-98-0188-I-1. In McDougall, your Board reopened Judge McDougall's adverse action appeal on its own motion and vacated the Board administrative judge's flawed

decision. Your Board made crystal clear, what was obvious all along, that a Board administrative judge had no Board subject matter jurisdiction to adjudicate an employed agency Administrative Law Judge adverse action.

Unlike what your Board did on its own motion in the McDougall Board appeal, your Board ignored my motion for your Board to reopen and vacate the same flawed Board administrative judge's adverse action decision in my Board Docket Nos. PH-0732-98-0213-I-1 and - PH-98-0731-0188-I-1. Based upon your Board's refusal to vacate my previously flawed Board adverse action decision, shortly thereafter, a Board Administrative Law Judge dismissed my Board appeal Docket No. CB-7521-10-0003-T-1, for res judicata. Again, without comment, your Board denied my petition for your Board to review my previously denied statutory due process rights. The Federal Circuit, also without comment, affirmed your Board's unexplained disparate actions.

To this date, I remain the only employed federal agency Administrative Law Judge to ever be discipline, removed and kept from federal employment by the Board, without mandatory 5 USC 7521 adverse action due process rights. As a matter of law, the Board does not have any discretion, and certainly not a discriminatory discretion, to decide which Administrative Law Judge will or will not receive 5 USC 7521 due process rights. I never lost these statutory rights and the Board is without any authority or jurisdiction to take them. At this point, I would like for the Board to either reopen and vacate these flawed Board decisions or to personally explain to me what makes me so different from any other Administrative Law Judge to deserve the Board to discipline me from

federal service, without mandated statutory due process.

Respectfully,

Reginald L. Syndnor
Administrative Law Judge
731 Buck Lane
Haverford, PA. 19041
856 816-0193
regsyn@aol.com

U.S. MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419
Phone: 202 653 7200; Fax 202 653 7130;
E-Mail: mspb@mspb.gov

April 29, 2015
Mr. Reginald L. Sydnor
731 Buck Lane
Haverford, PA 19041

Re: *Reginald L. Sydnor v. Office of Personnel Management and Social Security Administration*
MSPB Docket Nos. PH-0731-98-0188-I-1, PH-0752-98-0213-I-1;
Reginald L. Sydnor v. Social Security Administration
MSPB Docket No. CB-7521-10-0003-T-1

Dear Mr. Sydnor:

This is in response to your April 10, 2015 request for reconsideration of the Board's orders dated December 30, 1998 and March 7, 2011, in the appeals named above.

The orders included a specific statement that they represent the final decisions of the Board in these appeals and also notified you of your further review rights. The Board's regulations do not provide for your request for reconsideration of the Board's final decisions. There is, therefore, no further right to review of these appeals by the Board.

Sincerely,

William D. Spencer
Clerk of the Board

Hon. Susan Tsui Grundmann, May 28, 2015
Chairwoman
Merit Systems Protection Board (Board)
1615 M Street, NW
Washington, DC 20419

RE: Board's Refusal to Vacate Flawed Administrative Law Judge Adverse Action Board Decisions, Rendered Without 5 USC 7521 Due Process.

Docket No. PH-0752-98-0213-I-1
Docket No. PH-0731-98-0188-I-1
Docket No. CB-7521-10-0003-T-1

Dear Honorable Chairwoman Grundmann:

I am in receipt of your April 29, 2015 letter responding to my April 10, 2015 letter to you, addressing the Board's unexplainable discipline and removal of me from my employed agency Administrative Law Judge position, without 5 USC 7521 statutory due process. I have attached both letters for your immediate reference.

Although the Board insists that it must have a Board regulation to reconsider my per se flawed Board final decisions, the record will always demonstrate that the Board knowingly issued these flawed Board final decisions in violation of federal due process statutes, corresponding Board regulations and established Board case law. Furthermore, it will always be established that the Board intended to discipline, remove and keep me removed from my federal employment, without the 5 USC 7521 due process protection afforded other Administrative Law Judges.

It is clear from the Board's actions in my case that the Board, on its own, has an unwritten policy to arbitrarily and capriciously select what Administrative Law Judge will or will not receive 5 USC 7521 due process protection in an Administrative Law Judge adverse action.

Ironically, on May 11, 2015, the Board released a Report and Appendix to the President, President of the Senate and the Speaker of the House of Representatives titled "What is Due Process in Federal Civil Service Employment". However, the Report and Appendix avoid any reference to the Board's unwritten policy to selectively apply and enforce the due process provisions of 5 USC 7521, corresponding Board regulations and established Board case law.

Respectfully,

Reginald L. Sydnor
Administrative Law Judge

Attachments:
CC: Mark A. Robbins, Board Member
Office of Policy and Evaluation

No. 00-

In the

Supreme Court of the United States

REGINALD L. SYDNOR,
Petitioner,
v.
SOCIAL SECURITY ADMINISTRATION, AND THE
OFFICE OF PERSONNEL MANAGEMENT,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Reginald L. Sydnor
Attorney for Petitioner
731 Buck Lane
Haverford, PA 19041
(610) 649-0327

QUESTIONS PRESENTED

I.

Are Federal Administrative Agencies Constitutionally Mandated to Comply with Federal Statutory and Regulatory Disciplinary Due Process Procedures when Disciplining Federal Employees.

II.

Is a Federal District Court Mandated to Comply with Federal Statutory Due Process Procedure In the Appeal of an Administrative Federal Employer Discrimination Case.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the United States Merit Systems Protection Board now becomes a necessary party to this proceeding because its administrative procedure and judgment are also sought to be reviewed by this Court.

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TABLE OF APPENDICES

5 C.F.R. § 1201.140 provides in relevant part:

> (a) Judge. (1) Administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge.

5 C.F.R. § 1201.142 provides in relevant part:

> An administrative law judge who alleges that an agency has interfered with the judge's qualified decisional independence so as to constitute an unauthorized action under 5 U.S.C. 7521 may file a complaint with the Board under this subpart.

STATEMENT OF THE CASE

One of the fundamental questions involved in this case is whether a federal employee is entitled to relief from a district court judgment, endorsing federal administrative agencies' strict discipline of a federal employee, in total disregard of established statutory and regulatory due process disciplinary procedure. The question arises in the context of the Social Security Administration (SSA) and the MSPB removing an appointed Administrative Law Judge (ALJ) from his position without affording disciplinary due process procedures set forth in 5 U.S.C. § 7521 and 5 C.F.R. §§ 1201.137(a), 1201.140(a) and 1201.142.

Another essential question involved in this case is whether a district court judgment should be vacated and remanded when established statutory due process procedure for the litigation of administratively appealed federal employment discrimination matters is

abandoned by the on March 31, 1998, Petitioner again duly appealed to the MSPB all SSA disciplinary removal suspension actions against Petitioner from September 2, 1997 to February 12, 1998 and indefinitely beyond. Petitioner specifically appealed all SSA's disciplinary removal actions against Petitioner as denying statutory due process and racially motivated in violation of Title VII of the Civil Rights Act of 1964 (MSPB Docket No: PH-0752-98-0213-I-1) (App. J). Petitioner again appealed to the venue Northeastern Regional MSPB office. Again, without any explanation, Petitioner's appeal was transferred to the Washington Regional MSPB office and assigned to the same regional AJ (App. J).

On April 17, 1998, Petitioner motioned the AJ to consolidate both MSPB Docket Nos: PH-0731-98-0188-I and PH-0752-98-0213-I-1 and forward the cases to the appropriate MSPB office of Administrative Law Judge, pursuant to 5 C.F.R. § 1201.140. The AJ denied Petitioner's motion (App. G). On May 4, 1998, Petitioner appealed interlocutory to the clerk of the MSPB to have both appeals assigned and adjudicated by a MSPB Administrative Law Judge pursuant to 5 C.F.R. 1201.140 and to have the SSA named as an appealed MSPB party, pursuant to the mandate of 5 U.S.C. § 7521. The clerk of the MSPB also denied Petitioner's request (App. F).

On June 3, 1998, the AJ dismissed all Petitioner's appealed SSA disciplinary actions and related discrimination charge against the SSA for lack of MSPB subject matter jurisdiction (App. E). On June 11, 1998, the AJ affirmed OPM's unsuitability determination and ruled Petitioner failed to prove OPM violated the Rehabilitation Act of 1973 (App. D).

Petitioner duly petitioned the MSPB for review of the AJ's initial decision in both appeals. Petitioner

petitioned the MSPB to reverse the AJ's finding that the MSPB lacked subject matter jurisdiction over the SSA's disciplinary removal of Petitioner from his Administrative Law Judge position, pursuant to 5 U.S.C. § 7521, 5 C.F.R. §§ 1201.137, 1201.140(a) and 1201.142. Likewise, inter alias, Petitioner petitioned the MSPB to vacate any AJ findings on OPM's suitability determination and on the discrimination violation, pursuant to 5 C.F.R. §§ 1201.137 and 1201.140. On December 30, 1998, the MSPB consolidated both Petitioner's petitions for review and denied them without comment or opinion (App. C).

Pursuant to 5 C.F.R. § 1201.115(d)(1), on January 19, 1999, Petitioner petitioned the MSPB for reconsideration of its denial of the SSA subject matter, jurisdiction, inter alias, pursuant to newly discovered SSA FOIA information and contradictory actions of the SSA and the MSPB in the comparison *casein the matter of I. Speilman, Administrative Law Judge, Social Security Administration, Departments of Health, Education and Welfare*, 1MSPB 51, 1MSPR 54 (1979). (A Caucasian SSA Administrative Law Judge suspended sixty days, for falsification of application documents, only after opportunity for a hearing before a MSPB Administrative Law Judge).

On January 26, 1999, the MSPB informed Petitioner by letter that he had no administrative right to reconsideration, the matter was administratively closed and Petitioner's only other recourse was court proceedings (App. J). Neither Petitioner reconsideration request or the MSPB letter denial was made part of the MSPB certified record.

Furthermore, Petitioner appealed the District Court's determination that the MSPB can arbitrarily ignore its statutory due process mandate and change its

regulatory due process procedural demands for the discipline of a particular SSA, Administrative Law Judge. Petitioner also requested the Fourth Circuit Court of Appeals to remand the case back to the District Court for a trial *de novo* on the administrative discrimination issues, pursuant to 5 U.S.C. § 7703.

On March 30, 2000, the Fourth Circuit of Appeals found no error in the District Court's findings and affirmed the District Court's judgment. Petitioner petitioned the Fourth Circuit Court of Appeals for a rehearing and hearing en banc which were denied on July 10, 2000.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING ON THE CONSTITUTIONAL DEMAND FOR DUE PROCESS WHEN REMOVING A FEDERAL EMPLOYEE FROM FEDERAL EMPLOYMENT.

Petitioner's petition for writ of certiorari should be granted because the decision below conflicts with this Court's important prior rulings on the importance of due process when depriving an individual of life, liberty or property. Said deprivation must be preceded by notice and opportunity for a hearing appropriate to the case. The due process clause requires some kind of hearing prior to the discharge of an employee who has a constitutionally

APPENDIX C—ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD DATED DECEMBER 30, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBERS
PH-0731-98-0188-I-1
PH-0752-98-0213-I-1

REGINALD L. SYDNOR,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

and

SOCIAL SECURITY ADMINISTRATION,

Agencies.

DATE: DEC 30 1998

***

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Appendix C

ORDER

After full consideration, we join these appeals for adjudication pursuant to 5 C.F.R. §§ 1201.36(a)(2) and 1201.117(a)(5), and we DENY the appellant's petitions for review of the initial decisions issued on June 3, 1998 and June 11, 1998, because they do not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeals. The initial decisions in these appeals are now final. 5 C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS IN APPEAL
PH-0731-98-0188-I-1

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). 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(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5

U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

APPENDIX F—LETTER FROM ROBERT E. TAYLOR, UNITED STATES MERIT SYSTEMS PROTECTION BOARD TO ALAN B. EPSTEIN, ESQ. DATED MAY 12, 1998

U.S. MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Ave., NW.
Washington, DC 20419

Clerk of the Board
May 12, 1998

Alan B. Epstein, Esq.
The Bellevue, 9th Floor
Broad Street at Walnut
Philadelphia, PA 19102

RE: *Reginald L. Sydnor v. Office of Personnel Management* Docket No. PH-0731-98-0188-I-1
Reginald L. Sydnor v. Social Security Administration Docket No. PH-0752-98-0213-I-1

Dear Mr. Epstein:

This is in response to your filings dated May 4, 1998, captioned "Petition for Review of Judge Armstrong's Denial of Appellant's Motion for Certification of an Interlocutory Appeal on the Issue of Whether Appeal No. PH-0731-98-0188-I-1 Should be Heard by An Administrative Law Judge and Whether the Social Security Administration is a Proper Responding Agency to That Appeal", "Appellant's Motion to Have Both Appealed Actions Against Both

Agencies Assigned and Heard by an Administrative Law Judge", "Memorandum of Law in Support of Appellant's Motion for a Hearing on Both Appeals Before an Administrative Law Judge", and "Appellant's Motion for Certification of and Interlocutory Appeal on the Issue of Whether Appeal No. PH-0731-98-0188-I-1 Should be Heard by an Administrative Law Judge and Whether the Social Security Administration is a Proper Responding Agency to that Appeal".

The Board's regulations do not provide for a petition for review of an administrative judge's denial of a motion for certification of an interlocutory appeal. Further, the Board does not entertain motions for certification of interlocutory appeals. Such a motion can be made only to the judge, in this case, Judge Armstrong, under the provisions of 5 C.F.R. § 1201.93.

As you are aware, our regulations provide that an administrative judge's initial decision may be reviewed by the Board on petition for review after the initial decision is issued. Any disagreements a party may have with a ruling or determination by the judge may be made on petition for review. Therefore, parties should raise and preserve objections during proceedings in order to raise them on petition for review.

Your filings are being forwarded to Judge Armstrong for inclusion in the records.

Sincerely,

s/ Robert E. Taylor
Robert E. Taylor

APPENDIX G—ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, WASHINGTON REGIONAL OFFICE DENYING APPELLANT'S MOTION FOR INTERLOCUTORY APPEAL AND DENYING MOTION FOR PETITION FOR REVIEW OF DENIAL DATED MAY 5, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
PH-0731-98-0188-I-1

REGINALD L. SYDNOR,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Agency.

DATE: MAY 5, 1998

* * *

By motion dated April 23, 1998, the appellant filed an interlocutory appeal seeking review of my order denying his motions to have the appeal of OPM's suitability determination heard by an administrative law judge and to name the Social Security Administration as a party in the suitability appeal. Although the motion for

an interlocutory appeal was denied in a subsequent status conference, the denial was erroneously not memorialized for the record.

Pursuant to the Board's regulation, an administrative judge will certify a ruling for review only if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to the party or the public. 5 C.F.R. § 1201.92. Although the appellant disagrees with my rulings, it is my determination that that the issues in question do not present an important question of law or policy about which there should be a substantial basis for a difference of opinion. Accordingly, the appellant's motion for an interlocutory appeal is DENIED.

Subsequent to my oral denial of his motion for an interlocutory appeal, by submission dated May 5, 1998, the appellant filed a motion seeking petition for review of my ruling on this issue. The appellant's motion is frivolous and reflects a failure to review the Board's regulations or relevant caselaw prior to filing the motion. The Board's regulations for an interlocutory appeal expressly provide that: "[i]f the judge denies the motion, the party that sought certification may raise the matter at issue in a petition for review filed *after* the initial decision is issued, in accordance with §§ 1201.113 and 1201.114." 5 C.F.R. § 1201.93(b) (emphasis supplied). *See Crumbaker v. Department of Labor*, 7 M.S.P.R. 84, 91 (1981); *Bauer v. Department of the Treasury*, 4 M.S.P.R. 357, 358 (1980). As the appellant is undoubtedly aware, no initial decision has yet been issued in this appeal. At the time an initial decision is issued, the appellant will receive instructions on how to file a petition for review

with the full Board. Until that time, his motion is premature and is DENIED.

FOR THE BOARD: s/ Sherry A. Armstrong
Sherry A. Armstrong
Administrative Judge

RELEVANT PROVISONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall...be deprived of life, liberty, or property, without due process of law..."

Article II, 2, cl 2 of the United States Constitution provides in part:

"...the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments"

5 U.S.C 556 provides in relevant part:

This section applies, according to the provisions thereof, to hearings required by 553 or 554 of this title to be conducted in accordance with this section

(b) There shall preside at taking of evidence-

(3) one or more administrative law judges appointed under 3105 of this title.

5 U.S.C. 557 provides in relevant part:

This section applies, according to the provision thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of evidence, the presiding employee or....an employee qualified to preside at the hearing pursuant to section 556 of this title, shall initially decide the case...

5 U.S.C. 702 provides in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the grounds that it is against the United States or that the United States is an indispensable party....

5 U.S.C 7511 provides in relevant part:

(a) For the purpose of this subchapter-

(1) "employee" means-

(A) an individual in the competitive service-

5 U.S.C. 7512 provides in relevant part:

This subchapter applies to-

(1) a removal;

(2) a suspension for more than 14 days;

but does not apply to-

(E) an action initiated under section 1215 or 7521 of this title, or

(F) a suitability action taken by the office under regulations prescribed by the office, subject to the rules prescribed by the president under this title for administration of the competitive service.

5 U.S.C. 7513 provides in relevant part:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

5 U.S.C. 7514 provides:

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as to concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

5 U.S.C 7521 provides in relevant part:

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established, and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board (MSPB).

(b) The actions covered by this section are

(1) a removal;

(2) a suspension;

5 U.S.C 7703 (C) provides in relevant part:

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the Court shall review the record and hold unlawful and set aside any agency action...except that in the case of discrimination brought under any section referred to in subsection (b) (2) of this section, the employee or applicant shall have the right to have the facts subject to trial *de nova* by the reviewing Court.

28 U.S.C. 1254 provides in relevant part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. 1361 provides;

The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. 1651 provides in part:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective

jurisdictions and agreeable to the usage and principles of law.

5 C.F.R. 1201.118 provides:

Board reopening of final decisions. Regardless of any other provision of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law.

5 C.F.R. 1201. 137 provides in relevant part:

(a) Covered actions. The jurisdiction of the Board, under 5 U.S.C 7521 and this subpart with respect to actions against administrative law judges is limited to proposals by an agency to take any of the following actions against an administrative law judge:

(1) removal;

(2) suspension;

5 C.F.R. 1201. 140 provides in relevant part:

(a) Judge. (1) Administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge.

5 C.F.R. 1201.142 provides in relevant part:

An administrative law judge who alleges that an agency has interfered with the judge's qualified decisional independence so as to constitute an