QUESTIONS PRESENTED:

This case evokes constitutional, statutory, and common law challenges not fully addressed below, which underly a recusal motion against the Administrative Law Judge employed by an agency which was one of the subjects or parties in the Petitioner's whistleblower complaint.

1. Whether the Sixth Circuit, and the Merit Systems Protection Board, erred by finding that constitutional due process did not require recusal of an agency's Administrative Law Judge, AJ, in a whistleblower complaint which included the agency, based primarily on evidence of actual bias, and neglected situations where bias can be presumed due to non-pecuniary interests of the agency, and conflicts of interests, which "tempt adjudicators to disregard neutrality" or in circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable"?

2. Whether recusal of the Merit System Protection Board's, "MSPB," AJ, and of the MSPB, was required due to presumption of bias under 28 U.S.C. § 455(b)(1)(3)(4) and/or (5) due to conflicts of

interest and likelihood that MSPB members will be material witnesses, and are a party, in the proceeding?

3. Whether recusal of the Merit System Protection Board's, "MSPB," AJ, and of the MSPB, was required due to "other disqualification" under Section 554 of the Administrative Procedure Act in Title 5 of the United States Code and the agency's regulations, 5 CFR § 1201.42, based on the AJ and MSPB's conflict of interests since the MSPB was a party in the suit and a potential material witness in the proceedings?

ARGUMENT

I. THE DENIAL OF PETITIONER'S MOTION TO RECUSE THE MSPB'S AJ, AND REQUEST TO APPOINT AN INDEPENDENT AJ, VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS BECAUSE BIAS MUST BE PRESUMED SINCE THE MSPB WAS A PARTY AND SUBJECT IN THE WHISTLEBLOWER REPRISAL PROCEEDING

The Due Process Clause of the Fifth and the Fourteenth Amendment of the United States Constitution established a constitutional floor for deciding an adjudicator's impartiality. *Lacen v. Russo*, 2018 U.S. Dist. LEXIS 223406 (West. Dist. Mass. 2018) (citing *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456 (1985) (other citations omitted); *Bracy v. Gramley*, 520 U.S. 899, 904 117 S. Ct. 1793 (1997) (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986). The right to an impartial judge is an example of a constitutional right so basic to a fair

trial that their infraction can never be treated as harmless error. *Chianelli v. EPA*, 8 Fed. Appx. 971 * | 2001 U.S. App. LEXIS 9428.

Generally, the Supreme Court has recognized two kinds of judicial bias: actual bias and presumptive bias. *Buntion v. Quarterman* (citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). In many of these cases, courts assess *actual* bias based on findings whether or not the adjudicator's words or conduct showed that he or she had a "deep-seated antagonism against the employee," and thus, deprived the employee of due process, under this court's ruling in *Liteky et. al. v. United States*, 510 S.Ct. 540 (1994); *See also Bieber v. Department of the Army,* 287 F.3d 1358 (Fed. Cir. 2002) (MSPB applied *Liteky* standard to employee's request for new hearing based on actual bias); *Anderson v. Sheppard*, 856 F.2d 741, 747 (6th Cir. 1988)*; Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 106 S. Ct. 1580.

In fact, the Sixth Circuit Court of Appeals, the MPSB, and the AJ denied Petitioner's recusal almost exclusively based on actual bias alone. The Sixth Circuit also claimed that appearance of bias never automatically disqualifies a judge. *Carson v. MSPB*, 2021 U.S. app. LEXIS 14691 (6th Cir. 2021). Yet this runs completely counter to the Supreme Court's opinion that "Both the appearance and reality of impartial justice are necessary to

the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 579 U.S. 1, 16, 136 S. Ct. 1899 (2016).

An appearance of bias demeans the reputation and integrity of the adjudicatory process. *Caliste v. Cantrell*, 329 F.Supp.3d 296, 2018 U.S. Dist. LEXIS 1212 (E. Dist. Louisiana 2018). In other words, "an insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of insuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless." *Williams v. Pennsylvania*, 579 U.S. 1, 136 S. Ct. 1899 (2016).

Additionally, due process violations have become primarily evident in presumed bias cases, likely due to the *appearance* of partiality. *See Buntion v. Quarterman,* 524 F.3d 664 (5th Cir. 2008). Presumptive bias was commonly found in the following three situations:

> (1) the decision maker has a direct personal, substantial, and pecuniary interest in the outcome of the case; (2) an adjudicator has been the target of personal abuse or criticism from the party before him; and (3) a judicial or quasi judicial decision maker has the dual role of investigating and adjudicating disputes and complaints.

Id. at 673 (*Bigby v. Dretke*, 402 F.3d 551, 559 (5th Cir. 2005) (citing Supreme Court cases). These rules reflect the maxim that "no man is allowed to be a judge in his own cause," because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. The Federalist No. 10, p 59 (J. Cooke ed. 1961) (J. Madison); *Caperton v. A. T. Massey Coal Co.,* 556 U.S. 868, 129 S. Ct. 2252 (2009). "The disqualifying criteria cannot be defined with precision. Circumstances and relationships must be considered." *Id*. at 880. "According to the high court, the protection afforded a litigant under the due process clause in the realm of judicial disqualification extends beyond the narrow common law concern of a direct, personal, and substantial pecuniary interest in a case to 'a more general concept of interests that tempt adjudicators to disregard neutrality." *Caperton*, 556 U.S. at 878; *see also Harris v. Proano*, 2021 Cal. App. Unpub. LEXIS 4856, at *12-13.

The Sixth Circuit, the MSPB, and the AJ completely ignored the presumed bias factors which violated Petitioner's due process in this case. Although the Petitioner's situation is novel among recusal case authority, two of the above situations are most critical to this case's analysis. *First*, the Due Process Clause incorporates the common-law rule that a judge must recuse himself when he has a direct, personal, substantial, pecuniary

interest in a case. *Id*. at 876 (citing *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927)). Non-pecuniary conflicts "that tempt adjudicators to disregard neutrality" also offend due process. *Id.* at 878

Petitioner asserted in his whistleblower claims that the MSPB has repeatedly for years failed or refused to comply with its statutory duty at 5 U.S.C. § 1204(a)(3) to "...report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." (Exhibit , copy of Whistleblower claim or reference to record?). Undoubtedly, the MSPB has a substantial interest in whether the MSPB is found to have been violating federal law. An administrative judge (AJ) employed by the MSPB would be no different.

The MSPB AJ's are not completely independent entities, despite what the MSPB may claim. The MSPB employs AJ's who conduct hearings pursuant to the statute. (*See* 5 CFR § 1201.41) The MSPB hires its AJs with vacancy announcements for "Attorney-Examiners". It uses the honorific "Administrative Judge" for these individuals. However, they are not Administrative Law Judges (ALJs). They lack the statutory tenure and judicial independence of ALJs. *See* "Blowing in the Wind: Answers for Federal Whistleblowers," William & Mary Policy Review, Vol. 3, p. 184,

2012; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2119239, pages 215-218. Thus, they are subject to the normal supervisory direction within MSPB. MSPB, which employs the lawyers appointed to serve as AJs, it is their employer with whom they have an attorney-client relationship. Pursuant to its statutory authority, MSPB delegates its adjudicatory authority to its AJs, subject to its review of their initial decision. 5 U.S.C. §§ 1204(a) and (b). Thus, the AJ's carry the same presumed bias as the MSPB. In sum, Petitioner's due process rights were violated because they were not recused from hearing his whistleblower reprisal complaint and reassigned to an independent ALJ instead.

Second, a judge must withdraw where he or she "becomes embroiled in a running, bitter controversy" with one of the litigants, *Mayberry v. Pennsylvania,* 400 U.S. 455, 465, 91 S.Ct. 499, 505 **(**or becomes "so enmeshed in matters involving [a litigant] as to make it appropriate for another judge to sit," *Valdovino v. Atchely,* 2021 U.S. Dist. LEXIS 213036 (citing *Hurles*, 752 F.3d at 789-90. (citing *Johnson v. Mississippi,* 403 U.S. 212, 215-16, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971)).

Even a cursory examination of the chronology of Petitioner's case proceedings and Petitioner's whistleblower claims against the MSPB point to such a "running, bitter controversy" between the litigants. (See Exhibit ,

Expert Report??, if it was included previously in proceedings). No reasonable person could think that the MSPB, or its employed AJ, could be impartial in such a situation.

The appearance of bias especially arises in conflict of interest cases like the MSPB's situation in this case. *Caliste,* 329 F. Supp. 3d 296. In such cases, "the correct question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden" under the due process clause. *Id*. In other words, based on the circumstances, a disqualification inquiry must ask whether an average man or woman would be tempted sitting as an adjudicator to try the case with bias against issues presented by the Petitioner. *Wards Corner Beauty Acad. v. Nat'l Accrediting Comm'n o Career Arts & Sciences* 290 F.Supp.3d 463 (E.D., Va. 2018).

Presumed bias was most evident in Petitioner's whistleblower complaint against the U.S. Department of Energy and the MSPB, because the adjudication of a whistleblower reprisal appeal would require a "reasonable belief" determination about the violation of non-adjudicatory, non-discretionary, statutory duty by the Senate-Confirmed members of the MSPB. The MSPB even recognized the conflict-of-interest problem with

the Senate-confirmed MSPB members by appointing an MSPB AJ. However, this AJ was not independent from the MSPB. In fact, review of the AJ's decision would be reviewed by the MSPB. Also, the MSPB serves a supervisory role over their AJ's. Thus, the conflicts still remain and due process is still violated. The conflict of interest in this whistleblower case, where the MSPB was a party and subject, was fundamentally no different than in cases where the MSPB employee files an adverse employee appeal action. In those MSPB employee cases, the MSPB must follow a significantly different and independent administrative review under 5 CFR 1201.13. Otherwise, the MSPB employee's due process rights will be violated due to presume bias (see arguments in Section III below). The same should occur in this case in order to afford the Petitioner's fundamental due process right to a fair and impartial adjudicator of his whistleblower reprisal complaint.

The above circumstances lead to one conclusion, even as an objective matter, recusal was required. Petitioner's case is precisely the kind of circumstances in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. *Caperton*, 556 U.S. at 877, 129 S. Ct. 2252 (citing *Withrow v. Larkin*, 421 U.S. 35, 58, 95 S.Ct. 1456, 1470, 43 L.Ed.2d 712

(1975); *see also Greenberg v. Bd. of Governors of Fed. Reserve Sys.,* 968 F.2d 164, 167 (2d Cir.1992). As the high court explained in Caperton, the court conducts an objective examination to determine whether ''under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias and prejudgment that the practice must be forbidden.'" *Id.* at 884.

Any assertion that the above principles do not apply to administrative judicial procedures will fail. Due process constitutional protections are fundamental and require a fair and unbiased tribunal, regardless of whether that tribunal is in the context of a court hearing or some other administrative hearing. *C. Line, Inc. v. City of Davenport,* 957 F. Supp. 2d 1012, 2013 U.S. Dist. LEXIS 108540; *see also Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955))). *Withrow*, 421 U.S. at 46-47, 95 S. Ct. 1456 (finding that the fair tribunal requirement "applies to administrative agencies which adjudicate as well as to courts"); *Deretick v. Office of Admin. Hrg's, State of Minn.*, 798 F.2d 1147, 1152 (8th Cir. 1986) ("[A]

hearing officer must be impartial for an administrative agency to meet the requirements of due process.").

The Fifth Circuit succinctly stated the essential principles in *National Labor Relations Board v. Phelps*:

> A fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.

136 F.2d 562, 563-564 (1943); *see also Long Beach Federal Sav. & Loan Assoc. v. Federal Home Loan Bank Board*, 189 F. Supp. 589, (S.D. Cal.1960) (A hearing or trial conducted by a biased, prejudiced, interested, and disqualified tribunal or officer is a denial of constitutional due process, and nullifies such proceedings, and that the requirements for an unbiased and disinterested tribunal apply more strictly to an administrative adjudication than to a judicial one).

An appearance of bias demeans the reputation and integrity of the adjudicatory process. *Caliste v. Cantrell,* 329 F.Supp.3d 296, 2018 U.S. Dist. LEXIS 1212 (E. Dist. Louisiana 2018). In other words, an insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of insuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless. *Williams v. Pennsylvania* 579 U.S. 1, 136 S. Ct. 1899 (2016). Such harmful error occurred here below. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S., at 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712.

II. RECUSAL OF MSPB'S AJ, AND APPOINTMENT OF JUDICIALLY INDEPENDENT AJ WAS MANDATED DUE TO THE PRESUMPTION OF BIAS UNDER 28 U.S.C. §455(b)(1)(3)(4) and/or (5) ARISING FROM THE ADJUDICATOR'S CONFLICTS OF INTEREST SINCE THE MSPB WAS A PARTY AND SUBJECT OF, AND MSPB OFFICIALS WERE LIKELY MATERIAL WITNESSES IN, THE WHISTLEBLOWER REPRISAL PROCEEDING.

Federal nondiscretionary judicial recusal requirements are set forth in 28 U.S.C. § 455(b), which states:

> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> >
> > (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
> >
> > (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> >
> > (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> . . . ;
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

A. Although not mandatory, administrative agencies regularly apply federal judicial standards to assess appropriate due process rights of movants for recusal.

Notably, based on the face of the statute, administrative boards, and AJs are not required to apply 28 U.S.C. §§ 455(a) or (b) to recusal motions, because the statute applies only to judges appointed under Article III of the United States Constitution. *Reynolds v. Colvin*, No. 2:12-CV-2643-AKK, 2014 U.S. Dist. LEXIS 90066, at *21 (N.D. Ala. July 2, 2014) (Citing *Greenberg,* 968 F.2d at 167 (2d Cir.1992) ("the high standard of propriety applied to recusal motions for federal judges 'cannot apply to administrative law judges who, after all, are employed by the agency whose actions they review.'"); *Gibson v. FTC*, 682 F.2d 554, 565 (5th Cir. 1982), cert. denied, 460 U.S. 1068 (1983); *Brian Codd,* Claimant-Respondent, Cross-Respondent, No. 97-0608, 1998 WL 461478, at *3 (DOL Ben. Rev. Bd. Jan. 23, 1998); *Monda*, 8 OCAHO 1002 (June 24, 1998).

However, administrative boards regularly apply the federal judicial standards enunciated within 28 U.S.C. § 455 to recusal determinations.

Liteky et. al. v. United States, 510 S.Ct. 540 (1994), *Greenberg,* 968 F.2d. 164, and similar "bias" standards. *Bieber v. Dep't of Army,* (Army), 287 F.3d 1358, 1362 (Fed. Cir. 2002) (MSPB applies *Liteky* standard to employee's request for new hearing based on bias); *Licari v. Department of Transportation,* (USDOT), 705 F. App'x 978 (Fed. Cir. 2017) (Arbitrator's conduct did not constitute deep-seated antagonism against employee, and thus did not deprive employee of due process); *Louie v. Dep't of Treasury*, 122 F. App'x 449 (Fed. Cir. 2004) (Allegation that administrative law judge who presided over Internal Revenue Service (IRS) employee's appeal from demotion for unsatisfactory job performance was more willing to accept supervisor's opinions than the agency officials themselves, even if true, was insufficient to establish bias); *Herman v. Dep't of Just*., No. DC-1221-10-0164-B-2, 2013 WL 4047532, at *3 (M.S.P.B. Aug. 12, 2013) (The AJ's frank settlement discussions with the parties did not evidence a deep-seated antagonism against Herman); *Simmons v. Department of Defense*, (DOD), 443 Fed. Appx 539, 541, 2011 WL 4347047 (Fed. Cir. 2011) (Petitioner has made no showing of "a deep-seated favoritism or antagonism" on behalf of the AJ "that would [have made] fair judgment impossible.") (citing *Bieber v Department of the Army* , 287 F.3d 1358 at 1362 (Fed. Cir. 2002) (internal quotation marks omitted) (quoting *Liteky*,

510 U.S. at 555)); *Wright v. Administrative Review Board, Department of Labor, (DOL*), 836 F. Appx 248, 256, fn. 77 (5th Cir. 2020) (AJ's request that employer submit response to recusal motion is not evidence of bias); *Thomas v. Office of Personnel Management,* 350 Fed. Appx 448, 452, (Fed. Cir. 2001) (No evidence of favoritism or antagonism in AJ's decision to deny Thomas' discovery motion); *Brian Codd v. Stevedoring Services of America*, et. al. No. 97-0608, 1998 WL 461478, at *4 (DOL Ben. Rev. Bd. Jan. 23, 1998) (Section 455 rules are inapplicable to administrative proceedings; however, the rules are instructive; Reviewed "other disqualification beside personal bias and AJ judging his own bias; recusal not warranted); *Cesar Lee v. Environmental Protection Agency,* EPA, 2010 MSP 240 (December 9, 2010) (No recusal warranted due to EPA's counsel and the judge's previous association through the United States Postal Service Legal Department).

Ostensibly, Professor Louis Virelli from Stetson University supported this conclusion in a recent report assessing federal agency recusal standards. Louis J. Virelli, III, *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators*, May 14, 2020) (Report to the Admin. Conf. of the U.S., "Final Version"),

https://www.acus.gov/report/administrative-recusal-rules-taxonomy-and-study-existing-recusal-standards-agency-0. (Exhibit ?).

> The most comprehensive agency recusal standards are those that approximate judicial standards, whether by incorporating the federal judicial recusal statute directly, referring to model codes or canons of judicial ethics, or explicitly including all the features of judicial recusal.69 The common features of modern judicial recusal are those already discussed above—conflicts of interest, prior involvement, personal bias, and the appearance of impartiality. A small group of agency rules include all of these features, almost exclusively by incorporating judicial recusal sources into their administrative recusal standards. One clear example is the Department of the Interior, which has two separate regulations requiring adjudicators to recuse themselves "from a case if circumstances exist that would disqualify a judge in such circumstances under the recognized canons of judicial ethics."70 Another is a recently adopted regulation from the Occupational Safety & Health Review Commission (OSHRC), which states that "[a] Judge shall recuse himself or herself under circumstances that would require disqualification of a federal judge under Canon 3(C) of the Code of Conduct for United States Judges."71 Canon 3(C) is virtually indistinguishable from the federal recusal statute.72 Others have followed suit to varying degrees of specificity, but agencies with recusal rules that mirror federal judicial standards are a distinct and small minority. They do include, however, by far the most active agency adjudicator in the study, the Social Security Administration (SSA), as well as the DOJ's Executive Office of Immigration Review (DOJ EOIR) and the Nuclear Regulatory Commission (NRC).73 None of the three have adopted binding regulations governing recusal, but all have issued guidance documents that explicitly include features like protections for conflicts, prior involvement, personal bias, and the appearance of impartiality.74 A 2005 DOJ EOIR memorandum from the Chief Immigration Judge stated that the federal recusal statute, while it "does not specifically mention immigration judges . . . offers strong guidance on the recusal issue,"75 and the NRC's Staff Practice and Procedure Guide

> specifically refers to the federal statute in describing its desired approach to recusal.76 Explicitly incorporating judicial standards, including protection for the appearance of impartiality, comes closer to fulfilling the dual promises of recusal theory than any other administrative recusal standards.

Id. at 22-24. (*See also* Section V, Tables of Agencies' Recusal Standards).

Significantly, the National Labor Relations Board, NLRB, specifically found its regulations and ethics rules consistent with 28 U.S.C. § 455. Chairman John Ring, National Labor Relations Board Recusal Report, p. 30, November 19, 2019. (Exhibit 2) In fact, in 1999, a challenged NLRB member directly applied Section 455(a) and (b)(1) and (2) to resolve a request for his disqualification based on previous employment and denied the motion. *Overnite Transp. Co*., 329 NLRB 990, 1999 WL 1036568 (1999).

The Armed Services Board of Contract Appeals also has used the rules in Section 455 as "guidance on recusal issues". *In Re Env't Safety Consultants, Inc*., ASBCA No. 54995, 06-2 B.C.A. (CCH) ¶ 33321 (June 19, 2006). The Executive Office of Immigration Review, Office of the Chief Administrative Hearings Officer, also applied Section 455 to a motion for judge recusal, by analogy, to assess bias and prejudice. *Monda,* 8 OCAHO 1002 (June 24, 1998) (citing *Gibson v. FTC,* 682 F.2d 554, 565 (5th Cir. 1982), cert. denied, 460 U.S. 1068 (1983).

As should be the case here, the Nuclear Regulatory Commission required application of Section 455(a) and (b) to recusal adjudications and affirmed that subsection (b) factors are mandatory and cannot be waived: *See In the Matter of N. States Power Co.* (Pathfinder Atomic Plant, Byproduct Material License No. 22-08799-02, 30 N.R.C. 311 (Oct. 24, 1989) (Commissioner concludes that none of the alleged facts required him to disqualify myself from this case under the standards of 28 U.S.C. 455(b)); *See also In the Matter of Pub. Serv. Elec. & Gas Co., et al. (Hope Creek Generating Station, Unit 1),* 19 N.R.C. 13 (Jan. 25, 1984); U.S. Nuclear Regulatory Commission Staff Practice and Procedure Digest 3.1.4.2 (June 2011) ("Although the disqualification standard for federal judges in 28 U.S.C. § 455 does not by its terms apply to administrative judges, the Commission and its adjudicatory boards have applied it in dispositioning motions for disqualification under 10 C.F.R. § 2.313."), https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0386/d16/sr0386d16.pdf (noted in Virelli, III, Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators, p. 23, fn. 76).

Some of the administrative agency recusal cases resulted in a finding of bias. *Gallagher v. Department of the Air Force*, (Air Force), 84 MSPR

441, 1999 WL 1075322 (Judge's derogatory comments evidenced, or at least indicated perception, of bias; judge recused); *Am. Gen. Ins. Co. v. F.T.C.,* 589 F.2d 462 (9th Cir. 1979) ("A member of the Commission should have disqualified himself from participation in the Commission's decision where he had previously participated in the case as counsel."). In *Marshall v. Sun Petroleum Prods. Co*., "Commissioner Cottine, disqualified himself from participation in the case because, prior to his appointment as a member of the Commission, he had represented the union at the hearing before the ALJ." 622 F.2d 1176, 1179, n.3, 1980 U.S. App. LEXIS 17122 (3rd Cir. 1980); *See also* 28 U.S.C. § 455(b)(2); ABA, Code of Judicial Conduct, Canon 3C(1)(b) 1972);

Undoubtedly, the courts and administrative law judges presume that "honesty and integrity exist in those who serve as adjudicators for administrative agencies." *Reynolds v. Colvin*, No. 2:12-CV-2643-AKK, 2014 WL 2987658, at *6 (N.D. Ala. July 2, 2014) (citing *Schweiker v. McClure,* 456 U.S. 188, 195, 102 S.Ct. 1665 (1982)). This "presumption of integrity can be overcome by "a showing of conflict of interest or some other specific reason for disqualification." *D'Amato v. Apfel*, No. 00 CIV. 3048 (JSM), 2001 U.S. Dist. LEXIS 9459, 2001 WL 7769, at *16 (S.D.N.Y. July 10,

2001), aff'd sub nom. *D'Amato v. Barnhart,* 43 F. App'x 415 (2d Cir. 2002) (citing *Schweiker*, 465 U.S. at 195, 102 S.Ct. at 1670).

Regardless of its mandatory statutory application, the Federal Circuit in *Chiannelli, v. Env't Prot. Agency*, applied it to assess a denial of a recusal motion in an individual right of action appeal before the MSPB. 8 F. App'x 971, 980 (Fed. Cir. 2001).

> We believe, however, that the Supreme Court's reasoning in *Liteky* regarding the disqualification of federal judges applies with equal force to the disqualification of administrative judges. Indeed, we note that the Board has previously looked to the language of 28 U.S.C. § 455 and corresponding federal case law, including the Supreme Court's decision in *Liteky*, when deciding the propriety of an administrative judge's denial of a disqualification motion. See, e.g., *Washington v. Dep't of the Interior,* 81 M.S.P.R. 101, 104 (1999) ("There is no requirement that the Board be bound by the federal judicial rule, inasmuch as it is not a court, but ... we see no reason not to look to the rule and case law arising from 28 U.S.C. § 455, where relevant ...").

8 F. App'x 971, 980.

The Federal Circuit asserted that the Merit Systems Protection Board should take into account an individual's personal bias or self interest in prosecuting a matter, but should do so without impugning the motives of the putative whistleblower. *Id*. at 978.

Essentially, the MSPB and the Federal Circuit agree that Section 455(a) and (b) ordinarily must be applied to recusals of its AJ's. The MSPB

cases, then, should be no different than cases before the Nuclear Regulatory Commission, and other agencies, which mandate Section 455 application and hold also that Section 455(b) circumstances mandate recusal.

B. Recusal is mandatory in this case, because a clear conflict of interest or presumed bias can be found under 28 U.S.C. 455(b)

Ordinarily in determining actual bias cases under Section 455(a), an objective test is applied to determine whether a court or agency board should exercise its discretion to recuse or disqualify a judge or adjudicator in the case, similar to a due process evaluation. *Lacen v. Russo, Caperton v. A. T. Massey Coal Co, Kokinda v. Pa.* DOC, 2017 U.S. Dist. LEXIS 225681, at *1-2 (W.D. Penn. 2017) (citing *In re Kensington Int'l Ltd.,* 368 F.3d 289, 301 (3d Cir. 2004). The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias." *Caperton*, 556 U.S. at 882, 129 S. Ct. 2252; *Whipple v. Tenn. Bd. of Paroles*, 2019 U.S. App. LEXIS 238 (6th Cir. Jan. 3, 2019) (6th circuit handbook).

However, under subsection (b) of Section 455, the statute provides a list of specific instances where a federal judge's recusal is mandated,

regardless of the perception of a reasonable observer. *Shareef v. Donahoe* 2013 U.S. Dist. LEXIS 62275, at *8 (W.D. NC, 2013). Petitioner has continually asserted throughout these proceedings that recusal was necessary in this case due to the MSPB's conflict of interest since MSPB would be a party in and subject of the Petitioner's Whistleblower Reprisal Complaint, and the AJ appointed by the MSPB was not an independent adjudicator from the MSPB. Judicial codes of conduct and disqualification statutes are usually the primary sources of rules for most conflict-of-interest questions. *Gacho v. Wills*, 986 F.3d 1067 * | 2021 U.S. App. LEXIS 3399 (7th Cir.). Section 455 is such a federal disqualification statute. However, the Sixth Circuit and the MSPB failed to assess recusal based on Section 455(b) conflict of interest provisions. The Sixth Circuit and the MSPB merely assessed actual bias as set forth in the discretionary recusal provisions of Section 455(a). The Sixth Circuit failed to even seriously discuss the lack of independence of the AJ in this case, especially since the AJ ignored the Petitioner's claim against the MSPB. (Exhibit/Record?)

Before assessing the application of Section 455(b)'s mandatory recusal provisions, it is critical that the review of the recusal motion be applied to the MSPB in addition to the MSPB-appointed AJ. In sum, the

conflict of interest disqualifier of the MSPB should be extended to the dependent AJ.

Generally, recusal is mandatory if the adjudicator is named as a party or could be named as a party in a proceeding, under 28 U.S.C. § 455(b)(5)(i). *See Talley v. Strombom,* 2015 U.S. Dist. LEXIS 152550, at *3 (W.D. Wash. 2015). The "proceeding" includes pretrial, trial, appellate review, or other stages of litigation. 28 USCS § 455(d)(1).

The Sixth Circuit opined that the Petitioner did not make any allegations against the MSPB so there can be no even appearance of bias claim against the MSPB. *Carson*, 2021 U.S. App. LEXIS 14691, at *9. The court supported this claim by qualifying allegations with "that MSPB had taken a personnel action against him (Petitioner)." *Id*. *First*, the Sixth Circuit might have mistakenly this fact based on the AJ's opinion which failed to include any assessment of the Petitioner's whistleblower claim against the MSPB. Alternatively, the Sixth Circuit confused requirements for asserting a whistleblower claim with factors in assessing bias of an adjudicator.

Second, Petitioner's whistleblower complaint in *Carson v. Department of Energy*, alleged misconduct by the MSPB as well as Petitioner's employer, the United States Department of Energy supervisors. (See….) (Exhibit ?) Merely based on the above facts alone, the first

conflict of interest arises under Section 455(b)(5) because the MSPB is a party in, or at least the subject of, the Petitioner's Whistleblower Reprisal Complaint.

Even if not a party initially, it is clear if the whistleblower claims had been allowed to proceed, MSBP would have become a party to the action. Had the MSPB complied with this statutory mandate and requested an independent ALJ assigned to adjudicate Mr. Carson's whistleblower appeal, then the MSPB could also have become a party to the appeal by intervening pursuant to its regulations, because it would be substantially affected by: (a) a positive "reasonable belief" determination regarding Mr. Carson's whistleblower disclosure against it and/or (b) by the ALJ's determination that the Secretary of Energy direct the Attorney General to provide an opinion as to the interpretation and application of the disputed law. Had it intervened, the MSPB would have represented itself in the proceeding. Thus, subsection (b)(5) applied so no discretionary review existed. Recusal should have been granted

Recusal was also mandatory under 28 U.S.C. § 455(b)(1)(3). Subsection (b)(1) of §4 55(b)(1) demands recusal if the judge possesses personal knowledge of evidentiary facts concerning the proceeding. Subsection (b)(3) requires recusal where the judge has served in

governmental employment and in such capacity *participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy*. (Emphasis added). Lastly, if the judge had some financial or other interest that could be substantially affected by the outcome of the proceeding, then recusal was also required under Subsection (b)(4).

A plain reading of the Petitioner's whistleblower claim against the MSPB shows that the MSPB members would naturally be material witnesses with personal knowledge concerning whether the MSPB has failed or refused to comply with its statutory duty at 5 U.S.C. § 1204(a)(3) to "...report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." The MSPB are the "parties in interest" or the "subject of the claim." MSPB members are also lawyers who could have offered counsel to other members or government officials regarding the reporting requirement. Additionally, the Petitioner has been in continuous litigation for years over his whistleblower claims, including the particular one against the MSPB. It is inconceivable that MSPB members would have not expressed any opinion concerning the merits of the Petitioner's claim at issue in this case. Most critically, if Petitioner's whistleblower claim

was accurate, it is not only the MSPB that should be concerned that the MSPB was breaking the law. Yet, the AJ and MSPB seemingly ignored the specific allegation against it and justified denial of any recusal accordingly. In short, recusal was required under Subsection (b)(4) as well. It was clear error for the MSPB and the Sixth Circuit to not grant recusal under these circumstances.

I. The Administrative Procedure Act and MSPB Regulations required recusal since the MSPB and its appointed AJ were otherwise disqualified. (include only if Mr. Carson filed an affidavit in accordance- APA § 556(b))

The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. *BRIAN CODD v. STEVEDORING SERVICES OF AMERICA, HOMEPORT INSURANCE COMPANY*, 32 BRBS 143 (1998). If 28 U.S.C. § 455 is not applied to a recusal motion in an administrative hearing, Section 554 of the Administrative Procedures Act, "APA", in Title 5 of the United States Code and the agencies' regulations shall govern instead. *Greenberg*, 968 F.2d 166-7.

The APA requires an ALJ and AJs to conduct proceedings in an impartial manner. APA § 556(b). The Supreme Court "repeatedly has recognized due process demands that impartiality on the part of those who

function in judicial or quasi-judicial capacities." *Schweiker v. McClure,* 456 U.S. 188, 195 (1982). Judges are presumed to be unbiased; however, this "presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. " *Id.*

In addition to personal bias, a motion for disqualification of an administrative law judge may also be supported by a showing of "other disqualification." 5 U.S.C. § 556(b). Notably, the MSPB regulations in 5 CFR § 1201.42 also details general procedures for disqualifying or recusing an ALJ appointed by the MSPB Under Section 1201.42(b), a party can move for disqualification or recusal of an ALJ: "asking the judge to withdraw on the basis of personal bias or other disqualification". Although the APA and MSPB regulations are quite unclear about what is meant by the phrase "other disqualification," the judges shall examine the movant's recusal motion and any reply brief to determine whether any of the allegations raised therein could conceivably be considered grounds for "other disqualification. *See BRIAN A. CODD v. STEVEDORING SERVICES OF AMERICA, HOMEPORT INSURANCE COMPANY, SOUTH STEVEDORING, SIGNAL MUTUAL INDEMNITY ASSOC., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS*, 31 BRBS 134(ALJ).

There are very few cases adjudicating such conflict of interest cases under these provisions. Moreover, due to the unique type of claim and recusal motion in this case, no case precedent has applied the "other disqualification" in anything similar. Certainly, the court could certainly apply almost all of the previous arguments cited herein under constitutional due process or mandatory recusal under Section 455(b) and find justification for recusal due to the MSPB's conflict of interest in adjudicating (and its dependent AJ) a whistleblower reprisal complaint which includes an underlying reprisal claim against the MSPB. No doubt such a situation constitutes "other justification" for disqualification of the AJ and appointment of an independent ALJ.

Such a finding would merely mirror similar due process and impartiality concerns which led to the establishment of MSPB's regulation at 5 CFR §1201.13. MSPB's regulation at 5 CFR §1201.13, was issued early in the Board's history. Volume 47, No. 5 of the Federal Register, dated January 8, 1982. This regulation states that appeals by MSPB employees will be filed with the Clerk of the Board and will be *assigned to an administrative law judge* for adjudication under this subchapter. The regulation elaborates on the Board's reasoning about due process requirements in such Board Adjudications:

> The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in those cases unless the party shows that there has been harmful procedural irregularity in the proceedings before the *administrative law judge* or a clear error of law. In addition, the Board, as a matter of policy, will not rule on any interlocutory appeals or motions to disqualify the administrative law judge assigned to those cases until the initial decision has been issued.

5 CFR 1201.13 (Emphasis added)

The Petitioner merely requested in its recusal motion in his whistleblower case that he be treated no different than an MSPB employee in an appeal. In line with the concerns underlying 5 CFR 1201.13, the MSPB should have granted Petitioner's recusal motion and reassigned the case to an independent ALJ, in lieu of an MSPB employee AJ. The Sixth Circuit and the MPSB fundamentally erred and violated the Petitioner's rights by failing to do so.