ORIGINAL

No. 23-127

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SUPREME COURT, U.S.

In the Supreme Court of the United States

LEONARD COOPERMAN,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Leonard Cooperman
Petitioner Pro Se
178 Juniper Ridge Drive
Feeding Hills, MA 01030
(786)252-7615
LennyJ1952@yahoo.com

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SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Petitioner, who was employed as an Administrative Law Judge (ALJ) by Respondent, was the subject of removal proceedings for "conduct unbecoming of an ALJ." Petitioner asserted that such a charge was void for vagueness citing other federal circuit decisions such as *Bence v. Breier*, 501 F. 2d 1185 (7th Cir. 1974). *See also* this Court's decisions in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) and *Airport Commission v. Jews for Jesus*, 482 U.S. 569 (1987); as well as *Garcetti v. Ceballos*, 547 U.S. 410 (2006) a case dealing with when it is permissible to circumscribe speech by public sector employees, and impose discipline upon them for it.

His removal was also sought because he followed the Program Operations Manual System in resolving cases, which the Respondent contended he had no right to do.

The Questions Presented are:

1. Is the "conduct unbecoming" standard for subjecting an employee to disciplinary proceedings unconstitutionally vague, and therefore violative of the Due Process Clause of the Fifth Amendment to the United States Constitution in a situation where free speech concerns are implicated?

2. Is an ALJ, employed by the Respondent, required to follow the Respondent's Program Operations Manual System (POMS) and if so, does doing so insulate him from discipline for matters covered by the POMS?

PARTIES TO THE PROCEEDINGS

Petitioner and Appellant-Respondent below

- Leonard Cooperman

Respondent and Appellee-Petitioner below

- United States Social Security Administration

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Federal Circuit

No. 2022-1915

Leonard Cooperman, *Petitioner,* v. Social Security Administration, *Respondent*

Date of Final Opinion: May 16, 2023

Date of Rehearing Denial: June 13, 2023

Merit Systems Protection Board

No. CB-7521-16-0001-T-1

Social Security Administration, *Petitioner,* v. Leonard Cooperman, *Respondent*

Date of Final Order: May 27, 2022

Merit Systems Protection Board, Administrative Law Judge

No. CB-7521-16-0001-T-1

Social Security Administration, *Petitioner,* v. Leonard Cooperman, *Respondent*

Date of Final Order: March 16, 2017

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PETITION FOR A WRIT OF CERTIORARI

LEONARD COOPERMAN, Petitioner here, in the Court of Appeals, and before the full Merit Systems Protection Board (MSPB), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, but bears Federal Circuit case number 22-1915 and is attached at App.1a to this petition.

The opinions of the ALJ designated by the MSPB to hear and decide this case, and of the full MSPB are, likewise, not reported but are also attached at App.51a and App.13a, respectively, to this Petition.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2023. A petition for rehearing was filed on May 26, 2023 and denied on June 13, 2023. (App.262a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, REGULATORY, AND POLICY PROVISIONS INVOLVED

U.S. Const., amend. V

> No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The following regulatory provisions and guidance are reproduced in the appendix.

- 5 C.F.R. § 2635.101(b)(8), (14) relates to Question 1. (App.264a)
- Social Security Ruling (SSR) 13-2p(15) relates to Question 2. (App.268a)

INTRODUCTION AND HISTORY OF THE CASE

This case presents an evident and unmistakable conflict between the Federal Circuit and the Seventh Circuit over a significant Constitutional question: whether-consistent with the Due Process clause of the 5th Amendment—an Administrative Law Judge can be removed from office under the "conduct unbecoming an ALJ" standard; based on emails he sent to Attorneys with cases pending before him, the contents of which were deemed "conduct unbecoming" by the Respondent.

It also presents a clear conflict between the Respondent's policy which, as shown in this Petition, requires ALJs to adhere to the POMS, and the decision of the Federal Circuit in this case, which described the POMS as "merely a guide" for ALJs.

Petitioner, at the time removal proceedings against him were commenced by Respondent in October 2015, had worked as an Administrative Law Judge (ALJ) for Respondent for the past ten years.

The complaint seeking his removal contended that certain emails he sent to Attorneys representing clients who had matters pending before him constituted "conduct unbecoming an ALJ."

It also alleged that he neglected his duty by inadequately documenting a claimant's medical improve-

ment in cases where the claimant requested a closed period of disability benefits.[1]

Before the ALJ designated by the MSPB to hear the removal case, Petitioner contended that he had the right to rely on POMS 28010.015(C)2, which allowed him to end a closed period based on the improved symptoms of the claimant. He also contended that his emails to Attorneys were appropriate under the policy of the Respondent.[2]

The ALJ designated by the MSPB found Respondent guilty of most of the charges, but concluded a six month suspension rather than removal was the appropriate penalty. (App.51a.)

Both sides appealed to the full MSPB, which found that Petitioner's emails constituted conduct unbecoming an ALJ, that Petitioner did not have the right to rely on POMS, and overruled its' ALJ, finding that removal was appropriate. (App.13a.)

In his initial brief to the Court of Appeals, Petitioner cited the *Grayned* and *Airport Commission* cases as grounds for asserting that the "conduct unbecoming" standard which the MSPB enforced

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[1] See POMS 25510 A2, for the definition of a closed period. There were other grounds alleged as justifying Petitioner's removal. Two of these grounds, alleging inadequate summarization on-the-record, of off-the-record conversations with Counsel; and failing to adequately safeguard personal identifiable information by sending it to authorized recipients in an unencrypted manner, are not at issue in this Petition. The third, alleging conduct unbecoming an ALJ, will be discussed shortly.

[2] Social Security Administration, *Best Practices For Claimants' Representatives* (Updated April 2023), https://www.ssa.gov/appeals/best_practices.html

against him was unconstitutionally vague. In his reply brief, Petitioner cited the *Bence* case as showing the Seventh Circuit had explicitly found such a standard unconstitutionally vague.[3]

In its decision, when presented with Petitioner's claim that his convictions of conduct unbecoming were based on an unconstitutionally vague standard, the Court of Appeals said first that:

> Mr. Cooperman argues that he was denied due process for two reasons: first, because the charge of "conduct unbecoming" is impermissibly vague . . . [4]

It then observed:

> The specifications underlying Mr. Cooperman's conduct unbecoming charge fall into two categories in 5 C.F.R. § 2635.101(b): breach of duty of impartiality at (b)(8) and breach of duty to avoid creating the appearance of a violation of a law or ethical standard at (b)(14). Mr. Cooperman does not specifically challenge any of the specifications underlying this charge, nor does Mr. Cooperman deny the content of any of the emails that led to this charge. Instead, Mr. Cooperman invites us to create a new standard by which administrative law judges are "only subject to discipline for a violation of any Federal or State Law, or any written policy expressly and specifically defining what constitutes a

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[3] Those portions of Petitioner's briefs establishing these arguments are included in the Appendix.

[4] The second reason is not relevant to this Petition.

> violation." [ ] Mr. Cooperman does not provide any legal reasoning or support for this request, and we decline his invitation. Furthermore, Mr. Cooperman asks us to overturn two of our cases[5] upholding the removal of administrative law judges for conduct unbecoming charges, but again does not provide any rationale for us doing so."[6] (internal citation excluded)

Opinion of Court of Appeals, at App.10a. It affirmed Petitioner's removal.

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5 The two cases are *Long v. Social Security Administration*, 635 F.3d 526 (Fed. Cir. 2011) and *Abruzzo v. Social Security Administration*, 489 Fed. App'x 449 (Fed. Cir. 2012) (non-precedential) In each of these cases, the Federal Circuit applied its "conduct unbecoming" standard to justify removal of an SSA ALJ.

6 As the portions of Petitioner's submissions to the Court of Appeals show, that Court was actually provided by Petitioner with ample rationale for overturning the "conduct unbecoming" standard but, for reasons unknown, the Court did not engage it.

STATEMENT OF THE CASE

I. Question One

The Federal Circuit adheres to the "conduct unbecoming" standard of discipline, refusing Petitioner's request to follow the lead of *Bence* and declare it unconstitutional.

Bence, on the other hand, in dealing with police officers who had been disciplined, like Petitioner here, for written communications, first said:

> However, it is well-settled that the prohibition against vagueness extends to administrative regulations affecting conditions of governmental employment as well as to penal statutes, for the former may be equally effective as a deterrent to the exercise of free speech as the latter.

The *Bence* court then said, with particular relevance for this case:

> On its face, the rule proscribes only conduct which is both "unbecoming" and "detrimental to the service." It is obvious, however, that any apparent limitation on the prohibited conduct through the use of these qualifying terms is illusory, for "unbecoming" and "detrimental to the service" have no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned. Like beauty, their content exists only in the eye of the beholder. The subjectivity implicit in the language of the

> rule permits police officials to enforce the rule with unfettered discretion, and it is precisely this potential for arbitrary enforcement which is abhorrent to the Due Process Clause.

(emphasis supplied)

Thus, the Federal Circuit has adhered to the "conduct unbecoming" standard, while the Seventh Circuit has explicitly declared it unconstitutional.

This Circuit split creates confusion among the Federal workforce, and allows Federal agency managers to wield this confusion as a cudgel against ALJs, as was done here.

Either the Seventh Circuit is right or the Federal Circuit is right; they can't both be right. This Court should resolve the Circuit split.

II. Question Two

As regards Question 2, Petitioner asks this Court to resolve what is presently both a Hobson's choice for Respondent's ALJ's, and a substantial federal question as well: May they be disciplined for following Agency guidance as Petitioner was here, or must they ignore such guidance despite being required by the Agency to follow it, and face discipline as a result?

In resolving disability benefits cases over which he presided, Petitioner followed the Respondent's guidance as found in the POMS. Petitioner argued that the MSPB erred in disciplining him for adhering to this policy, because under the Respondent's rules, found at SSR 13-2p(15)(a) and Federal case law in his Circuit, *See Kubetin v. Astrue*, 637 F.Supp.2d 59

(D. Mass., 2009) he was not merely permitted, but required to adhere to it.

> However, the Court of Appeals held that:
>
> Courts have recognized that the POMS is merely a document to *guide* administrative law judges and does not replace or supersede any corresponding regulations. *See e.g., Wash. State Dep't of Soc. and Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 385 (2003) (noting that POMS are just "the publicly available operating instructions for processing Social Security claims").(emphasis added)

In so holding, the Court of Appeals did not discuss SSR 13-2p(15)(a), cited to it by Petitioner, which specifically indicates that Respondent's ALJs were *required* to follow the POMS. Nor did it address case law from the District and Circuit in which Petitioner presided, stating that Respondent was *required* to follow the POMS.

As a result of the decision below, the over 1,500 ALJs employed by Respondent[7] are between a rock and a hard place; follow the POMS and suffer the fate Petitioner did, or ignore the POMS and be subject to discipline for failing to adhere to Agency policy and Court orders.

This presents a national problem and therefore a substantial federal question which this Court should address.

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[7] Social Security Administration, *Information About SSA's Hearings and Appeals Operations*, https://www.ssa.gov/appeals/about_us.html

III. Legal Background

1. Legal Background on Question One

Actions taken against Federal Administrative Law Judges by the Government are subject to the provisions of 5 U.S.C. § 7521, which provides that removal may occur only after good cause is established before the Merit Systems Protection Board (MSPB) on the record and after an opportunity for a hearing.

The Federal Circuit, which has reviewing authority over the MSPB, approved a standard establishing that "good cause" can exist based on "conduct unbecoming an ALJ."

In *Abruzzo v. SSA*, Abruzzo argued, as does Petitioner here:

> that the standard for this charge is "Highly Subjective And [sic] Circumstance Dependent," and that "there is no reliable way to ascertain the line between innocent conduct and punishable misconduct."

But the Court rejected that argument in *Abruzzo*, holding that:

> We find that the Board applied an acceptable standard here. It described conduct unbecoming as "conduct" that revealed a temperament that detracted from character or reputation." *Abruzzo*, 2011 MSPB LEXIS 4754, at *6 (citing *Miles v. Dep't of Army*, 55 M.S.P.R. 633, 637 (1992) (holding that conduct unbecoming is "unattractive, unsuitable, or detracting from the employee's character")). That standard is consistent with a recent

> articulation reviewed by this court. In *Long v. SSA*, this court reviewed the standard phrased as "conduct that 'undermines public confidence in the administrative adjudicatory process,'" including misconduct "relate[d] in some way to the character traits expected of an ALJ," and affirmed the good cause removal of an ALJ for conduct unbecoming. 635 F.3d 526, 533-36 (Fed. Cir. 2011). We sustain the Board's "conduct unbecoming" standard applied here—that which "detracts from the ALJ's character or reputation" before the public. We hold that there was no legal error or abuse of discretion in finding "conduct unbecoming an ALJ."

In Petitioner's case, he argued that

> Second, Mr. Cooperman argues that the Board denied him due process, specifically because "conduct unbecoming" is impermissibly vague . . .

Opinion of Court, at App.6a.

Petitioner supported his argument with—among other things—authority from this Court, from the Seventh Circuit (*see Bence, infra.* at 15), and from a California Court of Appeals, (*see California School Employees, infra.* at 15).

However, the Federal Circuit, after citing the aspirational (as opposed to punitive) provisions of 5 C.F.R. 2635.101(b)(8) and (14), and contrary to Petitioner's citing of extensive legal authority, including *Grayned*, *Airport Commission*, and most persuasively *Bence*, showing the "conduct unbecoming" standard to be unconstitutional, simply said:

> Mr. Cooperman has not persuasively explained why his "conduct unbecoming" charge is impermissibly vague.

Opinion of Court, at App.10a-11a.

2. Legal Background on Question Two

The exact significance of Respondent's Program Operations Manual System, or POMS, has engendered debate among the lower Courts[8] and, as Petitioner is an example of, confusion among its ALJs.

This Court has described the POMS as the publicly available operating instructions for processing Social Security claims and noted that:

> While these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake of reading "other legal process" in abstract breadth. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)"

Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003).

In Petitioner's case, the Federal Circuit said, citing the above case, that:

> Courts have recognized that the POMS is *merely* a document to guide administrative

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[8] Compare the Federal Circuit's decision in this case to *Frain v. Commissioner of Social Security*, https://casetext.com/case/frain-v-commr-of-soc-sec at footnote 4, where Chief Judge Simon noted that SSA ALJ's are required to follow the POMS.

> law judges and does not replace or supersede any corresponding regulations. (emphasis added)

Opinion of Court, at App.7a-8a.

However, Social Security Ruling 13-2p(15)(a), says that

> We require adjudicators at all levels of administrative review to follow agency policy, as set out in the Commissioner's regulations, *SSRs,* Social Security Acquiescence Rulings (ARs), and other instructions, such as the Program Operations Manual System (POMS), Emergency Messages, and the Hearings, Appeals and Litigation Law manual (HALLEX). Under sections 205(a) and (b) and 1631(c) and (d) of the Act, the Commissioner has the power and authority to make rules and regulations and to establish procedures, not inconsistent with the Act, which are necessary or appropriate to carry out the provisions of the Act. The Commissioner also has the power and authority to make findings of fact and decisions as to the rights of any individual applying for payment under the Act. Because of the Commissioner's delegated authority to implement the provisions of the Act, we may, from time to time, issue instructions that explain the agency's policies, regulations, rules, or procedures. All adjudicators must follow our instructions. (emphasis added).

SSR, App.268a-269a.

And in the First Circuit, where Petitioner presided, case law is clear that the Respondent (and, derivatively, its employees such as Petitioner) are required, not advised; but required to follow POMS. For example, the District Court in *Kubetin v. Astrue*, quoting several cases from the First Circuit, remarked that while POMS may not have binding force,

> Courts in this Circuit have required SSA to follow the standards set forth in POMS repeatedly. *Da Rosa v. Sec'y Health Human Svcs.*, 803 F.2d 24, 26 (1st Cir. 1986) (vacating and remanding "for proceedings consistent with the interpretive guidelines set forth in the POMS instructions"); *Waters v. Bowen*, 709 F.Supp. 278, 281-82 (D.Mass. 1989); *accord Avery v. Sec'y of Health and Human Svcs.*, 797 F.2d 19, 24 (1st Cir. 1986) (construing, in *dicta,* POMS "as being the latest word on departmental . . . policy, committing the Secretary and superceding any inconsistent discussion and examples.").

Thus, as is the case with the "conduct unbecoming" standard discussed in question one, and as Petitioner suggested to the Federal Circuit in his Petition for rehearing, SSA ALJs are presented with a Hobson's choice: follow POMS and suffer the fate Petitioner did, or fail to follow POMS and be subject to discipline for ignoring required agency policy.

REASONS FOR GRANTING THE PETITION

I. Question One

As the Court in *Bence* said, in condemning the "conduct unbecoming" standard:

> The subjectivity implicit in the language of the rule permits police officials to enforce the rule with unfettered discretion, and it is precisely this potential for arbitrary enforcement which is abhorrent to the Due Process Clause. Further, where, as here, a rule contains no ascertainable standards for enforcement, administrative and judicial review can be only a meaningless gesture.

And as the California Court of Appeals said in the *California School Employees* case, in similar language:

> On its face, the rule proscribes conduct that is "unbecoming an employee in the public service." It is obvious that any apparent [52 Cal. App. 3d 156] limitation on the employee's conduct through the use of this qualifying term is illusory, for "unbecoming" has no inherent, objective content from which ascertainable standards defining the proscribed conduct can be fashioned. Like beauty, its content exists only in the eye of the beholder. The subjectivity implicit in the language of the rule permits district officials to enforce the rule with unfettered discretion, and it is precisely this potential

> for arbitrary enforcement which is abhorrent to the due process clause.(e.s.)

California School Employees Assn. v. Foothill Community College District, 52 Cal.Rptr.3d 150 (Cal. Ct. of App., 1st Dist. 1975). The *Bence* holding, as noted earlier, simply cannot be squared with the holding of the Federal Circuit in Petitioner's case.

The result of such discordant rulings is that Administrative Law Judges throughout the Federal Government labor under an uncertain standard of discipline. This situation is especially pernicious when, as was the case here, such a standard is applied to speech.

As *Bence* said:

> Moreover, because this vague rule does abut on sensitive first amendment freedoms, it may operate to chill the exercise of those freedoms.
>
> Thus, the Circuit split presented here has serious implications for SSA ALJs, and therefore disability benefits claimants nationwide, and should be resolved.

The Court should resolve this split, and affirm *Bence*.

II. Question Two

As to Question 2, there is no doubt that the over 1,500 SSA ALJs[9] are, as Petitioner noted to the Federal Circuit, between a rock and a hard place with respect to their fidelity to POMS.

Are they bound by it, as the First Circuit, a district court within the First Circuit, and Social Security Ruling 13-2p(15)(a) require?

Or is POMS merely advisory, as the Federal Circuit suggests?

As a result of this dilemma, Petitioner submits that the ability of SSA ALJs to properly apply Agency policy is chilled.

Because the SSA disability program is one of nationwide application, the chilling effect caused by the decision of the Federal Circuit has nationwide implications and presents a substantial federal question.[10]

This Court should dispel the confusion surrounding this important issue.

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[9] See https://www.ssa.gov/appeals/about_us.html.

[10] The Federal Circuit has nationwide jurisdiction over claims involving Federal employees. CAFC, *Court Jurisdiction*, https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Leonard Cooperman
Petitioner Pro Se
178 Juniper Ridge Drive
Feeding Hills, MA 01030
(786)252-7615
LennyJ1952@yahoo.com

August 2, 2023