No. 24-508

In the Supreme Court of the United States

JOSEPH C. ANORUO,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

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

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QUESTIONS PRESENTED

The Fifth Amendment government immunity does not confer a privilege to lie. *See United States v. Apfelbaum,* 445 U. S. 115, 117 (1980). Due process is guaranteed by the U.S. Constitution and applies to public employment in which the Government has established that there must be a cause to remove or suspend an individual. *See Gilbert v. Homar,* 520 U.S. 924, 935-36 (1997) (suspension); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 541 (1985) (removal). Due process "is flexible and calls for such procedural protections as the particular situation demands." *Gilbert,* 520 U.S. at 930 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)).

Defamation in a performance appraisal can occur when an employer makes false or harmful statements that damage an employee's reputation. Petition Clause of the First Amendment does not provide absolute immunity to a defendant charged with expressing libelous and damaging falsehoods. *Also, see Codd v. Velger,* 429 U.S. 624 (Feb 22, 1977). By its terms, §1001 covers "any" false statement—that is, a false statement "of whatever kind as noted in," *United States v. Gonzales,* 520 U.S. 1, 5 (1997)—including the use of the word "no" in response to a question and *Brogan v. United States,* 522 U.S. 398 (1988). The Questions Presented are:

1. Whether 5th Amendment due process clause of the constitution of the United States is impeded if fairness of the performance appraisal, performance improvement plan and in discovery proceeding of relevant material facts needed to fully develop a record is prevented.

2. Whether the Petition Clause of the First Amendment is violated if false metrics/data, unsupported testimonial evidence, misrepresentation about material facts, libelous and harmful falsehoods is used to rate and review employee performance appraisal and rate and fact-finding for allegations of harassment at workplace

3. Whether appellant exhausted his administrative remedies with office of special counsel (OSC) in the disclosure of waste of about additional 2 million dollars in partial prescription fills, the deletion of patient prescription activity log, and the complaint to office of inspector general (OIG) on 9/13/2020 that was reviewed by the agency on February 08, 2021 which may have contributed to the issuance of performance improvement plan (PIP) and fact-finding on workplace harassment charge in violation of 18 U.S.C § 1001 and appellant first and fifth amendment right of the constitution?

4. Whether this court can review the credibility determination of administrative judge if presented with sufficiently sound reasons to overturn the decision and/or to determine negative suitability of the credibility determination based on evidence on the record as determined.

5. Whether the merit panel and merit system protection Board (MSPB) should transfer discrimination claims to district court if it does not have jurisdiction instead of outright denial.

LIST OF PROCEEDINGS

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No. 2023-1114
Joseph C. Anoruo, *Petitioner*, v.
Department of Veterans Affairs, *Respondent*
Date of Final Opinion: August 16, 2023

U.S. Merit Systems Protection Board
Denver Field Office
No. SF-1221-22-0181-W-1
Joseph C. Anoruo, *Appellant*, v.
Department of Veterans Affairs, *Agency*
Date of Final Order: August 19, 2022

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PETITION FOR A WRIT OF CERTIORARI

1. Dr. Joseph Anoruo, hereby petition for writ of Certiorari which seeks review of the order #83 dated January 30, 2024 issuing mandate., by the Federal Circuit Court of Appeals in case No. 23-1114. App 0101 *Per the Court - Jarrett B Perlow, Clerk of the Court*

2. Dr. Joseph Anoruo, hereby petition for writ of Certiorari which seeks review of the order #82 dated January 30, 2024 denying motion for reconsideration doc# [81] on order to motion to stay mandate, by the Federal Circuit Court of Appeals in case No. 23-1114. * * * *Before Chen, Cunningham, and Stark, Circuit Judges. Per Curiam.* * * *

3. Dr, Joseph Anoruo hereby Petition for writ of Certiorari which seeks review of the order dated January 24, 2024 doc #80 denying motion #78 to stay mandate by the Federal Circuit Court of Appeals in case No. 23-1114, for which motion to stay mandate was denied on 01/24/2024. * * * *Before Chen, Cunningham, and Stark, Circuit Judges. Per Curiam.* * * *

4. Dr. Joseph Anoruo hereby Petition for writ of Certiorari which seeks review of the order dated August 16, 2023, by the Federal Circuit Court of Appeals in case No. 23-1114, reviewing MSPB CASE No: SF-1221-22-0181-W-1 Final order of August 19, 2022, denying corrective action, for which a timely petition [76] for rehearing En Banc doc#77 was denied on January 23, 2024. *"Before Moore, Chief Judge,*

Lourie, Dyk, Prost, Reyna, Taranto, Chen, Hughes, Stoll, Cunningham, and Stark, Circuit Judges[1].

OPINIONS BELOW

The Court of Appeals for the federal Circuit (CAFC) opinion on appeal that seeks review of the order #83 dated January 30, 2024 issuing mandate., by the Federal Circuit Court of Appeals in case No. 23-1114 to which an enlargement of time was requested by appellant and granted by this court on 4/25/2024.

The Court of Appeals for the federal Circuit (CAFC) opinion on appeal that seeks review of the order #82 dated January 30, 2024 denying motion for reconsideration doc #81 on order to motion to stay mandate, by the Federal Circuit Court of Appeals in case No. 23-1114, for which motion to consider was denied on 01/30/2024.

The Court of Appeals for the federal Circuit (CAFC) opinion on writ of Certiorari which seeks review of the order dated January 24, 2024 doc #80 denying motion #78 to stay mandate by the Federal Circuit Court of Appeals in case No. 23-1114, for which motion to stay mandate was denied on 01/24/2024.

The Court of Appeals for the federal Circuit (CAFC) opinion on appeal that seeks review of the order dated January 24, 2024 denying [78]] motion to stay mandate, by the Federal Circuit Court of Appeals in case No.

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[1] Circuit Judge Newman did not participate.

23-1114, for which reconsideration was denied on 01/30/2024.

The Court of Appeals for the federal Circuit (CAFC) opinion on appeal on review of the order dated January 23, 2024, by the Federal Circuit Court of Appeals in case No. 23-1114 on order to stay Mandate, for which a timely motion to stay mandate 01/30/2024 is not reported.

The Court of Appeals for the federal Circuit (CAFC) opinion on writ of Certiorari which seeks review of the order dated August 16, 2023, by the Federal Circuit Court of Appeals in case No. 23-1114, reviewing MSPB CASE No: SF-1221-22-0181-W-1 Final order of August 19, 2022, denying corrective action (App 0001-0087) S.A. 1-87 for which a timely petition [76] for rehearing En Banc doc#77 was denied on January 23, 2024 is not reported.

JURISDICTION

The Congress has authorized Supreme Court review of decisions of the state courts and lower federal courts through two procedural mechanisms: appeals and petitions for a writ of certiorari pursuant to 28 U.S.C. §§ 1254(1). The Court of Appeal issued mandate on its order dismissing rehearing en banc on January 30, 2024; denied motion for reconsideration to stay mandate filed on 01/29/2024 on 01/30/2024; denied motion to stay mandate submitted on 01/23/2024 on 01/24/2024. The court further denied the motion for rehearing in en banc and forwarded the motion to the same.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Art. III, Sec. 2, Cl. 1:

> The judicial power shall extend to all cases in law and Equity that arise under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . [and] to controversies to which the United States shall be a party . . . .

INTRODUCTION

On March 7, 2016, following a strategic initiative to consolidate the Pharmacies (Doc 34-2 pp 632), the leadership dishonestly closed the outpatient pharmacies through misrepresentation of data and reported same to the congress which adversely affected our veterans and employees. The leadership changed the appellant's tour of duty to include working evenings and weekends which affected appellant condition of work and pay, and he incurred pecuniary loss.[2] He petitioned to stop the decision which springboarded into the ongoing OSC complaints the MSPB IRA appeal at issue. OMI report substantiating my allegation of waste to the tune of over 4 million dollars of taxpayers' money wasted if the report is corrected as requested, but the congress was deceived to believe that 45, 000 dollars was wasted. Of note is that

[2] Appellant has authority to petition the congress especially when the data used is false and misleading.

the OMI report required 9 policy changes to be implemented across the VA which was done and now millions of dollars are being saved yearly.

However, to deny corrective action, the MSPB administrative judge sanctioned appellant for taking long time to find document and asked questions during hearing and limited his question to agency witnesses to only the scope of the questions presented by the agency counsel. In a show of deep-rooted favoritism characterized by wrong interpretation of VA policies and procedures tantamount to abuse of judicial discretion, she ignored all the lies, misrepresentation and inconsistencies in the agency witness account and testimonies but somehow determined that appellant was not a credible witness. See excerpt of hearing transcript. App.133a-200a. Credibility determination arrived at through mischaracterization, misrepresentation and unsupported evidence is clearly erroneous and abuse of judicial discretion.

The merit panel overlooked AJ's abused of her judicial discretion as will be demonstrated, violated the courts orders, and all the evidence that shows agency inconsistencies and shifting explanation demonstrating pretext for reprisal, but highlighted appellant filing documents to impeach the credibility of agency witness that was not available when the record closed as potential ground for affirming MSPB final order. If the above inconsistencies and misrepresentations were considered the clear and convincing evidence disappears as demonstrated in the material facts and excerpt of record.

Being vocal does not translate to lack of credibility. They judge openly displayed her deep-rooted favoritism to agency and antagonism against appel-

lant during appellant oral submission on March 21, 2022, when he informed the judge that the failure to admit the disclosures that include the deletion of patient prescription activity log (*See* Doc 34-2 pp 502-562, as reflected at App.202a) and about 2-million-dollar waste through partial refill properly presented to OSC is tantamount to abuse of judicial discretion. The judge further queried on why appellant was still in the VA.

I am hopeful that at least 4 distinguished Supreme court judges shall look at misrepresentation and inconsistencies, the violation of law including 18 U.S.C § 1001 in this case to find ground and look at evidence to determine if appellant credibility is questionable. The judge knows she would not deny corrective action if she did not cite credibility determination and reference appellant demeanor. I have attached almost the verbatim hearing transcript which shall be the cornerstone of this review. One considers the MSPB order of August 19, 2022, and merit order of 08/16/2023 as what many legal luminaries refer to as to as judges' impunity, witch hunt or victimization for being vocal. I am optimistic that the supreme court will look at material facts as laid out in the material facts and excerpts of record and conclude that the determinations are arbitrary, clearly erroneous and unsupported with material evidence.

STATEMENT OF THE CASE

I. Nature of the Case

Appellant appeals the decision of the court of appeal for the federal Circuit (CAFC) denying motion for reconsideration on order denying staying mandate, order denying staying mandate; order denying rehearing EN BANC affirming the Merit System Protection Board (board) denying his request for corrective action. App 0001-0086.

In 2018, appellant identified problems in the schedule and notified management to avoid a negative impact on the performance review, the management ignored it and on October 29, 2018, a settlement agreement was reached and the management erroneous thought I was negotiating for blue unit employees through my communication and abandoned the outcome of the review. Also see the same complaint by AFGE. App 0479-0480.

On December 15 and 16th, December 26,2020, appellant noticed a continued issue with the schedule and performance standard, notified the agency and reinforced the error in the scheduling and management also ignored it. Appellant was initially rated unsuccessful in two critical elements: pending data and consolidate mail order pharmacy (CMOP) errors, but the upper-level management determined that the rating of unsuccessful in unreviewed CMOP error was erroneous and rated appellant successful.

To be fair and equitable, Agency created primary pending shifts of at least 71 shifts (rotation 2, 4, 11

and 17 (and during covid leadership added telework shifts 2t, 4t, 7t, 11t, 14t, 13t, 14t, 16t, 17t) with a target of 400 prescriptions per day to yield 28,400 pending data to be minimally successful. Appellant worked 6 of these primary pending rotations based on the same schedule in 2021 and about the same in 2020 because the schedule has been same since late 2017 (Hawkins Testimony). The Agency reported that the appellant worked 28 pending rotation which is unsubstantiated and unsupported in the schedule the administrative judge reviewed at (S.A. 33-34) and a violation of the above master agreement.

Appellant noticed consistent pattern of scheduling disparity that affected the evaluation standards, reported it to leadership for review on several occasions and management ignored it and continued to use the flawed/skewed schedule in the metrics that looks good in paper but retaliatory in practice occasioned by violation of law and VA regulation to rate Appellant unsuccessful in performance review due to my ongoing OSC complaints.

Specifically, on January 7, 2021, December 15 and 16, 2020 appellant disputed the performance standard due among other things, ongoing inequitable and disparity in scheduling and management ignored it.

In February 2020 in the presence of AFGE the disparity in scheduling and performance standards were discussed with management; in August 2020 due to excessive assignment of prior drug authorization, AFGE requested breakdown of the assignments and management practically ignored correcting the error.

On October 29, 2018, the issue of disparity in schedule was discussed with management and settlement agreement reached, but management abandoned it. The Agency erroneously alleged that appellant was negotiating the workplace conditions for the blue unit employees because of the e-mail he sent to the blue unit employee BUEs as directed by the chief of HR/AFGE president. The email was forwarded to the local EEOC manager and office of general counsel who reviewed the communication and concluded that appellant was negotiating with BUEs and advised management to abandon the settlement agreement relating to the e-mail and they did. Rule 408 expressly allows the use of settlement-related evidence for a few reasons in exceptional circumstances[3]. *See Cook v. Yellow Freight System, Inc.*, 132 F.R.D. 548 (E.D. Cal. 1990) (a settlement agreement was admitted showing that a settling party understood certain reporting requirements contained in the agreement, and hence that the party's later alleged violation of those same requirements was intentional).

Appellant was rated unsuccessful in 2020 and 2021 fiscal year because of low pending data due to inequitable scheduling on pending shifts. Based on the 2020 & 2021 outpatient pharmacist schedule reviewed which has been the same since FY2017, (Dale testimony) when compared with similarly situated outpatient pharmacists, (17 other pharmacist) appellant was assigned the most prior drug authorization request (PADR) requiring 15-60 minutes or more to

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[3] The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

complete each, non-pending rotations, and pulled to other service need shifts when he was supposed to be on pending rotations (assigned only 4-6 out of about 71 potential pending shifts which was insufficient to meet the evaluation standard). However each time Appellant was assigned to pending shift, he excelled and even out-performed most other pharmacists. *See* Tab 29 pp 55-61. Dale admits that I can do 500 prescriptions a day but believes I was not doing what I was supposed to do when I was supposed to do that because I was busy constructing e-mail (Dale testimony)[4].

As a result of the above, through the violation of DVA/AFGE Master Agreement on written PIP, the abject disregard to employee immunity due to OSC hold on the underlying issue and overly negligence, Agency issued performance improvement plan (PIP) to me on 6/11/2021 following a mid-year review on 6/08/2021. I did not participate in the PIP because it was pre-calculated for failure and involves violation of AFGE/DVA Master Agreement Article 27, section 8(e) and 10(A). AFGE filed a grievance complaint on 7/05/2021 which was placed on abeyance on 8/16/2021 because the performance issue was before OSC. While these issues lingered, appellant was subjected to all forms of hostile work environment issues including a kangaroo hostile work environment allegation which was never raised by the claimant to him[5], my wages

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[4] Demonstrates that appellant time responding to hostile work environment allegations affected his productivity in pending number.

[5] Danielle a pharmacy technician supervisor in a biased and accusatory characterization infused her ridiculous opinion, "He doesn't like Kim. It might be because she's female" (App 0615)

were garnished because of overly charged debt I owed to Agency on a previous case. Appellant believes agency actions through scheduling practice leading to low pending, unsuccessful performance appraisal and performance improvement plan were intentional and due to Appellant's ongoing OSC complaints. I am requesting to be made whole and all responsible management official implicated in the action ordered to face appropriate disciplinary action including removal from the federal employment service.

On April 26, 2021, my supervisor passed by my workstation and asked me to sign my midyear performance appraisal. I informed him that due to the errors in the schedule due to non-assignment of pending shift since October 1,2020, I have reviewed it, made comments and resubmitted it for upper management review. Mr. Hawkins went back and submitted it and indicated "refused to sign," however the reviewed my submission and on 5/5/2021 they advised Dale to assign me a pending shift and Dale came to the window where I was working around 10am ad advised me to close my window and do pending and I did and excelled.

During hearing Dale admitted that appellant version of event is correct. "Then that probably happened. Just like you said." *See* Dale Testimony.

AJ and the panel determined that Appellant was not a credible witness, reviewed the record and determined that appellant completed 28 pending shifts

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and considered his responses as disrespectful but not threatening. Noteworthy is that appellant notified the leadership that he was filing or has filed a complaint because of their action and did same.

when the record demonstrated that he completed 6; committed 108 consolidate mail order Pharmacy errors while detailed review shows 44 potential errors and upper-level manager reviewed same and recommended appellant to be rated successful and Agency did.

Even though Appellant attached his painstaking review of 108 assigned errors, the judge claimed she could not find the review, even though Hawkins, Tarman and appellant testified on the same. Dale referenced Dr. Anoruo's review and noted," He indicated in October 2020, he was assessed 30 CMOP rejects and only 7 could be attributed to him.

REASONS FOR GRANTING THE PETITION

The court should grant this petition because the order denial corrective action was due to misrepresentation and clearly erroneous finding of facts as demonstrated here.

In FY 2020 and 2021, Pharmacy developed Functional Statement/Job Description (Tab 28 pp 234-238) that prioritizes the pharmacist providing pharmaceutical care to optimize patient response that comply with Article 27, Section 3 of the Master Agreement that requires performance appraisal to be fair and objective and measure actual work performance over the entire rating period. What is observed is that most of appellant performance throughout the year identified in this instant case were not considered, instead Appellant was evaluated based on the work he was not assigned or does not have opportunity to process pending prescriptions which is beyond his control despite several

notifications and settlement agreement reached on the same or disproportionately not assigned enough pending rotations to meet pending data since 2017. *See* App.200a.

All witnesses agree that pending shift assignment determines your pending data (App.200a, Q/A 283-286. App.184a-185a, 187a) despite that appellant was 6 shifts in 2021, he was rated as completing 28 shifts. He had potential 44 consolidated mail order pharmacy errors but was rated as having 108. This is the gravamen of the case and believe this court will grant this writ of certiorari to avoid this happening to other employees in the future

The court of appeal for the federal circuit merit panel incorrectly decided an important question of law and facts, and the mistake should be fixed to prevent confusion in similar cases.

I. The Court Should Grant the Writ of Certiorari to Resolve the Violation of Appellant Constitutional Right and Ensure That Employees Receive Equitable Performance Appraisal Rating That Is Fair, Equitable and Based on Objective Criteria to the Maximum Extent Possible

1. Whether the merit panel, Agency/AJ violated the Appellant's 5th Amendment due process clause of the constitution of the United States, impeded and prejudiced appellant discovery of relevant material facts to fully develop the record. *See* Question Presented 1.

2. Whether agency witness lied in violation of 18 U.S.C § 1001 which caused harmful error that affected the outcome of the case. *See* Question Presented 2.

3. Whether the Petition Clause of the First Amendment was violated when agency used false metrics, unsupported testimonial evidence, lies about material facts, libelous and harmful falsehoods to rate appellant unsuccessful in performance appraisal. *See* Question Presented 3.

4. Whether first amendment absolute immunity protects agency for lying in performance appraisal and issues in this case including in the letters to the President of the United States arising from appellant disclosure. *See* Question Presented 4.

5. Whether the agency/AJ/merit panel breached its de facto obligation of good faith and fair dealing in managing its employees and appellant and in following its own policies. *See* Questions Presented 1-4

6. Whether credibility determination of administrative decision is not reviewable on appeal. *See* Questions Presented.

7. Whether new evidence asserted before the MSPB/Court and to impeach the credibility of witnesses that was not available when the record closed is admissible on appeal including hearing transcript that was not available before closing arguments.

8. Whether the merit panel and initial decision contains erroneous findings of material fact.

9. Whether MSPB should have transferred the discrimination allegation to district court or placed discrimination claims on abeyance instead of outright denial. *See Perry v. Merit Systems Protection Board* Certiorari to the United States Court of Appeals for the District of Columbia Circuit No. 16–399. Argued April 17, 2017—Decided June 23, 2017 (The proper

review forum when the MSPB dismisses a mixed case on jurisdictional grounds is district court. Pp. 9–17). Ordering that appellant file EEOC complaint is harmful error and an abusive of judicial discretion because the 45 days to initiate EEOC complaint has elapsed.

II. Abuse of Judicial Discretion

In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). An administrative judge's conduct during a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). AJ exhibited express deep-rooted favoritism for the agency, shouted appellant down when he spoke, was focused on alleged inconsistent, made statements like appellant can't question the agency and even asked appellant why he was still in the VA as documented in appellant March 28, 2022, objection. (tab 26). AJ practically acted like the agency attorney as demonstrated in the excerpts of hearing transcript included in the appendix. Most often AJ redirected questions so that Agency witnesses will lie and/or indirectly make them give uncommitted answers or speculative answers. Merit panel erred to affirm denial of corrective action.

III. New Evidence to Impeach the Credibility Agency Witnesses

The court of appeal for the federal circuit merit panel noted, "We do not consider new evidence that was not presented to the Board. *See Oshiver ex rel. Oshiver v. Off. of Pers. Mgmt.*, 896 F.2d 540, 542 (Fed. Cir. 1990).

The merit panel omitted the relevant aspect of the citation. see Oshiver v. OPM, No. 89-3019, CAFC (Feb. 14, 1990), (quoting "Our precedent clearly establishes the impropriety of seeking a reversal of the board's decision on the basis of assertions never presented to the presiding official or to the board[6]." *Rockwell v. Department of Transp.*, 789 F.2d 908, 913 (Fed. Cir. 1986). In this instant case these issues and assertions called new evidence were made to the board, except that the documents were not readily available and meant to impeach the credibility of Agency witnesses. *See* App.160a Q/A 132. Also see question presented on due process violation, defamation & violation of 18 U.S.C. § 1001.

The notice of major error did not make the letter to the president new. It is to clarify the record on file. *See Anoruo v. United States*. No: 15-658C (January 29, 2018) (. . . cannot re-characterize the 2011 VA letter so as to regenerate his cause of action. *See Martinez v. United States*, 333 F.3d 1295, 1312 (Fed. Cir. 2003)[7].

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[6] Most of these issues were presented to the board.

[7] This document is relevant and a product of the accepted claim and is synonymous with the panel recharacterization of the discovered error in the letter to the president showing about 2 million dollars waste of taxpayers' money as a new document which is not.

This is also not new evidence and should be accepted and cons

> Furthermore, during the hearing, the administrative judge determined that appellant could introduce new evidence or document outside the record to impeach the credibility of a witness. Tab 68-3 @ 00:12:16. The transcript to impeach the agency credibility, error notification to the president, the evidence of MSPB communication and daily pending number reports were not available when the record closed but were asserted before the board. The panel decision that this court does not accept new evidence conflicts with a decision of this court, prior MSPB rulings (*see* 5 C.F.R. § 1201.115(d). *Shelly S. Smith, v. Department of the Army*, MSPB Doc: SF 0752-14-0085-I-3 (July 27, 2023) (These are relevant evidence which could have affected the outcome should not have been disallowed, "quoting *Vaughn v. Department of the Treasury*, 119 M.S.P.R. 605, ¶ 12 (2013); 5 C.F.R. § 1201.41(b).

IV. The Merit Panel and Initial Decision Contains Erroneous Findings of Material Fact

The merit panel noted, "on appeal, Dr. Anoruo contests several of the AJ's findings of fact, including that the AJ made erroneous credibility determinations, failed to consider scheduling inequalities, relied on unreliable metrics, and failed to find a hostile

workplace. Substantial evidence supports each of the AJ's determinations"[8].

Contrary to the panel determination, *See* FY 2021 Schedule Review: Corrected Data for Joseph Anoruo (App.200a). The merit panel could not point to any truthful substantial evidence except fabricated lies as presented in App.200a. This data does not show how the Agency got the 28 shifts and 53% the agency used to rate appellant unsuccessful. *See* App.133a-134a Q/A at 1-6). These overzealous leaders loves to lie. If they can lie to OSC, office of medical inspector and the president and get away with it, the planned to do the same here, but must be stopped because the government is not immune from lie as discussed here.

On the rotation 2 schedule, even though Dale admitted that he has no recollection of appellant being pulled or assignment and because he was in training at that time, AJ and merit panel determined that appellant worked rotation 2 and ignored appellant testimony that he did not work the shift as shown on the schedule between 11/16 to 11/20/2020 like they erroneously determined that he worked rotation 11 between 09/28-10/02/2020 which was clearly erroneous. The schedule shows that Guz (rotation 3) was off some days that week and appellant was the available float to be pulled and was pulled to cover for Gus (rotation 13) who was doing inpatient/covid vaccine preparation that period. *See* SAppx634. Neither my first supervisor Dr. Kim nor Dale confirmed appellant worked rotation 2, and rotation 13 must be covered, therefore appel-

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[8] Substantial evidence was largely due to lies and misrepresentations as shown in the excerpts of record and presented here and cannot be believed.

lant testimony is supported with evidence. If in doubt, a fact-finding is required, either through production report for that day or through IT to determine the location appellant and Guz worked on that day, but due to AJ's apparent bias, she erroneously concluded that appellant worked the rotation and used same in her analysis. *See* App.145a-149a. *See* Question presented 1 on the discussion of unreviewed 108 CMOP rejects et al.

The merit panel noted, "AJ provided express credibility findings and thoroughly explained her reasoning. *See* S.A. 10-22. For instance, the AJ concluded that Dr. Anoruo made inconsistent statements and had a "tendency to misread or misunderstand documents," which undermined his credibility. App0016." *See* App. 29a-31a.

Contrary to the above false narrative due to misguided information, and lack of evidence to deny corrective action, AJ resorted to character assassination due to my previous case encounter with her. *See* appellant discussion on fraudulent credibility assessment below based on AJ's perception and misinformation. There was no factual inconsistent statement. Appellant maintained that PIP was not discussed during the midyear review, though identified by Dale as remedial process to correct low pending data and considered by AFGE. They typo on appellant affidavit was clarified on 07/01/2022 (MSPB Tab 64) as contained in his reply on 6/11/2021 when he received a notification for PIP MSPB tab 29, pp84-87. The identification and consideration of performance improvement plan (PIP) as was the case during midyear progressive review of June 8, 2021, pursuant to AFGE/DVA master agreement article 27 Section 9 (C) was not required proce-

dure for PIP, as a result AFGE differed PIP process to HR with request for additional documents before discussion of PIP will proceed, therefore PIP was not discussed on June 8, 2021. *See* AFGE testimony App.195a Q/A:172. *Also, see* AFGE response to the development of written PIP at App.192a: Q/A 262-264. Also (*see* Q/A 250-272). The record demonstrated that Mr. Hawkins lied consistently with all other lies, misrepresentations and shifting explanations which demonstrate pretext for discrimination and retaliatory animus. He did not present PIP document during the meeting, rather he identified it as process to correct the low pending number and deceived appellant that he was invited for a midyear review but informed the board that it was meant to issue PIP (*App.141a-142a Q/A:42-49*); AFGE confirmed they requested documentation which Dale never provided, but when asked about the document, he initially denied pledging to provide document to AFGE or ever received any self-assessment, but during cross-examination he noted that he possibly did. Also see MSPB Tab 30 pp 18-19 for list of documents he admitted receiving on 12/06/2021 which include CMOP and daily pending self-assessment.

Dale also lied that the development of written PIP in consultation with AFGE is not required, even though the use of "shall" is a mandatory command. App.178a Q/A 206-208. *He also lied that* he had another pharmacist he placed on PIP during the case accepted period (August 2021 to December 2021) and that they completed it, but not successfully and referenced (JP). Contrary to that JP said she was not given PIP in 2021 or within the claim accepted period but in 2022. S*ee* App.185a-186a Q/A 236-240. The merit panel erred to affirm MSPB initial decision.

The merit panel further noted, "The Board also had substantial evidence to conclude that there were no scheduling disparities between Dr. Anoruo and other outpatient pharmacists. Instead, all outpatient pharmacists were pulled from "pending" rotations "in the same manner and with the same frequency." S.A. 32; *see also* S.A. 677.

Contrary to this AJ cannot support the substantial evidence with any facts as the corrected FY2021 data (App.200a) speaks for itself. Appellant was assigned the least pending shifts since 2017[9] (App.135a Q/A at 8) and was not assigned to telework, CCN, or covid vaccine preparation and his pending number were not adjusted like other pharmacists. *See* FY 2021 Schedule Review: Corrected Data for Joseph Anoruo (App.200a). *Also see* AJ's schedule review (App.51a, 52a-53a); App.134a at A6 (I will determine how many weeks you were assigned to those shifts[10]). However substantial evidence demonstrate that16 out of 17 pharmacists were assigned to telework which is rotations designated with "T", CCN, Inpatient or Covid vaccine preparation and appellant was not and was not given comparable position on primary pending rotations (2,4,11 and 17, et al)[11].

So, the merit panel substantial evidence (unverified pending metrics and unreviewed CMOP reject) used

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9 Request all unsuccessful performance appraisal based on this skewed schedule to be rescinded.

10 Her analysis focused on false metrics and not the actual shifts as reported at App.200a.

11 There is no mathematical way from the metrics tab 28, pp 172 of 467agency provided to arrive at 28 pending shifts used in the rating appellant unsuccessful.

to conclude that there were no scheduling disparities is unsupported. The appellant was not assigned to telework or given comparable opportunity while in the hospital and only worked about 6 days of primary pending shifts in 2020-2021. AJ noted, "Preponderant evidence reflects the appellant was indeed often reassigned from shifts where processing pending prescriptions was the primary assignment based on the needs of the service. App.51a. Also see AJ's review of the schedule at App.52a-53a, however this need of the service was not accounted for like it was with those who did CCN, Inpatient or covid vaccine preparation. *See* Hawkins testimony. App.150a Q/A 88 &88.

The merit panel also noted, "Substantial evidence likewise supports the Board's findings that Dr. Anoruo did not suffer from a hostile work environment. He primarily argues that his Centralized Mail Order Pharmacy ("CMOP") errors should constitute a separate personnel action for purposes of his hostile work environment claim. We discern no error in the AJ's view that accepting Dr. Anoruo's argument "would result in inappropriately considering the same agency actions as two separate personnel actions"[12] because "these errors were at least partially responsible for the appellant's challenged performance appraisal." S.A. 36-37. The statement is clearly erroneous.

First, hostile work environment allegations are all encompassing and should not be limited to August 2020-September 2021, especially when the schedule targeting appellant for poor performance was developed

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[12] The merit panel determination contradicts the AFGE master agreement cited above and not supported by any sound policy and therefore an abuse of judicial discretion.

in 2017 after appellant protected activities of 2016. However, within the period of the accepted claims through the violation of policies and procedures, the agency pervasively threatened appellant with personnel actions that included unsubstantiated error charges the CMOP rejects, Kangaroo harassment charge, denial of leave, garnishment of salary which affected appellant condition of work. For instance, AJ noted App.46a (With regard to the April 2021 leave request, I find no credible evidence the appellant's leave request had been approved). On several occasions, Dale threatened me with late signing of notes because appellant did not complete the notes at the time of entry which was contrary to the stipulation of MCP. *See* App.160a-162a Q/A, 130-140.

However, per AFGE/DVA master agreement, Article 27 section 2 (i) the performance standards can be written for more than one level of achievement (Tab 28 pp 150 of 467 at pp "I") and in this instant case performance appraisal and hostile work environment allegations are different levels of achievement contrary to the harmful erroneous determination of the judge and the merit panel. *See* upper-level management determination that Dr. Anoruo was not given an opportunity to improve in the CMOP during the rating period Tab 33 pp 27 of 45.

Also, appellant approved annual leave on 4/23/2021 (Tab 28 pp456 of 467 and 9/9/2021 (Tab 31 pp.9-14) were all previously approved but denied because my leave fell on the day I was scheduled off per weekend rotation in effect since 2017 and not due to coverage issues. *See* "The schedule in regard to weekend rotation is established and has been this way since I started working for the VA in 2017 (Tab 31 pp

9). These leave denials affected appellant condition of work, affected his family life and reduced his approved annual leave based on seniority from 80 hours to 64 hours which is unjustified unwarranted personnel action that trigger backpay and tantamount to abuse of judicial discretion.[13]

Furthermore, on the kangaroo harassment charge, Appellant was never notified that his e-mail communication with supervisor on 9/17/2020 or at any other time was harassment. *See* Tab 28 pg262 #5. Also see inquiry into the allegation (Tab 28 pp266) all of which were violated. AJ determination was plainly erroneous and harmful and merit panel erred and both actions tantamount to abuse of judicial discretion.

Contrary to AJ determination and merit panel affirmation (App.9a), substantial evidence does not support the Board's finding that the agency presented clear and convincing evidence that similarly situated individuals who were not whistleblowers were also placed on a PIP, when they failed to meet the performance standard for processing pending prescriptions within the accepted period of August 2020 and September 2021 (emphasis added) because there was none. *See, e.g.*, S.A 0086-0087 (noting that another pharmacist was placed on a PIP for failing to meet pending prescription performance standard). *See* ECF No. 56 at 12-13 & App.185a-186a (JP testimony on PIP).

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[13] For AJ to state, "While the appellant appears to be upset he only used 72 hours of leave, I find Hawkins' assessment the appellant should not be charged leave for non-duty days was entirely appropriate, and did not reflect denying the appellant leave which is inconsistent with Dale's statement at Tab 31 pp 9 that he denied appellant leave based on weekend rotation that is in existence since 2017 and not staffing issues

These documents clearly shows that JP was not placed on PIP in 2021OR within the accepted period, but in 2022 between February and April after the case has started and the Agency did not follow PIP procedure required to initiate a PIP, did not contact AFGE and deceived the employee to believe that she was placed on PIP by employee relations instead of her supervisor. She also explained that she was successful after her 3 months at CCN (Community Care Network) was factored in and did not understand why she was placed on PIP. *See* App.185a-186a. One may infer that her placement on PIP was to present similarly situated employee alternative and legally flawed. Agency should not be allowed to benefit from its wrong through the violation of PIP procedure to present similarly situated employee who is not a whistleblower because it is a prohibited personnel practice for agency to benefit from its own wrongs. *See* "The fundamental principle of law is that wrongdoers should not profit from their own wrong. *See* 18-1501 *Liu v. SEC* (06/22/2020). This principle is reflected in the equitable remedy of restitution, disgorgement, or an accounting, which deprives wrongdoers of their net profits from unlawful activity, therefore agency's similarly situated comparator should fail, and hostile work environment claim should not fail.

Concerning changing the schedule on 8/16/2021 with added flag order process that limited pending opportunities starting with appellant rotation on 9/12/2021 at the time of PIP when pending data was at issue and continues thereafter affected appellant pending productivity App.97a. *See* Hawkins testimony which contradicts AJ analysis at App.145a Q/A 62 & 63; *see* schedule can be manipulated App.170a at

q/a 171; App 198a Q/A 283-286. Also see APP.134a Q/A 12-21 (Dale included rotation 8,9,15 and 16 as pending rotation and said he used same in the calculation of pending data for performance appraisal which is not reflected at App.200a). *See* JP testimony (you could probably get an hour or so maybe an hour and a half of pending time out of the whole shift-App.185a.

As demonstrated above, the panel erred because AJ determination was plainly erroneous same as the credibility determination which should have been reviewed for abuse of judicial discretion by merit panel, but they neglected it due to its agency pro bias. Because appellant repeatedly moved to file documents not previously included in the appendices, but discussed during hearing to counter the clearly erroneous finding of fact does not mean that appellant is not credible witness. App.9a.

The merit panel even violated its own court order: denied appellant motions without agency's opposition on 8/1/2023 and issued instant sua sponte orders and were too fast to issue instant orders in the case as if they were remotely engineered by the Agency or have no other pending cases in the docket which resulted in appellant filing a open letter to the chief Judge for suspicion of agency meddling in the case. *See* SA0029 for AJ's erroneous determination.

> Agency consistently lies and even lied to the congress in the office of Medical Inspectors report of investigation dated 09/12/2019 and in the "Letter to the President dated 12/15 /2022" relating to the petitioners substantiated whistle blower complaint that is germane to the disclosure and ongoing Office of

special counsel complaints. They claimed that about $10 per package of prescription mailed and calculated the waste to be about $45,000 for the 3 years which resulted in about 6 prescriptions a day and hence insignificant. This number only represented daily returns which were calculated to be about 6 packages. Pharmacy mailed an average of 250-300 prescriptions a day during that period, then multiplied the average number by $10 which will yield over 2 million dollars wasted for those 3 years. AJ's due to her pro bias, neglected to consider the Agency's errors, lies, clear misrepresentation and inconsistencies in the record which led to her erroneous credibility determination and denial of corrective action. *See* on 09/12/2019, the Office of medical inspectors (OMI) issued its initial report on petitioners Office Special Counsel (OSC) and notes " . . . Las Vegas Pharmacy lost approximately $10.00 more per package in postage cost-totaling more than $45,000 in excess postage cost";

V. Similarly, Action by Non-Whistleblower

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity, the Board will consider all of the relevant factors, including the following factors ("Carr factors"): (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against

employees who did not engage in such protected activity, but who are otherwise similarly situated. *See* whistleblower Retaliation Report of Investigation Regarding Alleged Reprisal Against a Secret Service Special Agent. Report Number. I15-USSS-SID-01777 (*quoting, Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 11; *see also Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Agency provided RN[14], JP as similarly situated employees who did not have ongoing OSC complaint and AJ noted, "J.P. testified to receiving notice of errors they did not think were errors. HR-1, R.N. testimony; HR-2, J.P. testimony. Both described having to contest these errors on a periodic basis to ensure non-errors were not factored against them in their performance. *Id.*

J.P. testified she did not meet the pending prescription performance standard in the fiscal year 2021, and the agency placed her on a PIP related to that element. HR-2, J.P. testimony. When she successfully completed the PIP, she was rated successful on that performance metric. *Id.* The agency thus took similar actions against J.P. and the appellant when they failed to meet the pending prescription performance standard"

Contrary to the above, there is no policy requiring pharmacists to report unsubstantiated errors to the supervisor periodically but can be done as time permits. What the policy requires with appraisal system is self-assessment at the end of the rating period.

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[14] Robina Nakimera. *See* App.187a-189a. She testified that pending data is subjective (App.188a Q/A # 245-249)

JP was not given PIP in 2021 and because she was successful when they factored in the time she spent in community care, but did not understand why PIP was still given to her in 2022 without contacting the union as required by AFGE/DVA master agreement. JP testimony. *See* App.185a-187a.

EXCERPTS OF HEARING TRANSCRIPT
DALE HAWKINS

Statement of material facts/excerpts of record:

Steven Funderburk, (OGC) (20:00):

> Okay. Did you have a couple of employees that were unsuccessful?
>
> Dale Hawkins, Supervisor (20:05):
>
> I did. There were two at midpoint, one of them retired and then there was just one at the end of the year.
>
> Steven Funderburk, (OGC) (20:13):
>
> Which, okay. And that was Dr. Anoruo? (20:14)
>
> A: Yes.

EXCERPTS OF HEARING TRANSCRIPT
JP

(App.184a-187a)

Q: Were you placed on a PIP?

A: I have been, yes, in the past.

Q: Why were you placed on PIP?

A: Because the pendings weren't acceptable numbers.

Q: What year was that?

A: I had a 90-day one. It was—I want to *see* February to April.

JUDGE BLACK: Okay. Dr. Paulson, February to April[15] of what year?

THE WITNESS: This year.

JUDGE BLACK: Thank you.

So that's 2022.

Q: What about last year?

A: Not—last year, no, I did not.

In summary, this case was initiated on March 7, 2021, with MSPB IRA appeal filed on January 18, 2022, and not within the same filing period. Appellant was placed on PIP in 2021 and within the claim accepted period, JP was not. Dale also admitted that 2 people were unsuccessful at the end of the year of one retired and appellant was the only one at the end of the year, but to present a similarly situated employee without whistleblower activity forced PIP on JP in 2022 and presented inconsistent statement that JP was also unsuccessful in 2021. Clearly the Carr factor weighs heavily in appellant favor. Dale also violated 18 U.S.C § 1001.

VI. Motive to retaliate

On several occasions, Appellant notified Agency leadership that he had filed EEOC, OSC, MSPB complaints reported the abuse and waste of taxpayers'

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[15] This case was initiated on March 7, 2021 with MSPB IRA appeal filed on January 18, 2022 and not within the same filing period. Merit panel erred

money to the congress, requested reopening of the Clinic pharmacy they closed using false data, filed lawsuits against the agency to which almost all the management were named. The Agency has always referenced these issues in their responses and motivated the Agency to retaliate against appellant through all the various actions as evident in this case. *See Redschlag v. Dep't of Army*, 89 M.S.P.R. 589, 634-36 (2001) (motive may exist if an official was named in grievances and complaints). *See Chambers v. Dep't of Interior*, 116 M.S.P.R. 17, 49-55, 2011 M.S.P.B 7 (2011) (finding strong motive because acting officials were extremely concerned about effect disclosures had on relationship with Congress).

Dale testified that appellant was busy constructing e-mail, worked 5 days of pending shift in the week of 9/27/2020 to 10/02/2020 and only completed about 500 prescriptions (MSPB Tab 68.2@01:57:05; & @01:57:38) and when given the opportunity that he was busy composing e-mails and does not fall through Tab 68.2 @01:58:24; 01:59:02). The above testimony demonstrates why Dale moved to remove me from the federal service. Contrary to Dale's dishonest statement *see* App.152a #101), Appellant was on part annual/sick leave between 9/28-9/30/2020 and covered rotation 3 on 10/02/2020 not shown on the schedule, was assigned conversions during the week and completed 250 prescriptions on 10/01/2020 which was the 3rd highest # for all local pharmacist excluding the remote pharmacist Rowden/Clark. SAppx371-2[16]. His false claim demon-

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[16] Maren & Annie may have processed higher number because outpatient pharmacy was on lockdown and provider order entry were limited so they concentrated on pending and conversions

strated general animosity of the management because of appellant ongoing substantiated Office of special council (OSC) report SAppx 163-182 along with his EEOC cases no 01161 dismissed on 6/28/2021 and remanded on 12/13/2022.

Similarly, the strength of motive, is not critical, as the agency comparator evidence weighs firmly in the appellant's favor and the lack of strength in the agency case due to misrepresentation, inconsistencies, shifting explanations and lies tips in complainant's favor. Taken together, appellant believes the agency has failed to demonstrate that it would have taken the action absent his ongoing OSC complaint.

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and no person reach 400 required for pending even the remote pharmacist who usually process over 500 RX(s) daily.

CONCLUSION

Based on the foregoing reasons, Appellant respectfully requests that this Court grant and settle these important questions of federal law, set aside the merit panel decision, grant appellant corrective action and the cost of filing and adjudication this appeals

Respectfully submitted,

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October 29, 2024

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