

**UNITED STATES COURT OF APPEALS FOR THE  
FEDERAL CIRCUIT**

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|--|---|------------------------------------|
| <b>Joseph P. Carson,</b>               | ) |                                    |
|  | ) |                                    |
| <b>Petitioner</b>                      | ) |                                    |
|  | ) | <b>Docket No: 2015-3135, -3211</b> |
| <b>v.</b>                              | ) |                                    |
| <b>Merit Systems Protection Board,</b> | ) |                                    |
|  | ) |                                    |
| <b>Respondent</b>                      | ) |                                    |
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**PETITIONER’S MOTION FOR LEAVE TO SUBMIT CORRECTIONS TO  
STATEMENTS OF FACT MADE BY RESPONDENT AT ORAL  
ARGUMENT**

Petitioner respectfully submits a motion for leave to submit corrections to statements of fact made by Respondent at Oral Argument on February 8, 2017.

Petitioner is again pro se, after dismissing his representative, Loring Justice, for cause on February 16, 2017. Mr. Justice, in petitioner’s opinion, violated the ABA Model Rules 3.3, “Candor Toward the Tribunal,” in: 1) omitting the material fact, as documented in the case record, that Mr. Carson has filed numerous petitions for writ of mandamus against the Office of Special Counsel, and 2) refusing to correct his omissions of material fact to the Court after Mr. Carson directed him to do so.

Mr. Justice, who has worked with Mr. Carson for over fifteen years, was well aware of these cases and their outcomes in responding to the Court’s

questions about petitions for writ of mandamus at 2:56, 3:30, 29:55 and 30:40 in oral argument. Mr. Justice, together with his associate, Mr. Rickman, submitted an unopposed motion to withdraw as counsel on February 17, 2017.

Mr. Carson apologizes to the Court for the professional misconduct of his representative and hopes the Court will consider appropriate disciplinary action.

The Merit Systems Protection Board's representative, Jeffrey Gauger, has represented the MSPB at this court **298 times** since January 1999 (which is as far back as the Court's PACER records go). He has likely represented it well over 100 times prior to January 1999 - quite possibly Mr. Gauger is the most experienced lawyer at this Court in its history - possibly even by a wide margin.

Despite that, he made, knowingly or not, material false statements to the Court in claiming at oral argument: 1) to be unaware whether Mr. Carson has filed numerous petitions for writs of mandamus against the Office of Special Counsel (despite his own brief mentioning them and their being repeatedly mentioned in the joint appendix), and 2) in three times claiming that Mr. Carson did not file IRA appeals after OSC closed its investigations into his two relevant reprisal complaints (despite these two IRA appeals being explicitly cited in one of the final MSPB decisions under review, despite Mr. Gauger's brief stating that the pending appeals of these two final MSPB decisions at the Court of Appeals for the

D.C. Circuit are “related cases” to this appeal, and despite these two IRA appeals being repeatedly mentioned and described in the joint appendix).

Whether he made these material false statements knowingly or not, what is now indisputable is that Mr. Gauger has not informed the Court of his material false statements, despite his being informed of them of February 16, 2017.<sup>1</sup>

The article, “*Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk’s Perspective*,” by Rachel Clark Hughey, *Journal of Appellate Practice and Process* Vol. 11, No. 2 (Fall 2010), concisely describes the professional duty of attorneys who appear before it at oral argument:<sup>2</sup>

**Answer the judges’ questions - directly, fully, candidly (and truthfully, by ABA model rule 3.3)**<sup>3</sup>

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<sup>1</sup> In an email on February 17, 2017 to Mr. Carson, Mr. Gauger stated he would not oppose Mr. Carson writing a letter to the Court, informing the Court that the case record demonstrates he has filed numerous petitions of writ of mandamus against OSC. Mr. Gauger did not mention his material false statements about the non-existence of the two relevant IRA appeals in his email of February 17, 2017. Mr. Carson subsequently (on February 20, 2017) requested that Mr. Gauger inform the Court of his material false statements at oral argument. He gave Mr. Gauger a deadline of COB on February 22, 2017 to respond to his request. Mr. Gauger has not responded to Mr. Carson’s request.

<sup>2</sup> available at <http://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1107&context=appellatepracticeprocess>

<sup>3</sup> Hughey, page 433 and footnote 149.

To do so, attorneys must be knowledgeable of the case record and be able to cite to it.<sup>4</sup> Mr. Justice knowingly omitted material fact about Mr. Carson’s numerous petitions for writ of mandamus against OSC. Mr. Gauger either knowingly made a number of material false statements or displayed a “shockingly shabby performance of a counsel’s appellate role (wherein counsel is expected to know intimately the record).”<sup>5</sup>

By their misconduct (including incompetence), the Court’s purpose for oral argument was largely thwarted. How can a worthwhile, productive “conversation” occur between the Court and counsel at oral argument when truthful statements about the case record are optional to the counsel?<sup>6</sup> How different oral argument would have been - in the questions asked and answered- had Mr. Justice and Mr. Gauger complied with their professional duties to the Court and the parties they represented - had they provided the Court full, direct, candid and truthful answers to its questions, based on their having proper knowledge of the case record, about mandamus and whether Mr. Carson filed IRA appeals after OSC closed its

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<sup>4</sup> Hughey page 429, footnote 129 and page 441, footnotes 184, 186, 187, and 188.

<sup>5</sup> Hughey page 441, footnote 187, citing Pac-Tec, Inc., v. Amerace Corporation, 903 F.2d 796 (Fed. Ckt. 1990) at 803-04.

<sup>6</sup> Hughey page 432, footnotes 142, 143, 144, and 145.

investigation of the two relevant reprisal complaints.

Finally, Mr. Gauger represents the Merit Systems Protection Board (MSPB), the federal agency with the stated mission “protect the merit system principles and promote an effective federal workforce free of prohibited personnel practices.”

Mr. Gauger should be held to a higher professional standard than other attorneys who practice at CAFC, in Mr. Carson’s opinion. Mr. Carson thinks ABA model rule 3.8, “special responsibilities of a prosecutor” should be the standard for his professional behavior - that Mr. Gauger should not be motivated just to “win” cases as an advocate of MSPB, but, more importantly, to be a “minister of justice” on behalf of the federal civil service. Mr. Carson hopes the Court considers appropriate disciplinary action against Mr. Gauger.

Attached to this motion for leave are:

1. A transcription of oral argument.
2. Citations to the case record that establish, contrary to what counsel stated at oral argument: 1) Mr. Carson filed numerous petitions for writ of mandamus against OSC, and 2) Mr. Carson filed IRA appeals after OSC closed its investigations into his two relevant reprisal complaints.

Respectfully Submitted,

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Joseph P. Carson, P.E., Petitioner  
10953 Twin Harbor Dr  
Knoxville, TN 37934  
865-300-5831

## **CERTIFICATE OF SERVICE**

I certify that the following document for this case:

1. Motion for leave to file corrections for material false statements made at oral argument
2. Transcript of oral argument
3. Corrections to material false statements made at oral argument, with citations to case record

was served on:

### **Respondent**

Jeffrey Gauger  
U.S. Merit Systems Protection Board  
1615 M St, NW  
Washington, DC 20419  
jeffrey.gauger@mspb.gov (Mr. Gauger has agreed to be served by email in this appeal, he is being served by email and by postal mail)

### **Amicus Curiae**

Brenda McCracken  
808 Baskin Drive  
Joliet, IL 60404  
brenda.mccracken@gmail.com (Ms. McCracken has agreed to be served by email in this appeal).

Andrew Dudley Jackson  
7519 W. 77<sup>th</sup> Avenue  
Crown Point, IN 46307  
jackson@njcdlp.org (Mr. Jackson has agreed to be served by email in this appeal).

Zena Denise Crenshaw-Logal  
7519 W. 77<sup>th</sup> Avenue  
Crown Point, IN 46307

crenshaw-logal@njcdlp.org (Ms. Crenshaw-Logal has agreed to be served by email in this appeal)

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph Carson

February 22, 2017